

1 DAVID G. SPIVAK (SBN 179684)
david@spivaklaw.com
2 CAROLINE TAHMASSIAN (SBN 285680)
caroline@spivaklaw.com
3 THE SPIVAK LAW FIRM
4 8605 Santa Monica Bl
PMB 42554
5 West Hollywood, CA 90069
Telephone: (213) 725-9094
6 Facsimile: (213) 634-2485

7 Attorneys for Plaintiff(s),
8 SHELIA CROMWELL, AARON SALAZAR,
ANDREW FORREST, and all others similarly situated
9 (Additional attorneys for Plaintiff(s) on following page)

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN BERNARDINO**
12 **(UNLIMITED JURISDICTION)**

14 SHELIA CROMWELL, AARON SALAZAR,
15 and ANDREW FORREST, on behalf of
16 themselves, all others similarly situated, and as
17 “aggrieved employees” on behalf of other
“aggrieved employees” under the Labor Code
Private Attorney General Act of 2004,,
18

19 *Plaintiff(s),*

20 vs.

21 DESERT CREMATION SOCIETY, INC., a
California corporation; ~~WIEFELS & SON, a~~
22 ~~California corporation~~; WIEFELS & SON II,
INC., a California corporation; ~~WIEFELS FD,~~
23 ~~INC., a California corporation~~; and DOES 1–50,
24 inclusive,

25 *Defendant(s).*

Case No. CIVSB2116331

**DECLARATION OF DAVID SPIVAK
IN SUPPORT OF PLAINTIFFS’
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing Date: February 13, 2024
Hearing Time: 1:30 p.m.
Hearing Dept.: S17, The Honorable
Joseph T. Ortiz

Action filed: June 04, 2021



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

ADDITIONAL ATTORNEYS FOR PLAINTIFF(S)

WALTER L. HAINES (SBN 71075)

walter@uelglaw.com

UNITED EMPLOYEES LAW GROUP

8605 Santa Monica Bl.

PMB 63354

West Hollywood, CA 90069

Telephone: (562) 256-1047

Facsimile: (562) 256-1006

Attorneys for Plaintiff(s),

SHELIA CROMWELL, AARON SALAZAR,

ANDREW FORREST, and all others similarly situated



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 **DECLARATION OF DAVID SPIVAK IN SUPPORT OF PLAINTIFFS' MOTION FOR**
2 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

3 I, DAVID SPIVAK, declare as follows:

4 1. I am an attorney duly licensed to practice law in the State of California and am an
5 attorney of record for Plaintiffs Aaron Salazar, Shelia Cromwell, and Andrew Forrest
6 (collectively "Plaintiffs") in their lawsuit against Defendants Desert Cremation Society, Inc. and
7 Wiefels & Son II, Inc. (collectively "Defendants"). Plaintiffs and Defendants are collectively
8 referred to as the "Parties."

9 2. Except as otherwise indicated, I have personal knowledge of all matters set forth
10 herein and, if called as a witness, could and would competently testify thereto under oath.

11 3. The Class Action and PAGA Settlement Agreement and Class Notice (the
12 "Settlement") is attached hereto as **Exhibit 1**. The Settlement Class consists of All of Defendants'
13 non-exempt decedent transport drivers (also known as transport specialists), but only for the time
14 period that the employee performed transport services, in California during the period of October
15 12, 2017 to October 27, 2023. The "Class Period" means the period from October 12, 2017
16 through October 27, 2023. *Id.* The "Aggrieved Employees" are "Aggrieved Employee" means all
17 of Defendants' non-exempt decedent transport drivers (also known as transport specialists), but
18 only for the time period that the employee performed transport services in California during the
19 PAGA Period. The "PAGA Period" begins March 17, 2020 and ends October 27, 2023. *Id.* The
20 Settlement is written, signed by all necessary Parties, and attached to this declaration as stated
21 above.

22 ***The Release Provisions***

23 4. **Released Persons.** Under the Settlement, the release to be given by the Class
24 Members (other than the Class representative) is limited to Defendants named in the Operative
25 Complaint, together with their officers, directors, employees, and agents. The released persons
26 consist of: Defendants and each of their current and former parents, owners, subsidiaries,
27 divisions, and affiliated or related persons or entities (including but not limited to, Aries
28 Properties, a California Corporation), and each of their respective officers, directors, employees,
29 partners, shareholders, attorneys, agents, executors, and assigns (collectively, the "Released
30 Parties"). Settlement, ¶ 1.42.



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 to tax withholding and will be reported on an IRS W-2 Form. The 80.00% of each Participating
2 Class Member's Individual Class Payment will be allocated to settlement of claims for interest
3 and penalties (the "Non-Wage Portion"). The Non-Wage Portions are not subject to wage
4 withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume full
5 responsibility and liability for any employee taxes owed on their Individual Class Payment.
Settlement, ¶ 3.2.4.1.

6 ***Factual and Procedural Background***

7 11. **Plaintiffs' Employment with Defendants.** Defendants operate in the crematory
8 business / industry. Defendants employed Plaintiffs drivers/transport specialists in California
9 during the Class Period.

10 12. **LWDA Notice.** On March 17, 2021, Plaintiff Shelia Cromwell ("Plaintiff
11 Cromwell") notified Defendants and the California Labor and Workforce Development Agency
12 ("LWDA"), pursuant to the California Private Attorneys General Act of 2004, California Labor
13 Code sections 2698, *et seq.* ("PAGA"), of alleged Labor Code violations committed by
14 Defendants. On March 19, 2021, Plaintiff Aaron Salazar ("Plaintiff Salazar") notified LWDA,
15 pursuant to PAGA, of alleged Labor Code violations committed by Defendants. On April 5, 2021,
16 Plaintiff Andrew Forest ("Plaintiff Forest") notified LWDA, pursuant to PAGA, of alleged Labor
17 Code violations committed by Defendants. A true and correct copy of the letter to the LWDA
18 dated March 17, 2021 is attached hereto as **Exhibit 2**. A true and correct copy of the letter to the
19 LWDA dated March 19, 2021 is attached hereto as **Exhibit 3**. A true and correct copy of the letter
to the LWDA dated April 5, 2021 is attached hereto as **Exhibit 4**.

20 13. **Lawsuit.** On June 04, 2021, Plaintiff Cromwell filed a Class Action Complaint in
21 the San Bernardino County Superior Court, Case No. CIVSB2116331, against Defendants on
22 behalf of herself and others similarly situated, alleging causes of action on a class-wide basis for:
23 (1) Failure to Pay All Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and
24 1198); (2) Failure to Provide Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide
25 Meal Periods (Lab. Code §§226.7, 512 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198
26 and 2802); (5) Wage Statement Penalties (Lab. Code §§ 226 and 226.2); (6) Waiting Time
27 Penalties (Lab. Code §§ 201-203); and (7) Unfair Competition (Bus. & Prof. Code §§ 17200, *et*
28 *seq.*). A true and correct copy of the class complaint is attached as **Exhibit 5**. On or about June
14, 2021, Plaintiffs Aaron Salazar and Andrew Forrest filed a PAGA action against Defendants



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

Desert Cremation Society, Inc; Wiefels & Son; Wiefels & Son II, Inc.; and Wiefels FD, Inc. in San Bernardino Superior Court (case number CIVSB2116545). A true and correct copy of the PAGA complaint is attached as **Exhibit 6**. On or about August 17, 2021, Shelia Cromwell filed a First Amended Complaint in the Action to make a typographic correction in Plaintiff Cromwell's first name from "SHEILA" to "SHELIA." A true and correct copy of the first amended complaint is attached as **Exhibit 7**. On October 12, 2021, Plaintiff Cromwell filed her Second Amended Complaint adding Plaintiffs Salzar and Forrest and a claim under the Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, et seq. ("PAGA"). A true and correct copy of the second amended complaint is attached as **Exhibit 8**. On November 17, 2021, and pursuant to a tolling agreement between the parties, Plaintiffs filed a request for dismissal without prejudice of Defendants Wiefels & Son and Weifels FD, Inc. On November 11, 2021, Defendants filed an answer to Plaintiffs' Second Amended Complaint. Defendants deny all of Plaintiffs' allegations and strongly contend that their wage and hour policies, practices and procedures are fully compliant with all applicable laws. A true and correct copy of Defendants' Answer is attached hereto as **Exhibit 9**.

14. **Investigation.** On April 14, 2022, Plaintiffs requested that Defendants informally disclose documents and data to enable Plaintiffs to prepare for settlement discussions, including the number of putative class members and aggrieved employees, the number of paychecks and workweeks for the various limitations periods applicable to Plaintiffs' claims. Plaintiffs also requested a reasonable, randomly selected sample of Defendant's time, payroll, and expense records, and related personnel records. *Id.* Finally, Plaintiffs requested Defendants' written policies applicable to the claims at hand and asked Defendants to identify any and all comparable claims against it.

15. The Parties thereafter engaged in an informal, voluntary exchange of information in the context of privileged settlement discussions to facilitate an early mediation. Defendants produced Plaintiffs' entire personnel files (including policies and agreements they signed and acknowledged) and copies of their relevant company written policies.

16. Defendants contend that they employed 169 putative class members during the period of July 06, 2017 to February 28, 2023. Defendants produced the records of 20.00% of the putative class members for the period of July 06, 2017 to February 28, 2023. Defendants' counsel selected the sample. Defendants' counsel notified Plaintiffs' counsel that the sample was selected



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 randomly by his clerks. Also, that sample selected was not based on dates of employment or
2 workweeks. The sample consisted of pay stubs, time punches, and related records.

3 17. **Plaintiffs' Data Analyst.** Plaintiff retained Billy Bonilla, a data analyst, to analyze
4 the sample. Plaintiffs also employed the Raosoft⁷ Sample Size calculator
5 (<http://www.raosoft.com/samplesize.html>) to determine if the sample size selected is statistically
6 reliable. *Bell v. Farmers Ins. Exch.* (2004) 115 Cal. App. 4th 715 and *Duran v. U.S. Bank* (2014)
7 59 Cal.4th 1. The *Bell* court found a relative margin of error of 32.4 percent was unacceptable
8 whereas the *Duran* court found a relative margin of error of 43.3 percent was unacceptable. Using
9 a margin of error of 32%, a confidence level of 95%, and a population size of 169, the Raosoft
10 Sample Size Calculator recommended a sample of 9. A true and correct copy of the results from
11 the Raosoft Sample Size Calculator are attached as **Exhibit 10** (Raosoft Sample Size Calculator
12 results print-out). Thus, the sample population that Plaintiffs' data analyst evaluated is statistically
13 reliable. *Id.*

14 18. **Mediation.** On June 29, 2023, following much of the foregoing informal
15 discovery and exchange of information, the Parties participated in a mediation session presided
16 over by Mediator Deborah Saxe, an experienced class action mediator. During the mediation, the
17 Parties had a full day of productive negotiations and reached agreement on a class-wide settlement
18 after the mediation session. During the mediation sessions, each side, represented by his/her/its
19 respective counsel, recognized the risk of an adverse result in the Action and agreed to settle the
20 Action and all other matters covered by this Agreement pursuant to the terms and conditions of
21 this Agreement.

22 19. **Defendants' financial Condition.** At the mediation, it became clear that
23 Defendants had insufficient resources to cover the full extent of liability. As part of the settlement
24 negotiations, Defendants disclosed its tax returns, profit and loss statements, and related
25 information for 2020 and 2021. The information provided was sufficient to demonstrate the

26 ⁷ Raosoft advertises, "Raosoft, Inc. produces EZSurvey for the
27 Internet, InterForm, SurveyWin, EZReport and Rapid Report innovative survey software
28 programs for information gathering and analysis. The family of survey software supports data
collection and reporting for any form-based data. Support is for web-surveys and forms, email
distribution, diskette, PDA, laptop or pen-based: all types of distribution." The Raosoft webpage
advertises that is it "database web survey software for gathering information."
<http://www.raosoft.com/> . It also advertises, "The parameters of the sample size calculation are
something that you choose." <http://www.raosoft.com/suggestreading.html>.



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 financial condition of the Defendants and that they will unlikely be able to afford payment of a
2 larger amount than the Settlement amount. Based on such records, Plaintiffs, on their own behalf
3 and on behalf of the Class Members, has agreed to settle the lawsuit on the terms set forth in the
4 Settlement.

Similar Actions

5 20. **Relevant Litigation and Claims.** I am not aware of any class, representative,
6 or other collective action in any other court, in this, or any other jurisdiction, that asserts
7 claims similar to those asserted in this action, on behalf of the class or group of individuals,
8 some or all of whom would also be members of the class to find in this action. I have made
9 a reasonable inquiry of the other members of my law firm and my counsel to determine
10 whether they are aware of any such similar actions. Based on these inquiries, I am aware of
11 no such similar actions. The Defendants disclosed that there have not been any comparable
12 claims against it.

Uncashed Checks

13 21. **Unclaimed Property Fund.** The Settlement provides for the disposition of
14 uncashed checks as follows: For any Class Member whose Individual Class Payment check or
15 Individual PAGA Payment check is uncashed and cancelled after the void date, the Administrator
16 shall transmit the funds represented by such checks to the California Controller's Unclaimed
17 Property Fund in the name of the Class Member thereby leaving no "unpaid residue" subject to
18 the requirements of California Code of Civil Procedure Section 384, subd. (b). Settlement, ¶ 4.4.3.
19 In my view, sending funds represented by uncashed checks to the Unclaimed Property Fund
20 instead of a *cy pres* recipient is the best way to insure that the Class Members and Aggrieved
21 Employees actually receive their portions of the Settlement.

Ascertainable and Numerous Class

22 22. **Ascertainability.** A class is ascertainable when it may be readily identified
23 without unreasonable expense or time by reference to official records. Here, Plaintiff maintains
24 that the above-defined Class is ascertainable because its members may be identified by reference
25 to Defendant's records and Defendants has agreed to share the relevant information from its
26 records to facilitate the settlement process. Therefore, the Settlement Class is ascertainable.

27 23. **Numerosity.** The Settlement Class has sufficiently numerous members to render
28 joinder impractical. No set number is required as a matter of law to maintain a class action. The



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 California Supreme Court has upheld a class of as few as 10 individuals. Defendants estimates
2 that there are approximately 100 Class Members for the Class Period of October 12, 2017 to
3 October 23, 2023. Plaintiffs maintain that it would be impractical and economically inefficient to
4 require each Settlement Class Member to separately maintain an individual action or be joined as
5 a named plaintiff in this action. In light of these considerations, the Settlement Class' membership
6 is sufficiently numerous. Additionally, there are 53 Aggrieved Employees for the PAGA Period
of March 17, 2020 to October 23, 2023.

7 ***Predominant Common Questions***

8 24. A question of law or fact is common to the members of a class if it may be resolved
9 through common proof. In this case, there are many predominant common questions. Plaintiffs
10 assert all class members were subject to the same or similar operations and employment policies,
11 practices, and procedures. The claims arise from Defendants' alleged policy-driven failure to pay
12 wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to
13 indemnify for business expenses, failure to issue proper wage statements, failure to timely pay
14 wages, failure to maintain required payroll records, and related labor law violations, all of which
15 Plaintiffs claim constitute unfair business practices and give rise to PAGA penalties. Plaintiffs
16 assert that common questions include, but are not limited to: (1) Whether Defendants failed to
17 pay all wages earned to class members for all hours worked at the correct rates of pay; (2) Whether
18 Defendants failed to provide the class with all meal and rest periods in compliance with California
19 law; (3) Whether Defendants failed to pay the class one additional hour of pay on workdays it
20 failed to provide the class with one or more meal or rest periods in compliance with California
21 law; (4) Whether Defendants failed to indemnify the class for all necessary business expenditures
22 incurred during the discharge of their duties; (5) Whether Defendants knowingly and intentionally
23 failed to provide the class with accurate wage statements; (6) Whether Defendants willfully failed
24 to provide the class with timely final wages; and (7) Whether Defendants engaged in unfair
competition within the meaning of Business and Professions Code section 17200, *et seq.*, with
respect to the class.

25
26 ///

27
28 ///



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Typicality

25. Plaintiffs contend that their claims are typical for the purposes of certifying the Settlement Class. Plaintiffs assert that they, like absent Class Members was subject to the same relevant policies and procedures governing their compensation, hours of work and meal and rest periods. Because Plaintiffs contend that they were subject to the same general course of conduct as absent Class Members, resolving the common questions as they apply to Plaintiffs will determine Defendants' *prima facie* liability to all Class Members. Moreover, Plaintiffs' claims could potentially be subject to the same primary affirmative defenses as those of absent Class Members. Accordingly, Plaintiffs' claims are typical of the Class.

Adequacy

26. The adequacy requirement is met where the Plaintiffs are represented by counsel qualified to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class' interests. In other words, where the Plaintiffs have adequate counsel, the Plaintiffs may represent the entire class absent any disabling conflicts of interest that might hinder the Plaintiffs' ability to represent the class.

27. To the best of my knowledge, neither Plaintiffs nor I have any conflicts of interest with the absent Settlement Class Members. Plaintiffs contend that they are adequate class representatives. Plaintiffs and the Class Members have strong and co-extensive interests in this litigation because they all worked for Defendants during the relevant time period, allegedly suffered the same alleged injuries from the same alleged course of conduct, and there is no evidence of any conflict of interest between Plaintiffs and the Class Members. Moreover, Plaintiffs have demonstrated their commitment to the Settlement Class by, among other things, retaining experienced counsel, providing counsel with documents and extensively speaking with them to assist in identifying the claims asserted in this case, assisting them in identifying witnesses, as well as exposing themselves to the risk of attorneys' fees and costs awards against him if this lawsuit had been unsuccessful. Thus, Plaintiffs are adequate to serve as settlement class representative. The declaration of Plaintiff Aaron Salazar on this subject will be filed concurrently with this declaration.

///



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

Background of Class Counsel

28. In 1991, I earned a Bachelor of the Arts degree with a major in Political Science from the University of California at Berkeley. In 1995, I earned a Juris Doctor degree from Southwestern University School of Law.

29. In December of 1995, the Supreme Court for the State of California admitted me as an Attorney and Counselor at Law and licensed me to practice law in all the Courts of this State. On May 11, 2012, I also became admitted to the District of Columbia Bar. In February 2013, I became admitted to the New York State Bar.

30. My law practice has always focused on representation of private and public employees with claims of unpaid wages, wrongful termination, harassment, family and medical leave, whistleblowing, discrimination, benefits, and civil rights violations. One of my websites, FightWrongfulTermination.com, provides a further description of my practice.

31. I have tried many cases before California and federal courts, government agencies and neutral arbitrators. I am a member of the California Employment Lawyers Association (CELA).

32. Since I started practicing law, I have tried many cases before courts, arbitrators and government agencies. Some of my cases are:

a. *Ricardo Sandoval v. Dept. of Treasury*, United States District Court, Southern District of California (the Honorable Judith Keep presiding), 1998. Plaintiffs Special Agent for the U. S. Customs Service alleged discrimination and retaliation in promotions and discipline. The jury awarded compensatory damages. Court subsequently awarded additional back pay and gave Plaintiffs a retroactive promotion. See "Lawsuit Puts Customs Service on Trial: Agent Alleges Corruption, White Supremacist Cabal" by Valerie Alvord, San Diego Union-Tribune, April 29, 1998; "Customs Agent Is Awarded \$200,000: Jury Says He Faced Bias And Retaliation" by Valerie Alvord, San Diego Union-Tribune, May 16, 1998.

b. *Jorge Guzman v. Department of Justice*, United States District Court, Central District of California (the Honorable Lourdes Baird presiding), 1999. Plaintiffs Special Agent for the Immigration and Naturalization Service alleged racial discrimination, retaliation and police brutality by agents of the Office of the Inspector General. Jury found the Defendants liable. Case settled shortly before the damages phase. See "U.S. to Pay \$400,000 to INS Agent in Bias Suit; Courts: Complaint says he suffered 10 years of harassment on the job because he is



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 Latino, including falsified charges" by Patrick J. McDonnell, Los Angeles Times, January 21,
2 1999.

3 c. *Dr. Perry Crouch v. SHIELDS*, Los Angeles Superior Court, Compton (the
4 Honorable Michael Rutberg presiding), 2001. Plaintiff whistleblower brought civil rights claims
5 and wrongful termination claims against employer in a month-long jury trial. The jury awarded
6 compensatory and punitive damages. See "Activist Says Criticism of Rail Plan Cost His Job" by
7 Dan Weikel, Los Angeles Times, September 28, 2000; "Punitive Damages Awarded to Fired
8 Social Worker" by Dan Weikel, Los Angeles Times, June 10, 2000; "A Whistleblower's
9 Revenge" by Susan Goldsmith, New Times Los Angeles, June 8, 2000.

10 d. *Imagraph, Inc. (Steve Shiffman) v. Mohamed T. Nehmeh*, Orange County
11 Superior Court, Central Justice Center (the Honorable Kirk H. Nakamura presiding), 2004.
12 Plaintiff, who I represented pro bono sought the return of \$45,000.00 he paid to an attorney
13 escrow officer who subsequently absconded with the money. The jury awarded compensatory
14 damages. The Judgment with interest is now far in excess of that amount. Soon after this case was
15 litigated, the State Bar of California awarded me the Wiley W. Manuel Award for Pro Bono Legal
16 Services.

17 e. *Rick Pierce v. Department of Treasury*, Merit Systems Protection Board
18 (1999). Administrative Judge awarded compensatory damages to wrongfully terminated Customs
19 Agent, followed by an award of Attorneys' fees and costs.

20 f. *Richard Wamel v. Ocelot Engineering Co.*, Judicate West before the
21 Honorable Robert Polis (ret.) (2008). In that case, I represented a victim of FMLA violations and
22 wrongful termination against his former employer. The Neutral Arbitrator awarded compensatory
23 and liquidated damages. The claims for damages, attorney's fees and costs were resolved shortly
24 thereafter by means of a confidential settlement.

25 g. *Alina Ghrdilyan v. RJ Financial, Inc., et al.*, LA Superior Court case no.
26 BC430633 (2012), the Honorable Ronald Sohigian presiding. To my knowledge, this case is the
27 first and only case to be successfully prosecuted through trial under the Labor Code Private
28 Attorney Generals Act of 2004, Labor Code §§ 2698, et seq. on behalf of plaintiffs and other
aggrieved employees against someone other than an employer for civil penalties including unpaid
wages. The case involves claims of unpaid overtime, unprovided rest and meal periods, unpaid



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 vacation, untimely interval and final wages, and unreimbursed expenses. For my work in that
2 case, the Court awarded me an hourly rate of \$600.00 hour based on my skill and experience.

3 33. Since 2007, I have prosecuted several traditional wage & hour class actions as the
4 sole or primary attorney for the plaintiffs, including *Pudelwitts v. Regent Parking, Inc.*, *Singery*
5 *v. Quality Vessel Engineering*, *Tesillo v. LA Executive Towing Service, Inc.*, and *Madison v. The*
6 *Limousine Connection*. One such case is *Jose Tapia v. Mangen Group, Inc.*, LASC case no.
7 BC377114, a garden-variety wage & hour class action with many of the same claims at issue in
8 this case. The Honorable Jane Johnson of the Los Angeles Superior Court, presiding over the
9 motion for final approval of the Settlement Class action settlement in *Tapia*, had no quarrel with
an hourly rate of \$525.00 for my services.

10 34. In my representation of employees, I have prosecuted several lawsuits on behalf
11 of employees with claims of rest and meal period and overtime violations or other wage claims.

12 35. I have been involved in the prosecution of numerous wage and hour class actions
13 at various stages of litigation. A small sampling of the wage and hour class action cases in which
14 I have recently been counsel of records is as follows:

15 a. *Alafa v. Custom Built Personal Training, Inc.*, Tulare County Superior
16 Court, Case No. VCU-245496 (appointed Class Counsel and granted final approval class action
settlement on behalf of assistant fitness manager employees).

17 b. *Cuellar v. Lovin Oven*, Orange County Superior Court, Case No. 30-2010-
18 000382146 (appointed Class Counsel and granted final approval of class action settlement by the
19 court on behalf of nonexempt employees).

20 c. *Cunningham v. DPI Specialty Foods West, Inc.*, Los Angeles Sup.Ct., Case
21 No. BC465017 (appointed Class Counsel and granted final approval by this Court of class action
22 settlement on behalf of merchandiser employees).

23 d. *Deckard v. MSL Community Management LLC*, Riverside County Superior
24 Court, Case No. RIC1204182 (appointed Class Counsel and granted final approval of class action
settlement on behalf of caregivers and medical technicians).

25 e. *DiCato v. Francesca's Collections, Inc.*, San Diego County Superior
26 Court, Case No. 37-2012-00094401-CU-OE-CTL (appointed Class Counsel and granted final
27 approval of class action settlement on behalf of boutique manager and assistant manager
28 employees).



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 f. *Evans v. Equinox, et al.*, Los Angeles Sup.Ct., Case No. BC440058
2 (appointed Class Counsel and granted final approval by this Court of class action settlement on
3 behalf of personal trainer employees).

4 g. *Huynh v. Carefusion Resources, LLC, et al.*, San Diego Sup.Ct., Case No.
5 37-2009-00103277-CU-OE-CTL (appointed Class Counsel and granted final approval of class
6 action settlement on behalf of medical devices employees).

7 h. *Hidalgo, et al. v. Sun Hill*, Los Angeles Superior Court, Case No.
8 BC480808 (appointed Class Counsel and granted final approval of class action settlement on
9 behalf of hourly employees).

10 i. *La Fleur v. Medical Management International, Inc.*, United States District
11 Court, Central District of California, Case No. EDCV13-00398-VAP (appointed Class Counsel
12 and granted final approval of class action settlement on behalf of practice managers).

13 j. *Linder, et al. v. Warehouse Services, Inc.*, San Bernardino Superior Court,
14 Case No. CIVDS1500146 (appointed Class Counsel and granted final approval of class action
15 settlement on behalf of non-exempt hourly employees excluding truck drivers).

16 k. *Lynch, et al. v. American Guard Services*, Los Angeles Superior Court,
17 Case No. BC462681 (appointed Class Counsel and granted final approval of class action
18 settlement on behalf of security guard employees).

19 l. *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court, Case No. S-
20 1500-CV-282679 (appointed Class Counsel and granted final approval of class action settlement
21 on behalf of dairy and agricultural laborers).

22 m. *Montes v. Branam Enterprises, Inc.*, Los Angeles Sup.Ct. Case No.
23 BC442608 (appointed Class Counsel and granted final approval by this Court of class action
24 settlement on behalf of call concert rigging employees). *Nardone v. Sequoia Beverage Company,*
25 *LP*, Tulare County Superior Court, Case No. VCU-248370 (appointed Class Counsel and granted
26 final approval of class action settlement by the court on behalf of hourly employees).

27 n. *Ogbuehi v. Comcast of California/Colorado/Florida/Oregon, Inc.*, United
28 States District Court, Eastern District of California, Case No. EDCV13-00672-KJM-KJN
(appointed Class Counsel and granted final approval of class action settlement on behalf of virtual
customer account executives).



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 o. *Rosen v. Image Transfer*, Los Angeles Superior Court, Case No.
2 BC511072 (appointed Class Counsel and granted final approval of class action settlement on
3 behalf of bobtail truck drivers).

4 p. *Sandoval v. Rite Aid Corp.*, Los Angeles Superior Court, Case No.
5 BC431249 (granted class certification through contested motion and appointed Class Counsel in
6 case on behalf of former pharmacy employees based on late final wage payments in violation of
7 Labor Code §§ 201–203).

8 q. *Shaw, et al. v. Interthinx, Inc.*, United States District Court for the District
9 of Colorado, Case No. 13-CV-01229-REB-BNB (appointed Class Counsel and granted final
10 approval of class action settlement by the court on behalf of auditor employees).

11 r. *Stucker v. L'Oreal*, Los Angeles Sup.Ct. Case No. BC456080 (appointed
12 Class Counsel and granted final approval by this Court of class action settlement involving alleged
13 misclassification of sales employees and unpaid vacation pay).

14 s. *Valdez v. Healthcare Services Group, Inc.*, Los Angeles Sup.Ct., Case No.
15 BC462917 (appointed Class Counsel and granted final approval by this Court of class action
16 settlement on behalf of service account manager employees).

17 t. *Valencia v. SCIS Air Security Corp.*, Los Angeles Superior Court, Case
18 No. BC421485 (granted class certification through contested motion and appointed Class Counsel
19 in case on behalf of former security workers based on late final wage payments in violation of
20 Labor Code §§ 201–203).

21 u. *Vang v. Burlington Coat Factory Corporation*, United States District Court
22 Central District of California, Case No. 09-CV-08061-CAS-JCx (appointed Class Counsel and
23 granted final approval of class action settlement by the court on behalf of assistant store manager
24 employees).

25 v. *Volney-Parris v. Southern California Edison Company*, Los Angeles
26 Superior Court, Case No. BC493038 (appointed Class Counsel and granted final approval of class
27 action settlement on behalf of customer specialist employees).

28 w. *White v. 20/20 Communications, Inc.*, San Bernardino County Superior
Court, Case No. CIVRS1301718 (appointed Class Counsel and granted final approval of class
action settlement on behalf of hourly employees).



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1
2
3
4
5
6
7
8
9

Class Action Treatment Is Superior

36. A class action is also superior to other means of adjudicating the issues in this action. The predominance of common legal and factual questions shows that this Court could fairly adjudicate the claims of Class Members through a single class action. In view of the *theoretical* alternatives that proposed class members could potentially utilize—representative PAGA action (where there is less relief available), individual civil lawsuits or wage claims through the Division of Labor Standards Enforcement (where there would be relatively little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly superior to all of them. Thus, this consideration supports conditional class action treatment for purposes of this Settlement only.

10
11
12
13
14
15
16
17
18
19
20

The Settlement is Presumptively Fair

37. The class settlement here satisfies all of the *Kullar* factors. The Settlement resulted from thorough, arms' length, negotiations between experienced counsel with the assistance of a respected mediator after sufficient discovery was exchanged to assess the relative strengths and weaknesses of their respective cases and Defendants' estimated exposure. Both defense counsel and I are particularly experienced in employment law and wage and hour class actions. We are experienced and qualified to evaluate the class claims, the viability of the defenses, and the risks and benefits of settlement versus trial on a fully informed basis. I have negotiated many wage and hour class settlements, including many involving the same issues presented here. Counsel on both sides share the view that the Settlement is a fair and reasonable settlement in light of the complexities of the case and uncertainties of class certification and litigation, and a fair result for the Class Members.

21
22
23
24
25
26
27
28

Exposure & Risk Analysis

38. Plaintiffs prepared "damages" estimates in advance of the mediation. Plaintiffs determined Defendants' maximum possible exposure for restitution and penalties to be approximately \$3,465,602.16 (consisting of \$1,398,255.94 in unpaid wages, \$196,790.54 in missed meal period premium wages, \$296,811.60 in missed rest break premium wages, \$53,746.00 in unreimbursed expenses, \$143,293.15 for wage statement penalties, \$390,240.00 for waiting time penalties, and \$986,464.93 for civil penalties under PAGA. True and correct copies of the spreadsheets I prepared for mediation of this Action are collectively attached to this declaration as **Exhibit 11**.



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

39. The estimates are in essence “home run” projections that omit data points that will undoubtedly reduce the maximum possible damages award and do not factor in any of the risks involved in litigating this Action. Plaintiffs calculated the damages based on the number of workweeks and pay periods provided by Defendants, Plaintiffs’ reports, and the employee data. *Id.* Plaintiffs also considered the possibility that Defendants could launch a *Pick Up Stix* campaign and pursue individual release agreements from the Class Members. Defendants also represented that they had interviewed current employees regarding Plaintiffs’ claims, all of whom would provide declarations, under penalty of perjury, that were favorable to Defendants with respect to the relevant factual issues at issue in Plaintiffs’ action. Plaintiffs’ counsel applied discounts to the maximum possible exposure to account for all other risks discussed below. While it is difficult to assign anything but crudely-determined percentages of risk to any of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would preclude recovery for such employees is substantial and alone justifies a significant discount because Defendants would likely by trial have gathered releases from the majority of the Class Members. A settlement for approximately 15.19% of the potential recovery is a proportion substantially in excess of recovery proportions sanctioned by existing case law.⁸

40. My initial estimates do not realistically account for the risks outlined below or the risk that a class will not be certified. Therefore, I believe a class settlement for \$500,000.00 is fair and reasonable.

41. **Risks Associated with the Arbitration Agreements.** The arbitration agreements entered into between Defendants on the one hand, and the Class Members, on the other, present a significant risk to the success of Plaintiffs’ class action litigation. According to Defendants, the majority of the Class entered into arbitration agreements with Defendants. As the arbitration agreements in question restrict potential litigants from bringing class actions against Defendants,

⁸ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998) (“[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to be within the targeted range of reasonableness.”); *Wise v. Ulta Salon, Cosmetics & Fragrance, Inc.* 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*, 2017 WL 708766 at * 10 (C.D. Cal. Feb 16, 2017) (“a settlement for fourteen percent recovery of Plaintiffs’ maximum recovery is reasonable”); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1042 (N.D. Cal. 2008) (approving settlement amount that “is just over 9% of the maximum potential recovery asserted by either party.”).



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 Plaintiffs would be effectively barred from pursuing claims on behalf of the Class in Court. Thus,
2 there is a significant risk the Court could determine that those Class Members who have not
3 entered into arbitration agreements with Defendants do not constitute a sufficiently numerous
4 class to justify class action treatment. As such, by continuing to trial on class-wide claims,
5 Plaintiffs would run the high risk of suffering defeat due to the existence of the arbitration
6 agreement. Moreover, the arbitration agreements would pose danger to any class certification
7 motion brought by Plaintiffs. Because different defenses would apply to some Class Members
8 and not others – i.e., the existence of signed arbitration agreements – there is a risk that the Court
9 could determine that Plaintiffs’ claims present too many individualized inquiries to justify class
certification.

10 42. **Risks Associated with Defendants’ financial Condition.** As stated above,
11 Defendants’ financial condition was an important factor in reaching this Settlement. Due to
12 Defendants’ financial condition, even if Plaintiffs prevailed on all claims at trial, his may never
13 recover the damages due to the risk of insolvency. A very large class action judgment would
14 almost certainly put the company out of business and/or would interfere with the company's
ability to carry out its contractual obligations.

15 43. **Risks Associated with Unpaid Wages Claim.** There is a risk that Plaintiffs’
16 recovery for unpaid wages would be extremely limited at best, largely because Defendants’
17 written policies throughout the relevant time period prohibited off-the-clock work. Off-the-clock
18 claims are difficult where a Defendants require in their written policies that all work must take
19 place while clocked in. *See Jong v. Kaiser Foundation Hospital* (2014) 226 Cal.App.4th 391
20 (employer must have notice of off-the-clock work for it to be compensable). *Id.* In their written
21 employment policies, Defendants mandate that employees must record all time worked accurately
22 on their time records and strictly prohibit employees from performing any work off-the-clock.
23 Moreover, while Defendants dispute that off-the-clock work occurred, they contend that any time
24 spent off the clock was *de minimis*. The California Supreme Court in *Troester v. Starbucks Corp.*
25 (2018) 5 Cal. 5th 829, 835 suggested that irregular and minute periods of time may still be subject
26 to a *de minimis* defense even if compensable. (Stating that “We do not decide whether there are
27 circumstances where compensable time is so minute or irregular that it is unreasonable to expect
28 the time to be recorded.”). Following *Troester*, Defendants contend that the *de minimis* doctrine



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 may apply here because the time spent off the clock were minute and insignificant. Accordingly,
2 a large award of penalties seems unlikely with respect to this claim.

3 44. The difficulty inherent in proving that off-the-clock work occurred poses a
4 significant hurdle to Plaintiffs. Plaintiffs will rely on declarations and witness statements to prove
5 this claim. Generally, a court will not certify a class unless it can determine an appropriate
6 classwide methodology. *See, e.g., Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014). Here,
7 Plaintiffs may rely heavily on anecdotal evidence to prove the off-the-clock work claim,
8 especially given the lack of records indicating when such off-the-clock work may have taken
9 place. Individualized inquiries would need to be conducted person-by-person, day-by-day, to
10 determine if an individual in fact worked “minutes” off-the-clock on a “regular” basis.
11 Accordingly, there is a significant risk that the Court would consider this evidentiary showing
12 insufficient as a classwide methodology.

13 45. **Risks Associated with the Meal Period Claims.** There are risks to Plaintiffs’
14 meal period claim. Defendants contend that, to establish a violation for missed meal periods, a
15 plaintiff must do more than show that a meal break was not taken. *Brinker*, 53 Cal. 4th at 1004.
16 So long as an employer provides employees with a “reasonable opportunity” to take a duty-free
17 meal period, it has no further duty to “police meal breaks and ensure no work thereafter is
18 performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff must show the employer impeded, discouraged,
19 or prohibited the employee from taking a proper break, or otherwise failed to release the employee
20 of all control. *Id.* “Thus, the crucial issue with regard to the meal break claim is the reason that a
21 particular employee may have failed to take a meal break.” *Washington v. Joe’s Crab Shack* (N.D.
22 Cal. 2010) 271 F.R.D. 629, 641. *Id.*

23 46. Defendants contend they did not impede or discourage Plaintiffs, or any other
24 employees, from taking their meal or rest periods. Defendants’ policies mandate that employees
25 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
26 of their meal breaks each day on their time records. The time records produced to Plaintiffs for
27 purposes of mediation show that meal periods were taken the vast majority of the time. Of the
28 time records that show a late, short or no lunch, individualized evidence may be necessary to
determine whether they occurred due to conduct of the Defendants or each of the employees
concerned. Accordingly, there is a significant risk that the value of Plaintiffs’ meal period claim
would be substantially reduced at trial.



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 47. **Risks Associated with the Rest Break Claims.** There are risks to Plaintiffs’ rest
2 period claim. Employers are not required to record rest periods and such periods are paid.
3 Defendants contend they provided non-exempt employees the opportunity to take rest periods in
4 accordance with California law. Further, Defendants’ written policies on meal and rest periods
5 are consistent with the Wage Order. Thus, unlike meal periods, where there are often records
6 showing whether an employee clocked out or not, there is no such evidence to prove a missed rest
7 period or that the employer refused to authorize and permit one. *Id.* Managing such claims at trial
8 has become exceedingly difficult. Plaintiffs will depend on sample witness testimony and surveys
9 to prove the claims. While a victory with such evidence is certainly possible, relevant caselaw
10 makes such claims risky from a trial management and due process perspective. *See Duran v. U.S.*
11 *Bank National Assn.* (2014) 59 Cal. 4th 1, 31 (explaining “[I]f sufficient common questions exist
12 to support class certification, it may be possible to manage individual issues through the use of
13 surveys and statistical sampling.”); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382;
14 *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

15 48. **Risks Associated with the Failure to Indemnify Claim.** There is a risk that the
16 Court may consider Plaintiffs’ claims as to Defendants’ alleged failure to indemnify for business
17 expenses to be individual in nature and thus decline to certify the class. Plaintiffs allege that
18 Defendants required Plaintiffs and the Class Members to use their personal items including
19 cellular phones, computers and other electronic devices, vehicles, and tools, and failed to
20 indemnify them for these business expenses. Defendants presented evidence that they had
21 supplied their employees with tools, equipment, and other supplies and had an expense
22 reimbursement policy. As such, there is a risk that the Court may consider Plaintiffs’ claims to be
23 individual in nature and unfit for class wide resolution.

24 49. **Risks Associated with the Waiting Time Penalty Claims.** Plaintiffs also assert
25 claims for wage statement violations, untimely wage violations, and PAGA penalties. Under
26 Labor Code section 226, wage statements must include various information, including the
27 applicable rates of pay, corresponding hours worked, and gross pay. Here, Plaintiffs’ wage
28 statement claim has the same underlying risks as the above claims, as it is derivative of them. On
their face, the wage statements issued by Defendants comply with the requirements of Labor Code
section 226.



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 50. **Risks Associated with the Waiting Time Penalties Claims.** Without proof
2 willful behavior, Plaintiffs will be unable to recover these penalties.

3 51. **Risks Associated With the PAGA Claim.** As the Operative Complaint makes
4 clear, Plaintiffs predicates their PAGA claim on the same Labor Code violations as their other
5 claims. Plaintiffs' "damages" spreadsheet, **Exhibit 11**, states the length of the relevant time
6 period for the PAGA claim and the number of employees allegedly employed during that time
7 period. Plaintiffs' "damages" spreadsheet, **Exhibit 11**, also states the total amount of civil
8 penalties for which the Defendants is potentially liable if all allegations are proven. As I state
9 above in connection with Plaintiffs' claims for statutory penalties with regard to proof
10 Defendants' intent, knowledge and willfulness, there are serious risks to proving Defendants
11 acted intentionally, knowingly, and willfully in violating the rights of Class Members under the
12 Labor Code. Plaintiffs calculated the agreed-upon amount of civil penalties by considering the
13 risks outlined above and that the Settlement already provides substantial payments for the Labor
14 Code violations that the civil penalties claim is predicated on.

15 52. Regarding PAGA, a court has discretion to award a lesser amount than the
16 maximum penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.*
17 (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendants has
18 posed valid defenses to the Labor Code claims underlying Plaintiffs' PAGA allegations. Thus,
19 the PAGA claims likewise face significant uncertainty. There is a risk that the Court would
20 consider the maximum civil penalty available to be confiscatory.

21 53. This uncertainty increases Plaintiffs' risk of pursuing the PAGA claims and
22 required a significant discount for settlement purposes. For mediation purposes, Plaintiffs'
23 counsel estimated a maximum possible exposure of approximately \$986,464.93 in civil penalties.
24 This estimate did not take into account any of the risks discussed above and assumed a violation
25 for every single pay period. *Id.* Plaintiffs' counsel also assessed multiple penalties for the same
26 pay period for the same alleged violations of different Labor Code provisions and derivative
27 violations. Although two federal district court decisions held that "stacking" PAGA penalties in
28 this fashion may be appropriate to determine the amount in controversy for purposes of removal
jurisdiction, Plaintiffs' counsel is not aware of any California state courts awarding plaintiffs
multiple PAGA penalties for the same violation for the same pay period under different Labor



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

Code provisions. This may be because the PAGA does not provide for what many employers characterize as claim splitting and not merely stacking.

54. I am aware of only two significant awards under the PAGA in a contested proceeding, both issued by federal district courts.⁹ PAGA penalty awards are often small even for egregious, intentional violations of the Labor Code.¹⁰

55. For instance, on October 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff, represented by very experienced counsel, civil penalties totaling only \$50.00. *Shields v. Security Paving Company, Inc.*, LA Superior Court case no. BC492828. Further, in *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018), the Court of Appeal

⁹ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2022) 2022 WL 17994018, the court awarded civil penalties under the PAGA of \$12,277,500.00 where total adjusted damages were \$18,695,692.58. In this regard, the district court stated,

The plain language of PAGA provides that “a court may award a lesser amount than the maximum civil penalty amount specified by this part if, *based on the facts and circumstances of the particular case*, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code s 2699(e)(2) (emphasis added). The relationship between the amount of total damages and the amount of maximum PAGA penalties is certainly a “circumstance” of the case under the term's ordinary meaning. The weight given to that circumstance is greater in this case because Plaintiffs' PAGA penalties are based on PAGA claims that are all derivative of Plaintiffs' individual claims except for one. As a general matter, it would be excessively punitive for the penalty imposed as a consequence of a discrete injury or set of injuries to exceed the damages caused by that injury or set of injuries.

Id., fn. 9. The district court further stated, “Virgin “has not presented any evidence that the full penalty would be excessive in relation to its ability to pay,” the weight of this factor is lessened.” *Id.*

In *Robert Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d. 1058, the court awarded approximately \$102 million in damages, primarily based on the Defendant's failures to comply with the requirements of California Labor Code section 226.

¹⁰ In 2012, I tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court case number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. A true and correct copy of the Second Amended Complaint in *Ghrdilyan* is attached as **Exhibit 12**. The plaintiff sought in excess of \$9 million in civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M. Sohigian awarded approximately \$325,000 in civil penalties under the PAGA. A true and correct copy of the judgment transcript in *Ghrdilyan* is attached as **Exhibit 13**, 19:8-20:19. Also, on October 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff civil, represented by very experienced counsel, penalties totaling only \$50.00. *Shields v. Security Paving Company, Inc.*, LA Superior Court case no. BC492828. A similar result could occur here.



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 affirmed judgment which provided for a PAGA penalty of only \$5 per pay period for the
2 defendant's meal period violations. A similar result could occur here.

3 56. **Risks Associated With A Pick-Up Stix Campaign.** An employer enjoys the right
4 to settle a putative class member's disputed wage claims individually, without the consent or
5 involvement of class counsel. (See *Chindarah v. Pick Up Stix, Inc.* 171 Cal. App. 4th 796 (2009).
6 As discussed above, Defendants may launch a "pick off" settlement campaign to pursue
7 individual release agreements from the Class Members, thereby potentially narrowing the size of
8 the Settlement Class – 100 members - until it is no longer numerous enough for class certification.
9 *Id.* Plaintiffs, then, may not have sufficient number of employees to represent. This led to a
significant reduction of claim value in settlement negotiations.

10 57. While the evidence gathered through Plaintiffs' discovery supports the merits of
11 the claims asserted in this lawsuit, Plaintiffs and their counsel recognize that continued litigation
12 presents significant risks that support a downward departure from Defendants' estimated liability
13 exposure. In view of the risks, the Settlement reflects my estimate of the total amount of damages,
14 monetary penalties or other relief that the Class could reasonably expect to be awarded at trial,
15 taking into account the likelihood of prevailing and other attendant risks. It also represents a fair,
16 adequate, and reasonable compromise amount for these claims and warrants preliminary
17 approval. *Id.*, *Torrissi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1376 (the financial
18 condition of Defendants predominated in assessing the reasonableness of settlement); *Spann v.*
19 *J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty concerning
20 Defendants' financial stability "strongly supports the reasonableness of the settlement"); See
21 *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014 WL 2465049,
* 3.

22 ***Allocation of the PAGA Payment***

23 58. The settlement of PAGA penalties in the sum of \$20,000.00, of which 75%
24 (\$15,000.00) will be paid to the LWDA and 25% (\$5,000.00) will be distributed to the Aggrieved
25 Employees, is reasonable and appropriate under the circumstances. The Parties negotiated a good
26 faith amount for PAGA Penalties to be paid to the LWDA and to the Aggrieved Employees. The
27 portion to be paid to the LWDA was not the result of self-interest at the expense of other
28 Aggrieved Employees.



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

Attorneys' Fees and Costs

59. I intend to request Class Counsel Attorneys' Fees of \$166,666.66 (one-third of the GSA) and Class Counsel's litigation costs incurred in prosecuting this Action, which I currently estimate to be approximately \$18,686.57 and will be no more than \$25,000.00 at the conclusion of matters related to the Settlement. In view of my efforts and risks in pursuing this case these amounts are well within the range of reasonableness and thus warrant this Court's preliminary approval. In addition, based on my experience in wage and hour class action matters, fee awards of approximately one-third of the settlement fund are routinely approved as reasonable. I have been awarded attorneys' fees equaling approximately one-third of the fund in several recent wage and hour class actions, including: *Alvarez v. Gary Grace Enterprises, LP*, Marin County Superior Court, Case No. CIV1002553 (one-third of fund); *Calderon v. Greatcall, Inc.*, San Diego Superior Court, Case No. 37-2010-00093743-CU-OE-CTL (one-third of fund); *Butler v. Lexxiom, Inc.*, San Bernardino County Superior Court, Case No. CIVRS1001579 (one-third of fund); *Perez v. Southwest Dealer Services, Inc.*, Los Angeles County Superior Court, Case No. BC439253 (one-third of fund); *O'Brien v. Optima Network Services, Inc.*, San Bernardino County Superior Court, Case No. CIVRS1107056 (one-third of fund); *Noyd v. The Cristcat Group, et al.*, Los Angeles County Superior Court, Case No. BC439558 (one-third of fund); *Huynh v. Carefusion Resources, LLC, et al*, San Diego Sup.Ct., Case No. 37-2009-00103277-CU-OE-CTL (one-third of fund); *Cunningham v. DPI Specialty Foods West, Inc.*, Los Angeles Sup.Ct., Case No. BC465017 (one-third of fund); *Stucker v. L'Oreal USA S/D, Inc.*, Los Angeles Sup. Ct., Case No. BC456080 (one-third of fund); *Valdez v. Healthcare Services Group, Inc.*, Los Angeles Sup.Ct., Case No. BC462917 (one-third of fund); *Hernandez, et al v. HSBC*, U.S. District Court, Central District of California, Case No. 10-CV-4753 (one-third of fund); *Sandoval, et al. v. Thrifty Payless, Inc., et al.* Los Angeles Sup.Ct., Case No. BC431249 (one-third of fund); *Alafa v. Custom Built Personal Training, Inc.*, Tulare County Superior Court, Case No. VCU-245496 (one-third of fund); *Nardone v. Sequoia Beverage Company, LP*, Tulare Sup.Ct., Case No. VCU-248370 (one-third of fund); *Rosen v. Image Transfer*, Los Angeles Sup.Ct., Case No. BC511702 (one-third of fund); *Tucker v. Maly's West, Inc.*, Los Angeles Sup.Ct., Case No. BC483920 (one-third of fund); *King v. Build.com*, Butte Sup.Ct., Case No. 159985 (one-third of fund); *Clifford v. Anderson Hay & Grain*, Los Angeles Sup.Ct., Case No. BC517625 (one-third of fund); *Nichols, et al. v. Vitamin Shoppe*, Contra Costa Sup.Ct., Case No. CIVMSC13-01136 (one-third of fund); *Clarke v. Insight*



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 *Global*, U.S. District Court, Southern District of California, Case No. 13-CV-0357 (one-third of
2 fund); *Fischer, et al. v. National Distribution Centers LP, et al.*, Riverside Sup.Ct., Case No.
3 RIC1114952 (one-third of fund); *Shaw, et al. v. Interthinx, Inc.*, United States District Court for
4 the District of Colorado, Case No. 13-CV-01229-REB-BNB (one-third of fund); *Ogbuehi v.*
5 *Comcast of California/ Colorado/ Florida/ Oregon, Inc.*, United States District Court, Eastern
6 District of California, Case No. EDCV13-00672-KJM-KJN (one-third of fund); *Lynch, et al. v.*
7 *American Guard Services*, Los Angeles Superior Court, Case No. BC462681 (one-third of fund);
8 *Volney-Parris v. Southern California Edison Company*, Los Angeles Superior Court, Case No.
9 BC493038 (one-third of fund); *Hidalgo, et al. v. Sun Hill*, Los Angeles Superior Court, Case No.
10 BC480808 (one-third of fund); *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court, Case
11 No. S-1500-CV-282679 (one-third of fund); *Linder, et al. v. Warehouse Services, Inc.*, San
Bernardino Superior Court, Case No. CIVDS1500146 (one-third of fund).

12 60. The amount of fees and costs requested are commensurate with (1) the risk Class
13 Counsel took in bringing the case, (2) the extensive time, effort and expense dedicated to the case,
14 (3) the skill and determination Class Counsel has shown, (4) the results Class Counsel achieved,
15 (5) the value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel
16 turned down to devote time to this matter. Class Counsel also interviewed and obtained
17 information from putative class members, met and conferred with Defendants' counsel on
18 numerous occasions, reviewed and analyzed hundreds of pages of data and documents provided
19 by Defendants and obtained through other sources, researched applicable law, and estimates of
"damages" for purposes of settlement discussions, among other tasks.

20 61. Class Counsel have borne all the risks and costs of litigation and will receive no
21 compensation until recovery is obtained. Class Counsel are well-experienced in wage-and-hour
22 class action litigation and used that experience to obtain a fair result for the Class. Considering
23 the amount of the attorney fees requested, the work performed, and the risks incurred, the
24 requested fees and costs are reasonable and should be awarded.

Class Representative Service Payments

25 62. The Settlement provides that Plaintiffs may seek Class Representative Service
26 Payments of \$15,000.00. This amount is entirely reasonable given Plaintiffs' efforts in this Action
27 and the risks they undertook on behalf of Class Members. Here, Plaintiffs have devoted many
28 hours advancing the interests of the Settlement Class. Plaintiffs have done this by, among other



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 things, retaining experienced counsel, providing them with information about their work history
2 with Defendants and Defendants' policies and practices with respect to the wage and hour claims
3 at issue, assisting counsel in identifying witnesses, traveling to and participating in mediation,
4 and being actively involved in the settlement process to ensure a fair result for the Settlement
5 Class as a whole. In doing this, Plaintiffs have been exposed to significant risks, including the
6 risk of an order to pay Defendants' attorneys' fees and costs if this action had been unsuccessful
7 (See Labor Code §§ 218.5-218.6). The efforts and risks that Plaintiffs undertook on behalf of the
8 Settlement Class shows that each of the proposed Class Representative Service Payments is fair,
9 adequate, and reasonable, and thus warrant preliminary approval. Plaintiffs' declaration, filed
10 concurrently with mine, provides further information supporting their request for the Class
11 Representative Service Payments.

12 63. Plaintiffs began their investigation and retention of attorneys to pursue the claims
13 at issue on approximately July 09, 2020. Awarding each Plaintiff 3.00% of the GSA is entirely
14 reasonable given Plaintiffs' efforts in this case undertaken on behalf of absent Class Members. In
15 this case, Plaintiffs have devoted several hours of their time advancing the interests of the Class
16 Members and also expects to devote additional hours of their time with Class Counsel overseeing
17 the administration of the Settlement if the Court grants final approval of the Settlement. *See*
18 *generally* Declaration of Aaron Salazar. Plaintiffs have done this by, among other things, retaining
19 experienced counsel, providing them with extensive information about their work history with
20 Defendants and Defendants' policies and practices with respect to the wage and hour claims at
21 issue, assisting them in contacting absent Class Members to gather information, participating in
22 a full day of mediation, foregoing pursuit of their individual claims in favor of a fair class-wide
23 resolution, and being actively involved in the settlement process to ensure a fair result for the
24 Class Members as a whole.

25 64. As Class representatives, Plaintiffs agreed to (1) consider the interests of the class
26 just as they would consider their own interests and, in some cases, to put the interests of the class
27 before their own interests; (2) actively participate in the lawsuit, as necessary, by among other
28 things, answering interrogatories, producing documents to Defendants and giving deposition and
trial testimony if requested; (3) travel to give such testimony; (4) recognize and accept that any
resolution of the lawsuit by dismissal or settlement, is subject to court approval, and must be
designed in the best interest of the class as a whole; (5) follow the progress of the lawsuit and



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 provide all relevant facts to Class Counsel; (6) champion many other people with similar claims
2 and injuries because of the importance of the case and that necessity that all Class Members
3 benefit from the lawsuit; and (7) fight for a resolution in which the individual recovery to each
4 Class Member, including Plaintiff, may be relatively small. Plaintiff agreed to shoulder all of
5 these responsibilities in exchange for a proportionate share of funds made available for
6 distribution to the Class Members. *See generally* Declaration of Aaron Salazar. Plaintiffs had no
7 guarantee of Class Representative Service Payments. This justifies the Class Representative
8 Service Payments sought.

8 65. In taking the actions outlined above, Plaintiffs have exposed themselves to
9 significant risks, including the risk that they could have been ordered to pay Defendants'
10 attorneys' fees and costs if this Action had been unsuccessful (*see* Lab. Code §§ 218.5-218.6), as
11 well as the risk that they could, in the future, face a potentially hostile work environment and
12 worsened career prospects for suing a prior employer for wage and hour violations and serving
13 as the Plaintiff in a class action lawsuit. Additionally, Plaintiffs have exposed themselves to the
14 risk that they could end up receiving less than Defendants would have paid them at the beginning
15 of the Action via a C.C.P. § 998 offer or other individual settlement offer to drop them class
16 allegations. On many occasions, California courts have ordered wage and hour plaintiffs and
17 would be class representatives to pay outrageous fee and/or cost awards for unsuccessful claims.
A few examples are:

- 18 a. *Zalewa v. Tempo Research Corp.*, No. B238142, 2013 WL 766535 (CA 2nd Dist.
19 March 1, 2013) (court awarded the employer \$2,210,360 in attorney's fees to be
20 paid by employee for employee's unsuccessful suit for unpaid bonuses). A true
21 and correct copy of the court's order is attached to this declaration as **Exhibit 14**.
- 22 b. *Cun v. Café Tiramisu LLC*, No. A131241, 2011 WL 5979937 (CA 1st Dist. Nov.
23 30, 2011) (court ordered the employee to pay \$36,612.50 in attorney's fees and
24 costs to employer for unsuccessful suit for unpaid wages). A true and correct copy
25 of the court's order is attached to this declaration as **Exhibit 15**.
- 26 c. *Csaszi v. Sharp Healthcare*, No. D038558, 2003 WL 352422 (CA 4th Dist. Feb.
27 18, 2003) (court ordered the employee to pay \$20,269 in attorney's fees and costs
28 to the employer for unsuccessful suit for unpaid wages and overtime). A true and
correct copy of the court's order is attached to this declaration as **Exhibit 16**.



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 d. *Villalobos v. Guertin*, No. CIV. S-07-2778 LKK/GGH, 2009 WL 4718721
2 (U.S.D.C. Eastern Dist. Dec. 3, 2009) (court ordered Plaintiffs' counsel to pay
3 \$21,180 in attorney's fees and \$1,525.80 in costs to defense counsel for unpaid
4 wages). A true and correct copy of the court's order is attached to this declaration
as **Exhibit 17**.

5 Such costs awards are higher than the share of the Net Settlement Amount ("NSA") that each
6 Plaintiff stands to receive as a Class Member. It is unfair in view of the substantial risk of an
7 adverse fee or cost award of several thousand dollars that Plaintiff receives less as a reward for
8 taking such a risk. Moreover, we cannot lose sight of the fact that Plaintiffs are not a high wage
9 earner. Even the lowest of the cost awards listed above would have devastating consequences for
10 each Plaintiff in view of his/her modest earnings.

11 66. As I explain further below, Plaintiffs' individual share of the Net Settlement
12 Amount will be less than that of some absent Class Members. Under the Settlement, Class
13 Members will receive a *pro rata* distribution of the Settlement proceeds proportionate to the
14 period of time he or she worked for Defendants during the Class Period, compared to the total of
15 the total period of time worked by all Class Members during the Class Period, as reflected by
16 Defendant's records. Because Plaintiffs may have been employed for a shorter period during the
17 Class Period, some Class Members will have worked more Work Weeks than Plaintiff and, as a
18 result, receive larger shares in the recovery – *even though they did not actively participate in the*
19 *lawsuit*. While this is a risk that Plaintiffs assumed when they brought their lawsuit, it is unfair to
20 limit Plaintiffs' Class Representative Service Payments to an amount not much greater than an
21 absent Class Members' share of the recovery. To encourage employees like Plaintiffs to don the
22 helm of class champions (and thereby advance the important public policies behind class actions),
the Court should award something substantial to Plaintiffs for their readiness to receive less than
absent Class Members while assuming all the risk and delay of payment.

23 67. The average putative class member in this case would be unlikely to pursue
24 individually the claims Plaintiffs brought against Defendants because such claims would be too
25 small to justify the cost and the risk. A putative class member will be unlikely to find an attorney
26 who is willing to pursue an individual's claims because the claims are too small to justify the
27 hundreds of hours of legal work necessary to prove each claim. Only the class action vehicle,
28 which allows for the aggregation of hundreds of risky small dollar value claims, makes such



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 claims advantageous for an attorney to pursue on a contingency basis and there can be no class
2 action without a class member assuming the great fiduciary responsibilities of as class
3 representative. This Court should allow the Class Representative Service Payments requested
4 because to do otherwise would discourage employees (and attorneys) from bringing class actions
in the first place.

5 68. If would-be class action plaintiffs are not adequately incentivized to advance the
6 public policy behind class actions in court in light of the time and risk it will entail, it is unlikely
7 that they will bring class action lawsuits in the first place. Once employers realize that such
8 lawsuits are unlikely, they will have no incentive to comply with wage and hour laws.

9 69. Plaintiffs face worsened career prospects for suing a former employer for wage
10 and hour violations and serving as the Plaintiff in a class action lawsuit. *See generally* Declaration
11 of Aaron Salazar. Because they filed a lawsuit in the California Superior Court, a public record
12 now exists that Plaintiffs sued their employer for Labor Code violations – a fact that won’t be lost
13 on prospective employers considering them for a job. Common sense dictates that an employer
14 will think twice about hiring someone who sued his/her last employer. Legal experts have
15 recognized this fact. Attached to this declaration as **Exhibit 18** is a true and correct copy of the
16 article “Employees: Better Think Twice Before Suing Your Employer (Four Reasons Why).”
17 Attached to this declaration as **Exhibit 19** is a true and correct copy of the article “What To Expect
18 If You Sue Your Employer.” California even has laws to address this risk: Labor Code § 1102.5
19 prohibits retaliation against employees who speak up about Labor Code violations and Labor
20 Code § 98.6 prohibits discrimination against employees who bring Labor Code violations to the
21 attention of the Labor Commissioner. Thus, the risk to Plaintiffs’ future employment shows that
the Class Representative Service Payments sought are fair, adequate, and reasonable, and
warrants final approval of the Court.

22 70. Class Counsel depended on Plaintiffs’ input to prosecute this lawsuit. Plaintiff
23 made this case possible for a number of reasons. First, Plaintiff challenged their employers on an
24 unlawful practice that led to Defendants paying a large percentage of the unpaid wages in question
25 plus interest to the remainder of their employees – in spite of Defendants’ financial limitations.
26 Plaintiffs provided Class Counsel with detailed descriptions of how Defendants’ business
operates, the hours and scheduling of employees, and the nature of the work Class Members
performed. *See generally* Declaration of Plaintiff Aaron Salazar.



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 71. By agreeing to settle the case in the best interest of the Class Members, Plaintiffs
2 have given up the right to pursue individual claims and recover substantially more in unpaid
3 wages, interest, waiting time penalties, pay stub penalties, and civil penalties that he will release
4 as part of the Settlement. Plaintiffs did not seek an individual settlement for their claims at all,
5 instead choosing to prosecute the claims on behalf of the Class Members.

6 72. In view of the risks, Plaintiff achieved a result the Class can be proud of. There
7 were significant risks (outlined in the preliminary approval motion) to any award on behalf of the
8 Class Members and still Plaintiffs achieved a settlement of \$500,000.00. This outstanding result
9 calls for significant awards to Plaintiffs for making the result possible.

10 ***Class Member and Aggrieved Employee Settlement Share Estimates***

11 73. Above, Plaintiffs estimate Plaintiffs' anticipated Individual Class Payments.

12 74. **Individual Class Payments.** At per hour (the average Class Member's hourly
13 wage), the average estimated Individual Class Payment to Class Members is the equivalent of
14 over hours of unpaid wages (the primary remedies sought) ($\$2,633.33 / \$16.26$ hourly rate =
15 161.95 hours). Thus, this is a result the Class can be proud of in view of the significant risks.

16 75. Plaintiff estimates that there are 5,000 Work Weeks for the Class Period. So, each
17 Work Week has a value of approximately \$52.67 ($\$263,333.34$ Net Settlement Amount / 5,000
18 Work Weeks = \$52.67). Plaintiff had 139 Work Weeks during the Class Period. Based on this, it
19 is anticipated that Plaintiff Aaron Salazar will receive an Individual Class Payment of
20 approximately \$7,320.67 as a Class Member ($139 \text{ Work Week} \times \$52.67 = \$7,320.67$) while the
21 average estimated Individual Class Payment to Class Members will be approximately \$2,633.33.
22 Some Class Members – those who worked more Work Weeks during the Class Period - will
23 receive more, and some less. The highest possible Individual Class Payment to a Class Member
24 (i.e., to those who qualify for all Work Weeks in the Class Period) will be approximately
25 \$16,552.05. The lowest possible Individual Class Payment to a Class Member (i.e., to those who
26 qualify for only one Work Week in the Class Period) will be approximately \$52.67. Some Class
27 Members – those who worked more Work Weeks during the Class Period - will receive more,
28 and some less.

 76. The Individual Class Payment will be paid to each Class Member based on his or
her eligible Work Weeks compared to the total Work Weeks. Because this method compensates
Class Members based on the extent of their potential injuries, in that Class Members who worked



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 for Defendants longer would have been subject to more alleged violations, it is fair, adequate, and
2 reasonable.

3 77. **Individual PAGA Payments.** I estimate that the average Aggrieved
4 Employee Individual PAGA Payment will be \$94.34. *Id.* Plaintiff Salazar's Individual PAGA
5 Payment, his individual share of 25% of the PAGA Penalties, will be less than that of some absent
6 Aggrieved Employees. Under the Settlement, each Aggrieved Employee will receive a *pro rata*
7 distribution of 25% of the PAGA Penalties proportionate to the number of paychecks he or she
8 had with Defendants during the PAGA Period, compared to the total of all paychecks of all
9 Aggrieved Employees during the PAGA Period, as reflected by Defendants' records. Plaintiffs
10 estimate that there are 1,157 Aggrieved Employee paychecks for the PAGA Period. So, each
11 Aggrieved Employee paycheck from the PAGA Period has a value of approximately \$4.32 (25%
12 of \$20,000.00 in PAGA Penalties / 1,157 Aggrieved Employee paychecks = \$4.32). It is
13 anticipated that Plaintiff Aaron Salazar will receive an Individual PAGA Payment of
14 approximately \$25.93 as an Aggrieved Employee (6 paychecks during the PAGA Period x \$4.32
15 paycheck value = \$7,320.67) while the average estimated Individual PAGA Payment to an
16 Aggrieved Employee will be approximately \$94.34 (\$5,000.00, 25% of PAGA Penalties /
17 Aggrieved Employee paychecks during the PAGA Period = \$94.34 Individual PAGA Payment).
18 Some Aggrieved Employees – those who had more paychecks during the PAGA Period - will
19 receive more, and some less. The highest possible Individual PAGA Payment to an Aggrieved
20 Employee (i.e., to those who qualify for all paychecks in the PAGA Period) will be approximately
\$374.80. The lowest possible Individual PAGA Payment to an Aggrieved Employee (i.e., to those
who qualify for only one paycheck in the PAGA Period) will be approximately \$4.32.

21 ***Proposed Preliminary Approval Order***

22 78. Plaintiffs file a proposed Preliminary Approval Order with this declaration. The
23 proposed Preliminary Approval Order includes the Notice Packet. The Notice Packet consists of
24 the Class Notice (Exhibit A to the Preliminary Approval Order), the Election Not to Participate
25 in Settlement form (Exhibit B to the Preliminary Approval Order), the Work Week Dispute form
26 (Exhibit C to the Preliminary Approval Order), and the Objection form (Exhibit D to the
27 Preliminary Approval Order) in English with Spanish translations. Based on my investigation,
28 the Class Members all understand English, Spanish or both. The Notice Packet does not include
any other forms. The Settlement Agreement is not attached to the proposed Preliminary Approval



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 Order. I have carefully reviewed both the terms and the terminology of the proposed
2 Preliminary Approval Order and accompanying Notice Packet to confirm that the various
3 documents are internally consistent, consistent with each other, and consistent with the
4 Settlement Agreement.

5 79. **Identity of Administrator.** The proposed Preliminary Approval Order states
6 the name of the Administrator, and describes the nature of the services that the Administrator
7 will be required to perform, either directly or by reference to the Settlement Agreement.

8 80. **Exclusion Form.** The proposed Preliminary Approval Order provides that the
9 Class Notice shall be accompanied by the Election Not to Participate in Settlement form
10 (Exhibit B to the Preliminary Approval Order), the Work Week Dispute form (Exhibit C to the
11 Preliminary Approval Order), and the Objection form (Exhibit D to the Preliminary Approval
12 Order) in English with Spanish translations. Based on my investigation, the Class Members all
13 understand English, Spanish or both. The proposed Preliminary Approval Order provides that
14 any exclusion form shall be submitted to the Administrator rather than filed with the Court.
15 The proposed Preliminary Approval Order does not require the Class Member to send copies
16 of the exclusion form to counsel, but requires the Administrator to do so. The proposed
17 Preliminary Approval Order provides that the Administrator shall file a declaration
18 concurrently with the filing of Plaintiffs' motion for final approval with a copy of every
19 exclusion form received by the Administrator.

20 81. **Objection form.** The proposed Preliminary Approval Order provides that the
21 Class Notice shall be accompanied by the Objection form that the Class Members may use.
22 The proposed Preliminary Approval Order provides that any objection shall be submitted to
23 the Administrator rather than filed with the Court. The proposed Preliminary Approval Order
24 does not require the Class Member to send copies of the objection form to counsel, but
25 requires the Administrator to do so. The proposed Preliminary Approval Order provides that
26 the Administrator shall file a declaration concurrently with the filing of the motion for final
27 approval with a copy of every objection form received by the administrator.

28 82. Neither the proposed Preliminary Approval Order, the Class Notice, nor the
Objection form require an objecting party to, either personally or through counsel, appear at
the hearing on the motion for final approval for that party's objection to be considered. Neither
the proposed Preliminary Approval Order, the Class Notice, nor the Objection form require



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 an objecting party to, either personally or through counsel, to file or serve, or to state in the
2 objection, a notice of intention to appear at the hearing on the motion for final approval.

3 83. **Final Approval Hearing Date.** The proposed Preliminary Approval Order
4 provides a proposed date for the Final Approval Hearing. The proposed Preliminary
5 Approval Order requires the Administrator to give notice to any objecting party of any
6 continuance of the hearing of the motion for final approval.

7 84. **No Injunction against Filing Claims.** Neither the proposed Preliminary
8 Approval Order nor the Class Notice purports to enjoin the Class Members from filing any
9 actions or administrative claims or proceedings pending the final hearing on the settlement,
10 or for any other period.

11 85. **No Claim Form.** The Settlement does not require a claim form.

12 *The Notice Packet*

13 86. The Settlement requires distribution of the Notice by First Class U.S. mail only.
14 Settlement, ¶ 8.4.2. Although there are current employee Class Members, it is uncertain whether
15 Defendant's records of their contact information include email addresses and Class Members,
16 who perform all of their work away from a desk, are not in a position to check their emails. As
17 such, notice by mail alone is fair, adequate, and reasonable. The Notice Packet (attached as
18 Exhibits A, B, C, and D to the Settlement) provides Class Members with all pertinent information
19 that they need to fully evaluate their options and exercise their rights under the Settlement.
20 Specifically, it clearly and concisely explains, among other things: (1) what the Settlement is
21 about; (2) who is a Settlement Class Member; (3) how Class Counsel will be paid; (4) how to
22 submit an exclusion request not to be bound by the Settlement; (5) how to object to the Settlement;
23 (6) how the Settlement will be allocated; (7) how payments to Class Members will be calculated;
24 (8) how the disputes will be resolved; and (9) the estimated settlement shares for each Class
25 Member. Additionally, the Notice will include the number of eligible Work Weeks a Class
26 Member had during the Class Period. Accordingly, the Notice should be approved because it
27 describes the Settlement with sufficient clarity and specificity to explain to Class Members what
28 this action is about, their rights under the Settlement, and how to exercise those rights. As such,
the Parties' proposed Notice fully complies with California Rules of Court 3.766(d) and 3.769(f)
and will allow Class Members to make informed responses to the proposed settlement.



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 87. The Settlement does not require Class Members to submit claims to
2 participate.

3 88. Each document in the Notice Packet is drafted in a manner that is likely to be
4 readily understood by the members of the Class. The Notice Packet does not contain any
5 Latin terms, legal terms of art, or unfamiliar symbols or abbreviations.

6 89. As stated above, the Class Notice includes an estimate of the likely recovery
7 by the individual Class Member. It also provides the estimated dollar value of a Work Week
8 and the estimated dollar value of a Pay Period.

9 90. The Class Notice states that the Court has determined only that there is
10 sufficient evidence to suggest that the proposed settlement might be fair, adequate, and
11 reasonable, and that any final determination of those issues will be made at the final hearing.

12 91. The Class Notice advises the Class Members of where they can find the
13 Settlement Agreement, by describing the full title and filing date either of the settlement
14 agreement and this declaration to which the Settlement Agreement is attached. The Class
15 Notice also states the address of the courthouse to which the case is assigned, and the address
16 of the court's website at which the case file can be viewed on-line.

17 92. The Class Notice describes the releases by Plaintiffs and the Class Members.

18 93. The lawsuit includes claim for civil penalties under PAGA. The Class Notice
19 defines PAGA. It states that Class Members may not opt out of the PAGA provisions of the
20 Settlement. However, it does not bar them from objecting to the PAGA portions of the
21 Settlement. The Class Notice also describes the terms of the settlement of the PAGA claim,
22 including who is an Aggrieved Employee. The Class Notice provides an estimate of the
23 individual Aggrieved Employee's share of 25% of the PAGA Penalties and advises
24 Aggrieved Employees that the payments will be reported on a Form 1099.

25 94. The Objection form instructs the objecting Class Member that the objection
26 must be delivered to the Administrator. The Objection form states the name and address of
27 the Administrator. It also states the date by which the objection must be mailed or otherwise
28 delivered.

 95. The information required to be provided by an objecting Class Member on the
Objection form does not exceed the minimum information necessary to (i) identify the



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 objector as a person entitled to object to the Settlement, (ii) describe the nature of and basis
2 for the objection, and (iii) contact the objector to clarify any uncertainties.

3 96. The Election Not To Participate form (i) instructs the Class Member seeking
4 exclusion that the exclusion form must be mailed or delivered to the Administrator, (ii) states
5 the name and address of the Administrator, and (iii) states the date by which the exclusion
6 form must be mailed or otherwise delivered.

7 97. The information required to be provided by a Class Member on the Election
8 Not To Participate form does not exceed the minimum information necessary to (i) identify
9 the person as a Class Member and (ii) contact the person to clarify any uncertainties.

10 98. The Election Not To Participate form indicates that exclusion from the Class
11 Settlement will not result in exclusion from the PAGA portion of the Settlement.

12 ***Administrator Duties***

13 99. The duties of the Settlement Administrator are spelled out in the Settlement and in
14 the bid provided by Simpluris, Inc. a true and correct copy of which is attached hereto as **Exhibit**
15 **20**.

16 ***Administration Costs***

17 100. With regard to the settlement administration costs provision (Settlement ¶ 8.1), it
18 is reasonable. Before agreeing to Simpluris, Inc. the Parties sought and reviewed bids from other
19 reputable third-party administrators: (A) Phoenix Settlement Administrators = \$7,000.00; (B)
20 Simpluris, Inc. = \$6,000.00; and C) ILYM Group, Inc. = \$6,950.00. A true and correct copy of
21 the bid from Phoenix Settlement Administrators is attached hereto as **Exhibit 21**. A true and
22 correct copy of the bid from ILYM Group, Inc. is attached hereto as **Exhibit 22**. Thus, the
23 settlement administration costs provision should be given preliminary approval.

24 ***PAGA Provisions of the Settlement***

25 101. The memorandum of points and authorities that accompanies this declaration
26 explains the terms of the provisions of the Settlement that apply to PAGA and civil penalties.

27 102. The Settlement provides that 25% of the PAGA Penalties shall be distributed
28 among all Aggrieved Employees, even those who opt out of the Class Settlement. See Settlement,
¶ 3.2.5.

103. The Settlement states as follows with regard to the release of the PAGA claim:
Plaintiffs on behalf of themselves and the Aggrieved Employees release all claims for civil



SPIVAK LAW
EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

1 penalties that could have been sought by the Labor Commissioner for the violations identified in
2 Plaintiffs' pre-filing letter to the LWDA; Plaintiffs do not release the claim for wages or damages
3 of any Aggrieved Employee unless such Aggrieved Employee is a Participating Class Member.
4 Settlement, ¶ 6.3.

5 104. The PAGA Release is limited to the Defendants named in the Operative
6 Complaint, together with Defendants' officers, directors, employees and agents. See
7 Settlement, ¶ 1.4.2 ("Released Parties").

8 105. The Settlement releases only those claims described in the notice sent by the
9 plaintiff to the LWDA, and only to the extent that they are alleged in the complaint. The
10 Settlement states: Plaintiffs on behalf of themselves and the Aggrieved Employees release all
11 claims for civil penalties that could have been sought by the Labor Commissioner for the
12 violations identified in Plaintiffs' pre-filing letter to the LWDA; Plaintiffs do not release the claim
13 for wages or damages of any Aggrieved Employee unless such Aggrieved Employee is a
14 Participating Class Member. Settlement, ¶ 6.1.

15 ***Notice of Settlement to the LWDA***

16 106. Pursuant to Labor Code § 2699(l)(2), Plaintiffs have provided notice of this
17 settlement to the LWDA with the filing and service of this motion. A true and correct copy of
18 Plaintiff Cromwell's submission with the LWDA and a confirmation email is attached hereto as
19 **Exhibit 23**. Plaintiff Salazar's submission with the LWDA and a confirmation email are
20 collectively attached hereto as **Exhibit 24**. Plaintiff Forrest's submission with the LWDA and a
21 confirmation email are collectively attached hereto as **Exhibit 25**.

22 I declare under the penalty of perjury of the laws of the State of California that the
23 foregoing is true and correct.

24 Executed on Monday, January 22, 2024 at Los Angeles, California.



25 DAVID SPIVAK,
26 Declarant



27 SPIVAK LAW
28 EMPLOYEE RIGHTS

Mail:
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Office:
1801 Century Park East
25th Fl
Los Angeles, CA 90067

EXHIBIT 1

1 DAVID G. SPIVAK (SBN 179684)
david@spivaklaw.com
2 CAROLINE TAHMASSIAN (SBN 285680)
caroline@spivaklaw.com
3 THE SPIVAK LAW FIRM
4 8605 Santa Monica Bl
PMB 42554
5 West Hollywood, CA 90069
Telephone: (213) 725-9094
6 Facsimile: (213) 634-2485

7 Attorneys for Plaintiff(s),
8 AARON SALAZAR, SHELIA CROMWELL, and ANDREW FORREST, and all others
similarly situated
9 (Additional attorneys for parties on following page)

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN BERNARDINO**
12 **(UNLIMITED JURISDICTION)**

13 AARON SALAZAR, SHELIA CROMWELL,
14 and ANDREW FORREST, on behalf of
15 themselves and all others similarly situated, and
16 as “aggrieved employees” on behalf of other
“aggrieved employees” under the Labor Code
Private Attorneys General Act of 2004,

17 *Plaintiff(s),*

18 vs.
19

20 DESERT CREMATION SOCIETY, INC., a
California corporation; WIEFELS & SON II,
21 INC., a California corporation; and DOES 1–50,
22 inclusive,

23 *Defendant(s).*

Case No. CIVSB2116331

**CLASS ACTION AND PAGA
SETTLEMENT AGREEMENT AND
CLASS NOTICE**

Action filed: June 04, 2021
Dept: S17, The Honorable Joseph
T. Ortiz

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

walter@uelglaw.com

8605 Santa Monica Bl.

West Hollywood, CA 90069

Facsimile: (562) 256-1006

AARON SALAZAR, SHELIA CROMWELL, and ANDREW FORREST, and all others similarly situated

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

mrobinson@rdwlaw.com

orobinson@rdwlaw.com

801 South Grand Avenue

Los Angeles CA 90017

Facsimile: (213) 229-0114

DESERT CREMATION SOCIETY, INC. and WIEFELS & SON II, INC.

1 This Class Action and PAGA Settlement Agreement (“Agreement”) is made by and
2 between plaintiffs Aaron Salazar, Shelia Cromwell, and Andrew Forrest (collectively
3 “Plaintiffs”) and defendants Desert Cremation Society, Inc. and Wiefels & Son II, Inc.
4 (collectively “Defendants”). The Agreement refers to Plaintiffs and Defendants collectively as
5 “Parties,” or individually as “Party.”

6 **1. DEFINITIONS.**

7 1.1. “Action” means the Plaintiffs’ lawsuit alleging wage and hour violations against
8 Desert Cremation Society, Inc. and Wiefels & Son II, Inc. captioned “Aaron Salazar, Shelia
9 Cromwell, and Andrew Forrest on behalf of themselves, and all others similarly situated, and as
10 ‘aggrieved employees’ on behalf of other ‘aggrieved employees’ under the Labor Code Private
11 Attorneys General Act of 2004, *Plaintiff(s)*, vs. Desert Cremation Society, Inc., a California
12 corporation, Wiefels & Son II, Inc., a California corporation; and DOES 1 through 50, inclusive,
13 *Defendant(s)*,” Case No. CIVSB2116331 initiated on June 04, 2021 and pending in Superior
14 Court of the State of California, County of San Bernardino.

15 1.2. “Administrator” means Simpluris, Inc., the neutral entity the Parties have agreed
16 to appoint to administer the Settlement.

17 1.3. “Administration Expenses Payment” means the amount the Administrator will be
18 paid from the Gross Settlement Amount to reimburse its reasonable fees and expenses in
19 accordance with the Administrator’s “not to exceed” bid submitted to the Court in connection
20 with Preliminary Approval of the Settlement.

21 1.4. “Aggrieved Employee” means all of Defendants’ non-exempt decedent transport
22 drivers (also known as transport specialists), but only for the time period that the employee
23 performed transport services in California during the PAGA Period.

24 1.5. “Class” means all of Defendants’ non-exempt decedent transport drivers (also
25 known as transport specialists), but only for the time period that the employee performed transport
26 services, in California during the Class Period.

27 1.6. “Class Counsel” means David G. Spivak of The Spivak Law Firm and Walter L.
28 Haines of United Employees Law Group.

1.7. “Class Counsel Fees Payment” and “Class Counsel Litigation Expenses Payment”
mean the amounts allocated to Class Counsel for reimbursement of reasonable attorneys’ fees and

1 expenses, respectively, incurred to prosecute the Action.

2 1.8. “Class Data” means Class Member identifying information in Defendants’
3 possession including the Class Member’s name, last-known mailing address, Social Security
4 number, and number of Class Period Work Weeks and PAGA Paychecks.

5 1.9. “Class Member” or “Settlement Class Member” means a member of the Class, as
6 either a Participating Class Member or Non-Participating Class Member (including a Non-
Participating Class Member who qualifies as an Aggrieved Employee).

7 1.10. “Class Member Address Search” means the Administrator’s investigation and
8 search for current Class Member mailing addresses using all reasonably available sources,
9 methods and means including, but not limited to, the National Change of Address database, skip
10 traces, and direct contact by the Administrator with Class Members.

11 1.11. “Class Notice” means the COURT APPROVED NOTICE OF CLASS ACTION
12 SETTLEMENT AND HEARING DATE FOR FINAL COURT APPROVAL, to be mailed to
13 Class Members in English with a Spanish translation in the form, without material variation,
attached as Exhibit A and incorporated by reference into this Agreement.

14 1.12. “Class Period” means the period from October 12, 2017 to the earlier of
15 preliminary approval of the class action settlement or October 27, 2023.

16 1.13. “Class representatives” means the named Plaintiffs in the operative complaint in
17 the Action seeking Court approval to serve as Class Representatives.

18 1.14. “Class Representative Service Payments” means the payments to the Class
Representatives for initiating the Action and providing services in support of the Action.

19 1.15. “Court” means the Superior Court of California, County of San Bernardino.

20 1.16. “Defendants” means named Defendants Desert Cremation Society, Inc. and
21 Wiefels & Son II, Inc.

22 1.17. “Defense Counsel” means Michael C. Robinson and Orion S. Robinson of
Robinson Di Lando, A Professional Law Corporation.

23 1.18. “Effective Date” means the date by when both of the following have occurred: (a)
24 the Court enters a Judgment on its Order Granting Final Approval of the Settlement; and (b) the
25 Judgment is final. The Judgment is final as of the latest of the following occurrences: (a) if no
26 Participating Class Member objects to the Settlement, the day the Court enters Judgment; (b) if
27 one or more Participating Class Members objects to the Settlement, the day after the deadline for

1 filing a notice of appeal from the Judgment; or if a timely appeal from the Judgment is filed, the
2 day after the appellate court affirms the Judgment and issues a remittitur.

3 1.19. “Final Approval” means the Court’s order granting final approval of the
4 Settlement.

5 1.20. “Final Approval Hearing” means the Court’s hearing on the Motion for Final
6 Approval of the Settlement.

7 1.21. “Final Judgment” means the Judgment Entered by the Court upon Granting Final
8 Approval of the Settlement. A proposed Final Judgment form is attached as Exhibit F.

9 1.22. “Gross Settlement Amount” means \$500,000.00 which is the total amount
10 Defendants agree to pay under the Settlement except as provided in Paragraph 9 below. The Gross
11 Settlement Amount will be used to pay Individual Class Payments, Individual PAGA Payments,
12 the LWDA PAGA Payment, Class Counsel Fees, Class Counsel Expenses, Class Representative
13 Service Payments and the Administrator’s Expenses.

14 1.23. “Individual Class Payment” means the Participating Class Member’s pro rata
15 share of the Net Settlement Amount calculated according to the number of Work Weeks worked
16 during the Class Period.

17 1.24. “Individual PAGA Payment” means the Aggrieved Employee’s pro rata share of
18 25% of the PAGA Penalties calculated according to the Aggrieved Employee’s number PAGA
19 Paychecks.

20 1.25. “Judgment” means the judgment entered by the Court based upon the Final
21 Approval.

22 1.26. “LWDA” means the California Labor and Workforce Development Agency, the
23 agency entitled, under Labor Code section 2699, subd. (i).

24 1.27. “LWDA PAGA Payment” means the 75% of the PAGA Penalties paid to the
25 LWDA under Labor Code section 2699, subd. (i).

26 1.28. “Net Settlement Amount” means the Gross Settlement Amount, less the following
27 payments in the amounts approved by the Court: Individual PAGA Payments, the LWDA PAGA
28 Payment, Class Representative Service Payments, Class Counsel Fees Payment, Class Counsel
Litigation Expenses Payment, and the Administration Expenses Payment. The remainder is to be
paid to Participating Class Members as Individual Class Payments.

1.29. “Non-Participating Class Member” means any Class Member who opts out of the

1 Settlement by sending the Administrator a valid and timely Request for Exclusion.

2 1.30. "Notice Packet" means the Class Notice (Exhibit A), the Election Not to
3 Participate in Settlement form (Exhibit B), the Work Week Dispute form (Exhibit C), and the
4 Objection form (Exhibit D) in English with Spanish translations.

5 1.31. "PAGA Paycheck" means any paycheck an Aggrieved Employee received from
6 Defendants for at least one day worked during the PAGA Period.

7 1.32. "PAGA Period" means the period from March 17, 2020 to the earlier of
8 preliminary approval of the class action settlement or October 27, 2023.

9 1.33. "PAGA" means the Private Attorneys General Act (Labor Code §§ 2698. et seq.).

10 1.34. "PAGA Notice" means Plaintiffs' March 17, 2021 letter to Defendants and the
11 LWDA providing notice pursuant to Labor Code section 2699.3, subd.(a).

12 1.35. "PAGA Penalties" means the total amount of PAGA civil penalties to be paid from
13 the Gross Settlement Amount, allocated 25% to the Aggrieved Employees (\$5,000.00) and the
14 75% to LWDA (\$15,000.00) in settlement of PAGA claims.

15 1.36. "Participating Class Member" means a Class Member who does not submit a valid
16 and timely Request for Exclusion from the Settlement.

17 1.37. "Plaintiffs" means Aaron Salazar, Shelia Cromwell, and Andrew Forrest the
18 named Plaintiffs in the Action.

19 1.38. "Preliminary Approval" means the Court's Order Granting Preliminary Approval
20 of the Settlement.

21 1.39. "Preliminary Approval Order" means the proposed Order Granting Preliminary
22 Approval and Approval of PAGA Settlement. A proposed Preliminary Approval Order form is
23 attached as Exhibit E.

24 1.40. "Released Class Claims" means the claims being released as described in
25 Paragraph 6.2 below.

26 1.41. "Released PAGA Claims" means the claims being released as described in
27 Paragraph 6.2 below.

28 1.42. "Released Parties" means: Defendants and each of their current and former
parents, owners, subsidiaries, divisions, and affiliated or related persons or entities (including but
not limited to, Aries Properties, a California Corporation), and each of their respective officers,
directors, employees, partners, shareholders, attorneys, agents, executors, and assigns

(collectively, the “Released Parties”).

1.43. “Request for Exclusion” means a Class Member’s submission of a written request to be excluded from the Class Settlement signed by the Class Member. An Election Not to Participate in Settlement form is attached as Exhibit B.

1.44. “Response Deadline” means 60 days after the Administrator mails Notice to Class Members and Aggrieved Employees, and shall be the last date on which Class Members may: (a) fax, email, or mail Requests for Exclusion from the Settlement, or (b) fax, email, or mail his or her Objection to the Settlement. Class Members to whom Notice Packets are resent after having been returned undeliverable to the Administrator shall have an additional 14 calendar days beyond the Response Deadline has expired.

1.45. “Settlement” means the disposition of the Action effected by this Agreement and the Judgment.

1.46. “Work Week” means any week during which a Class Member worked for Defendants as a transport driver for at least one day, during the Class Period.

1.47. A Work Week Dispute form is attached as Exhibit C.

2. RECITALS.

2.1. On June 04, 2021, Plaintiffs commenced this Action by filing a Complaint alleging causes of action against Defendants for failure to pay wages, unauthorized and unlawful wage deductions, failure to provide meal periods, failure to authorize and permit rest periods, failure to indemnify for business expenses, failure to issue proper wage statements, failure to timely pay wages, failure to maintain required payroll records, and related claims. On October 12, 2021, Plaintiffs filed a First Amended Complaint alleging causes of action against Defendants for failure to pay wages, unauthorized and unlawful wage deductions, failure to provide meal periods, failure to authorize and permit rest periods, failure to indemnify for business expenses, failure to issue proper wage statements, failure to timely pay wages, failure to maintain required payroll records, and related allegations. The First Amended Complaint is the operative complaint in the Action (the “Operative Complaint.”) Defendants deny the allegations in the Operative Complaint, deny any failure to comply with the laws identified in in the Operative Complaint and deny any and all liability for the causes of action alleged.

2.2. Pursuant to Labor Code section 2699.3, subd.(a), Plaintiffs gave timely written

1 notice to Defendants and the LWDA by sending the PAGA Notice.

2 2.3. On June 29, 2023, the Parties participated in an all-day mediation presided over
3 by Deborah Saxe which led to this Agreement to settle the Action (describe alternative means of
4 negotiation.

5 2.4. Prior to and during mediation, Plaintiffs obtained, through informal discovery,
6 the number of comparable employees, the number of workweeks, the number of paychecks,
7 average rates of pay, sample time records, sample payroll records, written policies, financial
8 records, and related information. Plaintiffs' investigation was sufficient to satisfy the criteria for
9 court approval set forth in *Dunk v. Foot Locker Retail, Inc.* (1996) 48 Cal.App.4th 1794, 1801 and
Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 129-130 ("*Dunk/Kullar*").

10 2.5. The Court has not granted class certification.

11 2.6. The Parties, Class Counsel and Defense Counsel represent that they are not aware
12 of any other pending matter or action asserting claims that will be extinguished or affected by the
13 Settlement.

14 3. MONETARY TERMS.

15 3.1. Gross Settlement Amount. Except as otherwise provided by Paragraph 9 below,
16 Defendants promise to pay \$500,000.00 and no more as the Gross Settlement Amount and to
17 separately pay any and all employer payroll taxes owed on the Wage Portions of the Individual
18 Class Payments. Defendants have no obligation to pay the Gross Settlement Amount (or any
19 payroll taxes) prior to the deadline stated in Paragraph 6.1 of this Agreement. The Administrator
20 will disburse the entire Gross Settlement Amount without asking or requiring Participating Class
21 Members or Aggrieved Employees to submit any claim as a condition of payment. None of the
Gross Settlement Amount will revert to Defendants.

22 3.2. Payments from the Gross Settlement Amount. The Administrator will make and
23 deduct the following payments from the Gross Settlement Amount, in the amounts specified by
the Court in the Final Approval:

24 3.2.1. To Plaintiffs: Class Representative Service Payments to the Class
25 Representatives of not more than \$15,000.00 each (in addition to any Individual Class Payments
26 and any Individual PAGA Payments the Class Representatives are entitled to receive as
27 Participating Class Members). Defendants will not oppose Plaintiffs' request for a Class

1 Representative Service Payments that do not exceed this amount. As part of the motion for Class
2 Counsel Fees Payment and Class Litigation Expenses Payment, Plaintiffs will seek Court
3 approval for any Class Representative Service Payments no later than 16 court days prior to the
4 Final Approval Hearing. If the Court approves a Class Representative Service Payment less than
5 the amount requested, the Administrator will retain the remainder in the Net Settlement Amount.
6 The Administrator will pay the Class Representative Service Payments using IRS Form 1099.
7 Plaintiffs assume full responsibility and liability for employee taxes owed on the Class
8 Representative Service Payments.

9 3.2.2. To Class Counsel: A Class Counsel Fees Payment of not more than
10 33.33%, which is currently estimated to be \$166,666.66 and a Class Counsel Litigation Expenses
11 Payment of not more than \$25,000.00. Defendants will not oppose requests for these payments
12 provided that they do not exceed these amounts. Plaintiffs and/or Class Counsel will file a motion
13 for Class Counsel Fees Payment and Class Litigation Expenses Payment no later than 16 court
14 days prior to the Final Approval Hearing. If the Court approves a Class Counsel Fees Payment
15 and/or a Class Counsel Litigation Expenses Payment less than the amounts requested, the
16 Administrator will allocate the remainder to the Net Settlement Amount. Released Parties shall
17 have no liability to Class Counsel or any other Plaintiffs' Counsel arising from any claim to any
18 portion any Class Counsel Fee Payment and/or Class Counsel Litigation Expenses Payment. The
19 Administrator will pay the Class Counsel Fees Payment and Class Counsel Expenses Payment
20 using one or more IRS 1099 Forms. Class Counsel assumes full responsibility and liability for
21 taxes owed on the Class Counsel Fees Payment and the Class Counsel Litigation Expenses
22 Payment and holds Defendants harmless, and indemnifies Defendants, from any dispute or
23 controversy regarding any division or sharing of any of these Payments.

24 3.2.3. To the Administrator: An Administrator Expenses Payment not to exceed
25 \$10,000.00 except for a showing of good cause and as approved by the Court. To the extent the
26 Administration Expenses are less or the Court approves payment less than \$10,000.00, the
27 Administrator will retain the remainder in the Net Settlement Amount.

28 3.2.4. To Each Participating Class Member: An Individual Class Payment
calculated by (a) dividing the Net Settlement Amount by the total number of Work Weeks worked
by all Participating Class Members during the Class Period and (b) multiplying the result by each
Participating Class Member's Work Weeks.

1 3.2.4.1. Tax Allocation of Individual Class Payments. 20.00% of
2 each Participating Class Member's Individual Class Payment will be allocated to settlement of
3 wage claims (the "Wage Portion"). The Wage Portions are subject to tax withholding and will be
4 reported on an IRS W-2 Form. The 80.00% of each Participating Class Member's Individual
5 Class Payment will be allocated to settlement of claims for interest and penalties (the "Non-Wage
6 Portion"). The Non-Wage Portions are not subject to wage withholdings and will be reported on
7 IRS 1099 Forms. Participating Class Members assume full responsibility and liability for any
employee taxes owed on their Individual Class Payment.

8 3.2.4.2. Effect of Non-Participating Class Members on Calculation
9 of Individual Class Payments. Non-Participating Class Members will not receive any Individual
10 Class Payments. The Administrator will retain amounts equal to their Individual Class Payments
in the Net Settlement Amount for distribution to Participating Class Members on a pro rata basis.

11 3.2.5. To the LWDA and Aggrieved Employees: PAGA Penalties in the
12 amount of \$20,000.00 to be paid from the Gross Settlement Amount, with 75% (\$15,000.00)
13 allocated to the LWDA PAGA Payment and 25% (\$5,000.00) allocated to the Individual PAGA
14 Payments.

15 3.2.5.1. The Administrator will calculate each Individual PAGA Payment
16 by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties \$5,000.00
17 by the total number of PAGA Paychecks of all Aggrieved Employees but only for the time period
18 that the employee performed transport services during the PAGA Period and (b) multiplying the
19 result by each Aggrieved Employee's PAGA Paychecks. Aggrieved Employees assume full
responsibility and liability for any taxes owed on their Individual PAGA Payment.

20 3.2.5.2. If the Court approves PAGA Penalties of less than the amount
21 requested, the Administrator will allocate the remainder to the Net Settlement Amount. The
22 Administrator will report the Individual PAGA Payments on IRS 1099 Forms.

23 **4. SETTLEMENT FUNDING AND PAYMENTS.**

24 4.1. Class Work Weeks and Aggrieved Employee Paychecks. Based on a review of
25 their records to date, Defendants estimate there are 100 Class Members who collectively worked
26 a total of 5,000.00 Work Weeks, and 53 Aggrieved Employees who received a total 1,157 of
PAGA Paychecks.

27 4.2. Class Data. Not later than 15 days after the Court grants Preliminary Approval

1 of the Settlement, Defendants will simultaneously deliver the Class Data to the Administrator, in
2 the form of a Microsoft Excel spreadsheet. To protect Class Members' privacy rights, the
3 Administrator must maintain the Class Data in confidence, use the Class Data only for purposes
4 of this Settlement and for no other purpose, and restrict access to the Class Data to Administrator
5 employees who need access to the Class Data to effect and perform under this Agreement.
6 Defendants have a continuing duty to immediately notify Class Counsel if they discover that the
7 Class Data omitted class member identifying information and to provide corrected or updated
8 Class Data as soon as reasonably feasible. Without any extension of the deadline by which
9 Defendants must send the Class Data to the Administrator, the Parties and their counsel will
10 expeditiously use best efforts, in good faith, to reconstruct or otherwise resolve any issues related
11 to missing or omitted Class Data.

12 4.3. Funding of Gross Settlement Amount. Defendants shall fully fund the Gross
13 Settlement Amount, and also fund the amounts necessary to fully pay Defendants' share of payroll
14 taxes by transmitting the funds to the Administrator no later than twelve months after Final
15 Approval.

16 4.4. Payments from the Gross Settlement Amount. Within 14 days after Defendants
17 fund the Gross Settlement Amount, the Administrator will mail checks for all Individual Class
18 Payments, all Individual PAGA Payments, the LWDA PAGA Payment, the Administration
19 Expenses Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses
20 Payment, and the Class Representative Service Payments. Disbursement of the Class Counsel
21 Fees Payment, the Class Counsel Litigation Expenses Payment and the Class Representative
22 Service Payments shall not precede disbursement of Individual Class Payments and Individual
23 PAGA Payments.

24 4.4.1. The Administrator will issue checks for the Individual Class Payments
25 and/or Individual PAGA Payments and send them to the Class Members via First Class U.S. Mail,
26 postage prepaid. The face of each check shall prominently state the date (not less than 180 days
27 after the date of mailing) when the check will be voided. The Administrator will cancel all checks
28 not cashed by the void date. The Administrator will send checks for Individual Settlement
Payments to all Participating Class Members (including those for whom Notice Packet was
returned undelivered). The Administrator will send checks for Individual PAGA Payments to all
Aggrieved Employees including Non-Participating Class Members who qualify as Aggrieved

1 Employees (including those for whom Notice Packet was returned undelivered). The
2 Administrator may send Participating Class Members a single check combining the Individual
3 Class Payment and the Individual PAGA Payment. Before mailing any checks, the Administrator
4 must update the recipients' mailing addresses using the National Change of Address Database.

5 4.4.2. The Administrator must conduct a Class Member Address Search for all
6 other Class Members whose checks are returned undelivered without USPS forwarding address.
7 Within 7 days of receiving a returned check the Administrator must re-mail checks to the USPS
8 forwarding address provided or to an address ascertained through the Class Member Address
9 Search. The Administrator need not take further steps to deliver checks to Class Members whose
10 re-mailed checks are returned as undelivered. The Administrator shall promptly send a
11 replacement check to any Class Member whose original check was lost or misplaced, requested
12 by the Class Member prior to the void date.

13 4.4.3. For any Class Member whose Individual Class Payment check or
14 Individual PAGA Payment check is uncashed and cancelled after the void date, the Administrator
15 shall transmit the funds represented by such checks to the California Controller's Unclaimed
16 Property Fund in the name of the Class Member thereby leaving no "unpaid residue" subject to
17 the requirements of California Code of Civil Procedure Section 384, subd. (b).

18 4.4.4. The payment of Individual Class Payments and Individual PAGA
19 Payments shall not obligate Defendants to confer any additional benefits or make any additional
20 payments to Class Members (such as 401(k) contributions or bonuses) beyond those specified in
21 this Agreement.

22 **5. [OMITTED]**

23 **6. RELEASES OF CLAIMS.** Effective on the date when Defendants fully fund the entire
24 Gross Settlement Amount and funds all employer payroll taxes owed on the Wage Portion of the
25 Individual Class Payments, Plaintiffs, Class Members, and Class Counsel will release claims
26 against all Released Parties as follows:

27 6.1 Plaintiffs' Release. Plaintiffs and their respective former and present spouses,
28 representatives, agents, attorneys, heirs, administrators, successors, and assigns generally, release
and discharge Released Parties from all claims, transactions, or occurrences that occurred during
the Class Period, including, but not limited to: (a) all claims that were, or reasonably could have
been, alleged, based on the facts contained, in the Operative Complaint and (b) all PAGA claims

1 that were, or reasonably could have been, alleged based on facts contained in the Operative
2 Complaint, Plaintiffs' PAGA Notice, or ascertained during the Action and released under 6.2,
3 below. ("Plaintiffs' Release.") Plaintiffs' Release does not extend to any claims or actions to
4 enforce this Agreement, or to any claims for vested benefits, unemployment benefits, disability
5 benefits, social security benefits, workers' compensation benefits that arose at any time, or based
6 on occurrences outside the Class Period. Plaintiffs acknowledge that Plaintiffs may discover facts
7 or law different from, or in addition to, the facts or law that Plaintiffs now know or believe to be
8 true but agrees, nonetheless, that Plaintiffs' Release shall be and remain effective in all respects,
9 notwithstanding such different or additional facts or Plaintiffs' discovery of them.

10 6.1.1 Plaintiffs' Waiver of Rights Under California Civil Code Section 1542. For
11 purposes of Plaintiffs' Release, Plaintiffs expressly waive and relinquish the provisions, rights,
12 and benefits, if any, of section 1542 of the California Civil Code, which reads:

13 **A general release does not extend to claims that the creditor or releasing party does**
14 **not know or suspect to exist in his or her favor at the time of executing the release,**
15 **and that if known by him or her would have materially affected his or her settlement**
16 **with the debtor or Released Party.**

17 6.2 Release by Participating Class Members: All Participating Class Members, on
18 behalf of themselves and their respective former and present representatives, agents, attorneys,
19 heirs, administrators, successors, and assigns, release Released Parties from all claims stated in
20 the Operative Complaint and those based solely upon the facts alleged in the Operative
21 Complaint. Except as set forth in Section 6.3 of this Agreement, Participating Class Members do
22 not release any other claims, including claims for vested benefits, wrongful termination, violation
23 of the Fair Employment and Housing Act, unemployment insurance, disability, social security,
24 workers' compensation, or claims based on facts occurring outside the Class Period.

25 6.3 Release of PAGA Claim. Plaintiffs on behalf of themselves and the Aggrieved
26 Employees release all claims for civil penalties that could have been sought by the Labor
27 Commissioner for the violations identified in Plaintiffs' pre-filing letter to the LWDA; Plaintiffs
28 do not release the claim for wages or damages of any Aggrieved Employee unless such Aggrieved
Employee is a Participating Class Member.

1
2 **7. MOTION FOR PRELIMINARY APPROVAL.** The Parties agree to jointly prepare and
3 file a motion for preliminary approval (“Motion for Preliminary Approval”) that complies with
4 the Court’s current checklist for Preliminary Approvals. A Preliminary Approval Order form is
5 attached as Exhibit E.

6 7.1 OMITTED

7 7.2 Plaintiffs’ Responsibilities. Plaintiffs will prepare and deliver to Defense
8 Counsel all documents necessary for obtaining Preliminary Approval, including: (i) a draft of the
9 notice, and memorandum in support, of the Motion for Preliminary Approval that includes an
10 analysis of the Settlement under *Dunk/Kullar* and a request for approval of the PAGA Settlement
11 under Labor Code Section 2699, subd. (f)(2)); (ii) a draft proposed Order Granting Preliminary
12 Approval and Approval of PAGA Settlement; (iii) a draft proposed Notice Packet; (iv) a signed
13 declaration from the Administrator attaching its “not to exceed” bid for administering the
14 Settlement and attesting to its willingness to serve; competency; operative procedures for
15 protecting the security of Class Data; amounts of insurance coverage for any data breach,
16 defalcation of funds or other misfeasance; all facts relevant to any actual or potential conflicts of
17 interest with Class Members; and the nature and extent of any financial relationship with
18 Plaintiffs, Class Counsel or Defense Counsel; (v) a signed declaration from Plaintiffs confirming
19 willingness and competency to serve and disclosing all facts relevant to any actual or potential
20 conflicts of interest with Class Members, and/or the Administrator; (v) a signed declaration from
21 each Class Counsel firm attesting to its competency to represent the Class Members; its timely
22 transmission to the LWDA of all necessary PAGA documents (initial notice of violations (Labor
23 Code section 2699.3, subd. (a)), Operative Complaint (Labor Code section 2699, subd. (l)(1)),
24 this Agreement (Labor Code section 2699, subd. (l)(2)); (vi) a redlined version of the parties’
25 Agreement showing all modifications made to the Model Agreement ready for filing with the
26 Court; and (vii) all facts relevant to any actual or potential conflict of interest with Class Members,
27 the Administrator and/or the Cy Pres Recipient. In their Declarations, Plaintiffs and Class
28 Counsel Declaration shall aver that they are not aware of any other pending matter or action
asserting claims that will be extinguished or adversely affected by the Settlement.

7.3 Responsibilities of Counsel. Class Counsel and Defense Counsel are jointly
responsible for expeditiously finalizing and filing the Motion for Preliminary Approval no later

1 than 30 days after the full execution of this Agreement; obtaining a prompt hearing date for the
2 Motion for Preliminary Approval; and for appearing in Court to advocate in favor of the Motion
3 for Preliminary Approval. Class Counsel is responsible for delivering the Court's Preliminary
4 Approval to the Administrator.

5 7.4 Duty to Cooperate. If the Parties disagree on any aspect of the proposed Motion
6 for Preliminary Approval and/or the supporting declarations and documents, Class Counsel and
7 Defense Counsel will expeditiously work together on behalf of the Parties by meeting in person
8 or by telephone, and in good faith, to resolve the disagreement. If the Court does not grant
9 Preliminary Approval or conditions Preliminary Approval on any material change to this
10 Agreement, Class Counsel and Defense Counsel will expeditiously work together on behalf of
11 the Parties by meeting in person or by telephone, and in good faith, to modify the Agreement and
12 otherwise satisfy the Court's concerns.

12 **8. SETTLEMENT ADMINISTRATION.**

13 8.1 Selection of Administrator. The Parties have jointly selected Simpluris, Inc. to
14 serve as the Administrator and verified that, as a condition of appointment, Simpluris, Inc. agrees
15 to be bound by this Agreement and to perform, as a fiduciary, all duties specified in this
16 Agreement in exchange for payment of Administration Expenses. The Parties and their Counsel
17 represent that they have no interest or relationship, financial or otherwise, with the Administrator
18 other than a professional relationship arising out of prior experiences administering settlements.

19 8.2 Employer Identification Number. The Administrator shall have and use its own
20 Employer Identification Number for purposes of calculating payroll tax withholdings and
21 providing reports state and federal tax authorities.

22 8.3 Qualified Settlement Fund. The Administrator shall establish a settlement fund
23 that meets the requirements of a Qualified Settlement Fund ("QSF") under US Treasury
24 Regulation section 468B-1.

25 8.4 Notice to Class Members.

26 8.4.1 No later than three (3) business days after receipt of the Class Data, the
27 Administrator shall notify Class Counsel that the list has been received and state the number of
28 Class Members, PAGA Members, Work Weeks, and PAGA Paychecks in the Class Data.

8.4.2 Using best efforts to perform as soon as possible, and in no event later than

1 14 days after receiving the Class Data, the Administrator will send to all Class Members identified
2 in the Class Data, via first-class United States Postal Service (“USPS”) mail, the Notice Packet
3 with Spanish translation, if applicable substantially in the forms attached to this Agreement as
4 **Exhibits A, B, C, and D.** The first page of the Class Notice shall prominently estimate the dollar
5 amounts of any Individual Class Payment and/or Individual PAGA Payment payable to the Class
6 Member, and the number of Work Weeks and PAGA Paychecks (if applicable) used to calculate these
7 amounts. Before mailing Notice Packets, the Administrator shall update Class Member addresses
8 using the National Change of Address database.

8 8.4.3 Not later than 3 business days after the Administrator’s receipt of any
9 Notice Packet returned by the USPS as undelivered, the Administrator shall re-mail the Notice
10 Packet using any forwarding address provided by the USPS. If the USPS does not provide a
11 forwarding address, the Administrator shall conduct a Class Member Address Search, and re-mail
12 the Notice Packet to the most current address obtained. The Administrator has no obligation to
13 make further attempts to locate or send Notice Packet to Class Members whose Notice Packet is
14 returned by the USPS a second time.

14 8.4.4 The deadlines for Class Members’ written objections, Challenges to Work
15 Weeks and/or PAGA Paychecks (disputes), and Requests for Exclusion will be extended an
16 additional 14 days beyond the 60 days otherwise provided in the Class Notice for all Class
17 Members whose notice is re-mailed. The Administrator will inform the Class Member of the
18 extended deadline with the re-mailed Notice Packet.

18 8.4.5 If the Administrator, Defendants or Class Counsel is contacted by or
19 otherwise discovers any persons who believe they should have been included in the Class Data
20 and should have received Notice Packet, the Parties will expeditiously meet and confer in person
21 or by telephone, and in good faith. in an effort to agree on whether to include them as Class
22 Members. If the Parties agree, such persons will be Class Members entitled to the same rights as
23 other Class Members, and the Administrator will send, via email or overnight delivery, a Class
24 Notice requiring them to exercise options under this Agreement not later than 14 days after receipt
25 of Class Notice, or the deadline dates in the Class Notice, which ever are later.

25 **8.5 Requests for Exclusion (Opt-Outs).**

26 8.5.1 Class Members who wish to exclude themselves (opt-out of) the Class
27 Settlement must send the Administrator, by fax, email, or mail, a signed written Request for

1 Exclusion not later than 60 days after the Administrator mails the Notice Packet (plus an
2 additional 14 days for Class Members whose Notice Packet is re-mailed). A Request for
3 Exclusion is a letter from a Class Member or his/her representative that reasonably communicates
4 the Class Member's election to be excluded from the Settlement and includes the Class Member's
5 name, address and email address or telephone number. To be valid, a Request for Exclusion must
6 be timely faxed, emailed, or postmarked by the Response Deadline. An Election Not to Participate
in Settlement form, attached as Exhibit B, may be used for this purpose but is not required.

7 8.5.2 The Administrator may not reject a Request for Exclusion as invalid
8 because it fails to contain all the information specified in the Class Notice. The Administrator
9 shall accept any Request for Exclusion as valid if the Administrator can reasonably ascertain the
10 identity of the person as a Class Member and the Class Member's desire to be excluded. The
11 Administrator's determination shall be final and not appealable or otherwise susceptible to
12 challenge. If the Administrator has reason to question the authenticity of a Request for Exclusion,
13 the Administrator may demand additional proof of the Class Member's identity. The
14 Administrator's determination of authenticity shall be final and not appealable or otherwise
susceptible to challenge.

15 8.5.3 Every Class Member who does not submit a timely and valid Request for
16 Exclusion is deemed to be a Participating Class Member under this Agreement, entitled to all
17 benefits and bound by all terms and conditions of the Settlement, including the Participating Class
18 Members' Releases under Paragraphs 6.2 and 6.3 of this Agreement, regardless of whether the
Participating Class Member actually receives the Class Notice or objects to the Settlement.

19 8.5.4 Every Class Member who submits a valid and timely Request for
20 Exclusion is a Non-Participating Class Member and shall not receive an Individual Class Payment
21 or have the right to object to the class action components of the Settlement. Aggrieved Employees
22 are eligible for an Individual PAGA Payment.

23 8.6 Challenges to Calculation of Work Weeks. Each Class Member shall have 60
24 days after the Administrator mails the Notice Packet (plus an additional 14 days for Class
25 Members whose Notice Packet is re-mailed) to challenge the number of Class Work Weeks and
26 PAGA Paychecks (if any) allocated to the Class Member in the Class Notice. This is also known
27 as a dispute. A Work Week Dispute form, attached as Exhibit C, may be used for this purpose
but is not required. The Class Member may challenge the allocation by communicating with the

1 Administrator via fax, email or mail. The Administrator must encourage the challenging Class
2 Member to submit supporting documentation. In the absence of any contrary documentation, the
3 Administrator is entitled to presume that the Work Weeks contained in the Class Notice are
4 correct so long as they are consistent with the Class Data. The Administrator's determination of
5 each Class Member's allocation of Work Weeks and/or PAGA Paychecks shall be final and not
6 appealable or otherwise susceptible to challenge. The Administrator shall promptly provide
7 copies of all challenges to calculation of Work Weeks and/or PAGA Paychecks to Defense
8 Counsel and Class Counsel and the Administrator's determination the challenges.

8.7 Objections to Settlement.

8.7.1 Only Participating Class Members may object to the class action
9 components of the Settlement and/or this Agreement, including contesting the fairness of the
10 Settlement, and/or amounts requested for the Class Counsel Fees Payment, Class Counsel
11 Litigation Expenses Payment and/or Class Representative Service Payments.

8.7.2 Participating Class Members may send written objections to the
12 Administrator, by fax, email, or mail. In the alternative, Participating Class Members may appear
13 in Court (or hire an attorney to appear in Court) to present verbal objections at the Final Approval
14 Hearing. A Participating Class Member who elects to send a written objection to the
15 Administrator must do so not later than 60 days after the Administrator's mailing of the Notice
16 Packet (plus an additional 14 days for Class Members whose Notice Packet was re-mailed). An
17 The Objection form attached as Exhibit D may be used for this purpose but is not required.

8.7.3 Non-Participating Class Members have no right to object to any of the class
18 action components of the Settlement.

8.8 Administrator Duties. The Administrator has a duty to perform or observe all
19 tasks to be performed or observed by the Administrator contained in this Agreement or otherwise.

8.8.1 Website, Email Address and Toll-Free Number. The Administrator will
20 establish and maintain and use an internet website to post information of interest to Class
21 Members including the date, time and location for the Final Approval Hearing and copies of the
22 Settlement Agreement, Motion for Preliminary Approval, the Preliminary Approval, the Notice
23 Packet, the Motion for Final Approval, the Motion for Class Counsel Fees Payment, Class
24 Counsel Litigation Expenses Payment and Class Representative Service Payments, the Final
25 Approval and the Judgment. The Administrator will also maintain and monitor an email address
26
27

1 and a toll-free telephone number to receive Class Member calls, faxes and emails.

2 8.8.2 Requests for Exclusion (Opt-outs) and Exclusion List. The Administrator
3 will promptly review on a rolling basis Requests for Exclusion to ascertain their validity. Not
4 later than 5 days after the expiration of the deadline for submitting Requests for Exclusion, the
5 Administrator shall email a list to Class Counsel and Defense Counsel containing (a) the names
6 and other identifying information of Class Members who have timely submitted valid Requests
7 for Exclusion (“Exclusion List”); (b) the names and other identifying information of Class
8 Members who have submitted invalid Requests for Exclusion; (c) copies of all Requests for
Exclusion from Settlement submitted (whether valid or invalid).

9 8.8.3 Weekly Reports. The Administrator must, on a weekly basis, provide
10 written reports to Class Counsel and Defense Counsel that, among other things, tally the number
11 of: Notice Packets mailed or re-mailed, Notice Packets returned undelivered, Requests for
12 Exclusion (whether valid or invalid) received, objections received, challenges to Work Weeks
13 and/or PAGA Paychecks received and/or resolved, and checks mailed for Individual Class
14 Payments and Individual PAGA Payments (“Weekly Report”). The Weekly Reports must include
15 provide the Administrator’s assessment of the validity of Requests for Exclusion and attach copies
of all Requests for Exclusion and objections received.

16 8.8.4 Work Week and/or PAGA Paycheck Challenges. The Administrator has
17 the authority to address and make final decisions consistent with the terms of this Agreement on
18 all Class Member challenges over the calculation of Work Weeks and/or PAGA Paychecks. The
Administrator’s decision shall be final and not appealable or otherwise susceptible to challenge.

19 8.8.5 Administrator’s Declaration. Not later than 14 days before the date by
20 which Plaintiffs are required to file the Motion for Final Approval of the Settlement, the
21 Administrator will provide to Class Counsel and Defense Counsel, a signed declaration suitable
22 for filing in Court attesting to its due diligence and compliance with all of its obligations under
23 this Agreement, including, but not limited to, its mailing of the Notice Packets, the Notice Packets
24 returned as undelivered, the re-mailing of Notice Packets, attempts to locate Class Members, the
25 total number of Requests for Exclusion from Settlement it received (both valid or invalid), the
26 number of written objections and attach the Exclusion List. The Administrator will supplement
27 its declaration as needed or requested by the Parties and/or the Court. Class Counsel is responsible
for filing the Administrator’s declaration(s) in Court.

1 8.8.6 Final Report by Administrator. Within 10 days after the Administrator
2 disburses all funds in the Gross Settlement Amount, the Administrator will provide Class Counsel
3 and Defense Counsel with a final report detailing its disbursements by employee identification
4 number only of all payments made under this Agreement. At least 15 days before any deadline
5 set by the Court, the Administrator will prepare, and submit to Class Counsel and Defense
6 Counsel, a signed declaration suitable for filing in Court attesting to its disbursement of all
7 payments required under this Agreement. Class Counsel is responsible for filing the
8 Administrator's declaration in Court.

9 **9. CLASS SIZE ESTIMATES and ESCALATOR CLAUSE.** Based on their records,
10 Defendants estimate that, as of the date of this Settlement Agreement, (1) there are 100 Class
11 Members and 5,000 total Work Weeks during the Class period and (2) there were 53 Aggrieved
12 Employees who received 1,157 PAGA Paychecks during the PAGA Period. If the Work Weeks
13 and/or Class Members as of the date the Court approves the settlement exceeds the referenced
14 5,000 Work Weeks and/or 100 Class Members by more than 10.00%, the Gross Settlement
15 Amount, including the Class Counsel Fees Payment, the Class Representative Service Payments,
16 and the LWDA payment, will increase proportionally according to the number of additional Work
17 Weeks or Class Members, whichever results in a higher increase in the Gross Settlement Amount.
18 Alternatively, Defendant may elect to end the Class Period on the date on which the number of
19 workweeks reached 5,500.

20 **10. DEFENDANTS' RIGHT TO WITHDRAW.** If the number of valid Requests for
21 Exclusion identified in the Exclusion List exceeds 5.00% of the total of all Class Members,
22 Defendants may, but are not obligated, elect to withdraw from the Settlement. The Parties agree
23 that, if Defendants withdraw, the Settlement shall be void ab initio, have no force or effect
24 whatsoever, and that neither Party will have any further obligation to perform under this
25 Agreement; provided, however, Defendants will remain responsible for paying all Settlement
26 Administration Expenses incurred to that point. Defendants must notify Class Counsel and the
27 Court of their election to withdraw not later than 7 days after the Administrator sends the final
28 Exclusion List to Defense Counsel; late elections will have no effect.

1 **11. MOTION FOR FINAL APPROVAL.** Not later than 16 court days before the calendared
2 Final Approval Hearing, Plaintiffs will file in Court, a motion for final approval of the Settlement
3 that includes a request for approval of the PAGA settlement under Labor Code section 2699,
4 subd. (l), a Proposed Final Approval Order and a proposed Judgment (collectively “Motion for
5 Final Approval”). Plaintiffs shall provide drafts of these documents to Defense Counsel not later
6 than 7 days prior to filing the Motion for Final Approval. Class Counsel and Defense Counsel
7 will expeditiously meet and confer in person or by telephone, and in good faith, to resolve any
disagreements concerning the Motion for Final Approval.

8 11.1 Response to Objections. Each Party retains the right to respond to any objection
9 raised by a Participating Class Member, including the right to file responsive documents in Court
10 no later than 5 court days prior to the Final Approval Hearing, or as otherwise ordered or accepted
by the Court.

11 11.2 Duty to Cooperate. If the Court does not grant Final Approval or conditions Final
12 Approval on any material change to the Settlement (including, but not limited to, the scope of
13 release to be granted by Class Members), the Parties will expeditiously work together in good
14 faith to address the Court’s concerns by revising the Agreement as necessary to obtain Final
15 Approval. The Court’s decision to award less than the amounts requested for the Class
16 Representative Service Payments, Class Counsel Fees Payment, Class Counsel Litigation
17 Expenses Payment and/or Administrator Expenses Payment shall not constitute a material
modification to the Agreement within the meaning of this paragraph.

18 11.3 Continuing Jurisdiction of the Court. The Parties agree that, after entry of
19 Judgment, the Court will retain jurisdiction over the Parties, Action, and the Settlement solely for
20 purposes of (i) enforcing this Agreement and/or Judgment, (ii) addressing settlement
21 administration matters, and (iii) addressing such post-Judgment matters as are permitted by law.

22 11.4 Waiver of Right to Appeal. Provided the Judgment is consistent with the terms
23 and conditions of this Agreement, specifically including the Class Counsel Fees Payment and
24 Class Counsel Litigation Expenses Payment reflected set forth in this Settlement, the Parties, their
25 respective counsel, and all Participating Class Members who did not object to the Settlement as
26 provided in this Agreement, waive all rights to appeal from the Judgment, including all rights to
27 post-judgment and appellate proceedings, the right to file motions to vacate judgment, motions
for new trial, extraordinary writs, and appeals. The waiver of appeal does not include any waiver

1 of the right to oppose such motions, writs or appeals. If an objector appeals the Judgment, the
2 Parties' obligations to perform under this Agreement will be suspended until such time as the
3 appeal is finally resolved and the Judgment becomes final, except as to matters that do not affect
4 the amount of the Net Settlement Amount.

5 11.5 Appellate Court Orders to Vacate, Reverse, or Materially Modify Judgment. If
6 the reviewing Court vacates, reverses, or modifies the Judgment in a manner that requires a
7 material modification of this Agreement (including, but not limited to, the scope of release to be
8 granted by Class Members), this Agreement shall be null and void. The Parties shall nevertheless
9 expeditiously work together in good faith to address the appellate court's concerns and to obtain
10 Final Approval and entry of Judgment, sharing, on a 50-50 basis, any additional Administration
11 Expenses reasonably incurred after remittitur. An appellate decision to vacate, reverse, or modify
12 the Court's award of the Class Representative Service Payments or any payments to Class
13 Counsel shall not constitute a material modification of the Judgment within the meaning of this
14 paragraph, as long as the Gross Settlement Amount remains unchanged.

15 **12. AMENDED JUDGMENT.** If any amended judgment is required under Code of Civil
16 Procedure section 384, the Parties will work together in good faith to jointly submit and a proposed
17 amended judgment.

18 **13. ADDITIONAL PROVISIONS.**

19 13.1 No Admission of Liability, Class Certification or Representative Manageability
20 for Other Purposes. This Agreement represents a compromise and settlement of highly disputed
21 claims. Nothing in this Agreement is intended or should be construed as an admission by
22 Defendants that any of the allegations in the Operative Complaint have merit or that Defendants
23 have any liability for any claims asserted; nor should it be intended or construed as an admission
24 by Plaintiffs that Defendants' defenses in the Action have merit. The Parties agree that class
25 certification and representative treatment is for purposes of this Settlement only. If, for any reason
26 the Court does grant Preliminary Approval, Final Approval or enter Judgment, Defendants
27 reserve the right to contest certification of any class for any reasons, and Defendants reserve all
28 available defenses to the claims in the Action, and Plaintiffs reserve the right to move for class
certification on any grounds available and to contest Defendants' defenses. The Settlement, this

1 Agreement and Parties' willingness to settle the Action will have no bearing on, and will not be
2 admissible in connection with, any litigation (except for proceedings to enforce or effectuate the
3 Settlement and this Agreement).

4 13.2 Confidentiality Prior to Preliminary Approval. Plaintiffs, Class Counsel,
5 Defendants and Defense Counsel separately agree that, until the Motion for Preliminary Approval
6 of Settlement is filed, they and each of them will not disclose, disseminate and/or publicize, or
7 cause or permit another person to disclose, disseminate or publicize, any of the terms of the
8 Agreement directly or indirectly, specifically or generally, to any person, corporation, association,
9 government agency, or other entity except: (1) to the Parties' attorneys, accountants, or spouses,
10 all of whom will be instructed to keep this Agreement confidential; (2) counsel in a related matter;
11 (3) to the extent necessary to report income to appropriate taxing authorities; (4) in response to a
12 court order or subpoena; or (5) in response to an inquiry or subpoena issued by a state or federal
13 government agency.

14 Each Party agrees to immediately notify each other Party of any judicial or agency
15 order, inquiry, or subpoena seeking such information. Plaintiffs, Class Counsel, Defendants and
16 Defense Counsel separately agree not to, directly or indirectly, initiate any conversation or other
17 communication, before the filing of the Motion for Preliminary Approval, any with third party
18 regarding this Agreement or the matters giving rise to this Agreement except to respond only that
19 "the matter was resolved," or words to that effect. This paragraph does not restrict Class Counsel's
20 communications with Class Members in accordance with Class Counsel's ethical obligations
21 owed to Class Members.

22 13.3 No Solicitation. The Parties separately agree that they and their respective
23 counsel and employees will not solicit any Class Member to opt out of or object to the Settlement,
24 or appeal from the Judgment. Nothing in this paragraph shall be construed to restrict Class
25 Counsel's ability to communicate with Class Members in accordance with Class Counsel's ethical
26 obligations owed to Class Members.

27 13.4 Integrated Agreement. Upon execution by all Parties and their counsel, this
28 Agreement together with its attached exhibits shall constitute the entire agreement between the
Parties relating to the Settlement, superseding any and all oral representations, warranties,
covenants, or inducements made to or by any Party.

13.5 Attorney Authorization. Class Counsel and Defense Counsel separately warrant

1 and represent that they are authorized by Plaintiffs and Defendants, respectively, to take all
2 appropriate action required or permitted to be taken by such Parties pursuant to this Agreement
3 to effectuate its terms, and to execute any other documents reasonably required to effectuate the
4 terms of this Agreement including any amendments to this Agreement.

5 13.6 Cooperation. The Parties and their counsel will cooperate with each other and
6 use their best efforts, in good faith, to implement the Settlement by, among other things,
7 modifying the Settlement Agreement, submitting supplemental evidence and supplementing
8 points and authorities as requested by the Court. In the event the Parties are unable to agree upon
9 the form or content of any document necessary to implement the Settlement, or on any
10 modification of the Agreement that may become necessary to implement the Settlement, the
11 Parties will seek the assistance of a mediator and/or the Court for resolution.

12 13.7 No Prior Assignments. The Parties separately represent and warrant that they
13 have not directly or indirectly assigned, transferred, encumbered, or purported to assign, transfer,
14 or encumber to any person or entity and portion of any liability, claim, demand, action, cause of
15 action, or right released and discharged by the Party in this Settlement.

16 13.8 No Tax Advice. Neither Plaintiffs, Class Counsel, Defendants nor Defense
17 Counsel are providing any advice regarding taxes or taxability, nor shall anything in this
18 Settlement be relied upon as such within the meaning of United States Treasury Department
19 Circular 230 (31 CFR Part 10, as amended) or otherwise.

20 13.9 Modification of Agreement. This Agreement, and all parts of it, may be
21 amended, modified, changed, or waived only by an express written instrument signed by all
22 Parties or their representatives, and approved by the Court.

23 13.10 Agreement Binding on Successors. This Agreement will be binding upon, and
24 inure to the benefit of, the successors of each of the Parties.

25 13.11 Applicable Law. All terms and conditions of this Agreement and its exhibits will
26 be governed by and interpreted according to the internal laws of the state of California, without
27 regard to conflict of law principles.

28 13.12 Cooperation in Drafting. The Parties have cooperated in the drafting and
preparation of this Agreement. This Agreement will not be construed against any Party on the
basis that the Party was the drafter or participated in the drafting.

13.13 Confidentiality. To the extent permitted by law, all agreements made, and orders

1 entered during Action and in this Agreement relating to the confidentiality of information shall
2 survive the execution of this Agreement.

3 13.14 Use and Return of Class Data. Information provided to Class Counsel pursuant
4 to Cal. Evid. Code §1152, and all copies and summaries of the Class Data provided to Class
5 Counsel by Defendants in connection with the mediation, other settlement negotiations, or in
6 connection with the Settlement, may be used only with respect to this Settlement, and no other
7 purpose, and may not be used in any way that violates any existing contractual agreement, statute,
8 or rule of court. Not later than 90 days after the date when the Court discharges the
9 Administrator's obligation to provide a Declaration confirming the final pay out of all Settlement
10 funds, Plaintiffs shall destroy, all paper and electronic versions of Class Data received from
11 Defendants unless, prior to the Court's discharge of the Administrator's obligation, Defendants
12 make a written request to Class Counsel for the return, rather than the destructions, of Class Data.

13 13.15 Headings. The descriptive heading of any section or paragraph of this Agreement
14 is inserted for convenience of reference only and does not constitute a part of this Agreement.

15 13.16 Calendar Days. Unless otherwise noted, all reference to "days" in this Agreement
16 shall be to calendar days. In the event any date or deadline set forth in this Agreement falls on a
17 weekend or federal legal holiday, such date or deadline shall be on the first business day
18 thereafter.

19 13.17 Notice. All notices, demands or other communications between the Parties in
20 connection with this Agreement will be in writing and deemed to have been duly given as of the
21 third business day after mailing by United States mail, or the day sent by email or messenger,
22 addressed as follows:

23 To Plaintiff:
24 David G. Spivak, Esq.
25 The Spivak Law Firm
26 8605 Santa Monica Bl
27 PMB 42554
28 West Hollywood, CA 90069
david@spivaklaw.com

To Defendant:
Orion S. Robinson, Esq.
Robinson Di Lando, A Professional Law Corporation
801 South Grand Avenue

Suite 500
Los Angeles, CA 90017
orobinson@rdwlaw.com

13.18 Execution in Counterparts. This Agreement may be executed in one or more counterparts by facsimile, electronically (i.e. DocuSign), or email which for purposes of this Agreement shall be accepted as an original. All executed counterparts and each of them will be deemed to be one and the same instrument if counsel for the Parties will exchange between themselves signed counterparts. Any executed counterpart will be admissible in evidence to prove the existence and contents of this Agreement.

13.19 Stay of Litigation. The Parties agree that upon the execution of this Agreement the litigation shall be stayed, except to effectuate the terms of this Agreement. The Parties further agree that upon the signing of this Agreement that pursuant to CCP section 583.330 to extend the date to bring a case to trial under CCP section 583.310 for the entire period of this settlement process.

Dated: 10 / 16 / 2023

By: 
AARON SALAZAR

Dated: 10 / 12 / 2023

By: 
SHELIA CROMWELL

Dated: 10 / 12 / 2023

By: 
ANDREW FORREST

Dated: _____

By: _____

Desert Cremation Society, Inc. and
Wiefels & Son II, Inc.

///

Suite 500
Los Angeles, CA 90017
orobinson@rdwlaw.com

13.18 Execution in Counterparts. This Agreement may be executed in one or more counterparts by facsimile, electronically (i.e. DocuSign), or email which for purposes of this Agreement shall be accepted as an original. All executed counterparts and each of them will be deemed to be one and the same instrument if counsel for the Parties will exchange between themselves signed counterparts. Any executed counterpart will be admissible in evidence to prove the existence and contents of this Agreement.

13.19 Stay of Litigation. The Parties agree that upon the execution of this Agreement the litigation shall be stayed, except to effectuate the terms of this Agreement. The Parties further agree that upon the signing of this Agreement that pursuant to CCP section 583.330 to extend the date to bring a case to trial under CCP section 583.310 for the entire period of this settlement process.

Dated: _____

By: _____
AARON SALAZAR

Dated: _____

By: _____
SHELIA CROMWELL

Dated: _____

By: _____
ANDREW FORREST

Dated: 10/11/23

By: 
LORI W. MATTHEWS
Desert Cremation Society, Inc. and
Wiefels & Son II, Inc.

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

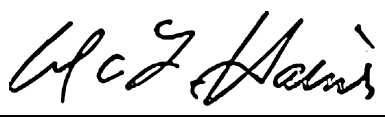
THE SPIVAK LAW FIRM

Dated: 10 / 13 / 2023

By: 
DAVID G. SPIVAK, Attorneys for
Plaintiff(s), AARON SALAZAR,
SHELIA CROMWELL, and ANDREW
FORREST, and all others similarly
situated

UNITED EMPLOYEES LAW GROUP

Dated: 10 / 12 / 2023

By: 
WALTER L. HAINES, Attorneys for
Plaintiff(s), AARON SALAZAR,
SHELIA CROMWELL, and ANDREW
FORREST, and all others similarly
situated

ROBINSON DI LANDO, A
PROFESSIONAL LAW CORPORATION

Dated: _____

By: _____
ORION S. ROBINSON, Attorneys for
Defendant(s), DESERT CREMATION
SOCIETY, INC. AND WIEFELS &
SON II, INC.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THE SPIVAK LAW FIRM

Dated: _____

By: _____
DAVID G. SPIVAK, Attorneys for
Plaintiff(s), AARON SALAZAR,
SHELIA CROMWELL, and ANDREW
FORREST, and all others similarly
situated

UNITED EMPLOYEES LAW GROUP

Dated: _____

By: _____
WALTER L. HAINES, Attorneys for
Plaintiff(s), AARON SALAZAR,
SHELIA CROMWELL, and ANDREW
FORREST, and all others similarly
situated

ROBINSON DI LANDO, A
PROFESSIONAL LAW CORPORATION

Dated: 10-12-23

By: 
ORION S. ROBINSON, Attorneys for
Defendant(s), DESERT CREMATION
SOCIETY, INC. AND WIEFELS &
SON II, INC.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

1 **COURT APPROVED NOTICE OF CLASS ACTION SETTLEMENT AND HEARING**
2 **DATE FOR FINAL COURT APPROVAL**

3 (case name: *Aaron Salazar, et al. v. Desert Cremation Society, Inc., et al.*, and number
4 CIVSB2116331)

5 ***The Superior Court for the State of California authorized this Notice. Read it carefully!***
6 ***It's not junk mail, spam, an advertisement, or solicitation by a lawyer. You are not being sued.***

7 **You may be eligible to receive money** from an employee class action lawsuit (“Action”) against Desert Cremation Society, Inc. and Wiefels & Son II, Inc. (“Defendants”) for alleged violations of California’s labor laws. The Action was filed by Defendants’ employees Aaron Salazar, Shelia Cromwell, and Andrew Forrest (“Plaintiffs”) and seek payment of (1) wages and other relief for a class of decedent transport drivers (“Class Members”) Defendants during the Class Period (October 12, 2017 to the earlier of preliminary approval of the class action settlement or October 27, 2023); and (2) penalties under the California Private Attorney General Act (“PAGA”) for hourly, non-exempt decedent transport driver employees who worked for Defendants during the PAGA Period (March 17, 2020 to the earlier of preliminary approval of the class action settlement or October 27, 2023) (“Aggrieved Employees”).

12 The proposed Settlement has two main parts: (1) a Class Settlement requiring Defendants to fund Individual Class Payments, and (2) a PAGA Settlement requiring Defendants to fund Individual PAGA Payments and pay penalties to the California Labor and Workforce Development Agency (“LWDA”).

15 Based on Defendants’ records, and the Parties’ current assumptions, **your Individual Class Payment is estimated to be \$<<IndividualClassPaymentAmount>> (less withholding) and your Individual PAGA Payment is estimated to be \$<<IndividualPAGAPaymentAmount>>.** The estimated dollar value of a Work Week is <<\$increment type value>> and a PAGA Paycheck is <<@PayPeriodValue>>. The actual amount you may receive likely will be different and will depend on a number of factors. (If no amount is stated for your Individual PAGA Payment, then according to Defendants’ records you are not eligible for an Individual PAGA Payment under the Settlement because you didn’t work during the PAGA Period.) The individual payments amounts will vary. However, the average Individual Class Payment to a Class Member is estimated to be <<\$Average Individual Class Payment Amount>>. The average Individual PAGA Payment to a Class Member is estimated to be <<\$Average Individual PAGA Payment Amount>>. The highest Individual Class Payment to a Class Member is estimated to be <<\$Highest Individual Class Payment Amount>> and the lowest is estimated to be <<\$Lowest Individual Class Payment Amount>>. The highest Individual PAGA Payment to a Class Member is estimated to be <<\$Highest Individual PAGA Payment Amount>> and the lowest is estimated to be <<\$Lowest Individual PAGA Payment Amount>>.

25 The above estimates are based on Defendants’ records showing that **you worked <<__>> Work Weeks** during the Class Period and **you had <<__>> PAGA Paychecks** during the PAGA Period. If you believe that you worked more Work Weeks and/or PAGA Paychecks, you can submit a challenge by the deadline date. See Section 4 of this Notice.

The Court has already preliminarily approved the proposed Settlement and approved this Notice. The Court has not yet decided whether to grant final approval. The Court has determined only that there is sufficient evidence to suggest that the proposed settlement might be fair, adequate, and reasonable, and that any final determination of those issues will be made at the Final Approval Hearing. Your legal rights are affected whether you act or not act. Read this Notice carefully. You will be deemed to have carefully read and understood it. At the Final Approval Hearing, the Court will decide whether to finally approve the Settlement and how much of the Settlement will be paid to Plaintiffs and Plaintiffs' attorneys ("Class Counsel"). The Court will also decide whether to enter a judgment that requires Defendants to make payments under the Settlement and requires Class Members and Aggrieved Employees to give up their rights to assert certain claims against Defendants.

If you worked for Defendants during the Class Period and/or the PAGA Period, you have two basic options under the Settlement:

(1) **Do Nothing.** You don't have to do anything to participate in the proposed Settlement and be eligible for an Individual Class Payment and/or an Individual PAGA Payment. As a Participating Class Member, though, you will give up your right to assert Class Period wage claims and PAGA Period penalty claims against Defendants.

(2) **Opt-Out of the Class Settlement.** You can exclude yourself from the Class Settlement (opt-out) by submitting a written Request for Exclusion or otherwise notifying the Administrator in writing. If you opt-out of the Settlement, you will not receive an Individual Class Payment. You will, however, preserve your right to personally pursue Class Period claims for California labor law violations against Defendants, and, if you are an Aggrieved Employee, remain eligible for an Individual PAGA Payment. You cannot opt-out of the PAGA portion of the proposed Settlement.

Defendants will not retaliate against you for any actions you take with respect to the proposed Settlement.

SUMMARY OF YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT

You Don't Have to Do Anything to Participate in the Settlement	If you do nothing, you will be a Participating Class Member, eligible for an Individual Class Payment and an Individual PAGA Payment (if any). In exchange, you will give up your right to assert the claims against Defendants that are covered by this Settlement (Released Claims).
You Can Opt-out of the Class Settlement but not the PAGA Settlement The Opt-out Deadline is <<RESPONSE DEADLINE>>	If you don't want to fully participate in the proposed Settlement, you can opt-out of the Class Settlement by sending the Administrator a written Request for Exclusion. You can use the enclosed Election Not To Participate In Settlement form for this purpose. Once excluded, you will be a Non-Participating Class Member and no longer eligible for an Individual Class Payment. Non-Participating

1		Class Members cannot object to any portion of the proposed Settlement. See Section 6 of this Notice.
2		
3		You cannot opt-out of the PAGA portion of the proposed Settlement. Defendants must pay Individual PAGA Payments to all Aggrieved Employees and Plaintiffs release Defendants from civil penalties they may owe to the Aggrieved Employees.
4		
5	Participating Class Members Can Object to the Class Settlement but not the PAGA Settlement	All Class Members who do not opt-out (“Participating Class Members”) can object to any aspect of the proposed Settlement. You can use the enclosed Objection form for this purpose. The Court’s decision whether to finally approve the Settlement will include a determination of how much will be paid to Class Counsel and Plaintiffs who pursued the Action on behalf of the Class. You are not personally responsible for any payments to Class Counsel or Plaintiffs, but every dollar paid to Class Counsel and Plaintiffs reduces the overall amount paid to Participating Class Members. You can object to the amounts requested by Class Counsel or Plaintiffs if you think they are unreasonable. See Section 7 of this Notice.
6	Written Objections Must be Submitted by <<RESPONSE DEADLINE>>	
7		
8		
9		
10		
11		
12	You Can Participate in the <<FinalApprovalHearingDate>> Final Approval Hearing	The Court’s Final Approval Hearing is scheduled to take place on <<FinalApprovalHearingDate>>. You don’t have to attend but you do have the right to appear (or hire an attorney to appear on your behalf at your own cost), in person, by telephone or by using the Court’s virtual appearance platform. Participating Class Members can verbally object to the Settlement at the Final Approval Hearing whether or not they submitted a written objection. See Section 8 of this Notice.
13		
14		
15		
16		
17	You Can Challenge the Calculation of Your Work Week / PAGA Paychecks	The amount of your Individual Class Payment and PAGA Payment (if any) depend on how many Work Weeks you worked at least one day during the Class Period and how many PAGA Paychecks you received at least one day during the PAGA Period, respectively. The number Class Period Work Weeks and number of PAGA Paychecks you received according to Defendants’ records is stated on the first page of this Notice. If you disagree with either of these numbers, you must challenge it by <<RESPONSE DEADLINE>>. See Section 4 of this Notice. You can use the enclosed Work Weeks Dispute form for this purpose.
18		
19	Written Challenges Must be Submitted by <<RESPONSE DEADLINE>>	
20		
21		
22		

1. WHAT IS THE ACTION ABOUT?

Plaintiffs are former employees of Defendants. The Action accuses Defendants of violating California labor laws by failure to pay wages, unauthorized and unlawful wage deductions, failure to provide meal periods, failure to authorize and permit rest periods, failure to indemnify for business expenses, failure to issue proper wage statements, failure to timely pay wages, failure to maintain required payroll records, and related violations of the Labor Code. Based on the same claims, Plaintiffs have also asserted a claim for civil penalties under the PAGA (Labor Code

1 section 2698 and sections that follow) (“PAGA”). Plaintiffs are represented by attorneys in the
2 Action: David G. Spivak of The Spivak Law Firm and Walter L. Haines of United Employees
Law Group (“Class Counsel.”)

3 Defendants strongly deny violating any laws or failing to pay any wages and contend they
4 complied with all applicable laws.

5 **2. WHAT DOES IT MEAN THAT THE ACTION HAS SETTLED?**

6 So far, the Court has made no determination whether Defendants or Plaintiffs are correct on the
7 merits. In the meantime, Plaintiffs and Defendants hired ☐ an experienced, neutral mediator ☐ a
8 retired judge ☐ (describe alternative means of negotiation) in an effort to resolve the Action by
9 negotiating an to end the case by agreement (settle the case) rather than continuing the expensive
10 and time-consuming process of litigation. The negotiations were successful. By signing a lengthy
11 written settlement agreement (“Agreement”) and agreeing to jointly ask the Court to enter a
judgment ending the Action and enforcing the Agreement, Plaintiffs and Defendants have
12 negotiated a proposed Settlement that is subject to the Court’s Final Approval. Both sides agree
the proposed Settlement is a compromise of disputed claims. By agreeing to settle, Defendants
do not admit any violations or concede the merit of any claims.

13 Plaintiffs and Class Counsel strongly believe the Settlement is a good deal for you because they
14 believe that: (1) Defendants have agreed to pay a fair, reasonable and adequate amount
15 considering the strength of the claims and the risks and uncertainties of continued litigation; and
16 (2) Settlement is in the best interests of the Class Members and Aggrieved Employees. The Court
preliminarily approved the proposed Settlement as fair, reasonable and adequate, authorized this
Notice, and scheduled a hearing to determine Final Approval.

17 **3. WHAT ARE THE IMPORTANT TERMS OF THE PROPOSED SETTLEMENT?**

18 A. Gross Settlement Amount. Defendants Will Pay \$500,000.00 as the Gross
19 Settlement Amount (Gross Settlement). Defendants have agreed to deposit the Gross Settlement
20 into an account controlled by the Administrator of the Settlement. The Administrator will use the
21 Gross Settlement to pay the Individual Class Payments, Individual PAGA Payments, Class
22 Representative Service Payments, Class Counsel’s attorney’s fees and expenses, the
23 Administrator’s expenses, and penalties to be paid to the California Labor and Workforce
Development Agency (“LWDA”). Assuming the Court grants Final Approval, Defendants will
fund the Gross Settlement not more than 14 days after the Judgment entered by the Court become
final. The Judgment will be final on the date the Court enters Judgment, or a later date if
Participating Class Members object to the proposed Settlement or the Judgment is appealed.

24 B. Court Approved Deductions from Gross Settlement. At the Final Approval
25 Hearing, Plaintiffs and/or Class Counsel will ask the Court to approve the following deductions
26 from the Gross Settlement, the amounts of which will be decided by the Court at the Final
Approval Hearing:

- 27 1. Attorney Fees and Costs. Up to \$166,666.66 (33.33% of the Gross

1 Settlement to Class Counsel for attorneys' fees and up to \$25,000.00 for their litigation expenses.
2 To date, Class Counsel have worked and incurred expenses on the Action without payment.

3 2. Class Representative Service Payment. Up to \$15,000.00 as a Class
4 Representative Service Payment for filing the Action, working with Class Counsel and
5 representing the Class. A Class Representative Service Payment will be the only monies Plaintiffs
6 will receive other than Plaintiffs' Individual Class Payments and any Individual PAGA Payments.

7 3. Administration Expenses. Up to \$10,000.00 to the Administrator for
8 services administering the Settlement.

9 4. PAGA Penalties. Up to \$20,000.00 for PAGA Penalties, allocated 75% to
10 the LWDA PAGA Payment and 25% in Individual PAGA Payments to the Aggrieved Employees
11 based on their PAGA Paychecks.

12 Participating Class Members have the right to object to any of these deductions. The Court
13 will consider all objections.

14 Based on their records, Defendants estimated that, as of the date of the Settlement, (1)
15 there are 100 Class Members and 5,000.00 Total Work Weeks during the Class period and (2)
16 there were 53 Aggrieved Employees who received 1,157 PAGA Paychecks during the PAGA
17 Period. If the Work Weeks and/or Class Members as of the date the Court approves the settlement
18 exceeds the referenced 5,000.00 Work Weeks and/or 100 Class Members by more than 10.00%,
19 the Gross Settlement Amount, including the Class Counsel Fees Payment, the Class
20 Representative Service Payments, and the LWDA payment, will increase proportionally
21 according to the number of additional Work Weeks or Class Members, whichever results in a
22 higher increase in the Gross Settlement Amount.

23 C. Net Settlement Distributed to Class Members. After making the above deductions
24 in amounts approved by the Court, the Administrator will distribute the rest of the Gross
25 Settlement (the "Net Settlement") by making Individual Class Payments to Participating Class
26 Members based on their Class Period Work Weeks.

27 D. Taxes Owed on Payments to Class Members. Plaintiffs and Defendants are asking
28 the Court to approve an allocation of 20.00% of each Individual Class Payment to taxable wages
("Wage Portion") and 80.00% to interest and penalties ("Non-Wage Portion."). The Wage Portion
is subject to withholdings and will be reported on IRS W-2 Forms. Defendants will separately
pay employer payroll taxes they owe on the Wage Portion. The Individual PAGA Payments are
counted as penalties rather than wages for tax purposes. The Administrator will report the
Individual PAGA Payments and the Non-Wage Portions of the Individual Class Payments on IRS
1099 Forms.

Although Plaintiffs and Defendants have agreed to these allocations, neither side is giving
you any advice on whether your Payments are taxable or how much you might owe in taxes. You
are responsible for paying all taxes (including penalties and interest on back taxes) on any

1 Payments received from the proposed Settlement. You should consult a tax advisor if you have
2 any questions about the tax consequences of the proposed Settlement.

3 E. Need to Promptly Cash Payment Checks. The front of every check issued for
4 Individual Class Payments and Individual PAGA Payments will show the date when the check
5 expires (the void date). If you don't cash it by the void date, your check will be automatically
6 cancelled, and the monies will be deposited with the California Controller's Unclaimed Property
7 Fund (https://www.sco.ca.gov/search_upd.html) in your name.

8 If the monies represented by your check is sent to the Controller's Unclaimed Property Fund, you
9 should consult the rules of the Fund for instructions on how to retrieve your money. You can
10 contact the Unclaimed Property Fund at (800) 992-4647.

11 F. Requests for Exclusion from the Class Settlement (Opt-Outs). You will be treated
12 as a Participating Class Member, participating fully in the Class Settlement, unless you notify the
13 Administrator in writing, not later than <<RESPONSE DEADLINE>>, that you wish to opt-out.
14 The easiest way to notify the Administrator is to email, fax, or mail a written and signed Request
15 for Exclusion by the <<RESPONSE DEADLINE>> Response Deadline. The Request for
16 Exclusion should be a letter from a Class Member or his/her representative setting forth a Class
17 Member's name, present address, telephone number, and a simple statement electing to be
18 excluded from the Settlement. You may use the enclosed Election Not To Participate In
19 Settlement form for this purpose. Excluded Class Members (i.e., Non-Participating Class
20 Members) will not receive Individual Class Payments, but will preserve their rights to personally
21 pursue claims against Defendants for violations of California's labor laws.

22 You cannot opt-out of the PAGA portion of the Settlement. Class Members who exclude
23 themselves from the Class Settlement (Non-Participating Class Members) remain eligible for
24 Individual PAGA Payments and Plaintiffs release Defendants from civil penalties they may owe
25 to the Aggrieved Employees.

26 G. The Proposed Settlement Will be Void if the Court Denies Final Approval. It is
27 possible the Court will decline to grant Final Approval of the Settlement or decline enter a
28 Judgment. It is also possible the Court will enter a Judgment that is reversed on appeal. Plaintiffs
and Defendants have agreed that, in either case, the Settlement will be void: Defendants will not
pay any money and Class Members will not release any claims against Defendants.

H. Administrator. The Court has appointed a neutral company, Simpluris, Inc. (the
"Administrator") to send this Notice, calculate and make payments, and process Class Members'
Requests for Exclusion. The Administrator will also decide Class Member Challenges over Work
Weeks, mail and re-mail settlement checks and tax forms, and perform other tasks necessary to
administer the Settlement. The Administrator's contact information is contained in Section 9 of
this Notice.

I. Participating Class Members' Release. After the Judgment is final and Defendants
have fully funded the Gross Settlement (and separately paid all employer payroll taxes),
Participating Class Members will be legally barred from asserting any of the claims released under

1 the Settlement. This means that unless you opted out by validly excluding yourself from the Class
2 Settlement, you cannot sue, continue to sue, or be part of any other lawsuit against Defendants or
3 their officers, directors, employees, and agents for wages based on the Class Period facts and
PAGA penalties based on PAGA Period facts, as alleged in the Action and resolved by this
Settlement.

4 The Participating Class Members will be bound by the following release:

5 All Participating Class Members, on behalf of themselves and their respective
6 former and present representatives, agents, attorneys, heirs, administrators,
7 successors, and assigns, release Released Parties from all claims stated in the
8 Operative Complaint and those based solely upon the facts alleged in the Operative
Complaint. Except as set forth in Section 6.3 of the Settlement Agreement,
9 Participating Class Members do not release any other claims, including claims for
vested benefits, wrongful termination, violation of the Fair Employment and
10 Housing Act, unemployment insurance, disability, social security, workers'
compensation, or claims based on facts occurring outside the Class Period.

11 J. The PAGA Release. After the Court's judgment is final, and Defendants have paid
12 the Gross Settlement (and separately paid the employer-side payroll taxes), Plaintiffs release all
13 claims for civil penalties that could have been sought by the Labor Commissioner for the
violations identified in Plaintiffs' pre-filing letter to the LWDA; Plaintiffs do not release the
14 claim for wages or damages of any Aggrieved Employee unless such Aggrieved Employee is a
Participating Class Member.

15 **4. HOW WILL THE ADMINISTRATOR CALCULATE MY PAYMENT?**

16 A. Individual Class Payments. The Administrator will calculate Individual Class
17 Payments by (a) dividing the Net Settlement Amount by the total number of Work Week worked
by all Participating Class Members, and (b) multiplying the result by the number of Work Week
18 worked by each individual Participating Class Member.

19 B. Individual PAGA Payments. The Administrator will calculate Individual PAGA
20 Payments by (a) dividing \$5,000.00 by the total number of PAGA Paychecks of all Aggrieved
Employees and (b) multiplying the result by the number of PAGA Paychecks of each individual
21 Aggrieved Employee.

22 C. Work Week/ PAGA Paycheck Challenges. The number of Class Work Weeks you
23 worked during the Class Period and the number of PAGA Paychecks you received during the
PAGA Period, as recorded in Defendants' records, are stated in the first page of this Notice. You
24 have until <<RESPONSE DEADLINE>> to challenge the number of Work Weeks and/or PAGA
Paychecks credited to you. You can submit your challenge by signing and sending a letter to the
25 Administrator by email, fax or regular U.S. mail. You can use the enclosed Dispute form for this
purpose. Section 9 of this Notice has the Administrator's contact information.

1 You need to support your challenge by submitting copies of pay stubs or other records.
2 The Administrator will accept Defendants' calculation of Work Weeks and/or PAGA Paychecks
3 based on Defendants' records as accurate unless you send copies of records containing contrary
4 information. You should send copies rather than originals because the documents will not be
5 returned to you. The Administrator will resolve Work Week and/or PAGA Paycheck challenges
6 based on your submission and on input from Class Counsel (who will advocate on behalf of
7 Participating Class Members) and Defendants' Counsel. The Administrator's decision is final.
8 You can't appeal or otherwise challenge its final decision.

6 5. HOW WILL I GET PAID?

7 A. Participating Class Members. The Administrator will send, by U.S. mail, a single
8 check to every Participating Class Member (i.e., every Class Member who doesn't opt-out)
9 including those who also qualify as Aggrieved Employees. The single check will combine the
10 Individual Class Payment and the Individual PAGA Payment.

11 B. Non-Participating Class Members. The Administrator will send, by U.S. mail, a
12 single Individual PAGA Payment check to every Aggrieved Employee who opts out of the Class
13 Settlement (i.e., every Non-Participating Class Member).

14 **Your check will be sent to the same address as this Notice. If you change your
15 address, be sure to notify the Administrator as soon as possible. Section 9 of this Notice has
16 the Administrator's contact information.**

15 6. HOW DO I OPT-OUT OF THE CLASS SETTLEMENT?

16 Email, fax, or mail a written and signed letter with your name, present address, telephone
17 number, and a simple statement that you do not want to participate in the Settlement. You may
18 use the enclosed Election Not To Participate In Settlement form for this purpose. The
19 Administrator will exclude you based on any writing communicating your request be excluded.
20 Be sure to personally sign your request, identify the Action as *Aaron Salazar vs. Desert
21 Cremation Society, Inc.*, Case No. CIVSB2116331, and include your identifying information (full
22 name, address, telephone number, approximate dates of employment, and social security number
23 for verification purposes). You must make the request yourself. If someone else makes the
24 request for you, it will not be valid. You should send your Request for Exclusion to the
25 Administrator by email, fax, or send by regular U.S. mail. **The Administrator must be sent
26 your request to be excluded by <<RESPONSE DEADLINE>>, or it will be invalid.** Section
27 9 of the Notice has the Administrator's contact information. If you are an Aggrieved Employee,
28 you will still receive an Individual PAGA Payment.

24 7. HOW DO I OBJECT TO THE SETTLEMENT?

25 Only Participating Class Members have the right to object to the Settlement. Before deciding
26 whether to object, you may wish to see what Plaintiffs and Defendants are asking the Court to
27 approve. At least 16 days before the Final Approval Hearing, Class Counsel and/or Plaintiffs will
28 file in Court (1) a Motion for Final Approval that includes, among other things, the reasons why

1 the proposed Settlement is fair, and (2) a Motion for Fees, Litigation Expenses and Service Award
2 stating (i) the amount Class Counsel is requesting for attorneys' fees and litigation expenses; and
3 (ii) the amount Plaintiffs are requesting as a Class Representative Service Payment. Upon
4 reasonable request, Class Counsel (whose contact information is in Section 9 of this Notice) will
5 send you copies of these documents at no cost to you. You can also view them and the Settlement
6 Agreement on the Administrator's Website <<ADMINISTRATOR WEBSITE>> or the Court's
7 website <<COURT WEBSITE>>.

8 A Participating Class Member who disagrees with any aspect of the Agreement, the Motion for
9 Final Approval and/or Motion for Fees, Litigation Expenses and Service Award may wish to
10 object, for example, that the proposed Settlement is unfair, or that the amounts requested by Class
11 Counsel or Plaintiffs are too high or too low. **The deadline for sending written objections to
12 the Administrator is <<RESPONSE DEADLINE>>.** Be sure to tell the Administrator what
13 you object to, why you object, and any facts that support your objection. Make sure you identify
14 the Action, *Aaron Salazar vs. Desert Cremation Society, Inc.*, case no. CIVSB2116331, and
15 include your name, current address, telephone number, and approximate dates of employment for
16 Defendants and sign the objection. Section 9 of this Notice has the Administrator's contact
17 information. You may use the enclosed Objection form for this purpose. You should send your
18 objection to the Administrator by email, fax, or send by regular U.S. mail.

19 Alternatively, a Participating Class Member can object (or personally retain a lawyer to object at
20 your own cost) by attending the Final Approval Hearing. You (or your attorney) should be ready
21 to tell the Court what you object to, why you object, and any facts that support your objection.
22 See Section 8 of this Notice (immediately below) for specifics regarding the Final Approval
23 Hearing.

24 **8. CAN I ATTEND THE FINAL APPROVAL HEARING?**

25 You can, but don't have to, attend the Final Approval Hearing on <<FINAL APPROVAL
26 HEARING DATE>> at <<FINAL APPROVAL HEARING TIME>> in Department S17 of the San
27 Bernardino County Superior Court, located at San Bernardino Justice Center, 247 West Third
28 Street, San Bernardino, CA 92415. At the Hearing, the judge will decide whether to grant Final
Approval of the Settlement and how much of the Gross Settlement will be paid to Class Counsel,
Plaintiffs, and the Administrator. The Court will invite comment from objectors, Class Counsel
and Defense Counsel before making a decision. You can attend (or hire a lawyer to attend) either
personally or virtually by <<CourtConnect/CourtCall/MicrosoftTeams>>
(https://www.<<CourtVirtualAppearanceLink>>). Check the Court's website for the most current
information.

It's possible the Court will reschedule the Final Approval Hearing. You should check the
Administrator's website <<ADMINISTRATOR WEBSITE>> beforehand or contact Class Counsel
to verify the date and time of the Final Approval Hearing.

29 **9. HOW CAN I GET MORE INFORMATION?**

1 The Agreement sets forth everything Defendants and Plaintiffs have promised to do under the
2 proposed Settlement. The easiest way to read the Agreement, the Judgment or any other
3 Settlement documents is to go to the Administrator's website at <<CLERK OF COURT'S PHONE
4 NUMBER>>. You can also telephone or send an email to Class Counsel or the Administrator
5 using the contact information listed below, or consult the Superior Court website by going to
6 (<http://www.<<COURT'S WEBSITE>>.aspx>) and entering the Case Number for the Action, Case
7 No. CIVSB2116331. You can also make an appointment to personally review court documents
8 in the Clerk's Office at the San Bernardino Justice Center by calling <<CLERK OF COURT'S
9 PHONE NUMBER>>.

DO NOT TELEPHONE THE SUPERIOR COURT TO OBTAIN INFORMATION ABOUT THE SETTLEMENT.

Class Counsel:

10 Name of Attorney: David G. Spivak
11 Email Address: david@spivaklaw.com
12 Name of Firm: The Spivak Law Firm
13 Mailing Address: 8605 Santa Monica Bl
14 PMB 42554
15 West Hollywood, CA 90069
16 Telephone: (213) 725-9094

Administrator:

15 Name of Company: Simpluris, Inc.
16 Email Address: ____
17 Mailing Address: ____
18 Telephone: ____
19 Fax Number: ____

10. WHAT IF I LOSE MY SETTLEMENT CHECK?

20 If you lose or misplace your settlement check before cashing it, the Administrator will replace it
21 as long as you request a replacement before the void date on the face of the original check. If
22 your check is already void

23 ☐ you should consult the Unclaimed Property Fund (https://www.sco.ca.gov/search_upd.html) for
24 instructions on how to retrieve the funds. You can contact the Unclaimedx Property Fund at (800)
25 992-4647.

26 ☐ you will have no way to recover the money.

11. WHAT IF I CHANGE MY ADDRESS?

27 To receive your check, you should immediately notify the Administrator if you move or otherwise
28 change your mailing address.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT B

1 *Salazar, et al. v. Desert Cremation Society, Inc., et al.*
2 **Superior Court of the State of California, County of San Bernardino**
3 Case No. CIVSB2116331

4 **ELECTION NOT TO PARTICIPATE IN SETTLEMENT FORM**

5 **IF YOU WANT TO BE INCLUDED IN THIS CLASS ACTION SETTLEMENT AND BE ELIGIBLE FOR**
6 **A SHARE OF THE SETTLEMENT PROCEEDS,**
7 **DO NOT FILL OUT THIS FORM.**

8 **IF YOU DO NOT WANT TO BE INCLUDED IN THE SETTLEMENT, YOU MUST COMPLETE AND**
9 **SIGN THIS DOCUMENT AND MAIL IT TO THE ADDRESS BELOW, EMAILED, FAXED, OR**
10 **POSTMARKED NOT LATER THAN <<RESPONSE DEADLINE>>:**

11 *Salazar, et al. v. Desert Cremation Society, Inc., et al. Class Action Administrator*
12 c/o _____
13 _____
14 _____

15 I declare as follows: I have received notice of the proposed settlement in this action and I wish to be
16 excluded from the class and ***not*** to participate in the proposed settlement. I understand this means that I will not be
17 bound by the Settlement and also will not share in the settlement proceeds. I understand that exclusion from the
18 Class Settlement will not result in exclusion from the PAGA portion of the Settlement. If I am an Aggrieved
19 Employee under the Settlement, I will still receive an Individual PAGA Payment.

20 _____
21 (Typed or Printed Name)

22 _____
23 (Address)

24 _____
25 (City, State, Zip Code)

26 _____
27 (Telephone Number, Including Area Code)

28 _____
(Identification Number)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and
correct and was executed on ____.

Dated: ____.
(Signature)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT C

1 **WORK WEEK DISPUTE FORM**

2 Superior Court of The State of California
3 For The County of San Bernardino

4 *Aaron Salazar, et al. v. Desert Cremation Society, Inc., et al.*, Case No. CIVSB2116331

5 Indicate Name/Address Changes, if any:

6 <<Name>>

7 <<Address>>

8 <<City>>, <<State>> <<Zip Code>>

9 XX - XX -

10 TO _____ FROM OCTOBER 12, 2017 THROUGH THE EARLIER OF
11 PRELIMINARY APPROVAL OF THE CLASS ACTION SETTLEMENT OR OCTOBER 27,
12 2023.

13 The amount of your estimated Individual Class Payment and Individual PAGA Payment
14 (settlement award or settlement share) is based upon the number of Work Weeks you worked
15 between October 12, 2017 and the earlier of preliminary approval of the class action settlement
16 or October 27, 2023 and Work Weeks you worked between March 17, 2020 and the earlier of
17 preliminary approval of the class action settlement or October 27, 2023. "Individual Class Work
18 Weeks" are defined as any Work Week in which you worked at least one (1) day as an hourly,
19 non-exempt decedent transport driver of Desert Cremation Society, Inc. and Wiefels & Son II,
20 Inc. ("Defendant") in California during the calendar week. "Individual PAGA Paychecks" are
21 defined as any Paycheck you received with at least one (1) day as an hourly, non-exempt decedent
22 transport driver of Desert Cremation Society, Inc. and Wiefels & Son II, Inc. ("Defendants") in
23 California during the calendar week during the period of March 17, 2020 through the earlier of
24 preliminary approval of the class action settlement or October 27, 2023. The number of Class
25 Work Weeks and PAGA Paychecks applicable to your claim are set forth below.

26 **YOUR ELIGIBLE WORK WEEKS**

27 Defendants' records indicate that you worked <<number of Work Weeks>> Work Weeks
28 between October 12, 2017 and the earlier of preliminary approval of the class action settlement
or October 27, 2023 and <<number of Paychecks>> PAGA Paychecks between March 17, 2020
through the earlier of preliminary approval of the class action settlement or October 27, 2023.

29 **YOUR ESTIMATED SETTLEMENT AWARD AND DISPUTE PROCEDURE**

30 Under the terms of the Class Action Settlement, you are entitled to receive a settlement payment
31 in the approximate estimated amount of <<\$Settlement Share Amount>>, minus all applicable
32 payroll and tax deductions, after the Court approves the Settlement and it goes into effect. This
33 process may take six months or more. You will receive a Form W-2 reflecting the payment to

1 you. Your settlement share reflected on this Notice is only an estimate. The exact amount of the
2 payment could vary, up or down.

3 If you wish to dispute the number of October 12, 2017 credited to you, or anything else about
4 your employment status, you must complete and return this form by indicating what you believe
5 is incorrect on the blank lines below and return it on or before <<RESPONSE DEADLINE>> to
6 the Administrator by email, fax, or regular U.S. Mail with proof of the submission date (such as
7 a postmark or delivery service date stamp). You may use this Work Weeks Dispute form for this
8 purpose. You must also send any documents or other information that you contend supports your
9 belief that the information set forth above is incorrect. The Administrator will resolve any dispute
10 based upon Defendants' records and any information you provide. Please be advised that the
11 information on this Work Weeks Dispute Form is presumed to be correct unless the documents
12 you submit are company records from Defendants.

13 _____
14 _____
15 _____
16 _____

17 **UNLESS YOU ARE FILING A DISPUTE REGARDING THE NUMBER OF WORK**
18 **WEEKS, RECEIPT OF A SETTLEMENT PAYMENT, OR YOUR EMPLOYMENT**
19 **STATUS, YOU DO NOT NEED TO TAKE ANY ACTION**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT D

1 **OBJECTION FORM**

2 ***Aaron Salazar, et al. v. Desert Cremation Society, Inc., et al.***
3 **Superior Court of the State California, County of San Bernardino**
4 **Case No. CIVSB2116331**

5 Please verify and/or complete any missing identifying information:

6 CPT ID: <<CPT ID>>

7 <<Name>>

8 <<Address1>>

<<Address2>>

<<City>>, <<State>> <<Zip>>

CORRECT NAME AND ADDRESS HERE:

Telephone Number: (_____) _____ - _____

10 **THIS FORM IS TO BE USED ONLY IF YOU WANT TO PARTICIPATE IN THE**
11 **SETTLEMENT, BUT YOU OBJECT TO THE TERMS OF THE SETTLEMENT. IF**
12 **YOU OBJECT TO THE SETTLEMENT, YOU SHOULD SIGN AND COMPLETE THIS**
13 **FORM ACCURATELY AND IN ITS ENTIRETY (OR ONE LIKE IT), AND YOU**
14 **SHOULD EMAIL IT TO <<_____@_____.COM>>, FAX IT TO <<XXX-XXX-**
15 **XXXX>>, OR MAIL IT BY FIRST CLASS U.S. MAIL TO THE ADMINISTRATOR SO**
16 **THAT IT IS POSTMARKED ON OR BEFORE <<RESPONSE DEADLINE>>. THE**
17 **ADDRESS FOR THE ADMINISTRATOR IS NOTED ON PAGE TWO OF THIS FORM.**

15 **IF YOU DO NOT OBJECT TO THE SETTLEMENT, DO NOT SUBMIT THIS FORM.**
16 **THE ADMINISTRATOR WILL SEND THIS OBJECTION AND ANY SUPPORTING**
17 **DOCUMENTS TO THE ATTORNEYS FOR THE PARTIES. THE ATTORNEYS FOR**
18 **THE PARTIES WILL FILE THE OBJECTION WITH THE COURT.**

18 The Court will consider your objection at the Final Approval Hearing if you timely submit it.
19 Include any and all evidence and supporting papers (including, without limitation, all briefs,
20 written evidence, and declarations) that you would like the Court to consider. However, you may
21 speak to the Court at the final approval hearing whether or not you submit a timely objection.

21 [] I OBJECT to the *Aaron Salazar, et al. v. Desert Cremation Society, Inc., et al.*
22 Settlement on the following grounds (if additional space necessary, please include additional
23 sheets of paper):

23 _____

24 _____

25 _____

26 _____

27 _____

[] I am or will be represented by an attorney (provide name and address of attorney on lines below if applicable):

Executed on _____, 2023

(Signature)

<<Name>>

(Printed Name)

EMAIL TO THE ADMINISTRATOR: <<____@____.COM>>

FAX TO THE ADMINITRATOR: <<(XXX) XXX-XXXX>>

MAIL TO THE SETTLEMENT ADMINISTRATOR, BY U.S. MAIL
POSTMARKED NOT LATER THAN <<RESPONSE DEADLINE>>:

Aaron Salazar, et al. v. Desert Cremation Society, Inc., et al. Administrator
[ADDRESS]

<<____>>
<<____>>
<<____>>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT E

1
2
3
4
5
6
7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF SAN BERNARDINO**
10 **(UNLIMITED JURISDICTION)**

11 AARON SALAZAR, SHELIA CROMWELL,
12 and ANDREW FORREST, on behalf of
13 themselves and all others similarly situated, and
14 as “aggrieved employees” on behalf of other
“aggrieved employees” under the Labor Code
Private Attorneys General Act of 2004,

15 *Plaintiff(s),*

16 vs.

17 DESERT CREMATION SOCIETY, INC., a
18 California corporation; WIEFELS & SON II,
19 INC., a California corporation; and DOES 1–50,
inclusive,

20 *Defendant(s).*
21
22
23

Case No. CIVSB2116331

**[PROPOSED] ORDER
PRELIMINARILY APPROVING
CLASS ACTION SETTLEMENT**

Action filed: June 04, 2021
Dept: S17, The Honorable Joseph
T. Ortiz

24 The Motion of Plaintiffs Aaron Salazar, Shelia Cromwell, and Andrew Forrest (hereafter
25 referred to as “Plaintiffs”) for Preliminary Approval of a Class Action Settlement (the “Motion”)
26 was considered by the Court, The Honorable Joseph T. Ortiz presiding. The Court having
27

1 considered the Motion, the Class Action and PAGA Settlement Agreement and Class Notice
2 (“Settlement” or “Settlement Agreement”), and supporting papers, HEREBY ORDERS THE
3 FOLLOWING:

4 1. The Court grants preliminary approval of the Settlement and the Settlement Class
5 based upon the terms set forth in the Settlement filed as an Exhibit to the Motion for Preliminary
6 Approval. All terms herein shall have the same meaning as defined in the Settlement. The Court
7 has determined only that there is sufficient evidence to suggest that the proposed settlement
8 might be fair, adequate, and reasonable, and that any final determination of those issues
9 will be made at the final hearing. The Court will make a determination at the hearing on the
10 motion for final approval of class action settlement (the “Final Approval Hearing”) as to whether
11 the Settlement is fair, adequate and reasonable to the Settlement Class.
12

13 2. For purposes of this Preliminary Approval Order, the “Settlement Class” means
14 Defendant’s decedent transport drivers but only for the period that the employee performed
15 transport services (collectively “Class Members”), who worked anytime during the Class Period.
16 The “Class Period” shall mean the period of time from October 12, 2017, through the earlier of
17 preliminary approval of the class action settlement or October 27, 2023.
18

19 3. Based on its records, Defendants estimate that, as of the date of the Settlement
20 Agreement, (1) there are 100 Class Members and 5,000.00 Total Work Weeks during the Class
21 period and (2) there were 53 Aggrieved Employees who received 1,157 PAGA Paychecks during
22 the PAGA Period. If the Work Weeks and/or Class Members as of the date the Court approves
23 the settlement exceeds the referenced 5,000.00 Work Weeks and/or 100 Class Members by more
24 than 10.00%, the Gross Settlement Amount, including the Class Counsel Fees Payment, the Class
25 Representative Service Payments, and the LWDA payment, will increase proportionally
26
27

1 according to the number of additional Work Weeks or Class Members, whichever results in a
2 higher increase in the Gross Settlement Amount. Alternatively, Defendant may elect to
3 end the Class Period on the date on which the number of workweeks reached 5,500.
4

5 4. “Effective Date” means the date by when both of the following have occurred: (a)
6 the Court enters a Judgment on its Order Granting Final Approval of the Settlement; and (b) the
7 Judgment is final. The Judgment is final as of the latest of the following occurrences: (a) if no
8 Participating Class Member objects to the Settlement, the day the Court enters Judgment; (b) if
9 one or more Participating Class Members objects to the Settlement, the day after the deadline for
10 filing a notice of appeal from the Judgment; or if a timely appeal from the Judgment is filed, the
11 day after the appellate court affirms the Judgment and issues a remittitur.
12

13 5. This action is provisionally certified pursuant to section 382 of the California Code
14 of Civil Procedure and Rule 3.760, et seq. of the California Rules of Court as a class action for
15 purposes of settlement only with respect to the proposed Settlement Class.

16 6. Not later than 15 days after the Court grants Preliminary Approval of the
17 Settlement, Defendants will simultaneously deliver the Class Data to the Administrator, in the
18 form of a Microsoft Excel spreadsheet. To protect Class Members’ privacy rights, the
19 Administrator must maintain the Class Data in confidence, use the Class Data only for purposes
20 of the Settlement and for no other purpose, and restrict access to the Class Data to Administrator
21 employees who need access to the Class Data to effect and perform under the Settlement
22 Agreement. Defendants have a continuing duty to immediately notify Class Counsel if they
23 discover that the Class Data omitted class member identifying information and to provide
24 corrected or updated Class Data as soon as reasonably feasible. Without any extension of the
25 deadline by which Defendants must send the Class Data to the Administrator, the Parties and their
26
27

1 counsel will expeditiously use best efforts, in good faith, to reconstruct or otherwise resolve any
2 issues related to missing or omitted Class Data.

3 7. No later than three (3) business days after receipt of the Class Data, the
4 Administrator shall notify Class Counsel that the list has been received and state the number of
5 Class Members, PAGA Members, Work Weeks, and PAGA Paychecks in the Class Data.

6 8. Using best efforts to perform as soon as possible, and in no event later than 14
7 days after receiving the Class Data, the Administrator will send to all Class Members identified
8 in the Class Data, via first-class United States Postal Service (“USPS”) mail, the Notice Packet
9 with Spanish translation, if applicable substantially in the forms attached to this order as **Exhibits**
10 **A, B, C, and D**. The first page of the Class Notice shall prominently estimate the dollar amounts
11 of any Individual Class Payment and/or Individual PAGA Payment payable to the Class Member,
12 and the number of Work Weeks and PAGA Paychecks (if applicable) used to calculate these amounts.
13 Before mailing Notice Packets, the Administrator shall update Class Member addresses using the
14 National Change of Address database.
15

16 9. Not later than 3 business days after the Administrator’s receipt of any Notice
17 Packet returned by the USPS as undelivered, the Administrator shall re-mail the Notice Packet
18 using any forwarding address provided by the USPS. If the USPS does not provide a forwarding
19 address, the Administrator shall conduct a Class Member Address Search, and re-mail the Notice
20 Packet to the most current address obtained. The Administrator has no obligation to make further
21 attempts to locate or send Notice Packet to Class Members whose Notice Packet is returned by
22 the USPS a second time.
23

24 10. Class Counsel’s contact information is David G. Spivak, Esq., The Spivak Law
25 Firm, 8605 Santa Monica Bl, PMB 42554, West Hollywood, CA 90069. Defense Counsel’s
26

1 contact information is Orion S. Robinson, Esq., Robinson Di Lando, A Professional Law
2 Corporation, 801 South Grand Avenue, Suite 500, Los Angeles, CA, 90017.

3 11. The deadlines for Class Members' written objections, Challenges to Work Weeks
4 and/or PAGA Paychecks (disputes), and Requests for Exclusion will be extended an additional
5 14 days beyond the 60 days otherwise provided in the Class Notice for all Class Members whose
6 notice is re-mailed. The Administrator will inform the Class Member of the extended deadline
7 with the re-mailed Notice Packet.
8

9 12. If the Administrator, Defendants or Class Counsel is contacted by or otherwise
10 discovers any persons who believe they should have been included in the Class Data and should
11 have received Notice Packet, the Parties will expeditiously meet and confer in person or by
12 telephone, and in good faith, in an effort to agree on whether to include them as Class Members.
13 If the Parties agree, such persons will be Class Members entitled to the same rights as other Class
14 Members, and the Administrator will send, via email or overnight delivery, a Notice Packet
15 requiring them to exercise options under the Settlement Agreement not later than 14 days after
16 receipt of Notice Packet, or the deadline dates in the Notice Packet, which ever are later.
17

18 13. Requests for Exclusion. Class Members who wish to exclude themselves (opt-out
19 of) the Class Settlement must send the Administrator, by fax, email, or mail, a signed written
20 Request for Exclusion not later than 60 days after the Administrator mails the Notice Packet (plus
21 an additional 14 days for Class Members whose Notice Packet is re-mailed). A Request for
22 Exclusion is a letter from a Class Member or his/her representative that reasonably communicates
23 the Class Member's election to be excluded from the Settlement and includes the Class Member's
24 name, address and email address or telephone number. To be valid, a Request for Exclusion must
25 be timely faxed, emailed, or postmarked by the Response Deadline. An Election Not to Participate
26
27

1 in Settlement form, attached as Exhibit B, may be used for this purpose but is not required.

2 14. The Administrator may not reject a Request for Exclusion as invalid because it
3 fails to contain all the information specified in the Class Notice. The Administrator shall accept
4 any Request for Exclusion as valid if the Administrator can reasonably ascertain the identity of
5 the person as a Class Member and the Class Member's desire to be excluded. The Administrator's
6 determination shall be final and not appealable or otherwise susceptible to challenge. If the
7 Administrator has reason to question the authenticity of a Request for Exclusion, the
8 Administrator may demand additional proof of the Class Member's identity. The Administrator's
9 determination of authenticity shall be final and not appealable or otherwise susceptible to
10 challenge.
11

12 15. Every Class Member who does not submit a timely and valid Request for Exclusion
13 is deemed to be a Participating Class Member under the Settlement Agreement, entitled to all
14 benefits and bound by all terms and conditions of the Settlement, including the Participating Class
15 Members' Releases under Paragraphs 6.2 and 6.3 of the Settlement, regardless whether the
16 Participating Class Member actually receives the Class Notice or objects to the Settlement.
17

18 16. Every Class Member who submits a valid and timely Request for Exclusion is a
19 Non-Participating Class Member and shall not receive an Individual Class Payment or have the
20 right to object to the class action components of the Settlement. Plaintiffs release all claims for
21 civil penalties that could have been sought by the Labor Commissioner for the violations
22 identified in Plaintiffs' pre-filing letter to the LWDA; Plaintiffs do not release the claim for wages
23 or damages of any Aggrieved Employee unless such Aggrieved Employee is a Participating Class
24 Member.
25

26 17. Challenges to Calculation of Work Weeks. Each Class Member shall have 60 days
27

1 after the Administrator mails the Notice Packet (plus an additional 14 days for Class Members
2 whose Notice Packet is re-mailed) to challenge the number of Class Work Weeks and PAGA
3 Paychecks (if any) allocated to the Class Member in the Class Notice. This is also known as a
4 dispute. A Work Week Dispute form, attached as Exhibit C, may be used for this purpose but is
5 not required. The Class Member may challenge the allocation by communicating with the
6 Administrator via fax, email or mail. The Administrator must encourage the challenging Class
7 Member to submit supporting documentation. In the absence of any contrary documentation, the
8 Administrator is entitled to presume that the Work Weeks contained in the Class Notice are
9 correct so long as they are consistent with the Class Data. The Administrator's determination of
10 each Class Member's allocation of Work Weeks and/or PAGA Paychecks shall be final and not
11 appealable or otherwise susceptible to challenge. The Administrator shall promptly provide
12 copies of all challenges to calculation of Work Weeks and/or PAGA Paychecks to Defense
13 Counsel and Class Counsel and the Administrator's determination the challenges.

16 18. Objections to Settlement. Only Participating Class Members may object to the
17 class action components of the Settlement and/or this Agreement, including contesting the
18 fairness of the Settlement, and/or amounts requested for the Class Counsel Fees Payment, Class
19 Counsel Litigation Expenses Payment and/or Class Representative Service Payments.

20 19. Participating Class Members may send written objections to the Administrator, by
21 fax, email, or mail. In the alternative, Participating Class Members may appear in Court (or hire
22 an attorney to appear in Court) to present verbal objections at the Final Approval Hearing. A
23 Participating Class Member who elects to send a written objection to the Administrator must do
24 so not later than 60 days after the Administrator's mailing of the Notice Packet (plus an additional
25 14 days for Class Members whose Notice Packet was re-mailed). An The Objection form attached
26
27

1 as Exhibit D may be used for this purpose but is not required.

2 20. Non-Participating Class Members have no right to object to any of the class action
3 components of the Settlement.

4 21. Not later than 14 days before the date by which Plaintiffs are required to file the
5 Motion for Final Approval of the Settlement, the Administrator will provide to Class Counsel and
6 Defense Counsel, a signed declaration suitable for filing in Court attesting to its due diligence and
7 compliance with all of its obligations under the Settlement Agreement, including, but not limited
8 to, its mailing of the Notice Packets, the Notice Packets returned as undelivered, the re-mailing
9 of Notice Packets, attempts to locate Class Members, the total number of Requests for Exclusion
10 from Settlement it received (both valid or invalid), the number of written objections and attach
11 the Exclusion List. The Administrator will supplement its declaration as needed or requested by
12 the Parties and/or the Court. Class Counsel is responsible for filing the Administrator's
13 declaration(s) in Court.
14

15
16 22. The Court approves, as to form and content, the Class Notice in substantially the
17 form attached as Exhibit A to this Order, the Election Not to Participate in Settlement form in
18 substantially the form attached as Exhibit B to this Order, the Work Weeks Dispute form in
19 substantially the form attached as Exhibit C to this Order, and the Objection form in substantially
20 the form attached as Exhibit D to this Order.

21
22 23. The Court approves, for settlement purposes only, David G. Spivak of The Spivak
23 Law Firm and Walter L. Haines of United Employees Law Group as Class Counsel.

24 24. The Court approves, for settlement purposes only, Aaron Salazar as the Class
25 Representative.

26 25. The Court approves Simpluris, Inc. as the Administrator.
27

26. The Court preliminarily approves Class Counsel's request for attorneys' fees and costs subject to final review by the Court.

27. The Court preliminarily approves the estimated Administrator costs payable to the Administrator subject to final review by the Court.

28. The Court preliminarily approves Plaintiffs' Class Representative Service Payments subject to final review by the Court.

29. A Final Approval Hearing shall be held on ____ at ____.m. in Department S17 of the Superior Court for the State of California, County of San Bernardino, located at the San Bernardino Justice Center, 247 West Third Street, San Bernardino, CA 92415 to consider the fairness, adequacy and reasonableness of the proposed Settlement preliminarily approved by this Preliminary Approval Order, and to consider the application of Class Counsel for attorneys' fees and costs and the Class Representative Service Payments to the Class Representatives. The notice of motion and all briefs and materials in support of the motion for final approval of class action settlement and motion for attorneys' fees and litigation costs shall be served and filed with this Court on or before _____. Plaintiffs' counsel must give notice to any objecting party of any continuance of the hearing of the motion for final approval.

30. If for any reason the Court does not execute and file a Final Approval Order and judgment, or if the Effective Date, as defined in the Settlement, does not occur for any reason, the proposed Settlement that is the subject of this order, and all evidence and proceedings had in connection therewith, shall be without prejudice to the status quo ante rights of the Parties to the litigation, as more specifically set forth in the Settlement.

31. The Court expressly reserves the right to adjourn or continue the Final Approval Hearing from time to time without further notice to members of the Class. The Plaintiffs shall

1 give prompt notice of any continuance to Settlement Class Members who object to the Settlement.

2 **IT IS SO ORDERED.**

3
4
5 **DATE**

THE HONORABLE JOSEPH T. ORTIZ
JUDGE OF THE SUPERIOR COURT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT F

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO
(UNLIMITED JURISDICTION)

AARON SALAZAR, SHELIA CROMWELL,
and ANDREW FORREST, on behalf of
themselves and all others similarly situated, and
as “aggrieved employees” on behalf of other
“aggrieved employees” under the Labor Code
Private Attorneys General Act of 2004,

Plaintiff(s),

vs.

DESERT CREMATION SOCIETY, INC., a
California corporation; WIEFELS & SON II,
INC., a California corporation; and DOES 1–50,
inclusive,

Defendant(s).

Case No. CIVSB2116331

**[PROPOSED] FINAL ORDER AND
JUDGMENT APPROVING CLASS
ACTION SETTLEMENT**

Action filed: June 04, 2021

Dept: S17, The Honorable Joseph
T. Ortiz

This matter came on for hearing on ____ at ____m. in Department S17 of the above-
captioned court on Plaintiffs’ Motion for Final Approval of a Class Action Settlement pursuant
to California Rules of Court, Rule 3.769, as set forth in the Joint Stipulation of Class Action
Settlement and Release of Claims (the “Settlement”) filed herewith which provides for a Gross
Settlement Amount (“GSA”) of up to \$500,000.00 in compromise of all disputed claims on behalf
of decedent transport drivers during the period of October 12, 2017 to the earlier of preliminary

1 approval of the class action settlement or October 27, 2023 (“Settlement Class Period”). All
2 capitalized terms used herein shall have the same meaning as defined in the Settlement.

3 In accordance with the Court’s prior Order Granting Preliminary Approval of Class
4 Action Settlement, Class Members have been given notice of the terms of the Settlement and the
5 opportunity to submit a claim, request exclusion, comment upon or object to it or to any of its
6 terms. Having received and considered the Settlement, the supporting papers filed by the Parties,
7 and the evidence and argument received by the Court in conjunction with the motions for
8 preliminary and final approval of the Settlement, the Court grants final approval of the Settlement
9 and HEREBY ORDERS, ADJUDGES, DECREES AND MAKES THE FOLLOWING
10 DETERMINATIONS¹:

11
12 1. The Court has jurisdiction over the subject matter of the Action and over all Parties
13 to the Action, including all Class Members. Pursuant to this Court’s Order Granting Preliminary
14 Approval of Class Action Settlement of ___, the Notice Packet was sent to each Class Member
15 by First Class U.S. mail. The Notice Packet informed Class Members of the terms of the
16 Settlement, their right to receive their proportional share of the Settlement, their right to request
17 exclusion, their right to comment upon or object to the Settlement, and their right to appear in
18 person or by counsel at the final approval hearing and be heard regarding final approval of the
19 Settlement. Adequate periods of time were provided by each of these procedures. No member of
20 the Settlement Class presented written objections to the proposed Settlement as part of this notice
21 process, stated an intention to appear, or actually appeared at the final approval hearing.
22
23
24

25
26 ¹ A true and correct copy of the Court’s ruling on the Motion for Final Approval of Class Action
27 Settlement entered on [REDACTED] is attached hereto as **Exhibit A** and incorporated by reference. A true
28 and correct copy of the Court’s Minute Order dated [REDACTED] is attached hereto as **Exhibit B** and
incorporated by reference.

2. For purposes of this Final Order and Judgment, the Class Members are Defendants' decedent transport drivers during the Class Period, at any time during the period of October 12, 2017 to the earlier of preliminary approval of the class action settlement or October 27, 2023 ("Settlement Class Period").

3. The Court finds and determines that the notice procedure afforded adequate protections to Class Members and provides the basis for the Court to make an informed decision regarding final approval of the Settlement based on the responses of Class Members. The Court finds and determines that the notice provided in this case was the best notice practicable, which satisfied the requirements of law and due process as to all persons entitled to such notice.

Release by Plaintiffs and Class Members. The Parties agree that it is their intent that the resolution set forth in this Settlement will release and discharge the Released Claims by way of any further attempt, by lawsuit, administrative claim or action, arbitration, demand, or other action of any kind by each and all of the Settlement Class Members (including participation to any extent in any representative or collective action) against the Released Parties. This release will not take effect until Defendants have paid the Gross Settlement Amount in full per this Settlement Agreement.

PAGA Release. Plaintiffs on behalf of themselves and the Aggrieved Employees release all claims for civil penalties that could have been sought by the Labor Commissioner for the violations identified in Plaintiffs' pre-filing letter to the LWDA; Plaintiffs do not release the claim for wages or damages of any Aggrieved Employee unless such Aggrieved Employee is a Participating Class Member.

“**Released Claims**” shall mean all claims stated in the Operative Complaint and based solely on the facts alleged in the Operative Complaint. “**Released Parties**” shall mean

1 Defendants, their officers, directors, employees and agents.

2 2. The Court further finds and determines that the terms of the Settlement are fair,
3 reasonable and adequate, that the Settlement is ordered finally approved, and that all terms and
4 provisions of the Settlement, including the release of claims contained therein, should be and
5 hereby are ordered to be consummated, and directs the Parties to effectuate the Settlement
6 according to its terms. As of the Effective Date of Settlement, and for the duration of the
7 Settlement Class Period, all Class Members are hereby deemed to have waived and released all
8 Released Claims and are forever barred and enjoined from prosecuting the Released Claims
9 against the Released Parties as fully set forth in the Settlement. No objections were received by
10 the Parties or the Court through the date of this Final Order and Judgment. The Court finds ____
11 Class Member(s) - ____ - submitted a request for exclusion from the Settlement as determined by
12 the Administrator and therefore is/are not in the Settlement Class.
13

14 3. The Court finds and determines that (a) the Settlement Shares to be paid to
15 Participating Class Members and (b) the LWDA payment as civil penalties under the California
16 Labor Code Private Attorneys General Act of 2004, as amended, California Labor Code sections
17 2699 *et seq.*, as provided for by the Settlement are fair and reasonable. The Court hereby grants
18 final approval to, and orders the payment of, those amounts be made to the Participating Class
19 Members and to the California Labor & Workforce Development Agency (“LWDA”), in
20 accordance with the terms of the Settlement.
21

22 4. The Court further grants final approval to and orders that the following payments
23 be made in accordance with the terms of the Settlement:
24

25 a. Class Counsel fees & costs of \$166,666.66 in attorneys’ fees and
26 \$25,000.00 in litigation costs to Class Counsel;
27

b. \$15,000.00 as a Class Representative Service Payment award payable to each Plaintiff for their services as Class Representatives;

c. \$10,000.00 in costs of the Administrator payable to Simpluris, Inc. for its services as the Administrator; and

d. Payment of \$15,000.00 (75% of the (\$20,000.00 PAGA penalty) to the LWDA.

7. The settlement shall proceed as directed in the Settlement, and no payments pursuant to the Settlement shall be distributed until after the Effective Date of Settlement. Without affecting the finality of this Final Order and Judgment in any way, the Court retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation and enforcement of this Final Order and Judgment and the Settlement pursuant to California Rule of Court 3.769(h).

8. Within twelve months of Final Approval, Defendants shall deposit the Settlement proceeds in an account designated by the Administrator: (i) the total amount of all Individual Class Payments to Participating Class Members, (ii) the Court approved Class Counsel fees & costs, (iii) the Court-approved Class Representative Service Payments, (iv) the Court-approved costs of the Administrator, (v) the payment to the LWDA, and (vi) (i) the total amount of all Individual PAGA Payments to Aggrieved Employees.

9. Other than their employer side payroll taxes, Defendants' payment of such sums shall be the sole financial obligation of Defendants under the Settlement, and shall be in full satisfaction of all claims released herein, including, without limitation, all claims for wages, penalties, interest, attorneys' fees, costs and expenses.

10. Pursuant to CCP 384 and the Settlement, Participating Class Members shall have

1 ninety (90) days from the date of the check's issuance to cash their Settlement Share check. After
2 the expiration of the 180-day period, on Defendants' behalf, the Administrator shall remit any
3 amounts from voided settlement checks and otherwise unclaimed, plus interest on the Residue at
4 the legal rate of interest from the date of entry of the initial judgement to the California Unclaimed
5 Property Fund.

6
7 11. The Parties shall file a final accounting report by _____. A non-appearance case
8 review re submission of a final report is scheduled for _____ at _____.m. in **Department S17**. The
9 Parties shall also prepare and file a stipulation and proposed order and proposed Amended Final
10 Order and Judgment by _____ which includes the amount of distribution of unpaid cash Residue,
11 and unclaimed or abandoned funds to the non-party, the accrued interest on that sum. The
12 stipulation shall be signed by counsel for the class and defense counsel in accord with the
13 proposed Amended Final Order and Judgment. If there are objections by any party or non-party,
14 class counsel shall immediately notify the Court and the matter will be set for further hearing. A
15 non-appearance hearing for the lodging of the stipulation and proposed order and separate
16 amended judgment is scheduled for _____ at _____.m. in **Department S17**.

17
18 12. Nothing in this Final Order and Judgment shall preclude any action to enforce the
19 Parties' obligations under the Settlement or hereunder, including the requirement that Defendants
20 deposit funds for distribution by the Administrator to Participating Class Members in accordance
21 with the Settlement.

22
23 13. The Court hereby enters final judgment in this case in accordance with the terms
24 of the Settlement, Order Granting Preliminary Approval of Class Action Settlement, and this Final
25 Order and Judgment.

26 14. The Parties are hereby ordered to comply with the terms of the Settlement.
27

15. The Parties shall bear their own costs and attorneys' fees except as otherwise provided by the Settlement and this Final Order and Judgment.

16. The Settlement is not an admission by Defendants nor is this Final Order and Judgment a finding of the validity of any claims in the Action or of any wrongdoing by Defendants. Furthermore, the Settlement is not a concession by Defendants and shall not be used as an admission of any fault, omission, or wrongdoing by Defendants. Neither this Final Order and Judgment, the Settlement, any document referred to herein, any exhibit to any document referred to herein, any action taken to carry out the Settlement, nor any negotiations or proceedings related to the Settlement are to be construed as, or deemed to be evidence of, or an admission or concession with regard to, the denials or defenses of Defendants, and shall not be offered in evidence in any proceeding against the Parties hereto in any Court, administrative agency, or other tribunal for any purpose whatsoever other than to enforce the provisions of this Final Order and Judgment. This Final Order and Judgment, the Settlement and exhibits thereto, and any other papers and records on file in the Action may be filed in this Court or in any other litigation as evidence of the settlement by Defendants to support a defense of res judicata, collateral estoppel, release, or other theory of claim or issue preclusion or similar defense as to the Released Claims.

17. This document shall constitute a Judgment for purposes of California Rule of Court 3.769(h).

IT IS SO ORDERED, ADJUDGED AND DECREED.

DATE _____

THE HONORABLE JOSEPH T. ORTIZ
JUDGE OF THE SUPERIOR COURT

EXHIBIT 2



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

March 17, 2021

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

RE: *Sheila Cromwell / Desert Cremation Society*

To Whom It May Concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Sheila Cromwell (hereafter “Cromwell”) provides notice on behalf of herself and of all individuals currently and formerly employed in California as non-exempt, hourly employees, including but not limited to transport specialists, and persons in similar positions, (hereafter referred to as “Aggrieved Employees,”) by Desert Cremation Society, Inc., a California corporation doing business as All Caring Cremations and All Caring Solutions, Wiefels & Son, a California corporation, Wiefels & Son II, Inc., a California corporation doing business as All California Cremation, and Wiefels FD, Inc., a California corporation (hereafter collectively referred to as “DCS”) of violations of California Labor Code §§ 201, 202, 203, 204, 226, 512, 1174, 1198, and 2802.

At all relevant times, DCS has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Cromwell and the Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission

Order No. 9-2001 (hereafter “the Wage Order”), paragraph 2, subdivision (F), and “Aggrieved Employees” within the meaning of California Labor Code § 2699(c).

Statement of Facts

On or about October 1, 2018, Cromwell began working for DCS as an hourly transport specialist. DCS employed her continuously from that date until on or about March 18, 2020, when DCS temporarily suspended Cromwell’s employment because she suffered an injury on the job which caused limited mobility in her left arm, preventing her from performing all work duties. Cromwell has not since returned to work. Cromwell last performed her duties for DCS on or about March 18, 2020.

At all relevant times, DCS issued wages to Cromwell and the Aggrieved Employees on a bi-monthly basis and paid them at an hourly rate of pay. At all relevant times, DCS classified Cromwell and the Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all relevant times, Cromwell and the Aggrieved Employees have worked over 8 hours in one workday and/or over 40 hours in one workweek. Despite this, DCS failed to provide Cromwell and the Aggrieved Employees with all timely rest and meal periods pursuant to California law, including, but not limited to, two timely 30-minute uninterrupted meal periods and three 10-minute rest periods on workdays they worked more than 10 hours. Further, due to the workload and low staffing levels, Cromwell and the Aggrieved Employees were denied their 30-minute duty-free meal period within the first 5 hours of work. DCS frequently forced Cromwell and the Aggrieved Employees to forgo timely, duty-free 30-minute meal periods by assigning them more time-sensitive work than it could reasonably expect them to complete within their first five hours of work.

At all relevant times, DCS failed to authorize and permit Cromwell and the Aggrieved Employees with rest periods in violation of California law. Due to high workload and low staffing levels, DCS failed to authorize and permit

Cromwell and the Aggrieved Employees to take 10-minute, paid, duty-free rest breaks every 4 hours worked or major fraction thereof. DCS did not seek an exemption from the rest period protections of the Wage Order from the California Divisions of Labor Standards Enforcement. Furthermore, DCS failed to pay premium wages for days on which it failed to provide Cromwell and the Aggrieved Employees with timely rest breaks and/or meal periods in compliance with California law.

At all relevant times, DCS required Cromwell and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. DCS required Cromwell and the Aggrieved Employees to use their personal cell phones in the course of performing their duties. DCS communicated with Cromwell and the Aggrieved Employees by phone regarding work instructions, scheduling, or to resolve work-related issues and did not provide mobile phones or an alternative to them for this purpose. Additionally, DCS did not reimburse Cromwell and the Aggrieved Employees for their cell phone expenses.

As a result of these aforementioned violations, DCS failed to provide Cromwell and the Aggrieved Employees with accurate written wage statements; failed to pay them all wages earned during employment; and failed to maintain accurate employee records with respect to Cromwell and the Aggrieved Employees as required under California law.

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

- a) DCS failed to provide Cromwell and other Aggrieved Employees with all rest breaks and meal periods;
- b) DCS failed to compensate Cromwell and other Aggrieved Employees at one hour's pay for each day in which they were not provided the rest breaks required by law;

- c) DCS failed to compensate Cromwell and other Aggrieved Employees at one hour's pay for each day in which they were not provided the meal periods required by law;
- d) DCS failed to indemnify Cromwell and other Aggrieved Employees for all business expenses;
- e) DCS failed to provide Cromwell and other Aggrieved Employees with accurate wage statements; and
- f) DCS failed to timely pay Cromwell and other Aggrieved Employees all earned and unpaid wages during their employment at DCS and at the time such employment ended.

Accordingly, Cromwell now seeks civil penalties on behalf of herself and other Aggrieved Employees based on DCS' alleged violations of the California Labor Code and the Wage Order.

The Wage Order

The Wage Order applies to:

“all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis...” (§1). Per §2 (P): “Transportation Industry” means any industry, business or establishment operated for the **purpose of conveying persons or property from one place to another** whether by rail, highway, air or water and all operations and services in connection therewith; and also includes storing or warehousing of goods or property and the repairing, parking, rental, maintenance or cleaning of vehicles.” (emphasis added).

At all relevant times during the applicable limitations period, DCS operated cremation and funeral services, including decedent transportation. Accordingly,

Cromwell and the Aggrieved Employees are entitled to the protections provided by the Wage Order.

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

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was no waived.

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

Meal Periods:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee...

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

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

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

Rest Periods:

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states:

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

compensation for each workday that the meal or rest or recovery period is not provided.

DCS intentionally and improperly failed to provide all timely duty-free rest breaks and/or meal periods to Cromwell and the Aggrieved Employees as required by law, including but not limited to, second meal periods and third rest periods on days they work directly or are on-call for more than 10 hours in a workday. DCS did not pay premium wages to Cromwell and the Aggrieved Employees on days it did not provide them with one or more timely meal and rest periods as required by California law. In failing to do so, DCS violated the provisions of California Labor Code §§ 226.7, 512, and 1198.

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

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.7, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

Failure to Reimburse for Expenses
(Lab. Code §§ 2802)

In pertinent part, California Labor Code § 2802(a) states, “An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.”

As describe above, during the applicable limitations period, DCS required Cromwell and other Aggrieved Employees to incur certain business expenses which it failed to indemnify them for both during and after their employment ended. Accordingly, Cromwell seeks civil penalties on behalf of herself and other Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 2802, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

California Labor Code § 226 require employers to furnish employees with accurate itemized written wage statements showing:

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

- other than a social security number may be shown on the itemized statement,
- 8) the name and address of the legal entity that is the employer, and
 - 9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

At relevant times during the applicable limitations period, DCS violated California Labor Code § 226, in that it failed to properly and accurately itemize each Aggrieved Employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the Aggrieved Employee and other requirements of California Labor Code § 226.

Accordingly, Cromwell seeks civil penalties on behalf of herself and Aggrieved Employees as follows: \$250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

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

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

As a result of the above described violations, DCS failed to pay Cromwell and the Aggrieved Employees within the time periods set by California Labor Code

§ 204 in that it failed to pay them for all hours worked at the correct rates of pay and failed to pay them premium wages for days on which it failed to provide them with one or more rest or meal periods.

Accordingly, Cromwell seeks civil penalties on behalf of herself and Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204, and \$200 for each Aggrieved Employee, plus 25% of the amount unlawfully withheld from each Aggrieved Employee, for each subsequent violations (penalties set by Labor Code § 210).

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

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

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

DCS failed to pay Cromwell and the Aggrieved Employees whose employment ended all of the earned but unpaid wages described above by the conclusion of

their employment with DCS. By failing to pay Cromwell and the Aggrieved Employees as set forth above by such time, DCS is liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of herself and the Aggrieved Employees, Cromwell seeks civil penalties from DCS as follows:

1. For violations of Labor Code § 201, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 201 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 201 occurred (penalties set by Labor Code § 2699(f)(2));
2. For violations of Labor Code § 202, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 202 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 202 occurred (penalties set by Labor Code § 2699(f)(2)); and
3. For violations of Labor Code § 203, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 203 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 203 occurred (penalties set by Labor Code § 2699(f)(2)).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174 and 1198)

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

Every person employing labor in this state shall:

...

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

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code section 1174.5 states:

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

Section 7 of the Wage Order states,

- (A) Every employer shall keep accurate information with respect to each employee including the following:
 - (1) Full name, home address, occupation and social security number.
 - (2) Birth date, if under 18 years, and designation as a minor.
 - (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be

recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

- (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
 - (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
 - (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.
- (B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.
- (C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

- (D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

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

DCS has failed to maintain the records required by section 1174 and the Wage Order, including but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Cromwell and the Aggrieved Employees. Accordingly, Cromwell seeks civil penalties on behalf of herself and the other aggrieved employees as follows:

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

Conclusion

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

Sincerely,



David Spivak, Esq.
david@spivaklaw.com

cc: Walter Haines, Esq.
Sheila Cromwell

Desert Cremation Society, Inc. dba All Caring Cremations, and All
Caring Solutions
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

Wiefels & Son
c/o Mark J. Matthews
Agent for Service of Process
630 S Vella Rd
Palm Springs, CA 92264

Wiefels & Son II, Inc. dba All California Cremation
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

Wiefels FD, Inc.
c/o Michael J. Wiefels
Agent for Service of Process
50 East Nicolet St
Banning, CA 92220

EXHIBIT 3



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

March 19, 2021

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

RE: *Aaron Salazar / Desert Cremation Society*

To whom it may concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Aaron Salazar (hereafter “Salazar”) provides notice on behalf of himself and of all individuals currently and formerly employed in California as non-exempt, hourly employees, including but not limited to transport specialists, and persons in similar positions, (hereafter referred to as “Aggrieved Employees,”) by Desert Cremation Society, Inc., a California corporation doing business as All Caring Cremations and All Caring Solutions, Wiefels & Son, a California corporation, Wiefels & Son II, Inc., a California corporation doing business as All California Cremation, and Wiefels FD, Inc., a California corporation (hereafter collectively referred to as “DCS”) of violations of California Labor Code §§ 201, 202, 203, 204, 226, 510, 512, 1174, 1194, 1197, 1198, and 2802.

At all relevant times, DCS has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Salazar and the Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission Order No. 9-2001 (hereafter “the Wage Order”), paragraph 2, subdivision (F), and “Aggrieved Employees” within the meaning of California Labor Code § 2699(c).

Statement of Facts

In approximately September 2017, Salazar began working for DCS as an hourly transport specialist. DCS employed him continuously from that date until on or about June 16, 2020, when his employment ended.

At all relevant times, DCS issued wages to Salazar and the Aggrieved Employees on a bi-monthly basis and paid them at an hourly rate of pay. At all relevant times, DCS classified Salazar and the Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all relevant times, Salazar and the Aggrieved Employees have worked over 8 hours in one workday and/or over 40 hours in one workweek. Despite this, DCS failed to provide Salazar and the Aggrieved Employees with all timely rest and meal periods pursuant to California law, including, but not limited to, two timely 30-minute uninterrupted meal periods and three 10-minute rest periods on workdays they worked more than 10 hours. Further, due to the workload and low staffing levels, DCS denied Salazar and the Aggrieved Employees their 30-minute duty-free meal period within the first 5 hours of work. DCS frequently forced Salazar and the Aggrieved Employees to forgo timely, duty-free 30-minute meal periods by assigning them more time-sensitive work than it could reasonably expect them to complete within their first five hours of work.

At all relevant times, DCS failed to authorize and permit Salazar and the Aggrieved Employees with rest periods in violation of California law. Due to high workload and low staffing levels, DCS failed to authorize and permit Salazar and the Aggrieved Employees to take 10-minute, paid, duty-free rest breaks every 4 hours worked or major fraction thereof. DCS did not seek an exemption from the rest period protections of the Wage Order from the California Divisions of Labor Standards Enforcement. Furthermore, DCS failed to pay premium wages for days on which it failed to provide Salazar and the Aggrieved Employees with timely rest breaks and/or meal periods in compliance with California law.

At all relevant times, DCS required Salazar and the Aggrieved Employees to work on-call shifts. DCS often required Salazar and the Aggrieved Employees to remain on-call 24 hours a day, 5 days a week. However, DCS did not pay Salazar and the Aggrieved Employees minimum, overtime, and double-time wages for such calls. During such on-call shifts, DCS restricted Salazar and the Aggrieved Employees in the types of activities they could perform and required them to stay available at all times. DCS prohibited Salazar and the Aggrieved Employees from consuming alcohol during the waiting periods of on-call shifts, and required them to stay within 30-minute driving distance from their work area. DCS required Salazar and the Aggrieved Employees to monitor their phones for work-related calls at all times. DCS required Salazar and the Aggrieved Employees to respond and show-up to the DCS office within 30-minutes of such calls, and subsequently to the assigned locations within 30-minutes. DCS, however, compensated the employees only when they arrived to the assigned locations, and only for the period they actually worked. Consequently, DCS failed to compensate Salazar and the Aggrieved Employees for all hours spent on-call. Salazar complained to management about DCS' Labor Code and Wage Order violations. DCS took no action to resolve his complaints.

At all relevant times, DCS required Salazar and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. DCS required Salazar and the Aggrieved Employees to use their personal cell phones in the course of performing their duties. DCS communicated with Salazar and the Aggrieved Employees by phone regarding work instructions, scheduling, or to resolve work-related issues and did not provide mobile phones or an alternative to them for this purpose. Additionally, DCS did not reimburse Salazar and the Aggrieved Employees for their cell phone expenses.

As a result of these aforementioned violations, DCS failed to provide Salazar and the Aggrieved Employees with accurate written wage statements; failed to pay them all wages earned during employment; and failed to maintain accurate employee records with respect to Salazar and the Aggrieved Employees as required under California law.

For the reasons herein, on behalf of himself and the Aggrieved Employees, Salazar alleges that DCS committed the following violations of California Labor Code and the Wage Order,:

- a) DCS failed to provide Salazar and other Aggrieved Employees with all rest breaks and meal periods;
- b) DCS failed to compensate Salazar and other Aggrieved Employees at one hour's pay for each day in which they were not provided the rest breaks required by law;
- c) DCS failed to compensate Salazar and other Aggrieved Employees at one hour's pay for each day in which they were not provided the meal periods required by law;
- d) DCS failed to compensate Salazar and other Aggrieved Employees for all hours worked at the correct rates of pay;
- e) DCS failed to indemnify Salazar and other Aggrieved Employees for all business expenses;
- f) DCS failed to provide Salazar and other Aggrieved Employees with accurate wage statements; and
- g) DCS failed to timely pay Salazar and other Aggrieved Employees all earned and unpaid wages during their employment at DCS and at the time such employment ended.

Accordingly, Salazar now seeks civil penalties on behalf of himself and other Aggrieved Employees based on DCS' alleged violations of the California Labor Code and the Wage Order.

The Wage Order

The Wage Order applies to:

“all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis...” (§1). Per §2 (P): “Transportation Industry” means any industry, business or establishment operated for the **purpose of conveying persons or property from one place to another** whether by rail, highway, air or water and all operations and services in connection therewith; and also includes storing or warehousing of goods or property and the repairing, parking, rental, maintenance or cleaning of vehicles.” (emphasis added).

At all relevant times during the applicable limitations period, DCS operated cremation and funeral services, including decedent transportation. Accordingly, Salazar and the Aggrieved Employees are entitled to the protections provided by the Wage Order.

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

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six

hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was no waived.

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

Meal Periods:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee...

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal

period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

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

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

Rest Periods:

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states:

- (b) 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, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

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

DCS intentionally and improperly failed to provide all timely duty-free rest breaks and/or meal periods to Salazar and the Aggrieved Employees as required by law, including but not limited to, second meal periods and third rest periods on days they work directly or are on-call for more than 10 hours in a workday. DCS did not pay premium wages to Salazar and the Aggrieved Employees on days it did not provide them with one or more timely meal and rest periods as required by California law. In failing to do so, DCS violated the provisions of California Labor Code §§ 226.7, 512, and 1198.

Accordingly, Salazar seeks civil penalties on behalf of himself and other Aggrieved Employees as follows:

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.7, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in

addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and

3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

Under Labor Code § 1197, “The minimum wage for employees fixed by the [Industrial Welfare] commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful.”

Section 4 of Wage Order states,

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

In relevant part, Section 2 of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

In relevant part, California Labor Code § 1194 states,

(a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to

recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

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

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

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours

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

At all relevant times during the applicable limitations period, DCS failed to compensate Salazar and other Aggrieved Employees for all hours worked, including, but not limited to overtime wages during on-call shifts for all overtime hours they worked at the correct rates of pay.

Accordingly, Salazar seeks civil penalties on behalf of himself and other Aggrieved Employees as follows:

1. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 510, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558);
2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1194, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)); and
4. \$100 for each Aggrieved Employee for each initial and intentional violation of California Labor Code § 1197, and \$250 for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were

intentionally committed), in addition to an amount sufficient to recover unpaid wages (penalties set by California Labor Code § 1197.1).

Failure to Reimburse for Expenses
(Lab. Code §§ 2802)

In pertinent part, California Labor Code § 2802(a) states, “An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.”

As describe above, during the applicable limitations period, DCS required Salazar and other Aggrieved Employees to incur certain business expenses which it failed to indemnify them for both during and after their employment ended. Accordingly, Salazar seeks civil penalties on behalf of himself and other Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 2802, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

California Labor Code § 226 require employers to furnish employees with accurate itemized written wage statements showing:

- 1) gross wages earned,
- 2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission,
- 3) the number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis,

- 4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item,
- 5) net wages earned,
- 6) the inclusive dates of the period for which the employee is paid,
- 7) the name of the employee and his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement,
- 8) the name and address of the legal entity that is the employer, and
- 9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

At relevant times during the applicable limitations period, DCS violated California Labor Code § 226, in that it failed to properly and accurately itemize each Aggrieved Employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the Aggrieved Employee and other requirements of California Labor Code § 226.

Accordingly, Salazar seeks civil penalties on behalf of himself and Aggrieved Employees as follows: \$250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

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

California Labor Code § 204 states all wages (other than those mentioned in Labor Code sections 201–202) earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed,

and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. In addition, all wages for work performed in excess of the normal work period must be paid by no later than the following regular payday.

As a result of the above described violations, DCS failed to pay Salazar and the Aggrieved Employees within the time periods set by California Labor Code § 204 in that it failed to pay them for all hours worked at the correct rates of pay and failed to pay them premium wages for days on which it failed to provide them with one or more rest or meal periods.

Accordingly, Salazar seeks civil penalties on behalf of himself and Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204, and \$200 for each Aggrieved Employee, plus 25% of the amount unlawfully withheld from each Aggrieved Employee, for each subsequent violations (penalties set by Labor Code § 210).

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

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

Under Labor Code § 203, if an employer willfully fails to pay, without abatement or reduction, in accordance §§ 201 and 202, any wages of an

employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

DCS failed to pay Salazar and the Aggrieved Employees whose employment ended all of the earned but unpaid wages described above by the conclusion of their employment with DCS. By failing to pay Salazar and the Aggrieved Employees as set forth above by such time, DCS is liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of himself and the Aggrieved Employees, Salazar seeks civil penalties from DCS as follows:

1. For violations of Labor Code § 201, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 201 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 201 occurred (penalties set by Labor Code § 2699(f)(2));
2. For violations of Labor Code § 202, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 202 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 202 occurred (penalties set by Labor Code § 2699(f)(2)); and
3. For violations of Labor Code § 203, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 203 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 203 occurred (penalties set by Labor Code § 2699(f)(2)).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174 and 1198)

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

Every person employing labor in this state shall:

...

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

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code section 1174.5 states:

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

Section 7 of the Wage Order states,

- (A) Every employer shall keep accurate information with respect to each employee including the following:
- (1) Full name, home address, occupation and social security number.
 - (2) Birth date, if under 18 years, and designation as a minor.
 - (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
 - (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
 - (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
 - (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.
- (B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions

made on written orders of the employee may be aggregated and shown as one item.

- (C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.
- (D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

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

DCS has failed to maintain the records required by section 1174 and the Wage Order, including but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Salazar and the Aggrieved Employees. Accordingly, Salazar seeks civil penalties on behalf of himself and the other aggrieved employees as follows:

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

Conclusion

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

Sincerely,



David Spivak, Esq.

david@spivaklaw.com

cc: Walter Haines, Esq.
Aaron Salazar

Desert Cremation Society, Inc. dba All Caring Cremations, and All
Caring Solutions
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

Wiefels & Son
c/o Mark J. Matthews
Agent for Service of Process
630 S Vella Rd
Palm Springs, CA 92264

Wiefels & Son II, Inc. dba All California Cremation
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

LWDA / DCS

3/19/2021

Page 20 of 20

Wiefels FD, Inc.
c/o Michael J. Wiefels
Agent for Service of Process
50 East Nicolet St
Banning, CA 92220

EXHIBIT 4



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION, CERTIFIED MAIL, AND EMAIL

April 5, 2021

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

RE: *Andrew Forrest / Desert Cremation Society*

To whom it may concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Andrew Forrest (hereafter “Forrest”) provides notice on behalf of himself and of all individuals currently and formerly employed in California as non-exempt, hourly employees, including but not limited to transport specialists, and persons in similar positions, (hereafter referred to as “Aggrieved Employees,”) by Desert Cremation Society, Inc., a California corporation doing business as All Caring Cremations and All Caring Solutions, Wiefels & Son, a California corporation, Wiefels & Son II, Inc., a California corporation doing business as All California Cremation, and Wiefels FD, Inc., a California corporation (hereafter collectively referred to as “DCS”) of violations of California Labor Code §§ 204, 226, 510, 512, 1174, 1194, 1197, 1198, and 2802.

At all relevant times, DCS has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Forrest and the Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission Order No. 9-2001 (hereafter “the Wage

Order”), paragraph 2, subdivision (F), and “Aggrieved Employees” within the meaning of California Labor Code § 2699(c).

Statement of Facts

In approximately February 2020, Forrest began working for DCS located at 272 South Mountain View Ave, San Bernardino, as an hourly transport specialist. Since his hire date, Forrest has continuously worked for DCS and is still employed in that capacity.

At all relevant times, DCS issued wages to Forrest and the Aggrieved Employees on a semi-monthly basis and paid them at an hourly rate of pay. At all relevant times, DCS classified Forrest and the Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all relevant times, Forrest and the Aggrieved Employees have worked over 8 hours in one workday and/or over 40 hours in one workweek. Despite this, DCS failed to provide Forrest and the Aggrieved Employees with all timely rest and meal periods pursuant to California law. Further, due to the workload and low staffing levels, DCS denied Forrest and the Aggrieved Employees their 30-minute duty-free meal period within the first 5 hours of work. DCS frequently forced Forrest and the Aggrieved Employees to forego timely, duty-free 30-minute meal periods by assigning them more time-sensitive work than it could reasonably expect them to complete within their first five hours of work.

At all relevant times, DCS failed to authorize and permit Forrest and the Aggrieved Employees with rest periods in violation of California law. Due to high workload and low staffing levels, DCS failed to authorize and permit Forrest and the Aggrieved Employees to take 10-minute, paid, duty-free rest breaks every 4 hours worked or major fraction thereof. DCS did not seek an exemption from the rest period protections of the Wage Order from the California Division of Labor Standards Enforcement. Furthermore, DCS failed to pay premium wages for days on which it failed to provide Forrest and the

Aggrieved Employees with timely rest breaks and/or meal periods in compliance with California law.

At all relevant times, DCS required Forrest and the Aggrieved Employees to work on-call shifts. DCS often required Forrest and the Aggrieved Employees to remain on-call 24 hours a day, for up to 7 days a week. However, DCS did not pay Forrest and the Aggrieved Employees minimum, overtime, and double-time wages for such calls. During such on-call shifts, DCS restricted Forrest and the Aggrieved Employees in the types of activities they could perform and required them to stay available for additional work duties at all times. DCS prohibited Forrest and the Aggrieved Employees from consuming alcohol during the on-call shifts, and required them to stay within approximately a 25-mile radius of DCS's offices. Also during these on-call periods, DCS required Forrest and the Aggrieved Employees to monitor their phones for work-related calls at all times. DCS required Forrest and the Aggrieved Employees to respond and travel to the DCS office within 30 minutes of such calls, and subsequently to the assigned locations within 30 minutes. DCS, however, compensated the Aggrieved Employees only when they arrived to the assigned locations, and only for the period they worked at the assigned location. Consequently, DCS failed to compensate Forrest and the Aggrieved Employees for all hours spent on-call.

At all relevant times, DCS required Forrest and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. DCS required Forrest and the Aggrieved Employees to use their personal cell phones in the course of performing their duties. DCS communicated with Forrest and the Aggrieved Employees by phone regarding work instructions, scheduling, or to resolve work-related issues and did not provide mobile phones or an alternative to them for this purpose. Additionally, DCS did not reimburse Forrest and the Aggrieved Employees for their cell phone expenses.

As a result of these aforementioned violations, DCS failed to provide Forrest and the Aggrieved Employees with accurate written wage statements; failed to pay them all wages earned during employment; and failed to maintain accurate

employee records with respect to Forrest and the Aggrieved Employees as required under California law.

For the reasons herein, on behalf of himself and the Aggrieved Employees, Forrest alleges that DCS committed the following violations of California Labor Code and the Wage Order,:

- a) DCS failed to provide Forrest and other Aggrieved Employees with all rest breaks and meal periods;
- b) DCS failed to compensate Forrest and other Aggrieved Employees at one hour's pay for each day in which they were not provided the rest breaks required by law;
- c) DCS failed to compensate Forrest and other Aggrieved Employees at one hour's pay for each day in which they were not provided the meal periods required by law;
- d) DCS failed to compensate Forrest and other Aggrieved Employees for all hours worked at the correct rates of pay;
- e) DCS failed to indemnify Forrest and other Aggrieved Employees for all business expenses;
- f) DCS failed to provide Forrest and other Aggrieved Employees with accurate wage statements; and
- g) DCS failed to timely pay Forrest and other Aggrieved Employees all earned and unpaid wages during their employment at DCS.

Accordingly, Forrest now seeks civil penalties on behalf of himself and other Aggrieved Employees based on DCS' alleged violations of the California Labor Code and the Wage Order.

///

The Wage Order

The Wage Order applies to:

“all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis...” (§1). Per §2 (P): “Transportation Industry” means any industry, business or establishment operated for the **purpose of conveying persons or property from one place to another** whether by rail, highway, air or water and all operations and services in connection therewith; and also includes storing or warehousing of goods or property and the repairing, parking, rental, maintenance or cleaning of vehicles.” (emphasis added).

At all relevant times during the applicable limitations period, DCS operated cremation and funeral services, including decedent transportation. Accordingly, Forrest and the Aggrieved Employees are entitled to the protections provided by the Wage Order.

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

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six

hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was no waived.

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

Meal Periods:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee...

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal

period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

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

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

Rest Periods:

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states:

- (b) 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, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

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

DCS intentionally and improperly failed to provide all timely duty-free rest breaks and/or meal periods to Forrest and the Aggrieved Employees as required by law. DCS did not pay premium wages to Forrest and the Aggrieved Employees on days it did not provide them with one or more timely meal and rest periods as required by California law. In failing to do so, DCS violated the provisions of California Labor Code §§ 226.7, 512, and 1198.

Accordingly, Forrest seeks civil penalties on behalf of himself and other Aggrieved Employees as follows:

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.7, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and

3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

Under Labor Code § 1197, “The minimum wage for employees fixed by the [Industrial Welfare] commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful.”

Section 4 of Wage Order states,

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

In relevant part, Section 2 of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

In relevant part, California Labor Code § 1194 states,

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

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

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

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

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

regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

At all relevant times during the applicable limitations period, DCS failed to compensate Forrest and other Aggrieved Employees for all hours worked, including, but not limited to overtime wages during on-call shifts for all overtime hours they worked at the correct rates of pay.

Accordingly, Forrest seeks civil penalties on behalf of himself and other Aggrieved Employees as follows:

1. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 510, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558);
2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1194, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)); and
4. \$100 for each Aggrieved Employee for each initial and intentional violation of California Labor Code § 1197, and \$250 for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were intentionally committed), in addition to an amount sufficient to recover unpaid wages (penalties set by California Labor Code § 1197.1).

///

Failure to Reimburse for Expenses
(Lab. Code §§ 2802)

In pertinent part, California Labor Code § 2802(a) states, “An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.”

As described above, during the applicable limitations period, DCS required Forrest and other Aggrieved Employees to incur certain business expenses which it failed to indemnify them for both during and after their employment ended. Accordingly, Forrest seeks civil penalties on behalf of himself and other Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 2802, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

California Labor Code § 226 require employers to furnish employees with accurate itemized written wage statements showing:

- 1) gross wages earned,
- 2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission,
- 3) the number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis,
- 4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item,
- 5) net wages earned,
- 6) the inclusive dates of the period for which the employee is paid,

- 7) the name of the employee and his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement,
- 8) the name and address of the legal entity that is the employer, and
- 9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

At relevant times during the applicable limitations period, DCS violated California Labor Code § 226, in that it failed to properly and accurately itemize each Aggrieved Employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the Aggrieved Employee and other requirements of California Labor Code § 226.

Accordingly, Forrest seeks civil penalties on behalf of himself and Aggrieved Employees as follows: \$250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

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

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

As a result of the above described violations, DCS failed to pay Forrest and the Aggrieved Employees within the time periods set by California Labor Code § 204 in that it failed to pay them for all hours worked at the correct rates of pay and failed to pay them premium wages for days on which it failed to provide them with one or more rest or meal periods.

Accordingly, Forrest seeks civil penalties on behalf of himself and Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204, and \$200 for each Aggrieved Employee, plus 25% of the amount unlawfully withheld from each Aggrieved Employee, for each subsequent violations (penalties set by Labor Code § 210).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174 and 1198)

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

Every person employing labor in this state shall:

...

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

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

///

Labor Code section 1174.5 states:

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

Section 7 of the Wage Order states,

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

production record shall be maintained by the employer.

- (B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.
- (C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.
- (D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

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

DCS has failed to maintain the records required by section 1174 and the Wage Order, including but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Forrest and the Aggrieved Employees. Accordingly, Forrest seeks civil penalties on behalf of himself and the other Aggrieved Employees as follows:

///

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

Conclusion

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

Sincerely,



David Spivak, Esq.

david@spivaklaw.com

cc: Walter Haines, Esq.
Andrew Forrest

Desert Cremation Society, Inc. dba All Caring Cremations, and All
Caring Solutions
c/o Orion S. Robinson, Esq.
Robinson Di Lando
801 South Grand Avenue, Suite 500
Los Angeles, CA 90017
orobinson@rdwlaw.com

///

Wiefels & Son
c/o Mark J. Matthews
Agent for Service of Process
630 S Vella Rd
Palm Springs, CA 92264

Wiefels & Son II, Inc. dba All California Cremation
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

Wiefels FD, Inc.
c/o Michael J. Wiefels
Agent for Service of Process
50 East Nicolet St
Banning, CA 92220

EXHIBIT 5

COPY

1 DAVID G. SPIVAK (SBN 179684)
2 david@spivaklaw.com
3 CAROLINE TAHMASSIAN (SBN 285680)
4 caroline@spivaklaw.com
5 MAYA CHEAITANI (SBN 335777)
6 maya@spivaklaw.com
7 THE SPIVAK LAW FIRM
8 16530 Ventura Blvd., Suite 203
9 Encino, CA 91436
10 Telephone (213) 725-9094
11 Facsimile (213) 634-2485

12 Attorneys for Plaintiff,
13 SHEILA CROMWELL, and all others similarly situated

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO
(UNLIMITED JURISDICTION)

SHEILA CROMWELL, as an "aggrieved
employee" on behalf of other similarly situated
"aggrieved employees" under the Labor Code
Private Attorney General Act of 2004,

Plaintiff,

vs.

DESERT CREMATION SOCIETY, INC., a
California corporation doing business as All
Caring Cremations and All Caring Solutions;
WIEFELS & SON, a California corporation;
WIEFELS & SON II, a California corporation
doing business as All California Cremation;
WIEFELS FD, INC., a California corporation;
and DOES 1-50, inclusive,

Defendants.

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO CIVIL DIVISION

JUN 04 2021

Sylvia Guajardo
SYLVIA GUAJARDO, DEPUTY

Case No. **CIV SB 2116331**

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

JURY TRIAL DEMANDED

BY FAX



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ADDITIONAL ATTORNEY FOR PLAINTIFF

Walter Haines (SBN 71075)
whaines@uelglaw.com
UNITED EMPLOYEES LAW GROUP
5500 Bolsa Ave, Suite 201
Huntington Beach, CA 92649
Telephone: (562) 256-1047
Facsimile: (562) 256-1006



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

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

3 **I. INTRODUCTION**

4 1. Plaintiff brings this representative action based on alleged violations of the
5 California Labor Code and Industrial Welfare Commission Order No. 9-2001 (hereafter “the
6 Wage Order”), against Defendants DESERT CREMATION SOCIETY, INC., a California
7 corporation doing business as All Caring Cremations and All Caring Solutions, WIEFELS &
8 SON, a California corporation, WIEFELS & SON II, a California corporation doing business as
9 All California Cremation, WIEFELS FD, INC., a California corporation, and DOES 1-50,
inclusive (collectively “Defendants”).

10 2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to
11 her, the State of California, and other similarly situated and aggrieved current and former
12 employees who worked in California as hourly, non-exempt employees, for civil penalties and
13 other related relief. These claims are based on Defendants’ failures to: (1) Provide all rest and
14 meal periods; (2) Indemnify for necessary work-related expenditures; (3) Provide accurate written
15 wage statements; (4) Timely pay wages during and upon termination of employment and; (5)
16 Maintain accurate employment records. Accordingly, Plaintiff now seeks to recover civil
penalties and related relief through this representative action.

17 **II. JURISDICTION AND VENUE**

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

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

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

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



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

III. THE PARTIES

7. Plaintiff, an individual and resident of California, on or about October 1, 2018, began working for Defendants as an hourly transport specialist. Defendants employed her continuously from that date until on or about March 18, 2020.

8. Defendant DESERT CREMATION SOCIETY, INC., is a corporation organized and existing under the laws of California and a citizen of California based on Plaintiff's information and belief.

9. Defendant WIEFELS & SON is a corporation organized and existing under the laws of California and a citizen of California based on Plaintiff's information and belief.

10. Defendant WIEFELS & SON II, INC., is a corporation organized and existing under the laws of California and a citizen of California based on Plaintiff's information and belief.

11. Defendant WIEFELS FD, INC., is a corporation organized and existing under the laws of California and a citizen of California based on Plaintiff's information and belief.

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

A. THE AGGRIEVED EMPLOYEES

13. The "Aggrieved Employees" are all individuals currently and formerly employed by Defendants in California, as hourly, non-exempt employees, including, but not limited to transport specialists, and persons in comparable positions, at any time during the period of March 17, 2020 and entry of judgment ("the PAGA Period").

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

15. At all relevant times, in perpetrating the acts and omissions alleged herein, Defendants, and each of them, acted pursuant to and in furtherance of a policy, practice, or a lack



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 of a practice which resulted in Defendants not paying Plaintiff and the other Aggrieved
2 Employees in accordance with applicable California labor laws as alleged herein.

3 16. Plaintiff is informed and believes and thereon alleges that each and every one of
4 the acts and omissions alleged herein were performed by, and/or attributable to, all Defendants,
5 each acting as agents and/or employees, and/or under the direction and control of each of the other
6 defendants, and that said acts and failures to act were within the course and scope of said agency,
7 employment, and/or direction and control.

8 **IV. FACTUAL ALLEGATIONS**

9 17. On or about October 1, 2018, Plaintiff began working for Defendants as an hourly
10 transport specialist. Defendants employed her continuously from that date until on or about March
11 18, 2020, when Defendants temporarily suspended Plaintiff's employment because she suffered
12 an injury on the job which caused limited mobility in her left arm, preventing her from performing
13 all work duties. Plaintiff has not since returned to work. Plaintiff last performed her duties for
14 Defendants on or about March 18, 2020.

15 18. At all relevant times, Defendants issued wages to Plaintiff and the Aggrieved
16 Employees on a bi-monthly basis and paid them at an hourly rate of pay. At all relevant times,
17 Defendants classified Plaintiff and the Aggrieved Employees as non-exempt employees entitled
18 to the protections of both the Labor Code and the Wage Order.

19 19. At all relevant times, Plaintiff and the Aggrieved Employees have worked over 8
20 hours in one workday and/or over 40 hours in one workweek. Despite this, Defendants failed to
21 provide Plaintiff and the Aggrieved Employees with all timely rest and meal periods pursuant to
22 California law, including, but not limited to, two timely 30-minute uninterrupted meal periods
23 and three 10-minute rest periods on workdays they worked more than 10 hours. Further, due to
24 the workload and low staffing levels Plaintiff and the Aggrieved Employees were denied their
25 30-minute duty-free meal period within the first 5 hours of work. Defendants frequently forced
26 Plaintiff and the Aggrieved Employees to forgo timely, duty-free 30-minute meal periods by
27 assigning them more time-sensitive work than they could reasonably expect them to complete
28 within their first five hours of work.

20. At all relevant times, Defendants failed to authorize and permit Plaintiff and the
Aggrieved Employees to take rest periods in violation of California law. Due to high workload
and low staffing levels, Defendants failed to authorize and permit Plaintiff and the Aggrieved



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 Employees to take 10-minute, paid, duty-free rest breaks every 4 hours worked or major fraction
2 thereof. Defendants did not seek an exemption from the rest period protections of the Wage Order
3 from the California Divisions of Labor Standards Enforcement. Furthermore, Defendants failed
4 to pay premium wages for days on which they failed to provide Plaintiff and the Aggrieved
Employees with timely rest breaks and/or meal periods in compliance with California law.

5 21. At all relevant times, Defendants required Plaintiff and the Aggrieved Employees
6 to incur certain business expenses in the course of performing their duties. Defendants required
7 Plaintiff and the Aggrieved Employees to use their personal cell phones in the course of
8 performing their duties. Defendants communicated with Plaintiff and the Aggrieved Employees
9 by phone regarding work instructions, scheduling, or to resolve work-related issues and did not
10 provide mobile phones or an alternative to them for this purpose. Additionally, Defendants did
11 not reimburse Plaintiff and the Aggrieved Employees for their cell phone expenses.

12 22. As a result of these aforementioned violations, Defendants failed to provide
13 Plaintiff and the Aggrieved Employees with accurate written wage statements; failed to pay them
14 all wages earned during employment; and failed to maintain accurate employee records with
respect to Plaintiff and the Aggrieved Employees as required under California law.

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

- 17 A. Not provided with all off duty meal periods;
- 18 B. Not provided with all rest break periods as required by law;
- 19 C. Not paid one hour's pay for each workday in which Defendants failed to
20 provide them with one or more timely rest periods;
- 21 D. Not paid one hour's pay for each workday in which Defendants failed to
22 provide them with one or more timely meal periods;
- 23 E. Not indemnified for all necessary business expenditures incurred during
the discharge of their duties;
- 24 F. Not provided with accurate and complete wage statements; and
- 25 G. Not timely paid all earned and unpaid wages during their employment with
26 Defendants and at the time such employment ended.

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

28 **CIVIL PENALTIES**



(Lab. Code §§ 2698, et seq.)

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

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

25. At all relevant times, Plaintiff and the Aggrieved Employees have been non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

A. FAILURE TO PROVIDE REST BREAKS AND MEAL PERIODS

26. In relevant part, California Labor Code § 1198 states:

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

27. In relevant part, In relevant part, California Labor Code § 512 states:

An employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer shall not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

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

Rest Periods

(A) “Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

worked for which there shall be no deduction from wages.”

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

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

Meal Periods

(A) “No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by mutual consent of the employee and the employer. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an ‘on duty’ meal period and counted as time worked. An ‘on duty’ meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.”

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

30. In relevant part, California Labor Code § 226.7 states:

(b) An employer shall not require an employee to work during a meal or rest period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

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



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 of compensation for each work day that the meal or rest period is
2 not provided.

3 31. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff and the
4 Aggrieved Employees were entitled to uninterrupted meal periods of at least 30 minutes for each
5 day they worked five or more hours. Pursuant to California Labor Code § 512, they were also
6 entitled to a second 30-minute meal period when they worked more than 10 hours in a workday.

7 32. Pursuant to the Wage Order, Plaintiff and the Aggrieved Employees were entitled
8 to be provided with net rest breaks of at least ten minutes for each four-hour period of work, or
9 major fraction thereof.

10 33. Defendants intentionally failed to provide Plaintiff and the Aggrieved Employees
11 with all required 30-minute duty free meal periods and 10-minute rest periods free from any work
12 duties in accordance with the Wage Order.

13 34. At all relevant times, Defendants failed to provide all timely duty-free rest breaks
14 and/or meal periods to Plaintiff and the Aggrieved Employees as required by law, including but
15 not limited to, second meal periods and third rest periods on days they worked more than 10
16 hours. Defendants also did not pay premium wages to Plaintiff and the Aggrieved Employees on
17 days they did not provide them with one or more timely meal and rest periods as required by
18 California law.

19 35. Plaintiff is informed and believes and thereon alleges that, at all relevant times
20 within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy
21 which resulted in Defendants not providing the and the Aggrieved Employees with all off-duty
22 meal periods and rest breaks required by California law.

23 **B. FAILURE TO INDEMNIFY**

24 36. In pertinent part, California Labor Code § 2802(a) states:

25 “An employer shall indemnify his or her employee[s] for all
26 necessary expenditures incurred by the employee in direct
27 consequence of the discharge of his or her duties.”

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



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 38. At all relevant times, as a condition for employment, Defendants required Plaintiff
2 and the Aggrieved Employees to use their personal mobile phones for work-related activities
3 without reimbursing them for mobile phone expenses.

4 39. Plaintiff is informed and believes and thereon alleges that, at all relevant times,
5 Defendants maintained a policy and/or practice, or lack thereof, which resulted in Defendants'
6 failure to indemnify Plaintiff and the Aggrieved Employees for the reasonable expenses they
7 incurred during the course of performing their duties.

8 **C. FAILURE TO PROVIDE ACCURATE WRITTEN WAGE STATEMENTS**

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

14 41. Pursuant to California Labor Code § 226, an employee is deemed to suffer injury
15 if the employer fails to provide a wage statement. Also, an employee is deemed to suffer injury if
16 the employer fails to provide accurate and complete information as required by California Labor
17 Code § 226(a) and the employee cannot "promptly and easily determine" from the wage statement
18 alone one or more of the following:

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

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

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

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

 E. The number of piece-rate units earned and the piece rate.

 42. "Promptly and easily determine," as stated in California Labor Code § 226(e),
means a reasonable person would be able to readily ascertain the information without reference



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 to other documents or information.

2 43. As alleged herein, Defendants failed to provide Plaintiff and the other Aggrieved
3 Employees with all meal and rest periods in compliance with California law. They also failed to
4 provide them with premium wages on workdays they failed to provide them with one or more
5 meal and/or rest periods in compliance with California law. As a result, Defendants have failed
6 to properly itemize Plaintiff and the other Aggrieved Employees' gross and net wages earned,
7 total hours worked, hourly rate of pay, the corresponding number of hours worked at each hourly
8 rate, and other requirements of California Labor Code § 226.

9 44. Defendants' failure to provide Plaintiff and the other Aggrieved Employees with
10 accurate wage statements was knowing and intentional. Defendants had the ability to provide
11 Plaintiff and the other Aggrieved Employees with accurate wage statements but intentionally
12 provided wage statements that Defendants knew were not accurate.

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

24 **D. UNTIMELY WAGES DURING EMPLOYMENT**

25 46. Labor Code § 204 states

- 26 (a) All wages, other than those mentioned in Section 201,
27 201.3, 202, 204.1, or 204.2, earned by any person in any
28 employment are due and payable twice during each
calendar month, on days designated in advance by the
employer as the regular paydays. Labor performed
between the 1st and 15th days, inclusive, of any calendar
month shall be paid for between the 16th and the 26th day
of the month during which the labor was performed, and
labor performed between the 16th and the last day,



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. ...

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

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

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

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

47. Defendants paid wages to employees on regular intervals. Defendants failed to pay Plaintiff on such intervals for all wages earned and all hours worked including, but not limited to, all premium wages for all rest breaks and/or off-duty meal periods that were not provided. On information and belief, Plaintiff alleges that Defendants also failed to pay the Aggrieved Employees on such intervals for all wages earned and all hours worked.

E. UNTIMELY FINAL WAGES

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

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



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 50. By failing to pay earned minimum and premium wages to Plaintiff and the
2 Aggrieved Employees, Defendants failed to timely pay them all earned and unpaid wages in
3 violation of Labor Code § 201 or § 202.

4 51. Plaintiff is informed and believes that Defendants' failures to timely pay Plaintiff
5 and the Aggrieved Employees all of their earned and unpaid wages have been willful in that, at
6 all relevant times, Defendants have deliberately maintained policies and practices that violate the
7 requirements of the Labor Code and the Wage Order, even though at all relevant times, they have
8 had the ability to comply with those legal requirements.

8 **F. FAILURE TO MAINTAIN ACCURATE EMPLOYMENT RECORDS**

9 52. Labor Code § 1174 states:

10 Every person employing labor in this state shall:

11 ...

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

14 (d) Keep, at a central location in the state or at the plants or establishments
15 at which employees are employed, payroll records showing the hours worked
16 daily by and the wages paid to, and the number of piece-rate units earned by
17 and any applicable piece rate paid to, employees employed at the respective
18 plants or establishments. These records shall be kept in accordance with rules
19 established for this purpose by the commission, but in any case shall be kept
20 on file for not less than three years. An employer shall not prohibit an
21 employee from maintaining a personal record of hours worked, or, if paid on
22 a piece-rate basis, piece-rate units earned.

19 53. Labor Code § 1174.5 states:

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

23 54. Section 7 of the Wage Order states,

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

- 26 1. Full name, home address, occupation, and social security number.
- 27 2. Birth date, if under 18 years, and designation as a minor.
- 28 3. Time records showing when the employee begins and ends each
work period. Meal periods, split shift intervals and total daily
hours worked shall also be recorded. Meal periods during which
operations cease and authorized rest periods need not be recorded.



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

4. Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
5. Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
6. When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

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

56. On information and belief, Defendants have willfully failed to maintain the records required by § 1174 and Wage Order, including, but not limited to, the total premium wages earned for missed meal and rest periods owed to Plaintiff and the Aggrieved Employees.

G. CIVIL PENALTIES SOUGHT

57. Labor Code § 204 states

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

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

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

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

(d) The requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 more than seven calendar days following the close of the payroll period.

2 58. Defendants paid wages to employees on regular intervals. Defendants failed to pay
3 Plaintiff on such intervals for all wages earned and all hours worked. On information and belief,
4 Plaintiff alleges that Defendants also failed to pay the Aggrieved Employees on such intervals for
5 all wages earned and all hours worked.

6 59. During the applicable time period, Defendants violated California Labor Code
7 §§ 201, 202, 203, 204, 226, 226.7, 512, 1174, 1198, and 2802.

8 60. California Labor Code §§ 2699(a) and (g) authorize an aggrieved employee, on
9 behalf of themselves and other current or former employees, to bring a civil action to recover civil
10 penalties pursuant to the procedures specified in California Labor Code § 2699.3.

11 61. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff and the Aggrieved
12 Employees are entitled to recover civil penalties for each of the Defendants' violations of
13 California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 512, 1174, 1198, and 2802 during the
14 applicable limitations period in the following amounts:

15 A. For violations of California Labor Code § 204, one hundred dollars
16 (\$100.00) for each aggrieved employee for each initial violation and two hundred dollars
17 (\$200.00) for each aggrieved employee for each subsequent, willful or intentional violation
18 (penalty amounts established by California Labor Code § 210).

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

22 C. For violations of California Labor Code § 512, fifty dollars (\$50.00) for
23 each aggrieved employee for each initial violation for pay period for which the employee was
24 underpaid and one hundred dollars (\$100.00) for each underpaid employee for each pay period
25 for which the employee was underpaid (penalty amounts established by California Labor Code
26 § 558).

27 D. For violations of California Labor Code § 1174, five hundred dollars
28 (\$500.00) for each Aggrieved Employee for each initial violation (penalty amounts established
by Labor Code § 1174.5).

E. For violations of California Labor Code §§ 201, 202, 203, 226.7, 1198, and
2802, one hundred dollars (\$100.00) for each aggrieved employee per pay period for each initial



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

violation and two hundred dollars (\$200.00) for each aggrieved employee per pay period for each subsequent violation (penalty amounts established by California Labor Code § 2699(f)(2)).

H. NOTICE TO THE STATE OF CALIFORNIA AND DEFENDANTS

62. Plaintiff has complied with the procedures for bringing suit specified in California Labor Code § 2699.3. By letter dated March 17, 2021, Plaintiff gave written notice by certified mail to the Labor and Workforce Development Agency (“LWDA”) and Defendants of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. A true and correct copy of Plaintiff’s letter to the LWDA dated March 17, 2021 is attached hereto as Exhibit A. The LWDA has not responded to Plaintiff’s letter.

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

VI. PRAYER FOR RELIEF

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

- A. Civil penalties;
- B. Costs of suit;
- C. Reasonable attorneys’ fees; and
- D. Such other relief as the Court deems just and proper.

///

///

///

///

///

///

///

///

///

///



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

VII. DEMAND FOR JURY TRIAL

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

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: June 3, 2021

By: 

DAVID SPIVAK
CAROLINE TAHMASSIAN,
MAYA CHEAITANI, Attorneys for Plaintiff,
SHEILA CROMWELL, and all others similarly
situated



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

EXHIBIT A



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

March 17, 2021

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

RE: *Sheila Cromwell / Desert Cremation Society*

To Whom It May Concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Sheila Cromwell (hereafter “Cromwell”) provides notice on behalf of herself and of all individuals currently and formerly employed in California as non-exempt, hourly employees, including but not limited to transport specialists, and persons in similar positions, (hereafter referred to as “Aggrieved Employees,”) by Desert Cremation Society, Inc., a California corporation doing business as All Caring Cremations and All Caring Solutions, Wiefels & Son, a California corporation, Wiefels & Son II, Inc., a California corporation doing business as All California Cremation, and Wiefels FD, Inc., a California corporation (hereafter collectively referred to as “DCS”) of violations of California Labor Code §§ 201, 202, 203, 204, 226, 512, 1174, 1198, and 2802.

At all relevant times, DCS has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Cromwell and the Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission

Order No. 9-2001 (hereafter “the Wage Order”), paragraph 2, subdivision (F), and “Aggrieved Employees” within the meaning of California Labor Code § 2699(c).

Statement of Facts

On or about October 1, 2018, Cromwell began working for DCS as an hourly transport specialist. DCS employed her continuously from that date until on or about March 18, 2020, when DCS temporarily suspended Cromwell’s employment because she suffered an injury on the job which caused limited mobility in her left arm, preventing her from performing all work duties. Cromwell has not since returned to work. Cromwell last performed her duties for DCS on or about March 18, 2020.

At all relevant times, DCS issued wages to Cromwell and the Aggrieved Employees on a bi-monthly basis and paid them at an hourly rate of pay. At all relevant times, DCS classified Cromwell and the Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all relevant times, Cromwell and the Aggrieved Employees have worked over 8 hours in one workday and/or over 40 hours in one workweek. Despite this, DCS failed to provide Cromwell and the Aggrieved Employees with all timely rest and meal periods pursuant to California law, including, but not limited to, two timely 30-minute uninterrupted meal periods and three 10-minute rest periods on workdays they worked more than 10 hours. Further, due to the workload and low staffing levels, Cromwell and the Aggrieved Employees were denied their 30-minute duty-free meal period within the first 5 hours of work. DCS frequently forced Cromwell and the Aggrieved Employees to forgo timely, duty-free 30-minute meal periods by assigning them more time-sensitive work than it could reasonably expect them to complete within their first five hours of work.

At all relevant times, DCS failed to authorize and permit Cromwell and the Aggrieved Employees with rest periods in violation of California law. Due to high workload and low staffing levels, DCS failed to authorize and permit

Cromwell and the Aggrieved Employees to take 10-minute, paid, duty-free rest breaks every 4 hours worked or major fraction thereof. DCS did not seek an exemption from the rest period protections of the Wage Order from the California Divisions of Labor Standards Enforcement. Furthermore, DCS failed to pay premium wages for days on which it failed to provide Cromwell and the Aggrieved Employees with timely rest breaks and/or meal periods in compliance with California law.

At all relevant times, DCS required Cromwell and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. DCS required Cromwell and the Aggrieved Employees to use their personal cell phones in the course of performing their duties. DCS communicated with Cromwell and the Aggrieved Employees by phone regarding work instructions, scheduling, or to resolve work-related issues and did not provide mobile phones or an alternative to them for this purpose. Additionally, DCS did not reimburse Cromwell and the Aggrieved Employees for their cell phone expenses.

As a result of these aforementioned violations, DCS failed to provide Cromwell and the Aggrieved Employees with accurate written wage statements; failed to pay them all wages earned during employment; and failed to maintain accurate employee records with respect to Cromwell and the Aggrieved Employees as required under California law.

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

- a) DCS failed to provide Cromwell and other Aggrieved Employees with all rest breaks and meal periods;
- b) DCS failed to compensate Cromwell and other Aggrieved Employees at one hour's pay for each day in which they were not provided the rest breaks required by law;

- c) DCS failed to compensate Cromwell and other Aggrieved Employees at one hour's pay for each day in which they were not provided the meal periods required by law;
- d) DCS failed to indemnify Cromwell and other Aggrieved Employees for all business expenses;
- e) DCS failed to provide Cromwell and other Aggrieved Employees with accurate wage statements; and
- f) DCS failed to timely pay Cromwell and other Aggrieved Employees all earned and unpaid wages during their employment at DCS and at the time such employment ended.

Accordingly, Cromwell now seeks civil penalties on behalf of herself and other Aggrieved Employees based on DCS' alleged violations of the California Labor Code and the Wage Order.

The Wage Order

The Wage Order applies to:

“all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis...” (§1). Per §2 (P): “Transportation Industry” means any industry, business or establishment operated for the **purpose of conveying persons or property from one place to another** whether by rail, highway, air or water and all operations and services in connection therewith; and also includes storing or warehousing of goods or property and the repairing, parking, rental, maintenance or cleaning of vehicles.” (emphasis added).

At all relevant times during the applicable limitations period, DCS operated cremation and funeral services, including decedent transportation. Accordingly,

Cromwell and the Aggrieved Employees are entitled to the protections provided by the Wage Order.

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

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was no waived.

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

Meal Periods:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee...

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

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

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

Rest Periods:

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states:

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

compensation for each workday that the meal or rest or recovery period is not provided.

DCS intentionally and improperly failed to provide all timely duty-free rest breaks and/or meal periods to Cromwell and the Aggrieved Employees as required by law, including but not limited to, second meal periods and third rest periods on days they work directly or are on-call for more than 10 hours in a workday. DCS did not pay premium wages to Cromwell and the Aggrieved Employees on days it did not provide them with one or more timely meal and rest periods as required by California law. In failing to do so, DCS violated the provisions of California Labor Code §§ 226.7, 512, and 1198.

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

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.7, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

Failure to Reimburse for Expenses
(Lab. Code §§ 2802)

In pertinent part, California Labor Code § 2802(a) states, “An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.”

As describe above, during the applicable limitations period, DCS required Cromwell and other Aggrieved Employees to incur certain business expenses which it failed to indemnify them for both during and after their employment ended. Accordingly, Cromwell seeks civil penalties on behalf of herself and other Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 2802, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

California Labor Code § 226 require employers to furnish employees with accurate itemized written wage statements showing:

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

- other than a social security number may be shown on the itemized statement,
- 8) the name and address of the legal entity that is the employer, and
 - 9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

At relevant times during the applicable limitations period, DCS violated California Labor Code § 226, in that it failed to properly and accurately itemize each Aggrieved Employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the Aggrieved Employee and other requirements of California Labor Code § 226.

Accordingly, Cromwell seeks civil penalties on behalf of herself and Aggrieved Employees as follows: \$250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

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

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

As a result of the above described violations, DCS failed to pay Cromwell and the Aggrieved Employees within the time periods set by California Labor Code

§ 204 in that it failed to pay them for all hours worked at the correct rates of pay and failed to pay them premium wages for days on which it failed to provide them with one or more rest or meal periods.

Accordingly, Cromwell seeks civil penalties on behalf of herself and Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204, and \$200 for each Aggrieved Employee, plus 25% of the amount unlawfully withheld from each Aggrieved Employee, for each subsequent violations (penalties set by Labor Code § 210).

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

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

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

DCS failed to pay Cromwell and the Aggrieved Employees whose employment ended all of the earned but unpaid wages described above by the conclusion of

their employment with DCS. By failing to pay Cromwell and the Aggrieved Employees as set forth above by such time, DCS is liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of herself and the Aggrieved Employees, Cromwell seeks civil penalties from DCS as follows:

1. For violations of Labor Code § 201, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 201 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 201 occurred (penalties set by Labor Code § 2699(f)(2));
2. For violations of Labor Code § 202, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 202 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 202 occurred (penalties set by Labor Code § 2699(f)(2)); and
3. For violations of Labor Code § 203, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 203 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 203 occurred (penalties set by Labor Code § 2699(f)(2)).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174 and 1198)

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

Every person employing labor in this state shall:

...

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

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code section 1174.5 states:

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

Section 7 of the Wage Order states,

- (A) Every employer shall keep accurate information with respect to each employee including the following:
- (1) Full name, home address, occupation and social security number.
 - (2) Birth date, if under 18 years, and designation as a minor.
 - (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be

recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

- (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
 - (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
 - (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.
- (B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.
- (C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

- (D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

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

DCS has failed to maintain the records required by section 1174 and the Wage Order, including but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Cromwell and the Aggrieved Employees. Accordingly, Cromwell seeks civil penalties on behalf of herself and the other aggrieved employees as follows:

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

Conclusion

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

Sincerely,



David Spivak, Esq.
david@spivaklaw.com

cc: Walter Haines, Esq.
Sheila Cromwell

Desert Cremation Society, Inc. dba All Caring Cremations, and All
Caring Solutions
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

Wiefels & Son
c/o Mark J. Matthews
Agent for Service of Process
630 S Vella Rd
Palm Springs, CA 92264

Wiefels & Son II, Inc. dba All California Cremation
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

Wiefels FD, Inc.
c/o Michael J. Wiefels
Agent for Service of Process
50 East Nicolet St
Banning, CA 92220

EXHIBIT 6

COPY

4642958

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

JUN 14 2021

BY NATHANIEL JOHNSON, DEPUTY

1 DAVID G. SPIVAK (SBN 179684)
2 david@spivaklaw.com
3 CAROLINE TAHMASSIAN (SBN 285680)
4 caroline@spivaklaw.com
5 MAYA CHEAITANI (SBN 335777)
6 maya@spivaklaw.com
7 THE SPIVAK LAW FIRM
8 16530 Ventura Blvd., Suite 203
9 Encino, CA 91436
10 Telephone (213) 725-9094
11 Facsimile (213) 634-2485
12
13 Attorneys for Plaintiffs,
14 AARON SALAZAR and ANDREW FORREST

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SAN BERNARDINO
12 (UNLIMITED JURISDICTION)

13 AARON SALAZAR and ANDREW FORREST,
14 as "aggrieved employees" on behalf of themselves
15 and all other "aggrieved employees" under the
16 Labor Code Private Attorney General Act of
17 2004,

18 *Plaintiffs,*

19 vs.

20 DESERT CREMATION SOCIETY, INC., a
21 California corporation; WIEFELS & SON, a
22 California corporation; WIEFELS & SON II,
23 INC., a California corporation; WIEFELS FD,
24 INC., a California corporation; and DOES 1-50,
25 inclusive,

26 *Defendants.*

Case No.

CIV SB 2116545

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

JURY TRIAL DEMANDED

BY FAX



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ADDITIONAL ATTORNEY FOR PLAINTIFFS

Walter Haines (SBN 71075)
whaines@uelglaw.com
UNITED EMPLOYEES LAW GROUP
5500 Bolsa Ave, Suite 201
Huntington Beach, CA 92649
Telephone: (562) 256-1047
Facsimile: (562) 256-1006



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 Plaintiffs, AARON SALAZAR and ANDREW FORREST (collectively “Plaintiffs”), on
2 behalf of themselves, the State of California, and other Aggrieved Employees, complain and
3 allege as follows:

4 **I. INTRODUCTION**

5 1. Plaintiffs bring this representative action based on alleged violations of the
6 California Labor Code and Industrial Welfare Commission Order No. 9-2001 (hereafter “the
7 Wage Order”), against Defendants DESERT CREMATION SOCIETY, INC., a California
8 corporation doing business as All Caring Cremations and All Caring Solutions, WIEFELS &
9 SON, a California corporation, WIEFELS & SON II, a California corporation doing business as
10 All California Cremation, WIEFELS FD, INC., a California corporation, and DOES 1-50,
11 inclusive (collectively “Defendants”).

12 2. As set forth in more detail below, Plaintiffs allege that Defendants are liable to
13 them, the State of California, and other similarly situated and aggrieved current and former
14 employees who worked in California as hourly, non-exempt employees, for civil penalties and
15 other related relief. These claims are based on Defendants’ failures to: (1) Pay all wages for all
16 hours at the correct rates of; (2) Provide all rest and meal periods; (3) Indemnify for necessary
17 work-related expenditures; (4) Provide accurate written wage statements; (5) Timely pay wages
18 during and upon termination of employment and; (6) Maintain accurate employment records.
19 Accordingly, Plaintiffs now seek to recover civil penalties and related relief through this
20 representative action.

21 **II. JURISDICTION AND VENUE**

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

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

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

6. Venue is proper in San Bernardino County pursuant to California Code of Civil
Procedure § 395(a) and § 395.5 in that liability arose in San Bernardino County because at least
some of the transactions that are the subject matter of this Complaint occurred therein and/or



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 because each defendant is found, maintains offices, transacts business, and/or has an agent
2 therein.

3 **III. THE PARTIES**

4 7. Plaintiff, AARON SALAZAR is a natural person and resident of the State of
5 California.

6 8. Plaintiff, ANDREW FORREST is a natural person and resident of the State of
7 California.

8 9. At all relevant times, Plaintiffs were “employees” within the meaning of Title 8
9 California Code of Regulations § 11090 and “aggrieved employees” within the meaning of Labor
10 Code § 2699(c).

11 10. Defendant DESERT CREMATION SOCIETY, INC., is a corporation organized
12 and existing under the laws of California and a citizen of California based on Plaintiffs’
13 information and belief. DESERT CREMATION SOCIETY, INC. is doing business in California
14 as All Caring Cremations and All Caring Solutions.

15 11. Defendant WIEFELS & SON is a corporation organized and existing under the
16 laws of California and a citizen of California based on Plaintiffs’ information and belief.

17 12. Defendant WIEFELS & SON II, INC., is a corporation organized and existing
18 under the laws of California and a citizen of California based on Plaintiffs’ information and belief.
19 WIEFELS & SON II, INC. is doing business in California as All California Cremation.

20 13. Defendant WIEFELS FD, INC., is a corporation organized and existing under the
21 laws of California and a citizen of California based on Plaintiffs’ information and belief.

22 14. Plaintiffs are ignorant of the true names, capacities, relationships, and extents of
23 participation in the conduct alleged herein of the Defendants sued as DOES 1-50, inclusive, but
24 are informed and believe and thereon allege that said Defendants are legally responsible for the
25 wrongful conduct alleged herein and therefore sues these Defendants by such fictitious names.
26 Plaintiffs will amend the Complaint to allege the true names and capacities of the DOE
27 Defendants when ascertained.

28 15. Plaintiffs are informed and believe that each Defendant acted in all respect
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 that the acts of each Defendant are legally
attributable to each of the other Defendants.



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 **A. THE AGGRIEVED EMPLOYEES**

2 16. The “Aggrieved Employees” are all individuals currently and formerly employed
3 by Defendants in California, as hourly, non-exempt employees, including, but not limited to
4 transport specialists, and persons in comparable positions, at any time during the period of March
5 19, 2020 and entry of judgment (“the PAGA Period”).

6 17. Plaintiffs are informed and believe and thereon allege that, at all relevant times
7 herein, all Defendants were the agents, employees and/or servants, masters or employers of the
8 remaining defendants, and in doing the things hereinafter alleged, were acting within the course
9 and scope of such agency or employment, and with the approval and ratification of each of the
10 other Defendants.

11 18. At all relevant times, in perpetrating the acts and omissions alleged herein,
12 Defendants, and each of them, acted pursuant to and in furtherance of a policy, practice, or a lack
13 of a practice which resulted in Defendants not paying Plaintiffs and the other Aggrieved
14 Employees in accordance with applicable California labor laws as alleged herein.

15 19. Plaintiffs are informed and believe and thereon allege that each and every one of
16 the acts and omissions alleged herein were performed by, and/or attributable to, all Defendants,
17 each acting as agents and/or employees, and/or under the direction and control of each of the other
18 defendants, and that said acts and failures to act were within the course and scope of said agency,
19 employment, and/or direction and control.

20 **IV. FACTUAL ALLEGATIONS**

21 20. In approximately September 2017, Plaintiff Salazar began working for
22 Defendants as an hourly transport specialist. Defendants employed him continuously from that
23 date until on or about June 16, 2020, when his employment ended.

24 21. In approximately February 2020, Plaintiff Forrest began working for Defendants
25 located at 272 South Mountain View Ave, San Bernardino, as an hourly transport specialist.
26 Since his hire date, Forrest has continuously worked for Defendants and is still employed in that
27 capacity.

28 22. At all relevant times, Defendants issued wages to Plaintiffs and the Aggrieved
Employees on a semi-monthly basis and paid them at an hourly rate of pay. At all relevant times,
Defendants classified Plaintiffs and the Aggrieved Employees as non-exempt employees entitled
to the protections of both the Labor Code and the Wage Order.



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 23. At all relevant times, Plaintiffs and the Aggrieved Employees have worked over
2 eight (8) hours in one workday and/or over 40 hours in one workweek. Despite this, Defendants
3 failed to provide Plaintiffs and the Aggrieved Employees with all timely rest and meal periods
4 pursuant to California law. Due to the workload and low staffing levels, Defendants denied
5 Plaintiffs and the Aggrieved Employees their 30-minute duty-free meal period within the first
6 Five (5) hours of work. Defendants frequently forced Plaintiffs and the Aggrieved Employees to
7 forego timely, duty-free 30-minute meal periods by assigning them more time-sensitive work
8 than they could reasonably expect Plaintiffs and the Aggrieved Employees to complete within
their first five hours of work.

9 24. At all relevant times, Defendants failed to authorize and permit Plaintiffs and the
10 Aggrieved Employees to take rest periods in violation of California law. Due to high workload
11 and low staffing levels, Defendants failed to authorize and permit Plaintiffs and the Aggrieved
12 Employees to take 10-minute, paid, duty-free rest breaks every four (4) hours worked or major
13 fraction thereof. Defendants did not seek an exemption from the rest period protections of the
14 Wage Order from the California Division of Labor Standards Enforcement. Furthermore,
15 Defendants failed to pay premium wages for days on which they failed to provide Plaintiffs and
16 the Aggrieved Employees with timely rest breaks and/or meal periods in compliance with
California law.

17 25. At all relevant times, Defendants required Plaintiffs and the Aggrieved Employees
18 to work on-call shifts. Defendants often required Plaintiffs and the Aggrieved Employees to
19 remain on-call 24 hours a day, for up to seven (7) days a week. However, Defendants did not pay
20 Plaintiffs and the Aggrieved Employees minimum, overtime, and double-time wages for such
21 calls. During such on-call shifts, Defendants restricted Plaintiffs and the Aggrieved Employees
22 in the types of activities they could perform and required them to stay available for additional
23 work duties at all times. Defendants prohibited Plaintiffs and the Aggrieved Employees from
24 consuming alcohol during the on-call shifts, and required them to stay within approximately a
25 25-mile radius of Defendants' office. Also, during these on-call periods, Defendants required
26 Plaintiffs and the Aggrieved Employees to monitor their phones for work-related calls at all
27 times. Defendants required Plaintiffs and the Aggrieved Employees to respond and travel to
28 Defendants office within 30 minutes of such calls, and subsequently to the assigned locations
within 30 minutes. Defendants, however, compensated the Aggrieved Employees only after they



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 arrived to the assigned locations, and only for the period they worked at the assigned location.
2 Consequently, Defendants failed to compensate Plaintiffs and the Aggrieved Employees for all
3 hours spent on-call. Plaintiff Salazar complained to management about Defendants' Labor Code
4 and Wage Order violations. Defendants took no action to resolve his complaints.

5 26. At all relevant times, Defendants required Plaintiffs and the Aggrieved Employees
6 to incur certain business expenses in the course of performing their duties. Defendants required
7 Plaintiffs and the Aggrieved Employees to use their personal cell phones in the course of
8 performing their duties. Defendants communicated with Plaintiffs and the Aggrieved Employees
9 by phone regarding work instructions, scheduling, or to resolve work-related issues and did not
10 provide mobile phones or an alternative to them for this purpose. Additionally, Defendants did
11 not reimburse Plaintiffs and the Aggrieved Employees for their cell phone expenses.

12 27. As a result of these aforementioned violations, Defendants failed to provide
13 Plaintiffs and the Aggrieved Employees with accurate written wage statements; failed to pay
14 them all wages earned during employment; and failed to maintain accurate employee records
15 with respect to Plaintiffs and the Aggrieved Employees as required under California law.

16 28. For the reasons stated herein, Plaintiffs allege that as a result of Defendants'
17 unlawful practice and policies, Plaintiffs and the Aggrieved Employees were:

- 18 A. Not provided with all timely and off duty meal periods;
- 19 B. Not provided with all rest break periods as required by law;
- 20 C. Not paid one hour's pay for each workday in which Defendants failed to
21 provide them with one or more timely rest periods;
- 22 D. Not paid one hour's pay for each workday in which Defendants failed to
23 provide them with one or more timely meal periods;
- 24 E. Not paid for all hours worked at the correct rates of pay;
- 25 F. Not indemnified for all necessary business expenditures incurred during
26 the discharge of their duties;
- 27 G. Not provided with accurate and complete wage statements; and
- 28 H. Not timely paid all earned and unpaid wages during their employment with
Defendants and at the time such employment ended.

V. FIRST (AND ONLY) CAUSE OF ACTION

CIVIL PENALTIES



(Lab. Code §§ 2698, *et seq.*)

(By Plaintiffs, on behalf of themselves and the other Aggrieved Employees,
against all Defendants)

29. Plaintiffs incorporate all paragraphs of this Complaint as if fully alleged herein.

30. At all relevant times, Plaintiffs and the Aggrieved Employees have been non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

**A. FAILURE TO PAY ALL WAGES EARNED FOR ALL HOURS WORKED AT
THE CORRECT RATES OF PAY**

31. Section 2 of the Wage Order defines “hours worked” as “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so[.]”

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

33. Section 3 of the Wage Order states:

(A) Daily Overtime - General Provisions

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

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

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



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one-fortieth (1/40) of the employee's weekly salary.

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

35. Labor Code section 510 states:

Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work.

36. California Labor Code § 1194 invalidates any agreement between an employer and an employee to work for less than the minimum or overtime wage required under the applicable Wage Order.

37. California Labor Code § 1197 makes it unlawful for an employer to pay an employee less than the minimum wage required under the applicable Wage Order for all hours worked during a payroll period.

38. California Labor Code § 1198 makes it unlawful for an employer to employ an employee under conditions that violate the Wage Order.

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

1 40. Plaintiffs are informed and believe that, at all relevant times, Defendants have
2 applied centrally devised policies and practices to them and the Aggrieved Employees with
3 respect to working conditions and compensation arrangements.

4 41. At all relevant times during the applicable limitations period, Defendants paid
5 Plaintiffs and the Aggrieved Employees at an hourly rate on a bi-weekly basis.

6 42. At all relevant times during the applicable limitations period, Defendants failed
7 to compensate Plaintiffs and the Aggrieved Employees for all hours worked, including, but not
8 limited to overtime wages during on-call shifts for all overtime hours they worked at the correct
9 rates of pay.

10 43. Plaintiffs are informed and believe and thereon allege that, at all relevant times,
11 Defendants have maintained a policy, practice, or a lack of a policy which resulted in Defendants'
12 failure to compensate the Aggrieved Employees for all hours worked, including, but not limited
13 to, regular and overtime hours at the correct rates of pay.

14 **B. FAILURE TO PROVIDE REST BREAKS AND MEAL PERIODS**

15 44. In relevant part, California Labor Code § 1198 states:

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

21 45. In relevant part, In relevant part, California Labor Code § 512 states:

22 An employer shall not employ an employee for a work period of
23 more than five hours per day without providing the employee with
24 a meal period of not less than 30 minutes, except that if the total
25 work period per day of the employee is no more than six hours, the
26 meal period may be waived by mutual consent of both the
27 employer and employee.

28 An employer shall not employ an employee for a work period of
more than 10 hours per day without providing the employee with
a second meal period of not less than 30 minutes, except that if the
total hours worked is no more than 12 hours, the second meal
period may be waived by mutual consent of the employer and the
employee only if the first meal period was not waived.

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



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Rest Periods

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

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

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

Meal Periods

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by mutual consent of the employee and the employee.

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an “on duty” meal period and counted as time worked. An on-duty” meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the

1 employer shall pay the employee one (1) hour of pay at the
2 employee's regular rate of compensation for each workday that the
3 meal period is notprovided.

4 48. In relevant part, California Labor Code § 226.7 states:

5 (b) An employer shall not require an employee to work during
6 a meal or rest period mandated pursuant to an applicable statute,
7 or applicable regulation, standard, or order of the Industrial
8 Welfare Commission, the Occupational Safety and Health
9 Standards Board, or the Division of Occupational Safety and
10 Health.

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

20 49. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiffs and the
21 Aggrieved Employees were entitled to uninterrupted meal periods of at least 30 minutes for each
22 day they worked five or more hours. Pursuant to California Labor Code § 512, they were also
23 entitled to a second 30-minute meal period when they worked more than 10 hours in a workday.

24 50. Pursuant to the Wage Order, Plaintiffs and the Aggrieved Employees were
25 entitled to be provided with net rest breaks of at least ten minutes for each four-hour period of
26 work, or major fraction thereof.

27 51. Defendants intentionally failed to provide Plaintiffs and the Aggrieved
28 Employees with all required timely 30-minute duty free meal periods and 10-minute rest periods
free from any work duties in accordance with the Wage Order.

52. At all relevant times, Plaintiffs and the Aggrieved Employees have worked over
eight (8) hours in one workday and/or over 40 hours in one workweek. Despite this, Defendants
failed to provide Plaintiffs and the Aggrieved Employees with all timely rest and meal periods
pursuant to California law. Due to the workload and low staffing levels, Defendants denied
Plaintiffs and the Aggrieved Employees their 30-minute duty-free meal period within the first



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 five (5) hours of work. Defendants frequently forced Plaintiffs and the Aggrieved Employees to
2 forego timely, duty-free 30-minute meal periods by assigning them more time-sensitive work
3 than they could reasonably expect Plaintiffs and the Aggrieved Employees to complete within
4 their first five hours of work.

5 53. Furthermore, at all relevant times, due to high workload and low staffing levels
6 Defendants failed to authorize and permit Plaintiffs and the Aggrieved Employees to take 10-
7 minute, paid, duty-free rest breaks every 4 hours worked or major fraction thereof. Defendants
8 did not seek an exemption from the rest period protections of the Wage Order from the California
9 Division of Labor Standards Enforcement. Furthermore, Defendants failed to pay premium
10 wages for days on which they failed to provide Plaintiffs and the Aggrieved Employees with
11 timely rest breaks and/or meal periods in compliance with California law.

12 54. Plaintiffs are informed and believe and thereon allege that, at all relevant times
13 within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy
14 which resulted in Defendants not providing Plaintiffs and the Aggrieved Employees with all off-
15 duty meal periods and rest breaks required by California law.

16 **C. FAILURE TO INDEMNIFY**

17 55. In pertinent part, California Labor Code § 2802(a) states:

18 “An employer shall indemnify his or her employee[s] for all
19 necessary expenditures incurred by the employee in direct
20 consequence of the discharge of his or her duties.”

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

23 57. At all relevant times, as a condition for employment, Defendants required
24 Plaintiffs and the Aggrieved Employees to use their personal cell phones in the course of
25 performing their duties. Defendants communicated with Plaintiffs and the Aggrieved Employees
26 by phone regarding work instructions, scheduling, or to resolve work-related issues and did not
27 provide mobile phones or an alternative to them for this purpose. Additionally, Defendants did
28 not reimburse Plaintiffs and the Aggrieved Employees for their personal cell phone expenses.

58. Plaintiffs are informed and believe and thereon allege that, at all relevant times,
Defendants maintained a policy and/or practice, or lack thereof, which resulted in Defendants’
failure to indemnify Plaintiffs and the Aggrieved Employees for the reasonable expenses they



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 incurred during the course of performing their duties.

2
3 **D. FAILURE TO PROVIDE ACCURATE WRITTEN WAGE STATEMENTS**

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

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

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

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

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

22 D. The name of the employee and only the last four digits of his or his social
23 security number or an employee identification number other than a social security number; and

24 E. The number of piece-rate units earned and the piece rate.

25 61. “Promptly and easily determine,” as stated in California Labor Code § 226(e),
26 means a reasonable person would be able to readily ascertain the information without reference
27 to other documents or information.

28 62. At all relevant times, during the applicable limitations period, Defendants violated
California Labor Code § 226, in that they failed to properly and accurately itemize each and the
Aggrieved Employee’s gross wages earned, net wages earned, the total hours worked, the
corresponding number of hours worked at each rate by the and the Aggrieved Employee and other



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

requirements of California Labor Code § 226.

63. Defendants' failure to provide Plaintiffs and the other Aggrieved Employees with accurate wage statements was knowing and intentional. Defendants had the ability to provide Plaintiffs and the other Aggrieved Employees with accurate wage statements but intentionally provided wage statements that Defendants knew were not accurate.

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

E. UNTIMELY WAGES DURING EMPLOYMENT

65. Labor Code § 204 states

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

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

(2) An employer is in compliance with the requirements of subdivision (a) of Section 226 relating to



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

total hours worked by the employee, if hours worked in excess of the normal work period during the current pay period are itemized as corrections on the paystub for the next regular pay period. Any corrections set out in a subsequently issued paystub shall state the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked.

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

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

66. Defendants paid wages to employees on regular intervals. Defendants, however, failed to pay Plaintiffs on such intervals for all wages earned for all hours worked including, but not limited to, all premium wages for all rest breaks and/or timely, off-duty meal periods that were not provided. On information and belief, Plaintiffs allege that Defendants also failed to pay the Aggrieved Employees on such intervals for all wages earned and all hours worked.

F. UNTIMELY FINAL WAGES

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

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

69. Labor Code section 203 provides that the wages of an employee continue on a daily basis as a penalty for up to 30 days where an employer willfully fails to timely pay earned and unpaid wages to the employee in accordance with Labor Code section 201 or 202.

70. By failing to pay earned minimum and premium wages to Plaintiffs and the Aggrieved Employees, Defendants failed to timely pay them all earned and unpaid wages in violation of Labor Code § 201 or § 202.

71. Plaintiffs are informed and believes that Defendants' failures to timely pay



1 Plaintiffs and the Aggrieved Employees all of their earned and unpaid wages have been willful in
2 that, at all relevant times, Defendants have deliberately maintained policies and practices that
3 violate the requirements of the Labor Code and the Wage Order, even though at all relevant times,
4 they have had the ability to comply with those legal requirements.

5 **G. FAILURE TO MAINTAIN ACCURATE EMPLOYMENT RECORDS**

6 72. Labor Code § 1174 states:

7 Every person employing labor in this state shall:

8 ...

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

11 (d) Keep, at a central location in the state or at the plants or establishments
12 at which employees are employed, payroll records showing the hours worked
13 daily by and the wages paid to, and the number of piece-rate units earned by
14 and any applicable piece rate paid to, employees employed at the respective
15 plants or establishments. These records shall be kept in accordance with rules
16 established for this purpose by the commission, but in any case shall be kept
17 on file for not less than three years. An employer shall not prohibit an
18 employee from maintaining a personal record of hours worked, or, if paid on
19 a piece-rate basis, piece-rate units earned.

20 73. Labor Code § 1174.5 states:

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

26 74. Section 7 of the Wage Order states,

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

1. Full name, home address, occupation, and social security number.
2. Birth date, if under 18 years, and designation as a minor.
3. Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
4. Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
5. Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

6. When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

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

76. On information and belief, Defendants have willfully failed to maintain the records required by § 1174 and Wage Order, including, but not limited to, the total premium wages earned for missed meal and rest periods owed to Plaintiffs and the Aggrieved Employees.

H. CIVIL PENALTIES SOUGHT

77. During the applicable time period, Defendants violated California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, and 2802.

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

79. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiffs and the Aggrieved Employees are entitled to recover civil penalties for each of the Defendants' violations of California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, and 2802 during the applicable limitations period in the following amounts:

A. For violations of California Labor Code § 204, one hundred dollars (\$100.00) for each Aggrieved Employee for each initial violation and two hundred dollars (\$200.00) for each aggrieved employee for each subsequent, willful or intentional violation (penalty amounts established by California Labor Code § 210).

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

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

D. For violations of California Labor Code § 1174, five hundred dollars (\$500.00) for each Aggrieved Employee for each violation (penalty amounts established by



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 Labor Code § 1174.5).

2 E. For violations of California Labor Code § 1197, one hundred dollars
3 (\$100.00) for each Aggrieved Employee for each initial and intentional violation and two
4 hundred fifty dollars (\$250.00) for each and the Aggrieved Employee for each subsequent
5 violation, per pay period (regardless of whether the initial violations were intentionally
6 committed) (penalty amounts established by California Labor Code § 1197.1).

7 F. For violations of California Labor Code §§ 201, 202, 203, 226.7, 1194,
8 1198, and 2802, one hundred dollars (\$100.00) for each aggrieved employee per pay period for
9 each initial violation and two hundred dollars (\$200.00) for each aggrieved employee per pay
10 period for each subsequent violation (penalty amounts established by California Labor Code
11 § 2699(f)(2)).

12 **I. NOTICE TO THE STATE OF CALIFORNIA AND DEFENDANTS**

13 80. Plaintiffs have complied with the procedures for bringing suit specified in
14 California Labor Code § 2699.3. By letter dated March 19, 2021, Plaintiff Salazar gave written
15 notice by certified mail to the Labor and Workforce Development Agency (“LWDA”) and
16 Defendants of the specific provisions of the California Labor Code alleged to have been violated,
17 including the facts and theories to support the alleged violations. By letter dated April 5, 2021,
18 Plaintiff Forrest gave written notice by certified mail to the LWDA and Defendants of the specific
19 provisions of the California Labor Code alleged to have been violated, including the facts and
20 theories to support the alleged violations. True and correct copies of Plaintiffs’ letters to the
21 LWDA dated March 19, 2021 and April 5, 2021, are collectively attached hereto as Exhibit A.
22 The LWDA has not responded to Plaintiffs’ letters.

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

26 **VI. PRAYER FOR RELIEF**

27 82. WHEREFORE, Plaintiffs, on behalf of themselves and the Aggrieved Employees,
28 prays for relief and judgment against Defendants as follows:

- A. Civil penalties;
- B. Costs of suit;
- C. Reasonable attorneys’ fees; and



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

D. Such other relief as the Court deems just and proper.

VII. DEMAND FOR JURY TRIAL

Plaintiffs, on behalf of themselves and all other Aggrieved Employees, hereby demands a jury trial on all issues so triable.

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: June 11, 2021

By: 
DAVID SPIVAK
CAROLINE TAHMASSIAN,
MAYA CHEAITANI, Attorneys for Plaintiffs,
AARON SALAZAR and ANDREW
FORREST, and all others similarly
situated



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

EXHIBIT A



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

March 19, 2021

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

RE: *Aaron Salazar / Desert Cremation Society*

To whom it may concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Aaron Salazar (hereafter “Salazar”) provides notice on behalf of himself and of all individuals currently and formerly employed in California as non-exempt, hourly employees, including but not limited to transport specialists, and persons in similar positions, (hereafter referred to as “Aggrieved Employees,”) by Desert Cremation Society, Inc., a California corporation doing business as All Caring Cremations and All Caring Solutions, Wiefels & Son, a California corporation, Wiefels & Son II, Inc., a California corporation doing business as All California Cremation, and Wiefels FD, Inc., a California corporation (hereafter collectively referred to as “DCS”) of violations of California Labor Code §§ 201, 202, 203, 204, 226, 510, 512, 1174, 1194, 1197, 1198, and 2802.

At all relevant times, DCS has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Salazar and the Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission Order No. 9-2001 (hereafter “the Wage Order”), paragraph 2, subdivision (F), and “Aggrieved Employees” within the meaning of California Labor Code § 2699(c).

Statement of Facts

In approximately September 2017, Salazar began working for DCS as an hourly transport specialist. DCS employed him continuously from that date until on or about June 16, 2020, when his employment ended.

At all relevant times, DCS issued wages to Salazar and the Aggrieved Employees on a bi-monthly basis and paid them at an hourly rate of pay. At all relevant times, DCS classified Salazar and the Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all relevant times, Salazar and the Aggrieved Employees have worked over 8 hours in one workday and/or over 40 hours in one workweek. Despite this, DCS failed to provide Salazar and the Aggrieved Employees with all timely rest and meal periods pursuant to California law, including, but not limited to, two timely 30-minute uninterrupted meal periods and three 10-minute rest periods on workdays they worked more than 10 hours. Further, due to the workload and low staffing levels, DCS denied Salazar and the Aggrieved Employees their 30-minute duty-free meal period within the first 5 hours of work. DCS frequently forced Salazar and the Aggrieved Employees to forgo timely, duty-free 30-minute meal periods by assigning them more time-sensitive work than it could reasonably expect them to complete within their first five hours of work.

At all relevant times, DCS failed to authorize and permit Salazar and the Aggrieved Employees with rest periods in violation of California law. Due to high workload and low staffing levels, DCS failed to authorize and permit Salazar and the Aggrieved Employees to take 10-minute, paid, duty-free rest breaks every 4 hours worked or major fraction thereof. DCS did not seek an exemption from the rest period protections of the Wage Order from the California Divisions of Labor Standards Enforcement. Furthermore, DCS failed to pay premium wages for days on which it failed to provide Salazar and the Aggrieved Employees with timely rest breaks and/or meal periods in compliance with California law.

At all relevant times, DCS required Salazar and the Aggrieved Employees to work on-call shifts. DCS often required Salazar and the Aggrieved Employees to remain on-call 24 hours a day, 5 days a week. However, DCS did not pay Salazar and the Aggrieved Employees minimum, overtime, and double-time wages for such calls. During such on-call shifts, DCS restricted Salazar and the Aggrieved Employees in the types of activities they could perform and required them to stay available at all times. DCS prohibited Salazar and the Aggrieved Employees from consuming alcohol during the waiting periods of on-call shifts, and required them to stay within 30-minute driving distance from their work area. DCS required Salazar and the Aggrieved Employees to monitor their phones for work-related calls at all times. DCS required Salazar and the Aggrieved Employees to respond and show-up to the DCS office within 30-minutes of such calls, and subsequently to the assigned locations within 30-minutes. DCS, however, compensated the employees only when they arrived to the assigned locations, and only for the period they actually worked. Consequently, DCS failed to compensate Salazar and the Aggrieved Employees for all hours spent on-call. Salazar complained to management about DCS' Labor Code and Wage Order violations. DCS took no action to resolve his complaints.

At all relevant times, DCS required Salazar and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. DCS required Salazar and the Aggrieved Employees to use their personal cell phones in the course of performing their duties. DCS communicated with Salazar and the Aggrieved Employees by phone regarding work instructions, scheduling, or to resolve work-related issues and did not provide mobile phones or an alternative to them for this purpose. Additionally, DCS did not reimburse Salazar and the Aggrieved Employees for their cell phone expenses.

As a result of these aforementioned violations, DCS failed to provide Salazar and the Aggrieved Employees with accurate written wage statements; failed to pay them all wages earned during employment; and failed to maintain accurate employee records with respect to Salazar and the Aggrieved Employees as required under California law.

For the reasons herein, on behalf of himself and the Aggrieved Employees, Salazar alleges that DCS committed the following violations of California Labor Code and the Wage Order,:

- a) DCS failed to provide Salazar and other Aggrieved Employees with all rest breaks and meal periods;
- b) DCS failed to compensate Salazar and other Aggrieved Employees at one hour's pay for each day in which they were not provided the rest breaks required by law;
- c) DCS failed to compensate Salazar and other Aggrieved Employees at one hour's pay for each day in which they were not provided the meal periods required by law;
- d) DCS failed to compensate Salazar and other Aggrieved Employees for all hours worked at the correct rates of pay;
- e) DCS failed to indemnify Salazar and other Aggrieved Employees for all business expenses;
- f) DCS failed to provide Salazar and other Aggrieved Employees with accurate wage statements; and
- g) DCS failed to timely pay Salazar and other Aggrieved Employees all earned and unpaid wages during their employment at DCS and at the time such employment ended.

Accordingly, Salazar now seeks civil penalties on behalf of himself and other Aggrieved Employees based on DCS' alleged violations of the California Labor Code and the Wage Order.

The Wage Order

The Wage Order applies to:

“all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis...” (§1). Per §2 (P): “Transportation Industry” means any industry, business or establishment operated for the **purpose of conveying persons or property from one place to another** whether by rail, highway, air or water and all operations and services in connection therewith; and also includes storing or warehousing of goods or property and the repairing, parking, rental, maintenance or cleaning of vehicles.” (emphasis added).

At all relevant times during the applicable limitations period, DCS operated cremation and funeral services, including decedent transportation. Accordingly, Salazar and the Aggrieved Employees are entitled to the protections provided by the Wage Order.

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

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six

hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was no waived.

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

Meal Periods:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee...

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal

period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

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

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

Rest Periods:

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states:

- (b) 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, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

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

DCS intentionally and improperly failed to provide all timely duty-free rest breaks and/or meal periods to Salazar and the Aggrieved Employees as required by law, including but not limited to, second meal periods and third rest periods on days they work directly or are on-call for more than 10 hours in a workday. DCS did not pay premium wages to Salazar and the Aggrieved Employees on days it did not provide them with one or more timely meal and rest periods as required by California law. In failing to do so, DCS violated the provisions of California Labor Code §§ 226.7, 512, and 1198.

Accordingly, Salazar seeks civil penalties on behalf of himself and other Aggrieved Employees as follows:

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.7, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in

addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and

3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

Under Labor Code § 1197, “The minimum wage for employees fixed by the [Industrial Welfare] commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful.”

Section 4 of Wage Order states,

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

In relevant part, Section 2 of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

In relevant part, California Labor Code § 1194 states,

(a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to

recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

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

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

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours

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

At all relevant times during the applicable limitations period, DCS failed to compensate Salazar and other Aggrieved Employees for all hours worked, including, but not limited to overtime wages during on-call shifts for all overtime hours they worked at the correct rates of pay.

Accordingly, Salazar seeks civil penalties on behalf of himself and other Aggrieved Employees as follows:

1. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 510, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558);
2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1194, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)); and
4. \$100 for each Aggrieved Employee for each initial and intentional violation of California Labor Code § 1197, and \$250 for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were

intentionally committed), in addition to an amount sufficient to recover unpaid wages (penalties set by California Labor Code § 1197.1).

Failure to Reimburse for Expenses
(Lab. Code §§ 2802)

In pertinent part, California Labor Code § 2802(a) states, “An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.”

As describe above, during the applicable limitations period, DCS required Salazar and other Aggrieved Employees to incur certain business expenses which it failed to indemnify them for both during and after their employment ended. Accordingly, Salazar seeks civil penalties on behalf of himself and other Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 2802, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

California Labor Code § 226 require employers to furnish employees with accurate itemized written wage statements showing:

- 1) gross wages earned,
- 2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission,
- 3) the number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis,

- 4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item,
- 5) net wages earned,
- 6) the inclusive dates of the period for which the employee is paid,
- 7) the name of the employee and his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement,
- 8) the name and address of the legal entity that is the employer, and
- 9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

At relevant times during the applicable limitations period, DCS violated California Labor Code § 226, in that it failed to properly and accurately itemize each Aggrieved Employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the Aggrieved Employee and other requirements of California Labor Code § 226.

Accordingly, Salazar seeks civil penalties on behalf of himself and Aggrieved Employees as follows: \$250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

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

California Labor Code § 204 states all wages (other than those mentioned in Labor Code sections 201–202) earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed,

and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. In addition, all wages for work performed in excess of the normal work period must be paid by no later than the following regular payday.

As a result of the above described violations, DCS failed to pay Salazar and the Aggrieved Employees within the time periods set by California Labor Code § 204 in that it failed to pay them for all hours worked at the correct rates of pay and failed to pay them premium wages for days on which it failed to provide them with one or more rest or meal periods.

Accordingly, Salazar seeks civil penalties on behalf of himself and Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204, and \$200 for each Aggrieved Employee, plus 25% of the amount unlawfully withheld from each Aggrieved Employee, for each subsequent violations (penalties set by Labor Code § 210).

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

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

Under Labor Code § 203, if an employer willfully fails to pay, without abatement or reduction, in accordance §§ 201 and 202, any wages of an

employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

DCS failed to pay Salazar and the Aggrieved Employees whose employment ended all of the earned but unpaid wages described above by the conclusion of their employment with DCS. By failing to pay Salazar and the Aggrieved Employees as set forth above by such time, DCS is liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of himself and the Aggrieved Employees, Salazar seeks civil penalties from DCS as follows:

1. For violations of Labor Code § 201, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 201 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 201 occurred (penalties set by Labor Code § 2699(f)(2));
2. For violations of Labor Code § 202, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 202 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 202 occurred (penalties set by Labor Code § 2699(f)(2)); and
3. For violations of Labor Code § 203, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 203 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 203 occurred (penalties set by Labor Code § 2699(f)(2)).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174 and 1198)

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

Every person employing labor in this state shall:

...

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

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code section 1174.5 states:

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

Section 7 of the Wage Order states,

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

- (B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions

made on written orders of the employee may be aggregated and shown as one item.

- (C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.
- (D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

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

DCS has failed to maintain the records required by section 1174 and the Wage Order, including but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Salazar and the Aggrieved Employees. Accordingly, Salazar seeks civil penalties on behalf of himself and the other aggrieved employees as follows:

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

Conclusion

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

Sincerely,



David Spivak, Esq.

david@spivaklaw.com

cc: Walter Haines, Esq.
Aaron Salazar

Desert Cremation Society, Inc. dba All Caring Cremations, and All
Caring Solutions
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

Wiefels & Son
c/o Mark J. Matthews
Agent for Service of Process
630 S Vella Rd
Palm Springs, CA 92264

Wiefels & Son II, Inc. dba All California Cremation
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

LWDA / DCS

3/19/2021

Page 20 of 20

Wiefels FD, Inc.
c/o Michael J. Wiefels
Agent for Service of Process
50 East Nicolet St
Banning, CA 92220



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION, CERTIFIED MAIL, AND EMAIL

April 5, 2021

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

RE: *Andrew Forrest / Desert Cremation Society*

To whom it may concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Andrew Forrest (hereafter “Forrest”) provides notice on behalf of himself and of all individuals currently and formerly employed in California as non-exempt, hourly employees, including but not limited to transport specialists, and persons in similar positions, (hereafter referred to as “Aggrieved Employees,”) by Desert Cremation Society, Inc., a California corporation doing business as All Caring Cremations and All Caring Solutions, Wiefels & Son, a California corporation, Wiefels & Son II, Inc., a California corporation doing business as All California Cremation, and Wiefels FD, Inc., a California corporation (hereafter collectively referred to as “DCS”) of violations of California Labor Code §§ 204, 226, 510, 512, 1174, 1194, 1197, 1198, and 2802.

At all relevant times, DCS has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Forrest and the Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission Order No. 9-2001 (hereafter “the Wage

Order”), paragraph 2, subdivision (F), and “Aggrieved Employees” within the meaning of California Labor Code § 2699(c).

Statement of Facts

In approximately February 2020, Forrest began working for DCS located at 272 South Mountain View Ave, San Bernardino, as an hourly transport specialist. Since his hire date, Forrest has continuously worked for DCS and is still employed in that capacity.

At all relevant times, DCS issued wages to Forrest and the Aggrieved Employees on a semi-monthly basis and paid them at an hourly rate of pay. At all relevant times, DCS classified Forrest and the Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all relevant times, Forrest and the Aggrieved Employees have worked over 8 hours in one workday and/or over 40 hours in one workweek. Despite this, DCS failed to provide Forrest and the Aggrieved Employees with all timely rest and meal periods pursuant to California law. Further, due to the workload and low staffing levels, DCS denied Forrest and the Aggrieved Employees their 30-minute duty-free meal period within the first 5 hours of work. DCS frequently forced Forrest and the Aggrieved Employees to forego timely, duty-free 30-minute meal periods by assigning them more time-sensitive work than it could reasonably expect them to complete within their first five hours of work.

At all relevant times, DCS failed to authorize and permit Forrest and the Aggrieved Employees with rest periods in violation of California law. Due to high workload and low staffing levels, DCS failed to authorize and permit Forrest and the Aggrieved Employees to take 10-minute, paid, duty-free rest breaks every 4 hours worked or major fraction thereof. DCS did not seek an exemption from the rest period protections of the Wage Order from the California Division of Labor Standards Enforcement. Furthermore, DCS failed to pay premium wages for days on which it failed to provide Forrest and the

Aggrieved Employees with timely rest breaks and/or meal periods in compliance with California law.

At all relevant times, DCS required Forrest and the Aggrieved Employees to work on-call shifts. DCS often required Forrest and the Aggrieved Employees to remain on-call 24 hours a day, for up to 7 days a week. However, DCS did not pay Forrest and the Aggrieved Employees minimum, overtime, and double-time wages for such calls. During such on-call shifts, DCS restricted Forrest and the Aggrieved Employees in the types of activities they could perform and required them to stay available for additional work duties at all times. DCS prohibited Forrest and the Aggrieved Employees from consuming alcohol during the on-call shifts, and required them to stay within approximately a 25-mile radius of DCS's offices. Also during these on-call periods, DCS required Forrest and the Aggrieved Employees to monitor their phones for work-related calls at all times. DCS required Forrest and the Aggrieved Employees to respond and travel to the DCS office within 30 minutes of such calls, and subsequently to the assigned locations within 30 minutes. DCS, however, compensated the Aggrieved Employees only when they arrived to the assigned locations, and only for the period they worked at the assigned location. Consequently, DCS failed to compensate Forrest and the Aggrieved Employees for all hours spent on-call.

At all relevant times, DCS required Forrest and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. DCS required Forrest and the Aggrieved Employees to use their personal cell phones in the course of performing their duties. DCS communicated with Forrest and the Aggrieved Employees by phone regarding work instructions, scheduling, or to resolve work-related issues and did not provide mobile phones or an alternative to them for this purpose. Additionally, DCS did not reimburse Forrest and the Aggrieved Employees for their cell phone expenses.

As a result of these aforementioned violations, DCS failed to provide Forrest and the Aggrieved Employees with accurate written wage statements; failed to pay them all wages earned during employment; and failed to maintain accurate

employee records with respect to Forrest and the Aggrieved Employees as required under California law.

For the reasons herein, on behalf of himself and the Aggrieved Employees, Forrest alleges that DCS committed the following violations of California Labor Code and the Wage Order,:

- a) DCS failed to provide Forrest and other Aggrieved Employees with all rest breaks and meal periods;
- b) DCS failed to compensate Forrest and other Aggrieved Employees at one hour's pay for each day in which they were not provided the rest breaks required by law;
- c) DCS failed to compensate Forrest and other Aggrieved Employees at one hour's pay for each day in which they were not provided the meal periods required by law;
- d) DCS failed to compensate Forrest and other Aggrieved Employees for all hours worked at the correct rates of pay;
- e) DCS failed to indemnify Forrest and other Aggrieved Employees for all business expenses;
- f) DCS failed to provide Forrest and other Aggrieved Employees with accurate wage statements; and
- g) DCS failed to timely pay Forrest and other Aggrieved Employees all earned and unpaid wages during their employment at DCS.

Accordingly, Forrest now seeks civil penalties on behalf of himself and other Aggrieved Employees based on DCS' alleged violations of the California Labor Code and the Wage Order.

///

The Wage Order

The Wage Order applies to:

“all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis...” (§1). Per §2 (P): “Transportation Industry” means any industry, business or establishment operated for the **purpose of conveying persons or property from one place to another** whether by rail, highway, air or water and all operations and services in connection therewith; and also includes storing or warehousing of goods or property and the repairing, parking, rental, maintenance or cleaning of vehicles.” (emphasis added).

At all relevant times during the applicable limitations period, DCS operated cremation and funeral services, including decedent transportation. Accordingly, Forrest and the Aggrieved Employees are entitled to the protections provided by the Wage Order.

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

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six

hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was no waived.

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

Meal Periods:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee...

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal

period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

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

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

Rest Periods:

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states:

- (b) 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, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

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

DCS intentionally and improperly failed to provide all timely duty-free rest breaks and/or meal periods to Forrest and the Aggrieved Employees as required by law. DCS did not pay premium wages to Forrest and the Aggrieved Employees on days it did not provide them with one or more timely meal and rest periods as required by California law. In failing to do so, DCS violated the provisions of California Labor Code §§ 226.7, 512, and 1198.

Accordingly, Forrest seeks civil penalties on behalf of himself and other Aggrieved Employees as follows:

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.7, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and

3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

Under Labor Code § 1197, “The minimum wage for employees fixed by the [Industrial Welfare] commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful.”

Section 4 of Wage Order states,

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

In relevant part, Section 2 of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

In relevant part, California Labor Code § 1194 states,

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

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

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

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

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

regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

At all relevant times during the applicable limitations period, DCS failed to compensate Forrest and other Aggrieved Employees for all hours worked, including, but not limited to overtime wages during on-call shifts for all overtime hours they worked at the correct rates of pay.

Accordingly, Forrest seeks civil penalties on behalf of himself and other Aggrieved Employees as follows:

1. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 510, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558);
2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1194, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)); and
4. \$100 for each Aggrieved Employee for each initial and intentional violation of California Labor Code § 1197, and \$250 for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were intentionally committed), in addition to an amount sufficient to recover unpaid wages (penalties set by California Labor Code § 1197.1).

///

Failure to Reimburse for Expenses
(Lab. Code §§ 2802)

In pertinent part, California Labor Code § 2802(a) states, “An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.”

As described above, during the applicable limitations period, DCS required Forrest and other Aggrieved Employees to incur certain business expenses which it failed to indemnify them for both during and after their employment ended. Accordingly, Forrest seeks civil penalties on behalf of himself and other Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 2802, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

California Labor Code § 226 require employers to furnish employees with accurate itemized written wage statements showing:

- 1) gross wages earned,
- 2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission,
- 3) the number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis,
- 4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item,
- 5) net wages earned,
- 6) the inclusive dates of the period for which the employee is paid,

- 7) the name of the employee and his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement,
- 8) the name and address of the legal entity that is the employer, and
- 9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

At relevant times during the applicable limitations period, DCS violated California Labor Code § 226, in that it failed to properly and accurately itemize each Aggrieved Employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the Aggrieved Employee and other requirements of California Labor Code § 226.

Accordingly, Forrest seeks civil penalties on behalf of himself and Aggrieved Employees as follows: \$250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

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

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

As a result of the above described violations, DCS failed to pay Forrest and the Aggrieved Employees within the time periods set by California Labor Code § 204 in that it failed to pay them for all hours worked at the correct rates of pay and failed to pay them premium wages for days on which it failed to provide them with one or more rest or meal periods.

Accordingly, Forrest seeks civil penalties on behalf of himself and Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204, and \$200 for each Aggrieved Employee, plus 25% of the amount unlawfully withheld from each Aggrieved Employee, for each subsequent violations (penalties set by Labor Code § 210).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174 and 1198)

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

Every person employing labor in this state shall:

...

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

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

///

Labor Code section 1174.5 states:

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

Section 7 of the Wage Order states,

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

production record shall be maintained by the employer.

- (B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.
- (C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.
- (D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

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

DCS has failed to maintain the records required by section 1174 and the Wage Order, including but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Forrest and the Aggrieved Employees. Accordingly, Forrest seeks civil penalties on behalf of himself and the other Aggrieved Employees as follows:

///

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

Conclusion

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

Sincerely,



David Spivak, Esq.

david@spivaklaw.com

cc: Walter Haines, Esq.
Andrew Forrest

Desert Cremation Society, Inc. dba All Caring Cremations, and All
Caring Solutions
c/o Orion S. Robinson, Esq.
Robinson Di Lando
801 South Grand Avenue, Suite 500
Los Angeles, CA 90017
orobinson@rdwlaw.com

///

Wiefels & Son
c/o Mark J. Matthews
Agent for Service of Process
630 S Vella Rd
Palm Springs, CA 92264

Wiefels & Son II, Inc. dba All California Cremation
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

Wiefels FD, Inc.
c/o Michael J. Wiefels
Agent for Service of Process
50 East Nicolet St
Banning, CA 92220

EXHIBIT 7

DAVID G. SPIVAK (SBN 179684)

david@spivaklaw.com

CAROLINE TAHMASSIAN (SBN 285680)

caroline@spivaklaw.com

MAYA CHEAITANI (SBN 335777)

maya@spivaklaw.com

THE SPIVAK LAW FIRM

16530 Ventura Blvd., Suite 203

Encino, CA 91436

Telephone (213) 725-9094

Facsimile (213) 634-2485

Attorneys for Plaintiff,

SHELIA CROMWELL, and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

(UNLIMITED JURISDICTION)

SHELIA CROMWELL, as an "aggrieved
employee" on behalf of other similarly situated
"aggrieved employees" under the Labor Code
Private Attorney General Act of 2004,

Plaintiff,

vs.

DESERT CREMATION SOCIETY, INC., a
California corporation doing business as All
Caring Cremations and All Caring Solutions;
WIEFELS & SON, a California corporation;
WIEFELS & SON II, a California corporation
doing business as All California Cremation;
WIEFELS FD, INC., a California corporation;
and DOES 1-50, inclusive,

Defendants.

Case No.: CIVSB2116331

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

JURY TRIAL DEMANDED

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

AUG 17 2021

BY Leanne M. Landeros
LEANNE M. LANDEROS, DEPUTY

BY FAX



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ADDITIONAL ATTORNEY FOR PLAINTIFF

WALTER L. HAINES (SBN 71075)
whaines@uelglaw.com
UNITED EMPLOYEES LAW GROUP, P.C.
4276 Katella Ave., #301
Los Alamitos, CA 90720
Telephone (562) 256-1047
Facsimile (562) 256-1006



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

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

3 **I. INTRODUCTION**

4 1. Plaintiff brings this representative action based on alleged violations of the
5 California Labor Code and Industrial Welfare Commission Order No. 9-2001 (hereafter “the
6 Wage Order”), against Defendants DESERT CREMATION SOCIETY, INC., a California
7 corporation doing business as All Caring Cremations and All Caring Solutions, WIEFELS &
8 SON, a California corporation, WIEFELS & SON II, a California corporation doing business as
9 All California Cremation, WIEFELS FD, INC., a California corporation, and DOES 1-50,
10 inclusive (collectively “Defendants”).

11 2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to
12 her, the State of California, and other similarly situated and aggrieved current and former
13 employees who worked in California as hourly, non-exempt employees, for civil penalties and
14 other related relief. These claims are based on Defendants’ failures to: (1) Provide all rest and
15 meal periods; (2) Indemnify for necessary work-related expenditures; (3) Provide accurate written
16 wage statements; (4) Timely pay wages during and upon termination of employment and; (5)
17 Maintain accurate employment records. Accordingly, Plaintiff now seeks to recover civil
18 penalties and related relief through this representative action.

19 **II. JURISDICTION AND VENUE**

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

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

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

26 6. Venue is proper in San Bernardino County pursuant to California Code of Civil
27 Procedure § 395(a) and § 395.5 in that liability arose in San Bernardino County because at least
28 some of the transactions that are the subject matter of this Complaint occurred therein and/or



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 because each defendant is found, maintains offices, transacts business, and/or has an agent
2 therein.

3 **III. THE PARTIES**

4 7. Plaintiff, an individual and resident of California, on or about October 1, 2018,
5 began working for Defendants as an hourly transport specialist. Defendants employed her
6 continuously from that date until on or about March 18, 2020.

7 8. Defendant DESERT CREMATION SOCIETY, INC., is a corporation organized
8 and existing under the laws of California and a citizen of California based on Plaintiff's
9 information and belief.

10 9. Defendant WIEFELS & SON is a corporation organized and existing under the
11 laws of California and a citizen of California based on Plaintiff's information and belief.

12 10. Defendant WIEFELS & SON II, INC., is a corporation organized and existing
13 under the laws of California and a citizen of California based on Plaintiff's information and belief.

14 11. Defendant WIEFELS FD, INC., is a corporation organized and existing under the
15 laws of California and a citizen of California based on Plaintiff's information and belief.

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

22 **A. THE AGGRIEVED EMPLOYEES**

23 13. The "Aggrieved Employees" are all individuals currently and formerly employed
24 by Defendants in California, as hourly, non-exempt employees, including, but not limited to
25 transport specialists, and persons in comparable positions, at any time during the period of
26 March 17, 2020 and entry of judgment ("the PAGA Period").

27 14. Plaintiff is informed and believes and thereon alleges that, at all relevant times
28 herein, all Defendants were the agents, employees and/or servants, masters or employers of the



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 remaining defendants, and in doing the things hereinafter alleged, were acting within the course
2 and scope of such agency or employment, and with the approval and ratification of each of the
3 other Defendants.

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

8 16. Plaintiff is informed and believes and thereon alleges that each and every one of
9 the acts and omissions alleged herein were performed by, and/or attributable to, all Defendants,
10 each acting as agents and/or employees, and/or under the direction and control of each of the other
11 defendants, and that said acts and failures to act were within the course and scope of said agency,
12 employment, and/or direction and control.

13 **IV. FACTUAL ALLEGATIONS**

14 17. On or about October 1, 2018, Plaintiff began working for Defendants as an hourly
15 transport specialist. Defendants employed her continuously from that date until on or about March
16 18, 2020, when Defendants temporarily suspended Plaintiff's employment because she suffered
17 an injury on the job which caused limited mobility in her left arm, preventing her from performing
18 all work duties. Plaintiff has not since returned to work. Plaintiff last performed her duties for
19 Defendants on or about March 18, 2020.

20 18. At all relevant times, Defendants issued wages to Plaintiff and the Aggrieved
21 Employees on a bi-monthly basis and paid them at an hourly rate of pay. At all relevant times,
22 Defendants classified Plaintiff and the Aggrieved Employees as non-exempt employees entitled
23 to the protections of both the Labor Code and the Wage Order.

24 19. At all relevant times, Plaintiff and the Aggrieved Employees have worked over 8
25 hours in one workday and/or over 40 hours in one workweek. Despite this, Defendants failed to
26 provide Plaintiff and the Aggrieved Employees with all timely rest and meal periods pursuant to
27 California law, including, but not limited to, two timely 30-minute uninterrupted meal periods
28 and three 10-minute rest periods on workdays they worked more than 10 hours. Further, due to



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 the workload and low staffing levels Plaintiff and the Aggrieved Employees were denied their
2 30-minute duty-free meal period within the first 5 hours of work. Defendants frequently forced
3 Plaintiff and the Aggrieved Employees to forgo timely, duty-free 30-minute meal periods by
4 assigning them more time-sensitive work than they could reasonably expect them to complete
5 within their first five hours of work.

6 20. At all relevant times, Defendants failed to authorize and permit Plaintiff and the
7 Aggrieved Employees to take rest periods in violation of California law. Due to high workload
8 and low staffing levels, Defendants failed to authorize and permit Plaintiff and the Aggrieved
9 Employees to take 10-minute, paid, duty-free rest breaks every 4 hours worked or major fraction
10 thereof. Defendants did not seek an exemption from the rest period protections of the Wage Order
11 from the California Divisions of Labor Standards Enforcement. Furthermore, Defendants failed
12 to pay premium wages for days on which they failed to provide Plaintiff and the Aggrieved
13 Employees with timely rest breaks and/or meal periods in compliance with California law.

14 21. At all relevant times, Defendants required Plaintiff and the Aggrieved Employees
15 to incur certain business expenses in the course of performing their duties. Defendants required
16 Plaintiff and the Aggrieved Employees to use their personal cell phones in the course of
17 performing their duties. Defendants communicated with Plaintiff and the Aggrieved Employees
18 by phone regarding work instructions, scheduling, or to resolve work-related issues and did not
19 provide mobile phones or an alternative to them for this purpose. Additionally, Defendants did
20 not reimburse Plaintiff and the Aggrieved Employees for their cell phone expenses.

21 22. As a result of these aforementioned violations, Defendants failed to provide
22 Plaintiff and the Aggrieved Employees with accurate written wage statements; failed to pay them
23 all wages earned during employment; and failed to maintain accurate employee records with
24 respect to Plaintiff and the Aggrieved Employees as required under California law.

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

- 27 A. Not provided with all off duty meal periods;
28 B. Not provided with all rest break periods as required by law;



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 C. Not paid one hour's pay for each workday in which Defendants failed to
2 provide them with one or more timely rest periods;

3 D. Not paid one hour's pay for each workday in which Defendants failed to
4 provide them with one or more timely meal periods;

5 E. Not indemnified for all necessary business expenditures incurred during
6 the discharge of their duties;

7 F. Not provided with accurate and complete wage statements; and

8 G. Not timely paid all earned and unpaid wages during their employment with
9 Defendants and at the time such employment ended.

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

11 **CIVIL PENALTIES**

12 **(Lab. Code §§ 2698, et seq.)**

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

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

16 25. At all relevant times, Plaintiff and the Aggrieved Employees have been non-
17 exempt employees entitled to the protections of both the Labor Code and the Wage Order.

18 **A. FAILURE TO PROVIDE REST BREAKS AND MEAL PERIODS**

19 26. In relevant part, California Labor Code § 1198 states:

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

25
26 27. In relevant part, In relevant part, California Labor Code § 512 states:

27
28 An employer shall not employ an employee for a work period of



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer shall not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

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

Rest Periods

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

(B) If an employer fails to provide an employee a rest period in

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each work day that the rest period is not provided.”

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

Meal Periods

(A) “No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by mutual consent of the employee and the employer. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an ‘on duty’ meal period and counted as time worked. An ‘on duty’ meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.”

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

30. In relevant part, California Labor Code § 226.7 states:

(b) An employer shall not require an employee to work during a meal or rest period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

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

31. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff and the Aggrieved Employees were entitled to uninterrupted meal periods of at least 30 minutes for each day they worked five or more hours. Pursuant to California Labor Code § 512, they were also entitled to a second 30-minute meal period when they worked more than 10 hours in a workday.

32. Pursuant to the Wage Order, Plaintiff and the Aggrieved Employees were entitled to be provided with net rest breaks of at least ten minutes for each four-hour period of work, or major fraction thereof.

33. Defendants intentionally failed to provide Plaintiff and the Aggrieved Employees with all required 30-minute duty free meal periods and 10-minute rest periods free from any work

1 duties in accordance with the Wage Order.

2 34. At all relevant times, Defendants failed to provide all timely duty-free rest breaks
3 and/or meal periods to Plaintiff and the Aggrieved Employees as required by law, including but
4 not limited to, second meal periods and third rest periods on days they worked more than 10
5 hours. Defendants also did not pay premium wages to Plaintiff and the Aggrieved Employees on
6 days they did not provide them with one or more timely meal and rest periods as required by
7 California law.

8 35. Plaintiff is informed and believes and thereon alleges that, at all relevant times
9 within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy
10 which resulted in Defendants not providing the and the Aggrieved Employees with all off-duty
11 meal periods and rest breaks required by California law.

12 **B. FAILURE TO INDEMNIFY**

13 36. In pertinent part, California Labor Code § 2802(a) states:

14
15 “An employer shall indemnify his or her employee[s] for all
16 necessary expenditures incurred by the employee in direct
17 consequence of the discharge of his or her duties.”
18

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

21 38. At all relevant times, as a condition for employment, Defendants required Plaintiff
22 and the Aggrieved Employees to use their personal mobile phones for work-related activities
23 without reimbursing them for mobile phone expenses.

24 39. Plaintiff is informed and believes and thereon alleges that, at all relevant times,
25 Defendants maintained a policy and/or practice, or lack thereof, which resulted in Defendants’
26 failure to indemnify Plaintiff and the Aggrieved Employees for the reasonable expenses they
27 incurred during the course of performing their duties.

28 ///



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 **C. FAILURE TO PROVIDE ACCURATE WRITTEN WAGE STATEMENTS**

2 40. Pursuant to California Labor Code § 226(a), Plaintiff and the Aggrieved
3 Employees were entitled to receive, bi-weekly or at the time of each payment of wages, an
4 accurate itemized statement showing: a) gross wages earned; b) net wages earned; c) all applicable
5 hourly rates in effect during the pay period; and d) the corresponding number of hours worked at
6 each hourly rate by the employee.

7 41. Pursuant to California Labor Code § 226, an employee is deemed to suffer injury
8 if the employer fails to provide a wage statement. Also, an employee is deemed to suffer injury if
9 the employer fails to provide accurate and complete information as required by California Labor
10 Code § 226(a) and the employee cannot “promptly and easily determine” from the wage statement
11 alone one or more of the following:

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

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

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

20 D. The name of the employee and only the last four digits of his or his social
21 security number or an employee identification number other than a social security number; and

22 E. The number of piece-rate units earned and the piece rate.

23 42. “Promptly and easily determine,” as stated in California Labor Code § 226(e),
24 means a reasonable person would be able to readily ascertain the information without reference
25 to other documents or information.

26 43. As alleged herein, Defendants failed to provide Plaintiff and the other Aggrieved
27 Employees with all meal and rest periods in compliance with California law. They also failed to
28 provide them with premium wages on workdays they failed to provide them with one or more



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 meal and/or rest periods in compliance with California law. As a result, Defendants have failed
2 to properly itemize Plaintiff and the other Aggrieved Employees' gross and net wages earned,
3 total hours worked, hourly rate of pay, the corresponding number of hours worked at each hourly
4 rate, and other requirements of California Labor Code § 226.

5 44. Defendants' failure to provide Plaintiff and the other Aggrieved Employees with
6 accurate wage statements was knowing and intentional. Defendants had the ability to provide
7 Plaintiff and the other Aggrieved Employees with accurate wage statements but intentionally
8 provided wage statements that Defendants knew were not accurate.

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

20 **D. UNTIMELY WAGES DURING EMPLOYMENT**

21 46. Labor Code § 204 states

22 (a) All wages, other than those mentioned in Section 201,
23 201.3, 202, 204.1, or 204.2, earned by any person in any
24 employment are due and payable twice during each
25 calendar month, on days designated in advance by the
26 employer as the regular paydays. Labor performed
27 between the 1st and 15th days, inclusive, of any calendar
28 month shall be paid for between the 16th and the 26th day



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 of the month during which the labor was performed, and
2 labor performed between the 16th and the last day,
3 inclusive, of any calendar month, shall be paid for
4 between the 1st and 10th day of the following month. ...
5

6 (b) (1) Notwithstanding any other provision of this
7 section, all wages earned for labor in excess of the normal
8 work period shall be paid no later than the payday for the
9 next regular payroll period.
10

11 (2) An employer is in compliance with the
12 requirements of subdivision (a) of Section 226 relating to
13 total hours worked by the employee, if hours worked in
14 excess of the normal work period during the current pay
15 period are itemized as corrections on the paystub for the
16 next regular pay period. Any corrections set out in a
17 subsequently issued paystub shall state the inclusive dates
18 of the pay period for which the employer is correcting its
19 initial report of hours worked.
20

21 (c) However, when employees are covered by a collective
22 bargaining agreement that provides different pay
23 arrangements, those arrangements shall apply to the
24 covered employees.
25

26 (d) The requirements of this section shall be deemed satisfied
27 by the payment of wages for weekly, biweekly, or
28 semimonthly payroll if the wages are paid not more than



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

seven calendar days following the close of the payroll period.

47. Defendants paid wages to employees on regular intervals. Defendants failed to pay Plaintiff on such intervals for all wages earned and all hours worked including, but not limited to, all premium wages for all rest breaks and/or off-duty meal periods that were not provided. On information and belief, Plaintiff alleges that Defendants also failed to pay the Aggrieved Employees on such intervals for all wages earned and all hours worked.

E. UNTIMELY FINAL WAGES

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

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

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

51. Plaintiff is informed and believes that Defendants' failures to timely pay Plaintiff and the Aggrieved Employees all of their earned and unpaid wages have been willful in that, at all relevant times, Defendants have deliberately maintained policies and practices that violate the requirements of the Labor Code and the Wage Order, even though at all relevant times, they have had the ability to comply with those legal requirements.

F. FAILURE TO MAINTAIN ACCURATE EMPLOYMENT RECORDS

52. Labor Code § 1174 states:

Every person employing labor in this state shall:

...



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

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

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

12
13 53. Labor Code § 1174.5 states:

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

19
20 54. Section 7 of the Wage Order states,

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

- 23 1. Full name, home address, occupation, and social security number.
- 24 2. Birth date, if under 18 years, and designation as a minor.
- 25 3. Time records showing when the employee begins and ends each
26 work period. Meal periods, split shift intervals and total daily
27 hours worked shall also be recorded. Meal periods during which
28 operations cease and authorized rest periods need not be recorded.



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

4. Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
5. Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
6. When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

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

56. On information and belief, Defendants have willfully failed to maintain the records required by § 1174 and Wage Order, including, but not limited to, the total premium wages earned for missed meal and rest periods owed to Plaintiff and the Aggrieved Employees.

G. CIVIL PENALTIES SOUGHT

57. Labor Code § 204 states

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

(b) (1) Notwithstanding any other provision of this section, all wages earned for labor in excess of the normal work period shall be paid no later than the



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

payday for the next regular payroll period.

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

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

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

58. Defendants paid wages to employees on regular intervals. Defendants failed to pay Plaintiff on such intervals for all wages earned and all hours worked. On information and belief, Plaintiff alleges that Defendants also failed to pay the Aggrieved Employees on such intervals for all wages earned and all hours worked.

59. During the applicable time period, Defendants violated California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 512, 1174, 1198, and 2802.

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

61. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff and the Aggrieved Employees are entitled to recover civil penalties for each of the Defendants' violations of

California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 512, 1174, 1198, and 2802 during the applicable limitations period in the following amounts:

A. For violations of California Labor Code § 204, one hundred dollars (\$100.00) for each aggrieved employee for each initial violation and two hundred dollars (\$200.00) for each aggrieved employee for each subsequent, willful or intentional violation (penalty amounts established by California Labor Code § 210).

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

C. For violations of California Labor Code § 512, fifty dollars (\$50.00) for each aggrieved employee for each initial violation for pay period for which the employee was underpaid and one hundred dollars (\$100.00) for each underpaid employee for each pay period for which the employee was underpaid (penalty amounts established by California Labor Code § 558).

D. For violations of California Labor Code § 1174, five hundred dollars (\$500.00) for each Aggrieved Employee for each initial violation (penalty amounts established by Labor Code § 1174.5).

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

H. NOTICE TO THE STATE OF CALIFORNIA AND DEFENDANTS

62. Plaintiff has complied with the procedures for bringing suit specified in California Labor Code § 2699.3. By letter dated March 17, 2021, Plaintiff gave written notice by certified mail to the Labor and Workforce Development Agency (“LWDA”) and Defendants of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. A true and correct copy of Plaintiff’s letter to the LWDA dated February 17, 2021 is attached hereto as Exhibit A. The LWDA has not responded to



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Plaintiff's letter.

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

VI. PRAYER FOR RELIEF

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

- A. Civil penalties;
- B. Costs of suit;
- C. Reasonable attorneys' fees; and
- D. Such other relief as the Court deems just and proper.

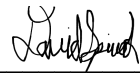
VII. DEMAND FOR JURY TRIAL

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

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: August 16, 2021

By 

DAVID SPIVAK
CAROLINE TAHMASSIAN
MAYA CHEAITANI, Attorneys for Plaintiff,
SHELIA CROMWELL, and all others similarly
situated



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

State of California,
County of Los Angeles

2. I am familiar with the practice of The Spivak Law Firm, for collection and processing of correspondence for mailing with the United States Postal Service. It is the practice that correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

Orion S. Robinson, Esq.
Robinson Di Lando, APLC
801 South Grand Avenue, Suite 500
Los Angeles, CA 90017
orobinson@rdwlaw.com

XXXX (BY EMAIL) I caused the documents to be sent to the persons at the electronic service addresses listed above from my electronic service address emily@spivaklaw.com.

____ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EMILY HOUNG LY

EXHIBIT 8

BY FAX

DAVID G. SPIVAK (SBN 179684)
david@spivaklaw.com
CAROLINE TAHMASSIAN (SBN 285680)
caroline@spivaklaw.com
MAYA CHEAITANI (SBN 335777)
maya@spivaklaw.com
THE SPIVAK LAW FIRM
16530 Ventura Blvd., Suite 203
Encino, CA 91436
Telephone (213) 725-9094
Facsimile (213) 634-2485

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

OCT 12 2021

BY Jovanna Leandro
JOVANNA LEANDRO, DEPUTY

Attorneys for Plaintiffs,
SHELIA CROMWELL, AARON SALAZAR, ANDREW FORREST, and all others similarly
situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO
(UNLIMITED JURISDICTION)**

SHELIA CROMWELL, AARON SALAZAR,
and ANDREW FORREST, on behalf of
themselves, all others similarly situated, and as
“aggrieved employees” on behalf of other
“aggrieved employees” under the Labor Code
Private Attorney General Act of 2004,

Plaintiffs,

vs.

DESERT CREMATION SOCIETY, INC., a
California corporation; WIEFELS & SON, a
California corporation; WIEFELS & SON II,
INC., a California corporation; WIEFELS FD,
INC., a California corporation; and DOES 1–50,
inclusive,

Defendants.

Case No.: CIVSB2116331

CLASS ACTION

**SECOND AMENDED COMPLAINT
FOR:**

1. Failure to Provide Rest Periods (Lab. Code §§ 226.7 and 1198);
2. Failure to Provide Meal Periods (Lab. Code §§ 512 and 1198);
3. Failure to Pay All Wages Earned for All Hours Worked at the Correct Rates of Pay (Lab. Code §§ 510, 1194, 1197, and 1198);
4. Failure to Indemnify for Expenses (Lab. Code § 2802)
5. Waiting Time Penalties (Lab. Code §§ 201, 202, and 203);
6. Unfair Competition (Bus. & Prof. Code §§ 17200, et seq.); and
7. Civil Penalties (Lab. Code §§ 2698, et seq.).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ADDITIONAL ATTORNEY FOR PLAINTIFFS

Walter Haines (SBN 71075)
whaines@uelglaw.com
UNITED EMPLOYEES LAW GROUP, P.C.
4276 Karelia Ave, #301
Los Alamitos, CA 90720
Telephone: (562) 256-1047
Facsimile: (562) 256-1006



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 Plaintiffs, SHELIA CROMWELL, AARON SALAZAR, and ANDREW FORREST
2 (collectively “Plaintiffs”), on behalf of themselves, all others similarly situated and the State of
3 California complain and allege as follows:

4 **INTRODUCTION**

5 1. Plaintiffs bring this class and representative action based on alleged violations of
6 the California Labor Code and Industrial Welfare Commission Order No. 9-2001 (hereafter “the
7 Wage Order”), against Defendants DESERT CREMATION SOCIETY, INC., a California
8 corporation doing business in California as All Caring Cremations and All Caring Solutions,
9 WIEFELS & SON, a California corporation currently operating under the name Aries Properties,
10 WIEFELS & SON II, INC. a California corporation doing business as All California Cremation,
11 WIEFELS FD, INC., a California corporation, and DOES 1-50, inclusive (collectively
12 “Defendants”).

13 2. As set forth in more detail below, Plaintiffs allege that Defendants are liable to
14 them, the State of California, and other similarly situated and aggrieved current and former
15 employees who worked in California as hourly, non-exempt employees, for unpaid wages, civil
16 penalties and other related relief. These claims are based on Defendants’ failures to: (1) Pay all
17 wages for all hours at the correct rates of pay; (2) Provide all rest and meal periods; (3) Indemnify
18 for necessary work-related expenditures; (4) Provide accurate written wage statements; (5)
19 Timely pay wages during and upon termination of employment; and (6) Fairly compete.
20 Accordingly, Plaintiffs now seek to recover unpaid wages and related relief through this class
21 action.

22 **JURISDICTION AND VENUE**

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

25 4. There is no basis for federal question subject matter jurisdiction in this case.
26 Specifically, Plaintiffs assert claims that solely arise under California law, rather than federal
27 law.

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

6. Venue is proper in San Bernardino County pursuant to California Code of Civil
Procedure § 395(a) and § 395.5 in that liability arose in San Bernardino County because at least
some of the transactions that are the subject matter of this Complaint occurred therein and/or



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 because each defendant is found, maintains offices, transacts business, and/or has an agent
2 therein.

3 **THE PARTIES**

4 7. Plaintiff, SHELIA CROMWELL is a natural person and resident of the State of
5 California.

6 8. Plaintiff, AARON SALAZAR is a natural person and resident of the State of
7 California.

8 9. Plaintiff, ANDREW FORREST is a natural person and resident of the State of
9 California.

10 10. At all relevant times, Plaintiffs were “employees” within the meaning of Title 8
11 California Code of Regulations § 11090 and “aggrieved employees” within the meaning of Labor
12 Code § 2699(c).

13 11. Defendant DESERT CREMATION SOCIETY, INC., is a corporation organized
14 and existing under the laws of California and a citizen of California based on Plaintiffs’
15 information and belief. DESERT CREMATION SOCIETY, INC. is doing business in California
16 as All Caring Cremations and All Caring Solutions.

17 12. Defendant WIEFELS & SON is a corporation organized and existing under the
18 laws of California and a citizen of California based on Plaintiffs’ information and belief.
19 Defendant WIEFELS & SON changed its name to ARIES PROPERTIES in March of 2021.

20 13. Defendant WIEFELS & SON II, INC. is a corporation organized and existing
21 under the laws of California and a citizen of California based on Plaintiffs’ information and belief.
22 WIEFELS & SON II, INC. is doing business in California as All California Cremation.

23 14. Defendant WIEFELS FD, INC., is a corporation organized and existing under the
24 laws of California and a citizen of California based on Plaintiffs’ information and belief.

25 15. Plaintiffs are ignorant of the true names, capacities, relationships, and extents of
26 participation in the conduct alleged herein of the Defendants sued as DOES 1-50, inclusive, but
27 are informed and believe and thereon allege that said Defendants are legally responsible for the
28 wrongful conduct alleged herein and therefore sues these Defendants by such fictitious names.
Plaintiffs will amend the Complaint to allege the true names and capacities of the DOE
Defendants when ascertained.

16. At all relevant times, in perpetrating the acts and omissions alleged herein,



Defendants and each of them acted pursuant to and in furtherance of a policy and/or practice, or lack thereof, which resulted in Defendants not paying Plaintiffs and other members of the below-described class in accordance with applicable laws as alleged herein.

17. Plaintiffs are informed and believe and thereon allege that each and every one of the acts and omissions alleged herein was performed by, and/or attributable to, all Defendants, each acting as agents and/or employees, and/or under the direction and control of each of the other Defendants, and that said acts and failures to act were within the course and scope of said agency, employment, and/or direction and control.

CLASS ALLEGATIONS

18. This action has been brought and may be maintained as a class action pursuant to California Code of Civil Procedure § 382 because there is a well-defined community of interest among the persons who comprise the readily ascertainable class defined below and because Plaintiffs are unaware of any difficulties likely to be encountered in managing this case as a class action.

19. **Class Definition:** The Class is defined as follows: all individuals currently and formerly employed by Defendants in California, as hourly, non-exempt employees, including, but not limited to transport specialists, and persons in comparable positions at any time during the period beginning four years prior to the filing of this action and ending on the date that final judgment is entered in this action (“Class” or “Class Members”).

20. **Reservation of Rights:** Pursuant to Rule of Court 3.765(b), Plaintiffs reserve the right to amend or modify the class definition with greater specificity, by further division into subclasses and/or by limitation to particular issues.

21. **Numerosity:** The Class Members are so numerous that the individual joinder of each individual Class Member is impractical. While Plaintiffs do not currently know the exact number of Class Members, Plaintiffs are informed and believe that the actual number exceeds the minimum required for numerosity under California laws.

22. **Commonality and Predominance:** Common questions of law and fact exist as to all Class Members and predominate over any questions which affect only individual Class Members. These questions include, but are not limited to:

A. Whether Defendants failed to provide the Class Members with all meal and rest periods in compliance with California law;



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 B. Whether Defendants failed to pay the Class Members for all hours worked
2 at the correct rates of pay;

3 C. Whether Defendants failed to indemnify the Class Members for all
4 reasonable expenses incurred during the course of employment;

5 D. Whether Defendants knowingly and intentionally failed to provide the
6 Class Members with accurate written wage statements;

7 E. Whether Defendants willfully failed to provide the Class Members with
8 timely final wages upon termination of employment;

9 F. Whether Defendants engaged in unfair competition within the meaning of
10 Business and Professions Code §§ 17200, et seq., with respect to the Class Members; and

11 G. Whether Class Members are entitled to restitution of money or property
12 that Defendants may have acquired from them through alleged Labor Code violations.

13 23. **Typicality:** Plaintiffs' claims are typical of the other Class Members' claims.
14 Plaintiffs are informed and believe and thereon allege that Defendants have a policy and/or
15 practice, or lack thereof, which resulted in Defendants failing to comply with the California Labor
16 Code, the Wage Order, and the Business and Professions Code.

17 24. **Adequacy of Class Representative:** Plaintiffs are adequate class representatives
18 in that they have no interests that are adverse to, or otherwise in conflict with, the interests of
19 absent Class Members. Plaintiffs are dedicated to vigorously prosecuting this action on behalf of
20 Class Members. Plaintiffs will fairly and adequately represent and protect the interests of Class
21 Members.

22 25. **Adequacy of Class Counsel:** Plaintiffs' counsel are adequate class counsel in that
23 they have no known conflicts of interest with Plaintiffs or absent Class Members, are experienced
24 in class action litigation, and are dedicated to vigorously prosecuting this action on behalf of
25 Plaintiffs and absent Class Members.

26 26. **Superiority:** A class action is vastly superior to other available means for fair and
27 efficient adjudication of Class Members' claims and would be beneficial to the parties and the
28 Court. Class action treatment will allow a number of similarly situated persons to simultaneously
and efficiently prosecute their common claims in a single forum without the unnecessary
duplication of effort and expense that numerous individual actions would entail. In addition, the
monetary amounts due to many individual Class Members are likely to be relatively small and



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 would thus make it difficult, if not impossible, for individual Class Members to both seek and
2 obtain relief. Moreover, a class action will serve an important public interest by permitting Class
3 Members to effectively pursue the recovery of monies owed to them. Further, a class action will
4 prevent the potential for inconsistent or contradictory judgments inherent in individual litigation.

STATEMENT OF FACTS

5 27. On or about October 1, 2018, Plaintiff Cromwell began working for Defendants
6 as an hourly transport specialist. Defendants employed her continuously from that date until
7 approximately March 18, 2020, when her employment ended.

8 28. In approximately September 2017, Plaintiff Salazar began working for
9 Defendants as an hourly transport specialist. Defendants employed him continuously from that
10 date until on or about June 16, 2020, when his employment ended.

11 29. In approximately February 2020, Plaintiff Forrest began working for Defendants
12 located at 272 South Mountain View Ave, San Bernardino, as an hourly transport specialist.
13 Since his hire date, Forrest has continuously worked for Defendants and is still employed in that
14 capacity.

15 30. At all relevant times, Defendants issued wages to Plaintiffs and the Class
16 Members on a bi-weekly basis and paid them at an hourly rate of pay. At all relevant times,
17 Defendants classified Plaintiffs and the Class Members as non-exempt employees entitled to the
18 protections of both the Labor Code and the Wage Order.

19 31. At all relevant times, Plaintiffs and the Class Members have worked over eight
20 (8) hours in one workday and/or over 40 hours in one workweek. Despite this, Defendants failed
21 to provide Plaintiffs and the Class Members with all timely rest and meal periods pursuant to
22 California law. Due to the workload and low staffing levels, Defendants denied Plaintiffs and the
23 Class Members their 30-minute duty-free meal period within the first Five (5) hours of work.
24 Defendants frequently forced Plaintiffs and the Class Members to forego timely, duty-free 30-
25 minute meal periods by assigning them more time-sensitive work than they could reasonably
26 expect Plaintiffs and the Class Members to complete within their first five hours of work.

27 32. At all relevant times, Defendants failed to authorize and permit Plaintiffs and the
28 Class Members to take rest periods in violation of California law. Due to high workload and low
staffing levels, Defendants failed to authorize and permit Plaintiffs and the Class Members to
take 10-minute, paid, duty-free rest breaks every four (4) hours worked or major fraction thereof.



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 Defendants did not seek an exemption from the rest period protections of the Wage Order from
2 the California Division of Labor Standards Enforcement. Furthermore, Defendants failed to pay
3 premium wages for days on which they failed to provide Plaintiffs and the Class Members with
4 timely rest breaks and/or meal periods in compliance with California law.

5 33. At all relevant times, Defendants required Plaintiffs and the other Class Members
6 to work on-call shifts. Defendants often required Plaintiffs and the Class Members to remain on-
7 call 24 hours a day, for up to seven (7) days a week. However, Defendants did not pay Plaintiffs
8 and the Class Members minimum, overtime, and double-time wages for such hours worked.
9 During such on-call shifts, Defendants restricted Plaintiffs and the Class Members in the types
10 of activities they could perform and required them to stay available for additional work duties at
11 all times. Defendants prohibited Plaintiffs and the Class Members from consuming alcohol
12 during the on-call shifts, and required them to stay within approximately a 25-mile radius of
13 Defendants' office. Also, during these on-call periods, Defendants required Plaintiffs and the
14 Class Members to monitor their phones for work-related calls at all times. Defendants required
15 Plaintiffs and the Class Members to respond and travel to Defendants' office within 30 minutes
16 of such calls, and subsequently to the assigned locations within 30 minutes. Defendants, however,
17 compensated Plaintiffs and the Class Members only after they arrived to the assigned locations,
18 and only for the period they worked at the assigned location. Consequently, Defendants failed to
19 compensate Plaintiffs and the Class Members for all hours spent on-call. Plaintiff Salazar
20 complained to management about Defendants' Labor Code and Wage Order violations.
21 Defendants took no action to resolve his complaints.

22 34. At all relevant times, Defendants required Plaintiffs and the Class Members to
23 incur certain business expenses in the course of performing their duties. Defendants required
24 Plaintiffs and the Class Members to use their personal cell phones in the course of performing
25 their duties. Defendants communicated with Plaintiffs and the Class Members by phone
26 regarding work instructions, scheduling, or to resolve work-related issues and did not provide
27 mobile phones or an alternative to them for this purpose. Additionally, Defendants did not
28 reimburse Plaintiffs and the Class Members for their cell phone expenses.

35. As a result of these aforementioned violations, Defendants failed to provide
Plaintiffs and the Class Members with accurate written itemized wage statements; failed to pay
them all wages earned during employment and after their employment ended; and failed to



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

maintain accurate employee records with respect to Plaintiffs and the Class Members as required under California law.

FIRST CAUSE OF ACTION
FAILURE TO PROVIDE REST BREAKS

(Lab. Code §§ 226.7 and 1198)

(By Plaintiffs and the Class against all Defendants)

36. Plaintiffs incorporate all paragraphs of this Complaint as if fully alleged herein.

37. At all relevant times during the applicable limitations period, Plaintiffs and the Class Members have been employees of Defendants and entitled to the benefits and protections of California Labor Code §§ 226.7 and 1198, and the Wage Order.

38. In relevant part, California Labor Code § 1198 states:

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

39. In relevant part, § 12 of the Wage Order states:

Rest Periods

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

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

40. In relevant part, California Labor Code § 226.7 states:

(b) An employer shall not require an employee to work during a meal or rest period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

Health.

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

41. Pursuant to the Wage Order, Plaintiffs and the Class Members were entitled to be provided with net rest breaks of at least ten minutes for each four-hour period of work, or major fraction thereof.

42. Defendants intentionally failed to provide Plaintiffs and the Class Members with all required 10-minute rest periods free from any work duties in accordance with the Wage Order.

43. At all relevant times, due to high workload and low staffing levels Defendants failed to authorize and permit Plaintiffs and the Class Members to take 10-minute, paid, duty-free rest breaks every four (4) hours worked or major fraction thereof. Defendants did not seek an exemption from the rest period protections of the Wage Order from the California Division of Labor Standards Enforcement. Furthermore, Defendants failed to pay premium wages for days on which they failed to provide Plaintiffs and the Class Members with timely rest breaks and/or meal periods in compliance with California law.

44. Plaintiffs are informed and believe and thereon allege that, at all relevant times within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy which resulted in Defendants not providing the Class with all rest breaks required by California law.

45. Defendants failed to pay Plaintiffs the additional wages required by California Labor Code § 226.7 for all rest breaks not provided to them. Plaintiffs are informed and believe and thereon allege that, at relevant times within the applicable limitations period, Defendants have maintained a policy, practice, or a lack of a policy which resulted in Defendants not providing the Class with additional wages for all rest breaks not provided to them as required by California Labor Code § 226.7.

46. As a result of Defendants' unlawful conduct, Plaintiffs and the Class Members have suffered damages in an amount, subject to proof, to the extent they were not paid additional



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

wages owed for all rest breaks not provided to them.

47. By reason of the above, pursuant to California Labor Code § 226.7, Plaintiffs and the Class Members are entitled to premium wages for workdays in which one or rest breaks were not provided to them.

SECOND CAUSE OF ACTION
FAILURE TO PROVIDE MEAL PERIODS
(Lab. Code §§ 226.7, 512, and 1198)

(By Plaintiffs and the Class against all Defendants)

48. Plaintiffs incorporate all paragraphs of this Complaint as if fully alleged herein.

49. At all relevant times during the applicable limitations period, Plaintiffs and the Class Members have been employees of Defendants and entitled to the benefits and protections of California Labor Code §§ 512 and 1198, and the Wage Order.

50. In relevant part, California Labor Code § 1198 states:

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

51. In relevant part, California Labor Code § 512 states:

An employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer shall not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

52. In relevant part, § 11 of the Wage Order states:

Meal Periods

(A) No employer shall employ any person for a work period of more than



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 five (5) hours without a meal period of not less than 30 minutes, except
2 that when a work period of not more than six (6) hours will complete the
3 day's work the meal period may be waived by mutual consent of the
4 employer and the employee...

5 (B) An employer may not employ an employee for a work period of more
6 than ten (10) hours per day without providing the employee with a second
7 meal period of not less than 30 minutes, except that if the total hours
8 worked is no more than 12 hours, the second meal period may be waived
9 by mutual consent of the employer and the employee only if the first meal
10 period was not waived.

11 (C) Unless the employee is relieved of all duty during a 30 minute meal
12 period, the meal period shall be considered an "on duty" meal period and
13 counted as time worked. An "on duty" meal period shall be permitted only
14 when the nature of the work prevents an employee from being relieved of
15 all duty and when by written agreement between the parties an on-the-job
16 paid meal period is agreed to. The written agreement shall state that the
17 employee may, in writing, revoke the agreement at any time.

18 (D) If an employer fails to provide an employee a meal period in
19 accordance with the applicable provisions of this order, the employer shall
20 pay the employee one (1) hour of pay at the employee's regular rate of
21 compensation for each workday that the meal period is not provided.

22 53. In relevant part, California Labor Code § 226.7 states:

23 (b) An employer shall not require an employee to work during a meal
24 or rest period mandated pursuant to an applicable statute, or applicable
25 regulation, standard, or order of the Industrial Welfare Commission, the
26 Occupational Safety and Health Standards Board, or the Division of
27 Occupational Safety and Health.

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

54. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiffs and the
Class Members were entitled to uninterrupted meal periods of at least 30 minutes for each day
they worked five or more hours. Pursuant to California Labor Code § 512, they were also entitled
to a second 30-minute meal period when they worked more than 10 hours in a workday.

55. Defendants intentionally failed to provide Plaintiffs and the Class Members with



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

all required 30-minute duty-free meal periods in accordance with the Wage Order.

56. At all relevant times, Plaintiffs and the Class Members have worked over eight (8) hours in one workday and/or over 40 hours in one workweek. Despite this, Defendants failed to provide Plaintiffs and the Class Members with all timely meal periods pursuant to California law. Due to the workload and low staffing levels, Defendants denied Plaintiffs and the Class Members their 30-minute duty-free meal period within the first five (5) hours of work. Defendants frequently forced Plaintiffs and the Class Members to forego timely, duty-free 30-minute meal periods by assigning them more time-sensitive work than they could reasonably expect Plaintiffs and the Class Members to complete within their first five hours of work.

57. Plaintiffs are informed and believe and thereon allege that, at all relevant times within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy which resulted in Defendants not providing the Class with all off-duty meal periods required by California law.

58. Defendants failed to pay Plaintiffs the additional wages required by California Labor Code § 226.7 for all meal periods not provided to them. Plaintiffs are informed and believe and thereon allege that, at relevant times within the applicable limitations period, Defendants have maintained a policy, practice, or a lack of a policy which resulted in Defendants not providing the Class with additional wages for all meal periods not provided to them as required by California Labor Code § 226.7.

59. As a result of Defendants' unlawful conduct, Plaintiffs and the Class Members have suffered damages in an amount, subject to proof, to the extent they were not paid additional wages owed for all meal periods not provided to them.

60. By reason of the above, pursuant to California Labor Code § 226.7, Plaintiffs and the Class Members are entitled to premium wages for workdays in which one or more timely, off-duty meal periods were not provided to them.

THIRD CAUSE OF ACTION

FAILURE TO PAY ALL WAGES EARNED FOR ALL HOURS WORKED AT THE CORRECT RATES OF PAY

(Lab. Code §§ 510, 1194, 1197, and 1198)

(By Plaintiffs and the Class against Defendants)

61. Plaintiffs incorporates all paragraphs of the Complaint as if fully alleged herein.



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 62. At all relevant times, Plaintiffs and the other Class Members have been non-
2 exempt employees of Defendants and entitled to the benefits and protections of California Labor
3 Code §§ 510, 1194, 1197, and 1198 and the Wage Order.

4 63. § 2 of the Wage Order defines “hours worked” as “the time during which an
5 employee is subject to the control of an employer, and includes all the time the employee is
6 suffered or permitted to work, whether or not required to do so.”

7 64. § 3 of the Wage Order states:

8 (A) Daily Overtime - General Provisions

9 (1) The following overtime provisions are applicable to employees 18
10 years of age or over and to employees 16 or 17 years of age who are not
11 required by law to attend school and are not otherwise prohibited by law
12 from engaging in the subject work. Such employees shall not be employed
13 more than eight (8) hours in any workday or more than 40 hours in any
14 workweek unless the employee receives one and one-half (1 ½) times such
15 employee’s regular rate of pay for all hours worked over 40 hours in the
16 workweek. Eight (8) hours of labor constitutes a day’s work. Employment
17 beyond eight (8) hours in any workday or more than six (6) days in any
18 workweek is permissible provided the employee is compensated for such
19 overtime at not less than:

20 (a) One and one-half (1 ½) times the employee’s regular rate of pay for all
21 hours worked in excess of eight (8) hours up to and including 12 hours in
22 any workday, and for the first eight (8) hours worked on the seventh (7th)
23 consecutive day of work in a workweek.

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

27 (c) The overtime rate of compensation required to be paid to a nonexempt
28 full-time salaried employee shall be computed by using the employee’s
regular hourly salary as one-fortieth (1/40) of the employee’s weekly
salary.

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

32 66. Labor Code § 510 states:

33 Eight hours of labor constitutes a day’s work. Any work in excess of eight



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. Nothing in this § requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work.

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

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

69. Labor Code § 1198 makes it unlawful for an employer to employ an employee under conditions that violate the Wage Order.

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

71. As described above, at all relevant times during the applicable limitations period, Defendants failed to compensate Plaintiffs and the Class Members for all hours worked, including, but not limited to overtime wages for all overtime hours they worked at the correct rates of pay.

72. Plaintiffs are informed and believe and thereon allege that, at all relevant times, Defendants maintained a policy and/or practice, or lack thereof, which resulted in Defendants' failure to compensate Plaintiffs and the other Class Members for all hours worked at the correct rates of pay as required by California law.

73. As a result of Defendants' unlawful conduct, Plaintiffs and the other Class Members have suffered damages, in an amount subject to proof, to the extent they were not paid the full amount of wages earned during each pay period during the applicable limitations period,



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 including minimum and overtime wages.

2 74. Pursuant to Labor Code § 1194, Plaintiffs, on behalf of themselves and Class
3 Members, seek to recover unpaid wages, liquidated damages in amounts equal to the amounts of
4 unpaid wages, interest thereon, and awards of reasonable costs and attorneys' fees, all in amounts
5 subject to proof.

6 **FOURTH CAUSE OF ACTION**

7 **FAILURE TO INDEMNIFY**

8 **(Lab. Code §2802)**

9 **(By Plaintiffs and the Class against all Defendants)**

10 75. Plaintiffs incorporate all paragraphs of this Complaint as if fully alleged herein.

11 76. At all relevant times, Plaintiffs and the class have been non-exempt employees
12 of Defendants and entitled to the benefits and protections of the California Labor Code section
13 2802 and the Wage Order.

14 77. In pertinent part, California Labor Code section 2802(a) states, "An employer
15 shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee
16 in direct consequence of the discharge of his or her duties."

17 78. At all relevant times, as a condition for employment, Defendants required
18 Plaintiffs and the Class Members to use their personal cell phones in the course of performing
19 their duties. Defendants communicated with Plaintiffs and the Class Members by phone
20 regarding work instructions, scheduling, or to resolve work-related issues and did not provide
21 mobile phones or an alternative to them for this purpose. Additionally, Defendants did not
22 reimburse Plaintiffs and the Class Members for their personal cell phone expenses.

23 79. Plaintiffs are informed and believe and thereon allege that, at all relevant times,
24 Defendants maintained a policy, practice, or a lack of a policy which resulted in Defendants'
25 failure to indemnify Plaintiffs and the class for the reasonable expenses they incurred during the
26 course of performing their duties.

27 80. By reason of the above, Plaintiffs and the members of the class are entitled to
28 reimbursement for all necessary expenditures and losses and interest due and owing to them
within four years (4) of the date of the filing of the Complaint until the date of entry of judgment
pursuant to California Labor Code section 2802(b). Further, Plaintiffs, on behalf of themselves
and the class, pray for reasonable attorney's fees pursuant to Labor Code section 2802(c).



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

81. Additionally, with respect to this cause of action, on behalf of themselves and the class, Plaintiffs pray for an award of reasonable attorney fees and costs, including interest thereon, as permitted by law, all in amounts subject to proof.

FIFTH CAUSE OF ACTION

FAILURE TO PROVIDE ACCURATE WRITTEN WAGE STATEMENTS

(Lab. Code § 226)

(By Plaintiffs and the Class against all Defendants)

82. Plaintiffs incorporate all paragraphs of the Complaint as if fully alleged herein.

83. At all relevant times during the applicable limitations period, Plaintiffs and the other Class Members have been employees of Defendants and entitled to the benefits and protections of California Labor Code § 226.

84. Pursuant to California Labor Code § 226(a), Plaintiffs and the other Class Members were entitled to receive, bi-weekly or at the time of each payment of wages, an accurate itemized statement showing:

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

85. Pursuant to California Labor Code § 226(e), an employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a
2 subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and
3 is entitled to an award of costs and reasonable attorneys' fees.

4 86. Pursuant to California Labor Code § 226(e), an employee is deemed to suffer
5 injury if the employer fails to provide a wage statement. Also, an employee is deemed to suffer
6 injury if the employer fails to provide accurate and complete information as required by California
7 Labor Code § 226(a) and the employee cannot "promptly and easily determine" from the wage
8 statement alone one or more of the following:

- 9 A. The amount of the gross wages or net wages paid to the employee during the pay
10 period or any of the other information required to be provided on the itemized
11 wage statement pursuant to California Labor Code § 226(a);
12 B. Which deductions the employer made from gross wages to determine the net wages
13 paid to the employee during the pay period;
14 C. The name and address of the employer and, if the employer is a farm labor
15 contractor, as defined in subdivision (b) of § 1682 of the California Labor Code,
16 the name and address of the legal entity that secured the services of the employer
17 during the pay period; and
18 D. The name of the employee and only the last four digits of his or her social security
19 number or an employee identification number other than a social security number

20 87. "Promptly and easily determine," as stated in California Labor Code § 226(e),
21 means a reasonable person would be able to readily ascertain the information without reference
22 to other documents or information.

23 88. As alleged herein, at all relevant times, during the applicable limitations period,
24 Defendants violated California Labor Code § 226, in that they failed to properly and accurately
25 itemize each of the Class Member's gross wages earned, net wages earned, the total hours
26 worked, the corresponding number of hours worked at each rate by the and the Class Members
27 and other requirements of California Labor Code § 226. Further, Defendants failed to state the
28 earned meal and rest period premium wages and their business expenses on Plaintiff and Class
Members' itemized written wage statements. As a result, Defendants have violated California
Labor Code § 226.

89. Defendants' failure to provide Plaintiffs and the other Class Members with



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 accurate wage statements was knowing and intentional. Defendants had the ability to provide
2 Plaintiffs and the other Class Members with accurate wage statements but intentionally provided
3 wage statements that Defendants knew were not accurate.

4 90. As a result of being provided with inaccurate wage statements by Defendants,
5 Plaintiffs and the other Class Members have suffered injury. Their legal rights to receive accurate
6 wage statements were violated and they were misled about the amount of wages they had actually
7 earned and were owed. In addition, the absence of accurate information on their wage statements
8 prevented immediate challenges to Defendants' unlawful pay practices, has required discovery
9 and mathematical computations to determine the amounts of wages owed, has caused difficulty
10 and expense in attempting to reconstruct time and pay records and/or has led to the submission of
11 inaccurate information about wages to state and federal government agencies. Further, Plaintiffs
12 and the other Class Members were not able to ascertain from the wage statements whether
13 Defendants complied with their obligations under California Labor Code § 226(a).

14 91. Pursuant to California Labor Code § 226(e), Plaintiffs and the other Class
15 Members are entitled to recover the greater of actual damages, or penalties of fifty dollars (\$50)
16 for the initial pay period in which a violation of California Labor Code § 226(a) occurred and one
17 hundred dollars for each violation of California Labor Code § 226(a) in a subsequent pay period,
18 not to exceed an aggregate penalty of four thousand dollars (\$4,000) per Class Member, and are
19 also entitled to an award of costs and reasonable attorneys' fees.

20 92. Accordingly, with respect to this cause of action, on behalf of themselves and the
21 other Class Members, Plaintiffs pray for the herein stated relief and for an award of all reasonable
22 costs and attorneys' fees, including interest thereon, as permitted by law, all in amounts subject
23 to proof.

24 **SIXTH CAUSE OF ACTION**

25 **WAITING TIME PENALTIES**

26 **(Lab. Code §§ 201, 202, and 203)**

27 **(By Plaintiffs SHELIA CROMWELL and AARON SALAZAR , and the Class against all**
28 **Defendants)**

93. Plaintiffs SHELIA CROMWELL and AARON SALAZAR incorporate all
paragraphs of this Complaint as if fully alleged herein.

94. At all relevant times during the applicable limitations period, Plaintiffs SHELIA



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 CROMWELL and AARON SALAZAR and the Class have been non-exempt employees of
2 Defendants and entitled to the benefits and protections of California Labor Code §§ 201–203,
3 and the Wage Order.

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

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

10 97. By failing to pay earned minimum, overtime, and premium wages to Plaintiffs
11 SHELIA CROMWELL and AARON SALAZAR and the Class, Defendants failed to timely pay
12 them all earned and unpaid wages in violation of Labor Code § 201 or § 202.

13 98. Plaintiffs SHELIA CROMWELL and AARON SALAZAR are informed and
14 believe that Defendants’ failures to timely pay all final wages to them and the Class Members
15 have been willful in that Defendants have the ability to pay final wages in accordance with Labor
16 Code §§ 201 and 202 but have intentionally adopted policies or practice that are incompatible
17 with those requirements.

18 99. Labor Code § 203 provides that the wages of an employee continue on a daily
19 basis as a penalty for up to 30 days where an employer willfully fails to timely pay earned and
20 unpaid wages to the employee in accordance with Labor Code § 201, or § 202.

21 100. Defendants failed to pay Plaintiffs SHELIA CROMWELL and AARON
22 SALAZAR and the Class Members whose employment ended all of the earned, but unpaid wages
23 described above by the conclusion of their employment.

24 101. Plaintiffs SHELIA CROMWELL and AARON SALAZAR are informed and
25 believe that Defendants’ failures to timely pay Plaintiffs and the Class all of their earned and
26 unpaid wages have been willful in that, at all relevant times, Defendants have deliberately
27 maintained policies and practices that violate the requirements of the Labor Code and the Wage
28 Order, even though at all relevant times, they have had the ability to comply with those legal
requirements.

102. Pursuant to Labor Code § 203, Plaintiffs SHELIA CROMWELL and AARON
SALAZAR seek waiting time penalties on behalf of themselves and the Class, in amounts subject



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 to proof not to exceed 30 days of waiting time penalties for each Class Member.

2 **SEVENTH CAUSE OF ACTION**

3 **UNFAIR COMPETITION**

4 **(Bus. & Prof. Code §§ 17200, et seq.)**

5 **(By Plaintiffs and the Class against all Defendants)**

6 103. Plaintiffs incorporate all paragraphs of the Complaint as if fully alleged herein.

7 104. At all relevant times during the applicable limitations period, Plaintiffs and the
8 other Class Members have been employees of Defendants and entitled to the benefits and
9 protections of the Business and Professions Code §§ 17200, et seq.

10 105. The unlawful conduct of Defendants alleged herein amounts to and constitutes
11 unfair competition within the meaning of California Business & Professions Code §§ 17200, et
12 seq. Due to their unfair and unlawful business practices as alleged herein, Defendants have
13 unfairly gained a competitive advantage over other comparable companies doing business in
14 California that comply with their legal obligations to, among other things, pay their employees
15 premium wages for workdays in which they did not provide employees with one or more meal
16 and rest periods, reimburse their employees for reasonable expenses incurred during the course
17 of performing their duties, and pay them all earned wages for all regular and overtime hours
18 worked.

19 106. As a result of Defendants' unfair competition as herein alleged, Plaintiffs and the
20 other Class Members have suffered injuries in fact and lost money or property. Defendants
21 deprived Plaintiffs and the other Class Members of minimum, overtime, off-the-clock, paid sick
22 leave and notice of paid sick leave, and premium wages and reimbursement for expenses that
23 Plaintiffs and the other Class Members incurred during the course of performing their duties.

24 107. Pursuant to California Business & Professions Code § 17203, Plaintiffs and the
25 other Class Members are entitled to restitution of all monies rightfully belonging to them that
26 Defendants did not pay them, or that Defendants otherwise retained by means of their unlawful
27 and unfair business practices.

28 108. Plaintiffs and the other Class Members are entitled to reasonable attorneys' fees in
connection with their unfair competition claims pursuant to California Code of Civil Procedure
§ 1021.5, the substantial benefit doctrine and/or the common fund doctrine.

EIGHTH CAUSE OF ACTION



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

CIVIL PENALTIES

(By Plaintiffs and the Class against all Defendants)

109. Plaintiffs incorporate all paragraphs of this Complaint as if fully alleged herein.

110. The “Aggrieved Employees” are all members of the Class defined above who Defendants employed during the period beginning in March 2019 and ending on the date that final judgment is entered in this action.

111. Labor Code § 204 states

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

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

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

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

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

112. Defendants paid wages to employees on regular intervals. Defendants, however,



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 failed to pay Plaintiffs on such intervals for all wages earned and all hours worked. On
2 information and belief, Plaintiffs allege that Defendants also failed to pay the Aggrieved
3 Employees on such intervals for all wages earned and all hours worked.

4 113. During the applicable time period, Defendants violated California Labor Code
5 §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, and 2802.

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

9 115. Pursuant to California Labor Code §§ 2699 (a) and (f), Plaintiffs and the Class
10 are entitled to recover civil penalties for each of the Defendants' violations of California Labor
11 Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, and 2802 during the
12 applicable limitations period in the following amounts:

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

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

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

25 D. For violations of California Labor Code § 1197, one hundred dollars
26 (\$100.00) for each Aggrieved Employee for each initial and intentional violation and two
27 hundred fifty dollars (\$250.00) for each Aggrieved Employee for each subsequent violation, per
28 pay period (regardless of whether the initial violations were intentionally committed) (penalty
amounts established by California Labor Code § 1197.1).

E. For violations of California Labor Code § 1174, five hundred dollars
(\$500.00) for each Aggrieved Employee for each violation (penalty amounts established by



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 California Labor Code § 1174.5).

2 F. For violations of California Labor Code §§ 201, 202, 203, 226.7, 1194,
3 1198, and 2802, one hundred dollars (\$100.00) for each Aggrieved Employee per pay period for
4 each initial violation and two hundred dollars (\$200.00) for each Aggrieved Employee per pay
5 period for each subsequent violation (penalty amounts established by California Labor Code
6 § 2699 (f)(2)).

7 116. Plaintiffs have complied with the procedures for bringing suit specified in
8 California Labor Code § 2699.3. By letter dated March 17, 2021, Plaintiff Cromwell gave
9 written notice by certified mail to the LWDA and Defendants of the specific provisions of the
10 California Labor Code alleged to have been violated, including the facts and theories to support
11 the alleged violations. By letter dated March 19, 2021, Plaintiff Salazar gave written notice by
12 certified mail to the LWDA and Defendants of the specific provisions of the California Labor
13 Code alleged to have been violated, including the facts and theories to support the alleged
14 violations. By letter dated April 5, 2021, Plaintiff Forrest gave written notice by certified mail
15 to the LWDA and Defendants of the specific provisions of the California Labor Code alleged to
16 have been violated, including the facts and theories to support the alleged violations. True and
17 correct copies of Plaintiffs' letters to the LWDA dated March 17, 2021, March 19, 2021, and
18 April 5, 2021, are collectively attached hereto as Exhibit A. The LWDA has not responded to
19 Plaintiffs' letters. Plaintiffs accompanied their LWDA notices with a fee in the amount of
20 \$75.00. The LWDA has failed to take action in response within 65 calendar days of the date of
21 Plaintiffs' notice, but Plaintiffs anticipate that the LWDA will provide written notice to Plaintiffs
22 informing them that it does not intend to investigate these allegations.

23 117. Pursuant to California Labor Code § 2699 (g), Plaintiffs and the Class Members
24 are entitled to an award of civil penalties, reasonable attorney's fees and costs in connection with
25 their claims for civil penalties.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray
28 for relief and judgment against Defendants as follows:

- 29 A. An order that the action be certified as a class action;
- 30 B. An order that Plaintiffs be appointed class representatives;
- 31 C. An order that counsel for Plaintiffs be appointed class counsel;



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

- 1 D. Unpaid Wages;
2 E. Actual Damages;
3 F. Statutory Damages;
4 G. Civil Penalties
5 H. Liquidated Damages;
6 I. Restitution;
7 J. Declaratory and injunctive relief;
8 K. Equitable relief;
9 L. Pre-judgment interest;
10 M. Statutory penalties;
11 N. Costs of suit;
12 O. Interest;
13 P. Reasonable attorneys' fees; and
14 Q. Such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

15 Plaintiffs, on behalf of themselves and all other Class Members, hereby demand a jury
16 trial on all issues so triable.

17 Respectfully submitted,

18 THE SPIVAK LAW FIRM

19
20 Dated: October 12, 2021

By: 

DAVID SPIVAK
CAROLINE TAHMASSIAN,
MAYA CHEAITANI, Attorneys for Plaintiffs,
SHELIA CROMWELL, AARON SALAZAR
and ANDREW FORREST, and all others
similarly situated



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

EXHIBIT A



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

March 17, 2021

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

RE: *Sheila Cromwell / Desert Cremation Society*

To Whom It May Concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Sheila Cromwell (hereafter “Cromwell”) provides notice on behalf of herself and of all individuals currently and formerly employed in California as non-exempt, hourly employees, including but not limited to transport specialists, and persons in similar positions, (hereafter referred to as “Aggrieved Employees,”) by Desert Cremation Society, Inc., a California corporation doing business as All Caring Cremations and All Caring Solutions, Wiefels & Son, a California corporation, Wiefels & Son II, Inc., a California corporation doing business as All California Cremation, and Wiefels FD, Inc., a California corporation (hereafter collectively referred to as “DCS”) of violations of California Labor Code §§ 201, 202, 203, 204, 226, 512, 1174, 1198, and 2802.

At all relevant times, DCS has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Cromwell and the Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission

Order No. 9-2001 (hereafter “the Wage Order”), paragraph 2, subdivision (F), and “Aggrieved Employees” within the meaning of California Labor Code § 2699(c).

Statement of Facts

On or about October 1, 2018, Cromwell began working for DCS as an hourly transport specialist. DCS employed her continuously from that date until on or about March 18, 2020, when DCS temporarily suspended Cromwell’s employment because she suffered an injury on the job which caused limited mobility in her left arm, preventing her from performing all work duties. Cromwell has not since returned to work. Cromwell last performed her duties for DCS on or about March 18, 2020.

At all relevant times, DCS issued wages to Cromwell and the Aggrieved Employees on a bi-monthly basis and paid them at an hourly rate of pay. At all relevant times, DCS classified Cromwell and the Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all relevant times, Cromwell and the Aggrieved Employees have worked over 8 hours in one workday and/or over 40 hours in one workweek. Despite this, DCS failed to provide Cromwell and the Aggrieved Employees with all timely rest and meal periods pursuant to California law, including, but not limited to, two timely 30-minute uninterrupted meal periods and three 10-minute rest periods on workdays they worked more than 10 hours. Further, due to the workload and low staffing levels, Cromwell and the Aggrieved Employees were denied their 30-minute duty-free meal period within the first 5 hours of work. DCS frequently forced Cromwell and the Aggrieved Employees to forgo timely, duty-free 30-minute meal periods by assigning them more time-sensitive work than it could reasonably expect them to complete within their first five hours of work.

At all relevant times, DCS failed to authorize and permit Cromwell and the Aggrieved Employees with rest periods in violation of California law. Due to high workload and low staffing levels, DCS failed to authorize and permit

Cromwell and the Aggrieved Employees to take 10-minute, paid, duty-free rest breaks every 4 hours worked or major fraction thereof. DCS did not seek an exemption from the rest period protections of the Wage Order from the California Divisions of Labor Standards Enforcement. Furthermore, DCS failed to pay premium wages for days on which it failed to provide Cromwell and the Aggrieved Employees with timely rest breaks and/or meal periods in compliance with California law.

At all relevant times, DCS required Cromwell and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. DCS required Cromwell and the Aggrieved Employees to use their personal cell phones in the course of performing their duties. DCS communicated with Cromwell and the Aggrieved Employees by phone regarding work instructions, scheduling, or to resolve work-related issues and did not provide mobile phones or an alternative to them for this purpose. Additionally, DCS did not reimburse Cromwell and the Aggrieved Employees for their cell phone expenses.

As a result of these aforementioned violations, DCS failed to provide Cromwell and the Aggrieved Employees with accurate written wage statements; failed to pay them all wages earned during employment; and failed to maintain accurate employee records with respect to Cromwell and the Aggrieved Employees as required under California law.

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

- a) DCS failed to provide Cromwell and other Aggrieved Employees with all rest breaks and meal periods;
- b) DCS failed to compensate Cromwell and other Aggrieved Employees at one hour's pay for each day in which they were not provided the rest breaks required by law;

- c) DCS failed to compensate Cromwell and other Aggrieved Employees at one hour's pay for each day in which they were not provided the meal periods required by law;
- d) DCS failed to indemnify Cromwell and other Aggrieved Employees for all business expenses;
- e) DCS failed to provide Cromwell and other Aggrieved Employees with accurate wage statements; and
- f) DCS failed to timely pay Cromwell and other Aggrieved Employees all earned and unpaid wages during their employment at DCS and at the time such employment ended.

Accordingly, Cromwell now seeks civil penalties on behalf of herself and other Aggrieved Employees based on DCS' alleged violations of the California Labor Code and the Wage Order.

The Wage Order

The Wage Order applies to:

“all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis...” (§1). Per §2 (P): “Transportation Industry” means any industry, business or establishment operated for the **purpose of conveying persons or property from one place to another** whether by rail, highway, air or water and all operations and services in connection therewith; and also includes storing or warehousing of goods or property and the repairing, parking, rental, maintenance or cleaning of vehicles.” (emphasis added).

At all relevant times during the applicable limitations period, DCS operated cremation and funeral services, including decedent transportation. Accordingly,

Cromwell and the Aggrieved Employees are entitled to the protections provided by the Wage Order.

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

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was no waived.

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

Meal Periods:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee...

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

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

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

Rest Periods:

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states:

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

compensation for each workday that the meal or rest or recovery period is not provided.

DCS intentionally and improperly failed to provide all timely duty-free rest breaks and/or meal periods to Cromwell and the Aggrieved Employees as required by law, including but not limited to, second meal periods and third rest periods on days they work directly or are on-call for more than 10 hours in a workday. DCS did not pay premium wages to Cromwell and the Aggrieved Employees on days it did not provide them with one or more timely meal and rest periods as required by California law. In failing to do so, DCS violated the provisions of California Labor Code §§ 226.7, 512, and 1198.

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

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.7, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

Failure to Reimburse for Expenses
(Lab. Code §§ 2802)

In pertinent part, California Labor Code § 2802(a) states, “An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.”

As describe above, during the applicable limitations period, DCS required Cromwell and other Aggrieved Employees to incur certain business expenses which it failed to indemnify them for both during and after their employment ended. Accordingly, Cromwell seeks civil penalties on behalf of herself and other Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 2802, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

California Labor Code § 226 require employers to furnish employees with accurate itemized written wage statements showing:

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

other than a social security number may be shown on the itemized statement,

- 8) the name and address of the legal entity that is the employer, and
- 9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

At relevant times during the applicable limitations period, DCS violated California Labor Code § 226, in that it failed to properly and accurately itemize each Aggrieved Employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the Aggrieved Employee and other requirements of California Labor Code § 226.

Accordingly, Cromwell seeks civil penalties on behalf of herself and Aggrieved Employees as follows: \$250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

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

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

As a result of the above described violations, DCS failed to pay Cromwell and the Aggrieved Employees within the time periods set by California Labor Code

§ 204 in that it failed to pay them for all hours worked at the correct rates of pay and failed to pay them premium wages for days on which it failed to provide them with one or more rest or meal periods.

Accordingly, Cromwell seeks civil penalties on behalf of herself and Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204, and \$200 for each Aggrieved Employee, plus 25% of the amount unlawfully withheld from each Aggrieved Employee, for each subsequent violations (penalties set by Labor Code § 210).

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

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

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

DCS failed to pay Cromwell and the Aggrieved Employees whose employment ended all of the earned but unpaid wages described above by the conclusion of

their employment with DCS. By failing to pay Cromwell and the Aggrieved Employees as set forth above by such time, DCS is liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of herself and the Aggrieved Employees, Cromwell seeks civil penalties from DCS as follows:

1. For violations of Labor Code § 201, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 201 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 201 occurred (penalties set by Labor Code § 2699(f)(2));
2. For violations of Labor Code § 202, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 202 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 202 occurred (penalties set by Labor Code § 2699(f)(2)); and
3. For violations of Labor Code § 203, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 203 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 203 occurred (penalties set by Labor Code § 2699(f)(2)).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174 and 1198)

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

Every person employing labor in this state shall:

...

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

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code section 1174.5 states:

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

Section 7 of the Wage Order states,

- (A) Every employer shall keep accurate information with respect to each employee including the following:
 - (1) Full name, home address, occupation and social security number.
 - (2) Birth date, if under 18 years, and designation as a minor.
 - (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be

recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

- (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
 - (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
 - (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.
- (B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.
- (C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

- (D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

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

DCS has failed to maintain the records required by section 1174 and the Wage Order, including but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Cromwell and the Aggrieved Employees. Accordingly, Cromwell seeks civil penalties on behalf of herself and the other aggrieved employees as follows:

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

Conclusion

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

Sincerely,



David Spivak, Esq.
david@spivaklaw.com

cc: Walter Haines, Esq.
Sheila Cromwell

Desert Cremation Society, Inc. dba All Caring Cremations, and All
Caring Solutions
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

Wiefels & Son
c/o Mark J. Matthews
Agent for Service of Process
630 S Vella Rd
Palm Springs, CA 92264

Wiefels & Son II, Inc. dba All California Cremation
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

Wiefels FD, Inc.
c/o Michael J. Wiefels
Agent for Service of Process
50 East Nicolet St
Banning, CA 92220



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

March 19, 2021

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

RE: *Aaron Salazar / Desert Cremation Society*

To whom it may concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Aaron Salazar (hereafter “Salazar”) provides notice on behalf of himself and of all individuals currently and formerly employed in California as non-exempt, hourly employees, including but not limited to transport specialists, and persons in similar positions, (hereafter referred to as “Aggrieved Employees,”) by Desert Cremation Society, Inc., a California corporation doing business as All Caring Cremations and All Caring Solutions, Wiefels & Son, a California corporation, Wiefels & Son II, Inc., a California corporation doing business as All California Cremation, and Wiefels FD, Inc., a California corporation (hereafter collectively referred to as “DCS”) of violations of California Labor Code §§ 201, 202, 203, 204, 226, 510, 512, 1174, 1194, 1197, 1198, and 2802.

At all relevant times, DCS has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Salazar and the Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission Order No. 9-2001 (hereafter “the Wage Order”), paragraph 2, subdivision (F), and “Aggrieved Employees” within the meaning of California Labor Code § 2699(c).

Statement of Facts

In approximately September 2017, Salazar began working for DCS as an hourly transport specialist. DCS employed him continuously from that date until on or about June 16, 2020, when his employment ended.

At all relevant times, DCS issued wages to Salazar and the Aggrieved Employees on a bi-monthly basis and paid them at an hourly rate of pay. At all relevant times, DCS classified Salazar and the Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all relevant times, Salazar and the Aggrieved Employees have worked over 8 hours in one workday and/or over 40 hours in one workweek. Despite this, DCS failed to provide Salazar and the Aggrieved Employees with all timely rest and meal periods pursuant to California law, including, but not limited to, two timely 30-minute uninterrupted meal periods and three 10-minute rest periods on workdays they worked more than 10 hours. Further, due to the workload and low staffing levels, DCS denied Salazar and the Aggrieved Employees their 30-minute duty-free meal period within the first 5 hours of work. DCS frequently forced Salazar and the Aggrieved Employees to forgo timely, duty-free 30-minute meal periods by assigning them more time-sensitive work than it could reasonably expect them to complete within their first five hours of work.

At all relevant times, DCS failed to authorize and permit Salazar and the Aggrieved Employees with rest periods in violation of California law. Due to high workload and low staffing levels, DCS failed to authorize and permit Salazar and the Aggrieved Employees to take 10-minute, paid, duty-free rest breaks every 4 hours worked or major fraction thereof. DCS did not seek an exemption from the rest period protections of the Wage Order from the California Divisions of Labor Standards Enforcement. Furthermore, DCS failed to pay premium wages for days on which it failed to provide Salazar and the Aggrieved Employees with timely rest breaks and/or meal periods in compliance with California law.

At all relevant times, DCS required Salazar and the Aggrieved Employees to work on-call shifts. DCS often required Salazar and the Aggrieved Employees to remain on-call 24 hours a day, 5 days a week. However, DCS did not pay Salazar and the Aggrieved Employees minimum, overtime, and double-time wages for such calls. During such on-call shifts, DCS restricted Salazar and the Aggrieved Employees in the types of activities they could perform and required them to stay available at all times. DCS prohibited Salazar and the Aggrieved Employees from consuming alcohol during the waiting periods of on-call shifts, and required them to stay within 30-minute driving distance from their work area. DCS required Salazar and the Aggrieved Employees to monitor their phones for work-related calls at all times. DCS required Salazar and the Aggrieved Employees to respond and show-up to the DCS office within 30-minutes of such calls, and subsequently to the assigned locations within 30-minutes. DCS, however, compensated the employees only when they arrived to the assigned locations, and only for the period they actually worked. Consequently, DCS failed to compensate Salazar and the Aggrieved Employees for all hours spent on-call. Salazar complained to management about DCS' Labor Code and Wage Order violations. DCS took no action to resolve his complaints.

At all relevant times, DCS required Salazar and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. DCS required Salazar and the Aggrieved Employees to use their personal cell phones in the course of performing their duties. DCS communicated with Salazar and the Aggrieved Employees by phone regarding work instructions, scheduling, or to resolve work-related issues and did not provide mobile phones or an alternative to them for this purpose. Additionally, DCS did not reimburse Salazar and the Aggrieved Employees for their cell phone expenses.

As a result of these aforementioned violations, DCS failed to provide Salazar and the Aggrieved Employees with accurate written wage statements; failed to pay them all wages earned during employment; and failed to maintain accurate employee records with respect to Salazar and the Aggrieved Employees as required under California law.

For the reasons herein, on behalf of himself and the Aggrieved Employees, Salazar alleges that DCS committed the following violations of California Labor Code and the Wage Order,:

- a) DCS failed to provide Salazar and other Aggrieved Employees with all rest breaks and meal periods;
- b) DCS failed to compensate Salazar and other Aggrieved Employees at one hour's pay for each day in which they were not provided the rest breaks required by law;
- c) DCS failed to compensate Salazar and other Aggrieved Employees at one hour's pay for each day in which they were not provided the meal periods required by law;
- d) DCS failed to compensate Salazar and other Aggrieved Employees for all hours worked at the correct rates of pay;
- e) DCS failed to indemnify Salazar and other Aggrieved Employees for all business expenses;
- f) DCS failed to provide Salazar and other Aggrieved Employees with accurate wage statements; and
- g) DCS failed to timely pay Salazar and other Aggrieved Employees all earned and unpaid wages during their employment at DCS and at the time such employment ended.

Accordingly, Salazar now seeks civil penalties on behalf of himself and other Aggrieved Employees based on DCS' alleged violations of the California Labor Code and the Wage Order.

The Wage Order

The Wage Order applies to:

“all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis...” (§1). Per §2 (P): “Transportation Industry” means any industry, business or establishment operated for the **purpose of conveying persons or property from one place to another** whether by rail, highway, air or water and all operations and services in connection therewith; and also includes storing or warehousing of goods or property and the repairing, parking, rental, maintenance or cleaning of vehicles.” (emphasis added).

At all relevant times during the applicable limitations period, DCS operated cremation and funeral services, including decedent transportation. Accordingly, Salazar and the Aggrieved Employees are entitled to the protections provided by the Wage Order.

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

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six

hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was no waived.

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

Meal Periods:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee...

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal

period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

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

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

Rest Periods:

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states:

- (b) 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, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

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

DCS intentionally and improperly failed to provide all timely duty-free rest breaks and/or meal periods to Salazar and the Aggrieved Employees as required by law, including but not limited to, second meal periods and third rest periods on days they work directly or are on-call for more than 10 hours in a workday. DCS did not pay premium wages to Salazar and the Aggrieved Employees on days it did not provide them with one or more timely meal and rest periods as required by California law. In failing to do so, DCS violated the provisions of California Labor Code §§ 226.7, 512, and 1198.

Accordingly, Salazar seeks civil penalties on behalf of himself and other Aggrieved Employees as follows:

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.7, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in

addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and

3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

Under Labor Code § 1197, “The minimum wage for employees fixed by the [Industrial Welfare] commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful.”

Section 4 of Wage Order states,

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

In relevant part, Section 2 of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

In relevant part, California Labor Code § 1194 states,

(a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to

recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

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

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

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours

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

At all relevant times during the applicable limitations period, DCS failed to compensate Salazar and other Aggrieved Employees for all hours worked, including, but not limited to overtime wages during on-call shifts for all overtime hours they worked at the correct rates of pay.

Accordingly, Salazar seeks civil penalties on behalf of himself and other Aggrieved Employees as follows:

1. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 510, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558);
2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1194, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)); and
4. \$100 for each Aggrieved Employee for each initial and intentional violation of California Labor Code § 1197, and \$250 for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were

intentionally committed), in addition to an amount sufficient to recover unpaid wages (penalties set by California Labor Code § 1197.1).

Failure to Reimburse for Expenses
(Lab. Code §§ 2802)

In pertinent part, California Labor Code § 2802(a) states, “An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.”

As describe above, during the applicable limitations period, DCS required Salazar and other Aggrieved Employees to incur certain business expenses which it failed to indemnify them for both during and after their employment ended. Accordingly, Salazar seeks civil penalties on behalf of himself and other Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 2802, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

California Labor Code § 226 require employers to furnish employees with accurate itemized written wage statements showing:

- 1) gross wages earned,
- 2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission,
- 3) the number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis,

- 4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item,
- 5) net wages earned,
- 6) the inclusive dates of the period for which the employee is paid,
- 7) the name of the employee and his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement,
- 8) the name and address of the legal entity that is the employer, and
- 9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

At relevant times during the applicable limitations period, DCS violated California Labor Code § 226, in that it failed to properly and accurately itemize each Aggrieved Employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the Aggrieved Employee and other requirements of California Labor Code § 226.

Accordingly, Salazar seeks civil penalties on behalf of himself and Aggrieved Employees as follows: \$250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

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

California Labor Code § 204 states all wages (other than those mentioned in Labor Code sections 201–202) earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed,

and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. In addition, all wages for work performed in excess of the normal work period must be paid by no later than the following regular payday.

As a result of the above described violations, DCS failed to pay Salazar and the Aggrieved Employees within the time periods set by California Labor Code § 204 in that it failed to pay them for all hours worked at the correct rates of pay and failed to pay them premium wages for days on which it failed to provide them with one or more rest or meal periods.

Accordingly, Salazar seeks civil penalties on behalf of himself and Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204, and \$200 for each Aggrieved Employee, plus 25% of the amount unlawfully withheld from each Aggrieved Employee, for each subsequent violations (penalties set by Labor Code § 210).

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

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

Under Labor Code § 203, if an employer willfully fails to pay, without abatement or reduction, in accordance §§ 201 and 202, any wages of an

employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

DCS failed to pay Salazar and the Aggrieved Employees whose employment ended all of the earned but unpaid wages described above by the conclusion of their employment with DCS. By failing to pay Salazar and the Aggrieved Employees as set forth above by such time, DCS is liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of himself and the Aggrieved Employees, Salazar seeks civil penalties from DCS as follows:

1. For violations of Labor Code § 201, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 201 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 201 occurred (penalties set by Labor Code § 2699(f)(2));
2. For violations of Labor Code § 202, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 202 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 202 occurred (penalties set by Labor Code § 2699(f)(2)); and
3. For violations of Labor Code § 203, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 203 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 203 occurred (penalties set by Labor Code § 2699(f)(2)).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174 and 1198)

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

Every person employing labor in this state shall:

...

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

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code section 1174.5 states:

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

Section 7 of the Wage Order states,

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

- (B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions

made on written orders of the employee may be aggregated and shown as one item.

- (C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.
- (D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

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

DCS has failed to maintain the records required by section 1174 and the Wage Order, including but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Salazar and the Aggrieved Employees. Accordingly, Salazar seeks civil penalties on behalf of himself and the other aggrieved employees as follows:

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

Conclusion

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

Sincerely,



David Spivak, Esq.

david@spivaklaw.com

cc: Walter Haines, Esq.
Aaron Salazar

Desert Cremation Society, Inc. dba All Caring Cremations, and All
Caring Solutions
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

Wiefels & Son
c/o Mark J. Matthews
Agent for Service of Process
630 S Vella Rd
Palm Springs, CA 92264

Wiefels & Son II, Inc. dba All California Cremation
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

LWDA / DCS

3/19/2021

Page 20 of 20

Wiefels FD, Inc.
c/o Michael J. Wiefels
Agent for Service of Process
50 East Nicolet St
Banning, CA 92220



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION, CERTIFIED MAIL, AND EMAIL

April 5, 2021

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

RE: *Andrew Forrest / Desert Cremation Society*

To whom it may concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Andrew Forrest (hereafter “Forrest”) provides notice on behalf of himself and of all individuals currently and formerly employed in California as non-exempt, hourly employees, including but not limited to transport specialists, and persons in similar positions, (hereafter referred to as “Aggrieved Employees,”) by Desert Cremation Society, Inc., a California corporation doing business as All Caring Cremations and All Caring Solutions, Wiefels & Son, a California corporation, Wiefels & Son II, Inc., a California corporation doing business as All California Cremation, and Wiefels FD, Inc., a California corporation (hereafter collectively referred to as “DCS”) of violations of California Labor Code §§ 204, 226, 510, 512, 1174, 1194, 1197, 1198, and 2802.

At all relevant times, DCS has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Forrest and the Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission Order No. 9-2001 (hereafter “the Wage

Order”), paragraph 2, subdivision (F), and “Aggrieved Employees” within the meaning of California Labor Code § 2699(c).

Statement of Facts

In approximately February 2020, Forrest began working for DCS located at 272 South Mountain View Ave, San Bernardino, as an hourly transport specialist. Since his hire date, Forrest has continuously worked for DCS and is still employed in that capacity.

At all relevant times, DCS issued wages to Forrest and the Aggrieved Employees on a semi-monthly basis and paid them at an hourly rate of pay. At all relevant times, DCS classified Forrest and the Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all relevant times, Forrest and the Aggrieved Employees have worked over 8 hours in one workday and/or over 40 hours in one workweek. Despite this, DCS failed to provide Forrest and the Aggrieved Employees with all timely rest and meal periods pursuant to California law. Further, due to the workload and low staffing levels, DCS denied Forrest and the Aggrieved Employees their 30-minute duty-free meal period within the first 5 hours of work. DCS frequently forced Forrest and the Aggrieved Employees to forego timely, duty-free 30-minute meal periods by assigning them more time-sensitive work than it could reasonably expect them to complete within their first five hours of work.

At all relevant times, DCS failed to authorize and permit Forrest and the Aggrieved Employees with rest periods in violation of California law. Due to high workload and low staffing levels, DCS failed to authorize and permit Forrest and the Aggrieved Employees to take 10-minute, paid, duty-free rest breaks every 4 hours worked or major fraction thereof. DCS did not seek an exemption from the rest period protections of the Wage Order from the California Division of Labor Standards Enforcement. Furthermore, DCS failed to pay premium wages for days on which it failed to provide Forrest and the

Aggrieved Employees with timely rest breaks and/or meal periods in compliance with California law.

At all relevant times, DCS required Forrest and the Aggrieved Employees to work on-call shifts. DCS often required Forrest and the Aggrieved Employees to remain on-call 24 hours a day, for up to 7 days a week. However, DCS did not pay Forrest and the Aggrieved Employees minimum, overtime, and double-time wages for such calls. During such on-call shifts, DCS restricted Forrest and the Aggrieved Employees in the types of activities they could perform and required them to stay available for additional work duties at all times. DCS prohibited Forrest and the Aggrieved Employees from consuming alcohol during the on-call shifts, and required them to stay within approximately a 25-mile radius of DCS's offices. Also during these on-call periods, DCS required Forrest and the Aggrieved Employees to monitor their phones for work-related calls at all times. DCS required Forrest and the Aggrieved Employees to respond and travel to the DCS office within 30 minutes of such calls, and subsequently to the assigned locations within 30 minutes. DCS, however, compensated the Aggrieved Employees only when they arrived to the assigned locations, and only for the period they worked at the assigned location. Consequently, DCS failed to compensate Forrest and the Aggrieved Employees for all hours spent on-call.

At all relevant times, DCS required Forrest and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. DCS required Forrest and the Aggrieved Employees to use their personal cell phones in the course of performing their duties. DCS communicated with Forrest and the Aggrieved Employees by phone regarding work instructions, scheduling, or to resolve work-related issues and did not provide mobile phones or an alternative to them for this purpose. Additionally, DCS did not reimburse Forrest and the Aggrieved Employees for their cell phone expenses.

As a result of these aforementioned violations, DCS failed to provide Forrest and the Aggrieved Employees with accurate written wage statements; failed to pay them all wages earned during employment; and failed to maintain accurate

employee records with respect to Forrest and the Aggrieved Employees as required under California law.

For the reasons herein, on behalf of himself and the Aggrieved Employees, Forrest alleges that DCS committed the following violations of California Labor Code and the Wage Order,:

- a) DCS failed to provide Forrest and other Aggrieved Employees with all rest breaks and meal periods;
- b) DCS failed to compensate Forrest and other Aggrieved Employees at one hour's pay for each day in which they were not provided the rest breaks required by law;
- c) DCS failed to compensate Forrest and other Aggrieved Employees at one hour's pay for each day in which they were not provided the meal periods required by law;
- d) DCS failed to compensate Forrest and other Aggrieved Employees for all hours worked at the correct rates of pay;
- e) DCS failed to indemnify Forrest and other Aggrieved Employees for all business expenses;
- f) DCS failed to provide Forrest and other Aggrieved Employees with accurate wage statements; and
- g) DCS failed to timely pay Forrest and other Aggrieved Employees all earned and unpaid wages during their employment at DCS.

Accordingly, Forrest now seeks civil penalties on behalf of himself and other Aggrieved Employees based on DCS' alleged violations of the California Labor Code and the Wage Order.

///

The Wage Order

The Wage Order applies to:

“all persons employed in the transportation industry whether paid on a time, piece rate, commission, or other basis...” (§1). Per §2 (P): “Transportation Industry” means any industry, business or establishment operated for the **purpose of conveying persons or property from one place to another** whether by rail, highway, air or water and all operations and services in connection therewith; and also includes storing or warehousing of goods or property and the repairing, parking, rental, maintenance or cleaning of vehicles.” (emphasis added).

At all relevant times during the applicable limitations period, DCS operated cremation and funeral services, including decedent transportation. Accordingly, Forrest and the Aggrieved Employees are entitled to the protections provided by the Wage Order.

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

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six

hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was no waived.

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

Meal Periods:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee...

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal

period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

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

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

Rest Periods:

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states:

- (b) 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, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

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

DCS intentionally and improperly failed to provide all timely duty-free rest breaks and/or meal periods to Forrest and the Aggrieved Employees as required by law. DCS did not pay premium wages to Forrest and the Aggrieved Employees on days it did not provide them with one or more timely meal and rest periods as required by California law. In failing to do so, DCS violated the provisions of California Labor Code §§ 226.7, 512, and 1198.

Accordingly, Forrest seeks civil penalties on behalf of himself and other Aggrieved Employees as follows:

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.7, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and

3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

Under Labor Code § 1197, “The minimum wage for employees fixed by the [Industrial Welfare] commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful.”

Section 4 of Wage Order states,

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

In relevant part, Section 2 of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

In relevant part, California Labor Code § 1194 states,

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

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

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

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

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

regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

At all relevant times during the applicable limitations period, DCS failed to compensate Forrest and other Aggrieved Employees for all hours worked, including, but not limited to overtime wages during on-call shifts for all overtime hours they worked at the correct rates of pay.

Accordingly, Forrest seeks civil penalties on behalf of himself and other Aggrieved Employees as follows:

1. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 510, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558);
2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1194, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)); and
4. \$100 for each Aggrieved Employee for each initial and intentional violation of California Labor Code § 1197, and \$250 for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were intentionally committed), in addition to an amount sufficient to recover unpaid wages (penalties set by California Labor Code § 1197.1).

///

Failure to Reimburse for Expenses
(Lab. Code §§ 2802)

In pertinent part, California Labor Code § 2802(a) states, “An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.”

As described above, during the applicable limitations period, DCS required Forrest and other Aggrieved Employees to incur certain business expenses which it failed to indemnify them for both during and after their employment ended. Accordingly, Forrest seeks civil penalties on behalf of himself and other Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 2802, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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

California Labor Code § 226 require employers to furnish employees with accurate itemized written wage statements showing:

- 1) gross wages earned,
- 2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission,
- 3) the number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis,
- 4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item,
- 5) net wages earned,
- 6) the inclusive dates of the period for which the employee is paid,

- 7) the name of the employee and his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement,
- 8) the name and address of the legal entity that is the employer, and
- 9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

At relevant times during the applicable limitations period, DCS violated California Labor Code § 226, in that it failed to properly and accurately itemize each Aggrieved Employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the Aggrieved Employee and other requirements of California Labor Code § 226.

Accordingly, Forrest seeks civil penalties on behalf of himself and Aggrieved Employees as follows: \$250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

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

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

As a result of the above described violations, DCS failed to pay Forrest and the Aggrieved Employees within the time periods set by California Labor Code § 204 in that it failed to pay them for all hours worked at the correct rates of pay and failed to pay them premium wages for days on which it failed to provide them with one or more rest or meal periods.

Accordingly, Forrest seeks civil penalties on behalf of himself and Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204, and \$200 for each Aggrieved Employee, plus 25% of the amount unlawfully withheld from each Aggrieved Employee, for each subsequent violations (penalties set by Labor Code § 210).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174 and 1198)

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

Every person employing labor in this state shall:

...

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

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

///

Labor Code section 1174.5 states:

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

Section 7 of the Wage Order states,

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

production record shall be maintained by the employer.

- (B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.
- (C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.
- (D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

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

DCS has failed to maintain the records required by section 1174 and the Wage Order, including but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Forrest and the Aggrieved Employees. Accordingly, Forrest seeks civil penalties on behalf of himself and the other Aggrieved Employees as follows:

///

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

Conclusion

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

Sincerely,



David Spivak, Esq.

david@spivaklaw.com

cc: Walter Haines, Esq.
Andrew Forrest

Desert Cremation Society, Inc. dba All Caring Cremations, and All
Caring Solutions
c/o Orion S. Robinson, Esq.
Robinson Di Lando
801 South Grand Avenue, Suite 500
Los Angeles, CA 90017
orobinson@rdwlaw.com

///

Wiefels & Son
c/o Mark J. Matthews
Agent for Service of Process
630 S Vella Rd
Palm Springs, CA 92264

Wiefels & Son II, Inc. dba All California Cremation
c/o Mark Matthews
Agent for Service of Process
690 Vella Rd
Palm Springs, CA 92264

Wiefels FD, Inc.
c/o Michael J. Wiefels
Agent for Service of Process
50 East Nicolet St
Banning, CA 92220

1 PROOF OF SERVICE

2
3 State of California,
4 County of Los Angeles

5 1. I am a citizen of the United States and am employed in the County
6 of Los Angeles, State of California. I am over the age of 18 years, and not a
party to the within action. My business address is 16530 Ventura Blvd., Suite
203, Encino, California 91436.

7 2. I am familiar with the practice of The Spivak Law Firm, for
8 collection and processing of correspondence for mailing with the United
9 States Postal Service. It is the practice that correspondence is deposited
with the United States Postal Service the same day it is submitted for
mailing.

10 On Tuesday, October 12, 2021, I served the foregoing document
11 described as **SECOND AMENDED COMPLAINT** on interested parties by electronic
mail, addressed as follows:

12 Orion S. Robinson, Esq.
13 Robinson Di Lando, APLC
14 801 South Grand Avenue, Suite 500
Los Angeles, CA 90017
orobinson@rdwlaw.com

15
16 _____ (BY MAIL) I caused such an envelope to be mailed by placing it for
collection and mailing, in the course of ordinary business practice, with
17 other correspondence of The Spivak Law Firm, 16530 Ventura Blvd., Suite 203,
Encino, California 91436.

18 XXXX (BY EMAIL) I caused the documents to be sent to the persons at the
19 electronic service addresses listed above from my electronic service address
emily@spivaklaw.com.

20
21 EXECUTED on Tuesday, October 12, 2021, at Los Angeles, California.

22 XXXX (State) I declare under penalty of perjury under the laws of the State
23 of California that the above is true and correct.

24 _____ (Federal) I declare that I am employed in the office of a member of the
bar of this court at whose direction the service was made.

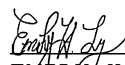
25
26 
27 EMILY HOUNG LY
28

EXHIBIT 9

Michael C. Robinson, Jr. (SBN 120308)
Orion S. Robinson (SBN 293796)
Michael B. Yee (SBN 283713)

ROBINSON DI LANDO

A Professional Law Corporation

801 S. Grand Ave, Suite 500
Los Angeles, California 90017
Telephone: (213) 229-0100
Facsimile: (213) 229-0114
E-mail: mrobinson@rdwlaw.com;
orobinson@rdwlaw.com
myee@rdwlaw.com

Attorneys for Defendants
DESERT CREMATION SOCIETY, INC.;
WIEFELS & SON II, INC.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO**

SHELIA CROMWELL, AARON SALAZAR,
and ANDREW FORREST, on behalf of
themselves, all others similarly situated, and as
“aggrieved employees” on behalf of other
“aggrieved employees” under Labor Code
Private Attorney General Act of 2004

Plaintiffs,

v.

DESERT CREMATION SOCIETY, INC., a
California corporation; WIEFELS & SON, a
California corporation; WIEFELS & SON II,
INC., a California corporation; WIEFELS FD,
INC., a California corporation; and DOES 1-50,
inclusive,

Defendants.

Case No. CIVSB2116331

[Hon. David S. Cohn Dept. S-26]

**DEFENDANTS DESERT CREMATION
SOCIETY, INC. AND WIEFELS & SON
II, INC.’S ANSWER TO PLAINTIFFS’
SECOND AMENDED COMPLAINT**

Action Filed: June 4, 2021
Trial Date: None Set

1 Defendants Desert Cremation Society, Inc. and Wiefels & Son II, Inc. (“Defendants”)
2 answer the class action complaint (the “Complaint”) filed by plaintiffs Shelia Cromwell, Aaron
3 Salazar, and Andrew Forrest (“Plaintiffs”), on behalf of themselves and all other similarly situated,
4 as follows:

5 **GENERAL DENIAL**

6 In accordance with California Code of Civil Procedure section 431.30(d), Defendants
7 generally and specifically deny each and every allegation and cause of action in Plaintiffs’
8 Complaint, and further deny that any of Plaintiffs’ or the alleged putative class members’ rights
9 were violated, that Plaintiffs or the alleged putative class member have been damaged in any sum or
10 manner at all, or that Plaintiffs or the alleged putative class members are entitled to any legal or
11 equitable relief from Defendants.

12 **AFFIRMATIVE DEFENSES**

13 As separate and further defenses to the Complaint, Defendants allege, based on information
14 and belief, the affirmative defenses listed below. By asserting these affirmative defenses,
15 Defendants do not in any way argue or concede that they have the burden of proof or persuasion on
16 any of these issues. Defendants presently have insufficient knowledge or information from which
17 to form a belief as to whether they may have additional affirmative defenses available to them.
18 Defendants therefore reserve the right to assert additional defenses that may become available or
19 apparent during discovery and to amend this Answer accordingly.

20 **FIRST AFFIRMATIVE DEFENSE**

21 **(Failure to State a Claim)**

22 1. The Complaint and the causes of action therein fail to state facts sufficient to
23 constitute a cause or causes of action against Defendants.

24 **SECOND AFFIRMATIVE DEFENSE**

25 **(Laches)**

26 2. Plaintiffs’ claims are barred, in whole or in part, by the equitable doctrine of laches.

27 ///

28 ///

THIRD AFFIRMATIVE DEFENSE

(Estoppel/Res Judicata)

3. Plaintiffs' claims are barred, in whole or in part, by the equitable doctrines of collateral estoppel and/or res judicata.

FOURTH AFFIRMATIVE DEFENSE

(Judicial Estoppel)

4. Plaintiffs' claims are barred, in whole or in part, by the equitable doctrine of judicial estoppel.

FIFTH AFFIRMATIVE DEFENSE

(Unclean Hands)

5. Plaintiffs' claims are barred, in whole or in part, by the equitable doctrine of unclean hands.

SIXTH AFFIRMATIVE DEFENSE

(Waiver)

6. Plaintiffs' claims are barred, in whole or in part, by the equitable doctrine of waiver.

SEVENTH AFFIRMATIVE DEFENSE

(Knowledge, Consent, and Ratification)

7. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs and the putative class members consented to and approved the alleged conduct about which they now complain.

EIGHTH AFFIRMATIVE DEFENSE

(Causation/Contribution by Plaintiff's Own Acts)

8. Plaintiffs' claims are barred, in whole or in part, because the injuries and/or damages alleged in the Complaint were proximately caused by, occurred, and/or were contributed to by Plaintiffs' and the putative class members' own acts or failures to act. Plaintiffs and the putative class members failed to exercise reasonable and ordinary care, caution, or prudence. Defendants' conduct was not the cause in fact or the proximate cause of any injury on which Plaintiffs now sue.

///

////

NINTH AFFIRMATIVE DEFENSE

(Causation/Contribution by Third-Party Acts)

9. Plaintiffs' claims are barred, in whole or in part, because the injuries and/or damages alleged in the Complaint were proximately caused by, occurred because of, and/or were contributed to by acts or failures to act by third parties.

TENTH AFFIRMATIVE DEFENSE

(Privilege/Good Cause)

10. Plaintiffs' claims are barred, in whole or in part, because all acts of Defendants affecting the terms and/or conditions of Plaintiffs' and the putative class members' employment were privileged and done with good cause.

ELEVENTH AFFIRMATIVE DEFENSE

(Failure to Exhaust Administrative Remedies/ Provide Sufficient Notice)

11. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs and the putative class members failed to provide sufficiently detailed written notice to Defendants and/or the Labor and Workforce Development Agency, and/or included allegations in the Complaint that fall outside the scope of Plaintiffs' and the putative class members' notices, and/or failed to provide notice before asserting a claim against a payment bond.

TWELFTH AFFIRMATIVE DEFENSE

(No Employment/Standing)

12. Plaintiffs' claims are barred, in whole or in part, to the extent that Plaintiffs and the putative class members were not employed by Defendants or Plaintiffs otherwise lack standing.

THIRTEENTH AFFIRMATIVE DEFENSE

(Independent Contractor)

13. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs and the putative class members were engaged as independent contractors for Defendants.

///

///

///

FOURTEENTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

14. Plaintiffs' claims are barred, in whole or in part, by the applicable statutes of limitations, including but not limited to the California Code of Civil Procedure, beginning with Section 335, and continuing through Section 349.4, specifically sections 335.1, 337, 338, 339, 340, 343, and California Business & Prof. Code §§16750.1 and 17208.

FIFTEENTH AFFIRMATIVE DEFENSE

(Arbitration/Alternative Dispute Resolution)

15. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs' claims are subject to mandatory, binding arbitration under an arbitration agreement Plaintiff and the putative class members agreed to in connection with their employment with Defendant.

SIXTEENTH AFFIRMATIVE DEFENSE

(Preemption)

16. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs' claims are preempted by federal law.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Settlement/Release)

17. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs and the putative class members released the claims for which they now seek relief.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Compliance with California Labor Code)

18. Plaintiffs' claims are barred, in whole or in part, because Defendants fully complied with the terms of, and performed their duties and obligations under, applicable provisions of the California Labor Code.

///

///

///

///

NINETEENTH AFFIRMATIVE DEFENSE

(Compliance with California Industrial Welfare Commission)

19. Plaintiffs' claims are barred, in whole or in part, because Defendants fully complied with the terms of, and performed their duties and obligations under, applicable orders of the California Industrial Welfare Commission.

TWENTIETH AFFIRMATIVE DEFENSE

(Plaintiffs' Bad Faith)

20. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs' claims are frivolous, unreasonable, and groundless. Plaintiffs bring this Complaint in bad faith. Accordingly, Defendants should be awarded their reasonable attorneys' fees pursuant to California Civil Code section 128.5.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Plaintiff's Willful Misconduct)

21. Plaintiffs' claims are barred, in whole or in part, by Plaintiffs' and the putative class members' willful misconduct.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Plaintiff's Carelessness, Recklessness, and/or Negligence)

22. Plaintiffs' claims are barred, in whole or in part, by Plaintiffs' and the putative class members' carelessness, recklessness, and/or negligence in the matters complained of in the Complaint.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Defendants' Good Faith)

23. Plaintiffs' claims are barred, in whole or in part, because Defendants acted in good faith at all times with respect to Plaintiffs' and the putative class members' employment, meal periods, rest periods, reimbursement, wage statements, and wages due upon termination.

///

///

///

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Good-Faith Dispute)

24. Plaintiffs' claims are barred, in whole or in part, because a good-faith dispute exists as to the existence and amount of any alleged unpaid wages.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(No Willful Failure to Pay Wages)

25. The Complaint fails to state a claim for penalties under California Labor Code section 203 because any failure by Defendants to pay wages to Plaintiff and the putative class members was not willful, and there is a good-faith dispute as to whether Defendants are obligated to pay any of the wages alleged by Plaintiffs to be due and owing.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Exempt Employee/Exemption from Wage-and-Hour Regulations)

26. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs and the putative class members were exempt employees, and/or Plaintiffs and the putative class members were otherwise exempt from California wage-and-hour regulations.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(No Meal or Rest Period Violations)

27. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs and the putative class members were not entitled to meal and/or rest periods, and if they were entitled to meal and/or rest periods, actually did take the meal and/or rest periods, and/or was permitted and authorized to take the meal and/or rest periods.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Nature of the Work Permits On-Duty Meal Periods)

28. Plaintiffs' claims are barred, in whole or in part, because Defendants' business and/or the nature of Plaintiffs' and the putative class members' work may prevent Plaintiffs and the putative class members from being relieved of all duty for a 30-minute meal period. Plaintiffs and the putative class members entered into a written agreement with Defendant regarding on-the-job meal periods as provided by California Industrial Welfare Commission Order No. 9, section 11(C).

1 Those written agreements state that Plaintiffs and the putative class members may, in writing,
2 revoke the agreement at any time.

3 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

4 **(Plaintiffs' Conduct Prevented Defendants' Payment of Wages)**

5 29. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs and the putative
6 class members refused Defendants' payment of wages and/or secreted themselves to avoid
7 Defendants' payment of wages. As a result, Defendants were unable to pay wages due Plaintiffs
8 and the putative class members.

9 **THIRTIETH AFFIRMATIVE DEFENSE**

10 **(No Further Compensation Due)**

11 30. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs and the putative
12 class members were not entitled to any further compensation.

13 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

14 **(Offset)**

15 31. To the extent that Plaintiffs and the putative class members were paid any
16 compensation by Defendants beyond that to which they were entitled, such additional compensation
17 would satisfy, in whole or in part, any alleged claim for unpaid wages, unreimbursed expenses, or
18 other monetary relief.

19 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

20 **(Bus. & Prof. Code § 17200 - No Restitution, Declaratory Relief, and/or Injunctive Relief)**

21 32. Defendants allege that the request for restitution, declaratory relief, and/or injunctive
22 relief is barred with respect to any and all alleged violations of California Business and Professions
23 Code section 17200, et seq. that have discontinued, ceased, and are not likely to occur.

24 **THIRTY-THIRD AFFIRMATIVE DEFENSE**

25 **(Bus. & Prof. Code § 17200—Not Unfair, Unlawful, Fraudulent, or Deceptive)**

26 33. Defendants allege that its business actions or practices were not unfair, unlawful,
27 fraudulent, or deceptive within the meaning of California Business and Professions Code section
28 17200 et seq.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

(No Damages)

34. Plaintiffs and the putative class members did not suffer any legally cognizable damages resulting from the alleged matters set forth in the Complaint.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

35. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs and the putative class members failed to take all reasonable, necessary, and appropriate action to mitigate any purported damages resulting from the alleged matters set forth in the Complaint.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

(Damages are Speculative and Uncertain)

36. The Complaint's requests for damages against Defendants are barred because Plaintiffs and the putative class members' damages, if any, are speculative, uncertain, and incapable of being ascertained.

THIRTY-SEVENTH AFFIRMATIVE DEFENSE

(Unconstitutional/Excessive Penalties)

37. Each claim for a penalty remedy is barred, in whole or in part, because the penalty sought is not commensurate with the harm suffered and thus violates the due process and excessive penalty protections afforded Defendants by the state and federal constitutions.

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

(No Attorneys' Fees)

38. The Complaint fails to state facts sufficient to support a claim upon which attorneys' fees may be awarded.

THIRTY-NINTH AFFIRMATIVE DEFENSE

(No Punitive Damages)

39. Plaintiffs are precluded from recovering any punitive damages because Defendants did not engage in oppressive, fraudulent, or malicious conduct toward Plaintiff and the putative class members. Cal. Civ. Code § 3294.

FORTIETH AFFIRMATIVE DEFENSE

(Lack of Manageability)

40. Plaintiffs' claims are barred, in whole or in part, because of the difficulties likely to be encountered that render the representative action unmanageable.

FORTY-FIRST AFFIRMATIVE DEFENSE

(No Ascertainable Representative Group/Class)

41. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs seek to recover damages and/or penalties for a representative group/class that is not ascertainable.

FORTY-SECOND AFFIRMATIVE DEFENSE

(Not Aggrieved Employees/Failure to Identify)

42. Plaintiffs' claims are barred, in whole or in part, to the extent that Plaintiffs seek to recover damages and/or penalties on behalf of individuals who are not aggrieved employees, and/or because Plaintiffs fail to identify any other alleged aggrieved employees.

FORTY-THIRD AFFIRMATIVE DEFENSE

(Inadequate Class Representative)

43. Plaintiffs' claims are barred, in whole or in part, because each plaintiff is an inadequate class representative for the claims asserted.

FORTY-FOURTH AFFIRMATIVE DEFENSE

(Uncertifiable Putative Class)

44. Plaintiffs' claims are barred, in whole or in part because Defendants have not engaged in actions of the kind alleged that are generally applicable to putative class members, and this action is therefore not properly maintainable and/or does not qualify for certification under the class-action requirements.

FORTY-FIFTH AFFIRMATIVE DEFENSE

(No Commonality)

45. Defendants allege that questions of law and fact common to putative class members do not predominate over questions affecting individual members of the proposed class. This action is therefore not appropriate for certification as a class action.

FORTY-SIXTH AFFIRMATIVE DEFENSE

(No Typicality)

46. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs cannot establish that their claims are typical of those of the putative class members. This action is therefore not appropriate for certification as a class action.

FORTY-SEVENTH AFFIRMATIVE DEFENSE

(No Numerosity)

47. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs cannot establish that members of the class are so numerous that joinder is impracticable. This action is therefore not appropriate for certification as a class action.

FORTY-EIGHTH AFFIRMATIVE DEFENSE

(No Community of Interest)

48. Defendants allege that the class allegations in the Complaint are improper as a matter of law because there is no community of interest in the claims asserted by Plaintiffs.

FORTY-NINTH AFFIRMATIVE DEFENSE

(Risk of Inconsistent Adjudications)

49. Defendants allege that Plaintiffs' claims create a risk of disposing of or impairing the claims, interests, or rights of absent class members.

FIFTIETH AFFIRMATIVE DEFENSE

(Actions Adverse to Class Members)

50. Defendants allege that Plaintiffs' claims are barred and/or reduced by virtue of Plaintiffs and their attorneys having taken actions for their own benefit that are adverse and inimical to the interests of the putative class members, and by purporting to act when Plaintiffs have and had irreconcilable conflicts of interest with the putative class members, rendering any judgment, award, or settlement void or voidable.

///

///

///

FIFTY-FIRST AFFIRMATIVE DEFENSE

(No Predominance and Superiority)

51. Defendants allege that Plaintiffs cannot establish a predominance of common issues over individual issues or that the class action is superior to other means of litigating the case.

FIFTY-SECOND AFFIRMATIVE DEFENSE

(Lack of Knowledge)

52. Plaintiff's claims are barred, in whole or in part, because Defendants and their officers, directors, managing agents, or managerial or supervisory employees, sufficiently knew or should have known of any alleged unlawful conduct.

FIFTY-THIRD AFFIRMATIVE DEFENSE

(Not Hours Worked/Failure to Accurately Report Hours Worked)

53. Plaintiff's claims are barred, in whole or in part, because Plaintiff and the alleged aggrieved employees did not accurately report the hours for which alleged unpaid wages, overtime, and penalties are sought, and/or some or all of the hours for which compensation is claimed are not considered hours worked under California law.

FIFTY-FOURTH AFFIRMATIVE DEFENSE

(Hours Worked Were De Minimis)

54. Plaintiff's claims are barred, in whole or in part, because the alleged uncompensated time Plaintiff and the alleged aggrieved employees spent working or working overtime was de minimis.

FIFTY-FIFTH AFFIRMATIVE DEFENSE

(No Knowing or Intentional Failure to Keep Records)

55. Plaintiff's claims are barred, in whole or in part, because Defendant's failure to keep adequate records, if any, was not knowing or intentional.

///

///

///

///

FIFTY-SIXTH AFFIRMATIVE DEFENSE

(No Common Questions of Law and Fact)

56. Defendants allege that questions of law and fact common to putative class members do not predominate over questions affecting individual members of the proposed class. Therefore, this action is not appropriate for certification as a class action.

FIFTY-SEVENTH AFFIRMATIVE DEFENSE

(Adequate Remedy at Law)

57. Defendants allege that the Complaint fails to state facts sufficient to support any granting of extraordinary or equitable relief, and otherwise has adequate remedies at law.

FIFTY-EIGHTH AFFIRMATIVE DEFENSE

(PAGA Unconstitutional)

58. Defendants allege that Plaintiff is not entitled to recover civil penalties or wages pursuant to Labor Code sections 558, 558.1, and 2698 et. seq, under the Private Attorneys General Act (“PAGA”), on the grounds that PAGA violates the United States and California Constitutions, in that: (1) such damages are so punitive in purpose and effect as to constitute excessive fines and unusual punishment in violation of the Excessive Fines Clause (U.S. Const., amend. VIII); (2) the imposition of such damages would violate Defendants’ right to due process and/or equal protection under the law, under the United States and California Constitutions; and (3) PAGA violates the Separation of Powers Doctrine (see Cal. Const. art. IV, section 1).

FIFTY-NINTH AFFIRMATIVE DEFENSE

(Payment)

59. Defendants allege that Plaintiff and the putative class members have been paid all sums earned by them and that are due and owing to them by virtue of their performance of work as alleged in the Complaint.

SIXTIETH AFFIRMATIVE DEFENSE

(No Regular Business Practice)

60. Plaintiff’s Complaint fails to establish a regular business practice or unlawful pattern of conduct by Defendants.

SIXTY-FIRST AFFIRMATIVE DEFENSE

(No Waiting Time Penalties)

61. Defendants are informed and believe and based thereon allege that to the extent Plaintiff seeks statutory penalties for an alleged willful failure to comply with the requirements of the California Labor Code, such penalties are barred or must be reduced because Defendants did not willfully violate the requirements of California Labor Code sections 201, 202 and 203, or any applicable California Labor Code section, and a good faith dispute exists concerning such alleged violations.

SIXTY-SECOND AFFIRMATIVE DEFENSE

(No Actual Injury)

62. Plaintiff and the putative class did not suffer actual injuries and therefore cannot recover damages or statutory penalties under California Labor Code section 226.

SIXTY-THIRD AFFIRMATIVE DEFENSE

(Penalties)

63. The Complaint fails to allege facts sufficient to establish a claim for penalties.

SIXTY-FOURTH AFFIRMATIVE DEFENSE

(Avoidable Consequences)

64. Plaintiff has a duty to use such means as are reasonable under the circumstances to avoid or mitigate alleged damages that result from statutory violations, if any. To the extent there was any statutory violation (which is not admitted but considered solely for purposes of this affirmative defense), Plaintiff unreasonably failed to avoid or reduce harm.

SIXTY-FIFTH AFFIRMATIVE DEFENSE

(Immunity)

65. Defendants allege that Plaintiff's Complaint, and each and every cause of action set forth therein alleged against Defendants is barred, in whole or in part, because actions taken with respect to Plaintiff's employment, if any, were based on an honest, reasonable, and good faith belief in the facts as known and understood at the time and is therefore immune from liability.

SIXTY-SIXTH AFFIRMATIVE DEFENSE

(After-Acquired Evidence)

66. Plaintiff's Complaint is limited or subject to an absolute bar as to recoverable damages based on after-acquired evidence Defendants have presently and/or may acquire during the course of this litigation.

FIFTY-SIXTH AFFIRMATIVE DEFENSE

(Bad Faith Claims)

67. The allegations and claims asserted in the Complaint have always been and continue to be frivolous, groundless and without merit. Plaintiff has brought this action in bad faith.

FIFTY-SEVENTH AFFIRMATIVE DEFENSE

(Failure to Plead with Certainty and Particularity)

68. The allegations of the Complaint and each purported cause of action contained therein are not pled with sufficient particularity and are uncertain, vague, ambiguous and unintelligible.

FIFTY-EIGHTH AFFIRMATIVE DEFENSE

(Mistake of Fact and Mistake of Law)

69. Defendants are informed and believe and thereon allege that Plaintiff's claims are barred by either a mistake of fact or a mistake of law or both.

SEVENTIETH AFFIRMATIVE DEFENSE

(Labor Code Section 204)

70. Defendants allege that the Complaint is limited or subject to an absolute bar because Defendants have complied with Labor Code section 204.

///

///

///

///

///

///

///

PRAYER

Defendants pray for judgment on Plaintiffs' Complaint as follows:

1. That Plaintiffs and the putative class members take nothing by their Complaint against Defendants, and that judgment be entered in favor of Defendants on each and every cause of action in the Complaint;
2. That Defendants recover their costs of suit to date;
3. That Defendants recover their reasonable attorneys' fees to date, to the extent permitted by applicable statute or law; and
4. That the Court awards such additional relief as it deems just and proper.

DATED: November 11, 2021

ROBINSON DI LANDO
A Professional Law Corporation

By:  _____

Michael C. Robinson
Orion S. Robinson
Michael B. Yee

Attorneys for Defendants
DESERT CREMATION SOCIETY, INC. and
WIEFELS & SON II, INC.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, state of California. I am over the age of 18 and not a party to the within action; my business address is 801 South Grand Avenue, Suite 500, Los Angeles, California 90017.

On **November 11, 2021**, I served the foregoing document(s) described as **DEFENDANTS DESERT CREMATION SOCIETY, INC. AND WIEFELS & SON II, INC.'S ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT** interested parties in this action as follows:

David G. Spivak Caroline Tahmassian Maya Cheaitani THE SPIVAK LAW FIRM 16530 Ventura Blvd, Ste. 203 Encino, CA 91436	Attorney for Plaintiff, SHEILA CROMWELL Telephone: 213.725.9094 Fax: 213.634.2485 Email: david@spivaklaw.com ; caroline@spivaklaw.com maya@spivaklaw.com
Walter Haines UNITED EMPLOYEES LAW GROUP 4276 Katella Ave, Ste. 301 Los Alamitos, CA 90720	Attorney for Plaintiff, SHEILA CROMWELL Telephone: 562.256.1047 Fax: 562.256.1006 Email: whaines@uelglaw.com

☒ BY PLACING ☐ the original ☒ a true copy thereof enclosed in sealed envelope(s) to the notification address(es) of record and transmitting via:

☐ U.S. MAIL: I caused such envelope(s) to be delivered by first-class mail. I am "readily familiar" with the firm's practice of collection and processing mail. It is deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ ELECTRONIC TRANSMISSION: I electronically transmitted a true and correct copy thereof to the email address(es) of record before close of business for the purpose of effecting service and the transmission was reported as complete and without error.

☒ STATE: I declare under penalty of perjury under the laws of the state of California that the above is true and correct.

Executed on **November 11, 2021**, at Los Angeles, California.


Christy Flores

EXHIBIT 10



Sample size calculator

What margin of error can you accept?

5% is a common choice

%

The margin of error is the amount of error that you can tolerate. If 90% of respondents answer *yes*, while 10% answer *no*, you may be able to tolerate a larger amount of error than if the respondents are split 50-50 or 45-55.

Lower margin of error requires a larger sample size.

What confidence level do you need?

Typical choices are 90%, 95%, or 99%

%

The confidence level is the amount of uncertainty you can tolerate. Suppose that you have 20 yes-no questions in your survey. With a confidence level of 95%, you would expect that for one of the questions (1 in 20), the percentage of people who answer *yes* would be more than the margin of error away from the true answer. The true answer is the percentage you would get if you exhaustively interviewed everyone.

Higher confidence level requires a larger sample size.

What is the population size?

If you don't know, use 20000

How many people are there to choose your random sample from? The sample size doesn't change much for populations larger than 20,000.

What is the response distribution?

Leave this as 50%

%

For each question, what do you expect the results will be? If the sample is skewed highly one way or the other, the population probably is, too. If you don't know, use 50%, which gives the largest sample size. See below under **More information** if this is confusing.

Your recommended sample size is

9

This is the minimum recommended size of your survey. If you create a sample of this many people and get responses from everyone, you're more likely to get a correct answer than you would from a large sample where only a small percentage of the sample responds to your survey.

Online surveys with **Vovici** have completion rates of **66%!**

Alternate scenarios

With a sample size of	100	200	300	With a confidence level of	90	95	99
Your margin of error would be	6.28%	0.00%	0.00%	Your sample size would need to be	7	9	15

Save effort, save time. **Conduct your survey online with Vovici.**

More information

If 50% of all the people in a population of 20000 people drink coffee in the morning, and if you were repeat the survey of 377 people ("Did you drink coffee this morning?") many times, then 95% of the time, your survey would find that between 45% and 55% of the people in your sample answered "Yes".

The remaining 5% of the time, or for 1 in 20 survey questions, you would expect the survey response to more than the margin of error away from the true answer. When you survey a sample of the population, you don't know that you've found the correct answer, but you do know that there's a 95% chance that you're within the margin of error of the correct answer.

Try changing your sample size and watch what happens to the *alternate scenarios*. That tells you what happens if you don't use the recommended sample size, and how M.O.E and confidence level (that 95%) are related.

To learn more if you're a beginner, read [Basic Statistics: A Modern Approach](#) and [The Cartoon Guide to Statistics](#). Otherwise, look at the [more advanced books](#).

In terms of the numbers you selected above, the sample size n and margin of error E are given by

$$x = Z(c/100)^2 r(100-r)$$

$$n = N x / ((N-1)E^2 + x)$$

$$E = \text{Sqrt}[(N - n)x / n(N-1)]$$

where N is the population size, r is the fraction of responses that you are interested in, and $Z(c/100)$ is the [critical value](#) for the confidence level c .

If you'd like to see how we perform the calculation, view the page source. This calculation is based on the [Normal distribution](#), and assumes you have more than about 30 samples.

About **Response distribution**: If you ask a random sample of 10 people if they like donuts, and 9 of them say, "Yes", then the prediction that you make about the general population is different than it would be if 5 had said, "Yes", and 5 had said, "No". Setting the response distribution to 50% is the most conservative assumption. So just leave it at 50% unless you know what you're doing. The sample size calculator computes the critical value for the normal distribution. Wikipedia has good articles on statistics.

How do you like this web page? ☐ Good as-is ☐ Could be even better

© 2004 by [Raosoft, Inc.](#). Please download and reuse this web page!
[Questions? Please let us know.](#)

Print

Done

EXHIBIT 11

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Aaron Salazar v. All Caring Solutions
Case no.:	CIVSB2116331
Court:	San Bernardino
Judge:	Hon. Joseph T Ortiz, Dept. S-17
Page subject:	Data

Numbers highlighted in green were provided by Defendants
Numbers highlighted in yellow were calculated based on the sample data
Numbers highlighted in blue are based on assumptions or Plaintiffs' and PCMs reports

Important Dates

Unfair Competition, Bus.&Prof. § 17200 ("UCL") period begins:	Friday, October 13, 2017
Lab.Code § 203 (waiting time penalties) period begins:	Saturday, October 13, 2018
Lab.Code § 2699 (civil penalties) period begins:	Tuesday, March 17, 2020
Lab.Code § 226 (pay stub penalties) period begins:	Monday, October 12, 2020
LWDA Notice:	Wednesday, March 17, 2021
PAGA Lawsuit:	Friday, June 4, 2021
Second Amended Complaint:	Tuesday, October 12, 2021
Sample begin:	Thursday, July 6, 2017
Sample end:	Tuesday, February 28, 2023
Sample calendar days:	2,063.00
Mediation:	Thursday, June 29, 2023
Anticipated Settlement Period end date:	Friday, October 27, 2023
Settlement Period to Sample Period:	106.88%

Classes / Groups sizes

UCL Class Members:	280
# of employees in a workday/payperiod (based on PPP application/records)	21
UCL Workweeks:	4,886
UCL Wage Statements:	2,443
UCL Workdays:	19,544
UCL Calendar days:	2,085
UCL Months:	68.55
Waiting Time Penalties Class Members:	100
PAGA Aggrieved Employees:	122
PAGA Wage Statements:	1,794
Wage Statement Class Members:	96
Wage Statement Class Wage Statements:	1,481

Averages

Average Hourly Rate:	\$ 16.26
Average Overtime Rate:	\$ 24.39

Confidential Settlement Communication

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Average Doubletime Rate:	\$	32.52
Average Work Hours Per Day:		24.00
Average Work Hours Per Week:		96.00
Average Workdays Per Week:		4.00
Workdays to Calendar Days (%):		57.14%
Paycycle:		bi-weekly
Paychecks Per Year:		26

Confidential Settlement Communication

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Aaron Salazar v. All Caring Solutions
Case no.:	CIVSB2116331 (Cromwell)
Court:	San Bernardino
Judge:	Hon. Joseph T Ortiz, Dept. S-17
Page subject:	Unpaid on-Call wages
Authority:	Lab.Code §§ 510, 1194, 1194.2, and 1198

Average Hourly Rate:	\$	16.26
Unpaid hours per pay week:		16.00
Actionable workweeks:		4,886
Interest:		10%
Unpaid wages:	\$	1,398,255.94

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Aaron Salazar v. All Caring Solutions
Case no.:	CIVSB2116331 (Cromwell)
Court:	San Bernardino
Judge:	Hon. Joseph T Ortiz, Dept. S-17
Page subject:	Unprovided Meal Periods
Authority:	Lab.Code §§ 226.7, 512, and 1198

Average Hourly Rate:	\$	16.26
Actionable workdays:		19,544
>>Percentage qualifying for meal periods:		88%
Violation rate (%)		70%

Meal period premium wages:	\$	196,790.54
-----------------------------------	----	-------------------

Confidential Settlement Communication

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Aaron Salazar v. All Caring Solutions
Case no.:	CIVSB2116331 (Cromwell)
Court:	San Bernardino
Judge:	Hon. Joseph T Ortiz, Dept. S-17
Page subject:	Unprovided Rest Periods
Authority:	Lab.Code §§ 226.7 and 1198

Average Hourly Rate:	\$	16.26
Actionable workdays:		19,544
>>Percentage qualifying for rest periods:		93%
Violation rate (%)		100%

Rest period premium wages:	\$	296,811.60
----------------------------	----	------------

Confidential Settlement Communication

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Aaron Salazar v. All Caring Solutions
Case no.:	CIVSB2116331 (Cromwell)
Court:	San Bernardino
Judge:	Hon. Joseph T Ortiz, Dept. S-17
Page subject:	Unreimbursed cellphone expenses
Authority:	Lab.Code § 2802

Telecom

UCL Pay Periods		2,443
Average cellphone reimbursment per pay period:	\$	20.00
Interest rate:		10%
Unreimbursed cellphone costs:	\$	53,746.00

Confidential Settlement Communication

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title: Aaron Salazar v. All Caring Solutions
Case no.: CIVSB2116331 (Cromwell)
Court: San Bernardino
Judge: Hon. Joseph T Ortiz, Dept. S-17
Page subject: **Itemized Wage Statements**
Authority: Lab.Code § 226

Wage Statement Class Members:		96
Wage Statement Class Wage Statements:		1,481
Initial penalty:	\$	50.00
Subsequent penalty:	\$	100.00
Statutory wage statement penalties:	\$	143,293.15

Confidential Settlement Communication

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Aaron Salazar v. All Caring Solutions
Case no.:	CIVSB2116331 (Cromwell)
Court:	San Bernardino
Judge:	Hon. Joseph T Ortiz, Dept. S-17
Page subject:	Waiting Time / Final Wages
Authority:	Lab.Code § 203

Waiting Time Penalties Class Members:		100
Days waiting:		30
Average Hourly Rate:	\$	16.26
Average Overtime Rate:	\$	24.39
Average Doubletime Rate:	\$	32.52
Average Work Hours Per Day:		8.00
Regular Hours Per Day:		8.00
Overtime Hours Per Day:		-
Doubletime Hours Per Day:		-
Waiting time penalties:	\$	390,240.00

Confidential Settlement Communication

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Aaron Salazar v. All Caring Solutions
Case no.:	CIVSB2116331 (Cromwell)
Court:	San Bernardino
Judge:	Hon. Joseph T Ortiz, Dept. S-17
Page subject:	PAGA Civil Penalties
Authority:	Lab.Code §§ 2698, <i>et seq.</i>

Labor Code violation	Labor Code Civil		Initial penalty	Pay periods		Total
	Penalty Statute					
Minimum wages (Lab.Code § 1197):	Lab.Code § 1197	\$	100.00	1,794	\$	179,357.26
Meal Periods/Overtime wages (Lab.Code §§ 512/510):	Lab.Code § 558	\$	50.00	1,794	\$	89,678.63
Rest periods (Lab.Code § 1198):	Lab.Code § 2699	\$	100.00	1,794	\$	179,357.26
Business expenses (Lab.Code § 2802):	Lab.Code § 2699	\$	100.00	1,794	\$	179,357.26
Improper pay stubs (Lab.Code § 226):	Lab.Code § 2699	\$	100.00	1,794	\$	179,357.26
Untimely wages (Lab.Code §§ 201-204):	Lab.Code § 2699	\$	100.00	1,794	\$	179,357.26
Total:					\$	986,464.93

Confidential Settlement Communication

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Aaron Salazar v. All Caring Solutions
Case no.:	CIVSB2116331 (Cromwell)
Court:	San Bernardino
Judge:	Hon. Joseph T Ortiz, Dept. S-17
Page subject:	Totals
Authority:	Various

Restitution	Reduction		Demand
Unpaid wages:	\$ 1,398,255.94	5%	\$ 1,328,343.14
Meal period premium wages:	\$ 196,790.54	5%	\$ 186,951.01
Rest period premium wages:	\$ 296,811.60	5%	\$ 281,971.02
Unreimbursed cellphone costs:	\$ 53,746.00	5%	\$ 51,058.70
Restitution subtotal:	\$ 1,945,604.08	\$	1,848,323.87
Penalties			
Statutory wage statement penalties:	\$ 143,293.15	5%	\$ 136,128.49
Waiting time penalties:	\$ 390,240.00	5%	\$ 370,728.00
Minimum wages (Lab.Code § 1197):civil penalties:	\$ 179,357.26	5%	\$ 170,389.40
Meal Periods/Overtime wages (Lab.Code §§ 512/510):civil penalties:	\$ 89,678.63	5%	\$ 85,194.70
Rest periods (Lab.Code § 1198):civil penalties:	\$ 179,357.26	5%	\$ 170,389.40
Business expenses (Lab.Code § 2802):civil penalties:	\$ 179,357.26	5%	\$ 170,389.40
Improper pay stubs (Lab.Code § 226):civil penalties:	\$ 179,357.26	5%	\$ 170,389.40
Untimely wages (Lab.Code §§ 201-204):civil penalties:	\$ 179,357.26	5%	\$ 170,389.40
Penalties subtotal:	\$ 1,519,998.08	\$	1,443,998.18
Grand total:	\$ 3,465,602.16	\$	3,292,322.05

EXHIBIT 12

1 DAVID G. SPIVAK, State Bar # 179684
2 THE SPIVAK LAW FIRM
3 9454 Wilshire Blvd.
4 Suite 303
5 Beverly Hills, CA 90212
6 Telephone (310) 499-4730
7 Facsimile (310) 499-4739
8 Email david@spivaklaw.com

CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court
FEB 24 2010

John A. Clarke, Executive Officer/Clerk
BY MARY GARCIA, Deputy

6 Attorney for Plaintiffs,
7 ALINA GHRDILYAN, EVGENIA SULTANIAN, and all others similarly situated

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT
10 (UNLIMITED JURISDICTION)

11 ALINA GHRDILYAN; EVGENIA
12 SULTANIAN; and all others similarly situated,

Case No.: BC430633

CLASS ACTION

13 *Plaintiffs,*

14 vs.

FIRST AMENDED COMPLAINT FOR:

1. Failure To Compensate Employees For All Hours Worked;
2. Failure To Provide Rest And Meal Periods;
3. Forfeiture of Vested Vacation Benefits;
4. Failure To Provide Accurate Written Wage Statements;
5. Failure To Timely Pay All Final Wages
6. Unauthorized Deductions;
7. Failure to Indemnify;
8. Unfair Competition; And
9. Civil Penalties

16 RJ FINANCIAL, INC., a California
17 corporation; RAMIL ABALKHAD, an
18 individual; and DOES 1 through 50, inclusive,

19 *Defendants.*

Action filed: 01/28/2010
CMC: 05/10/2010, 8:30 a.m.
FSC: Not set
Trial: Not set
Dept: 36, Hon. Gregory Alarcon

26 On behalf of both himself and all other persons similarly situated, plaintiff ALINA
27 GHRDILYAN and EVGENIA SULTANIAN ("Plaintiffs") bring this action against defendants
RJ FINANCIAL, INC., RAMIL ABALKHAD, and the other defendants, (collectively

THE
SPIVAK
LAW FIRM

1 “Defendants”) for violations of the California Labor Code, the applicable Industrial Welfare
2 Commission Order(s) (“Wage Order(s)”), and the California Business and Professions Code,
3 and as grounds therefore alleges:

4 INTRODUCTION

5 1. This action arises out of the allegedly unlawful labor practices of Defendants in
6 California. Through this class and collective action, Plaintiffs seek to represent the below-
7 defined classes and subclasses of persons who Defendants have allegedly committed labor law
8 violations against including, but not limited to, wage underpayments. As a result of the
9 allegedly unlawful labor conduct described herein, Plaintiffs now seek declaratory and
10 injunctive relief, damages, restitution, penalties, and other proper relief on behalf of himself and
11 other similarly situated persons.

12 PARTIES AND CONDUCT

13 A. Plaintiffs and Class Members

14 2. During the applicable time period, Plaintiff ALINA GHRDILYAN, an
15 individual, was employed in a position that she alleges Defendants have classified as non-
16 exempt from the overtime requirements of the California Labor Code and the applicable wage
17 order(s).

18 3. During the applicable time period, Plaintiff EVGENIA SULTANIAN, an
19 individual, was employed in a position that she alleges Defendants have classified as non-
20 exempt from the overtime requirements of the California Labor Code and the applicable wage
21 order(s).

22 4. At relevant times during the applicable limitations periods, Plaintiffs allege that
23 Defendants have failed to compensate them and Defendants’ other California employees for all
24 of the hours that they have worked, failed to compensate them for all of the overtime hours that
25 they have worked at overtime rates, failed to provide them with all required rest and meal
26 periods, failed to pay them additional required wages for rest and meal periods, improperly
27 denied earned wages that Defendants without authorization deducted from paychecks or
required reimbursement for, failed to indemnify for necessary expenditures, failed to timely pay

1 all final wages owed, caused them to forfeit vested vacation pay, and/or intentionally failed to
2 provide them with accurate written wage statements.

3 **B. Defendants**

4 5. Defendant RJ FINANCIAL, INC. is a corporation organized under the laws of
5 California. It was at all relevant times a “person” under Labor Code § 18.

6 6. Defendant RAMIL ABALKHAD (also known as Randy Abalkhad), an
7 individual residing in the County of Los Angeles, State of California, was at all relevant times
8 the chief executive officer of Defendant RJ FINANCIAL, INC. At all relevant times,
9 ABALKHAD acted on behalf of RJ FINANCIAL, INC. and oversaw RJ FINANCIAL, INC.’s
10 accounting and bookkeeping and all administrative functions, including payroll. The company
11 maintained books and records by staff members under his direction. At all relevant times,
12 ABALKHAD was a “person acting on behalf of an employer” (RJ FINANCIAL, INC. and the
13 Doe Defendants) who caused to be violated the provisions of the Labor Code regulating hours
14 and days of work in orders of the Industrial Welfare Commission as described below under
15 Labor Code § 558. Also, he was at all relevant times a “person” under Labor Code § 18.

16 7. Plaintiffs are ignorant of the true names, capacities, relationships, and extents of
17 participation in the conduct alleged herein, of the defendants sued as DOES 1-50, inclusive, but
18 are informed and believe and thereon allege that said defendants are legally responsible for the
19 wrongful conduct alleged herein and therefore sue these defendants by such fictitious names.
20 Plaintiffs will amend the complaint to allege the true names and capacities of the DOE
21 defendants when ascertained.

22 8. Plaintiffs are informed and believe and thereon allege that, at all relevant times
23 herein, all defendants were the agents, employees and/or servants, masters or employers of the
24 remaining defendants, and in doing the things hereinafter alleged, were acting within the course
25 and scope of such agency or employment, and with the approval and ratification of each of the
26 other defendants.

27 9. At all relevant times, in perpetrating the acts and omissions alleged herein,
defendants, and each of them, acted pursuant to and in furtherance of a policy and practice of

1 not paying Plaintiffs and other members of the below-described classes in accordance with
2 applicable California labor laws as alleged herein.

3 10. Plaintiffs are informed and believe and thereon allege that each and every one of
4 the acts and omissions alleged herein were performed by, and/or attributable to, all defendants,
5 each acting as agents and/or employees, and/or under the direction and control of each of the
6 other defendants, and that said acts and failures to act were within the course and scope of said
7 agency, employment and/or direction and control.

8 **CLASS ACTION ALLEGATIONS**

9 11. Plaintiffs incorporate paragraphs 1 through 10 of this Complaint as if fully
10 alleged herein.

11 12. Plaintiffs bring this action on behalf of themselves and all others similarly
12 situated as a class action pursuant to California Code of Civil Procedure § 382. Plaintiffs seek to
13 represent the following classes and subclasses of current, future, and/or former employees of
14 Defendants defined below:

15 **Wages Class:** All persons employed by Defendants in California who
16 have not been paid for all hours worked during the period beginning four
17 (4) years prior to the filing of this action and ending on the date that final
18 judgment is entered in this action.

19 **Overtime Class:** All persons employed by Defendants in California who
20 have not been paid at the legally required overtime rates for all hours
21 worked in excess of eight (8) hours in one (1) day and/or forty (40) hours
22 in one (1) week during the period beginning four (4) years prior to the
23 filing of this action and ending on the date that final judgment is entered in
24 this action.

25 **Rest Periods Class:** All persons employed by Defendants in California
26 who were not provided with a net rest period of at least ten (10) minutes
27 per each four (4) hour work period, or major portion thereof, during the
28 period beginning four (4) years prior to the filing of this action and ending
29 on the date that final judgment is entered in this action.

30 **Meal Periods Class:** All persons employed by Defendants in California
31 who were not provided with uninterrupted thirty (30) minute meal periods
32 during each work period of five (5) or more hours during the period
33 beginning four (4) years prior to the filing of this action and ending on the

1 date that final judgment is entered in this action.

2 **Vacation Pay Class:** All persons employed by Defendants in California
3 who earned vested paid vacation days without receiving
4 compensation for each vested paid vacation day during the
5 period beginning four (4) years prior to the filing of this action
6 and ending on the date that final judgment is entered in this
7 action.

8 **Unauthorized Deduction Class:** All persons employed by Defendants in
9 California whose wages were deducted by Defendants without statutory
10 authority or written consent during the period beginning four (4) years
11 prior to the filing of this action and ending on the date that final judgment
12 is entered in this action.

13 **Inaccurate Wage Statement Class:** All persons employed by Defendants
14 in California, including but not limited to members of the **Wages Class,**
15 **Overtime Class, Rest Period Class, Meal Period Class, and/or**
16 **Unauthorized Deduction Class** during the period beginning four (4)
17 years prior to the filing of this action and ending on the date that judgment
18 is entered in this action.

19 **Former Employee Class:** All persons employed by Defendants in
20 California, including, but not limited to, members of the **Wages Class,**
21 **Overtime Class, Rest Period Class, Meal Period Class, Unauthorized**
22 **Deduction Class, and/or Inaccurate Wage Statement Class** whose
23 employment with Defendants ended during the period beginning four (4)
24 years prior to the filing of this action and ending on the date that final
25 judgment is entered in this action, who either: a) were discharged and not
26 paid all wages owed on or before the day of termination; or b) resigned
27 without notice and were not paid all wages owed within 72 hours of
resignation; or c) resigned with 72 hours notice and were not paid all
wages owed on or before the day of quitting.

Indemnification Class: All persons employed by Defendants in
California, including, but not limited to, members of the **Wages Class,**
Overtime Class, Rest Period Class, Meal Period Class, Unauthorized
Deduction Class, and/or Inaccurate Wage Statement Class, who
Defendants failed to indemnify for all necessary expenditures incurred by
such employees in direct consequence of the discharge of their duties
during the period beginning four (4) years prior to the filing of this action
and ending on the date that final judgment is entered in this action.

UCL Class: All persons who are members of the **Wages Class, Rest**
Period Class, Meal Period Class, Overtime Class, Inaccurate Wage
Statement Class, Former Employee Class, Unauthorized Deduction

1 **Class**, and/or **Indemnification Class**, who have been employed by
2 Defendants in California at any time during the period beginning four (4)
3 years prior to the filing of this action and ending on the date that final
4 judgment is entered in this action.

5 **All-Inclusive Class:** All members of the **Wages Class**, **Overtime Class**,
6 **Rest Periods Class**, **Meal Periods Class**, **Inaccurate Wage Statement**
7 **Class**, **Unauthorized Deduction Class**, **Former Employee Class**, and/or
8 **Indemnification Class**.

9 13. This action has been brought and may be maintained as a class action pursuant to
10 California Code of Civil Procedure § 382 because there is a well-defined community of interest
11 among the persons who comprise readily ascertainable class.

12 14. Plaintiffs are unaware of any difficulties that are likely to be encountered in the
13 management of this case as a class action.

14 15. The class members are so numerous that the individual joinder of each individual
15 class member is impractical. While Plaintiffs do not currently know the exact number of class
16 members, Plaintiffs are informed and believe and thereon allege that the actual number of class
17 members exceeds the minimum number required for numerosity purposes under California law.

18 16. Common questions of law and fact exist as to all class members and predominate
19 over any questions which affect only individual class members. These questions include, but are
20 not limited to:

21 A. Do Defendants maintain policies or practices that systematically cause
22 the **Wages Class** not to be paid for all hours worked?

23 B. Have members of the **Overtime Class** been paid at the legally required
24 overtime rates for all hours worked in excess of eight (8) hours in one (1) day?

25 C. Do Defendants maintain policies or practices that systematically cause
26 the **Overtime Class** not to be paid at overtime rates for all overtime hours worked?

27 D. Did Defendants fail to provide members of the **Rest Period Class** with
all legally required rest periods in violation of California law?

 E. Did Defendants fail to provide members of the **Meal Period Class** with
all legally required meal periods in violation of California law?

 F. Did Defendants fail to pay members of the **Rest Period Class** the

1 additional wages required for rest periods that were not provided?

2 G. Did Defendants fail to pay members of the **Meal Period Class** the
3 additional wages required for meal periods that were not provided?

4 H. Did Defendants deduct wages from the paychecks of members of the
5 **Unauthorized Deduction Class** without written consent?

6 I. Did Defendants intentionally fail to provide members of the **Inaccurate**
7 **Wage Statement Class** with accurate written wage statements?

8 J. Did Defendants intentionally fail to indemnify members of the
9 **Indemnification Class** for all necessary expenditures incurred by the members of the class in
10 direct consequence of the discharge of their duties?

11 K. Are the vacation days received by members of the **Vacation Pay Class**
12 subject to forfeiture?

13 L. Did Defendants fail to timely pay **Former Employee Class** all final
14 wages owed following termination or discharge?

15 M. Are Defendants liable to members of the **Former Employee Class** for
16 continuation wages under California Labor Code § 203?

17 N. Did Defendants engage in unfair competition within the meaning of
18 California Business & Professions Code §§ 17200, *et seq.*, with respect to members of the **UCL**
19 **Class**?

20 O. Are class members entitled to prejudgment interest?

21 P. Are class members entitled to attorneys' fees?

22 17. Plaintiffs' claims are typical of the other class members' claims. Plaintiffs are
23 informed and believe and thereon allege that Defendants have a policy or practice of failing to
24 comply with the California Labor Code and the California Business and Professions Code as
25 alleged herein.

26 18. Plaintiffs will fairly and adequately represent and protect the interests of the
27 other class members. Plaintiffs have no interests adverse to the interests of the other class
members. In addition, Plaintiffs are represented by counsel experienced in wage and hour class

1 action cases.

2 19. A class action is vastly superior to other available means for fair and efficient
3 adjudication of the class members' claims and would be beneficial to the parties and the Court.
4 Class action treatment will allow a number of similarly situated persons to simultaneously and
5 efficiently prosecute their common claims in a single forum without the unnecessary duplication
6 of effort and expense that numerous individual actions would entail. In addition, the monetary
7 amounts due to many individual class members are likely to be relatively small and would thus
8 make it difficult, if not impossible, for individual class members to both seek and obtain relief.
9 Moreover, a class action will serve an important public interest by permitting class members to
10 effectively pursue the recovery of moneys owed to them. Further, a class action will prevent the
11 potential for inconsistent or contradictory judgments inherent in individual litigation.

12 **FIRST CLAIM FOR RELIEF**

13 **FAILURE TO PAY ALL EARNED HOURLY WAGES IN VIOLATION OF THE**
14 **CALIFORNIA LABOR CODE**

15 **(By Plaintiffs, the Wages Class, and the Overtime Class)**

16 20. Plaintiffs incorporate paragraphs 1 through 19 of the Complaint as if fully
17 alleged herein.

18 21. At all relevant times, Plaintiffs and the other members of the **Wages Class** and
19 the **Overtime Class** have been entitled to the protections of the California Labor Code,
20 including California Labor Code §§ 204, 510, and applicable Wage order(s). These protections
21 include the rights to be timely paid all wages earned at the legally required rates for all hours
22 worked.

23 22. California Labor Code § 510(a) requires employers to compensate employees at
24 one and one-half times their regular rates of pay for:

- 25 A. All hours worked in excess of eight hours in one workday;
26 B. All hours worked in excess of forty hours in one workweek; and,
27 C. The first eight hours worked on a seventh consecutive workday during a
workweek.

23. California Labor Code § 510(a) also requires employers to compensate employees at two times their regular rates of pay for:

A. All hours worked in excess of twelve hours in one day; and,

B. All hours worked in excess of eight hours on a seventh consecutive workday during a workweek.

24. During the applicable limitations period, Plaintiffs have worked more than eight hours in one workday, more than forty hours in one workweek, and eight or more hours on a seventh consecutive workday without being paid for all of those hours at the rates required under California Labor Code § 510(a).

25. Plaintiffs are informed and believe and thereon allege that Defendants have maintained a policy or practice of not compensating him and the other members of the **Wages Class** for all hours worked. Additionally, Plaintiffs are informed and believe and thereon allege that Defendants have maintained a policy or practice of not compensating the other members of the **Wages Class** and the **Overtime Class** at the rates required under California Labor Code § 510(a) for all hours worked in excess of eight hours in one day, all hours worked in excess of forty hours in one week, the first eight hours on a seventh consecutive workday, and all worked hours in excess of eight hours on a seventh consecutive workday.

26. As a result of Defendants' conduct, Plaintiffs, on behalf of themselves and the other members of the **Wages Class** and the **Overtime Class**, seeks declaratory and injunctive relief, damages for unpaid overtime wages, interest thereon, costs of suit, and reasonable attorney's fees pursuant to California Labor Code § 1194(a).

SECOND CLAIM FOR RELIEF

FAILURE TO PROVIDE REST AND MEAL PERIODS

(By Plaintiffs, the Rest Period Class, and the Meal Period Class)

27. Plaintiffs incorporate paragraphs 1 through 26 of the Complaint as if fully alleged herein.

28. At all relevant times, Plaintiffs and other members of the **Rest Period Class** and **Meal Period Class** have been employees of Defendants covered by California Labor Code §§

1 226.7 and 512, and Wage order 11.

2 29. Pursuant to the applicable wage order(s), Defendants are required to provide
3 Plaintiffs and the other members of the **Rest Period Class** with net rest periods of a least ten
4 (10) minutes for each four (4) hour work period, or major portion thereof, during any given
5 workday.

6 30. Pursuant to California Labor Code § 226.7, Defendants are required to pay
7 Plaintiffs and the other members of the **Rest Period Class** one (1) additional hour of wages for
8 each rest period not provided in accordance with the applicable wage order(s).

9 31. During the applicable limitations period, Defendants failed to provide Plaintiffs
10 with net rest periods of at least ten (10) minutes for every four (4) hours work period, or major
11 portion thereof, and failed to pay them the required additional wages for rest periods not
12 provided to her.

13 32. Plaintiffs are informed and believe and thereon allege that Defendants maintain a
14 policy or practice of failing to provide other members of the **Rest Period Class** with net rest
15 periods of at least ten (10) minutes for every four (4) hours worked and of failing to pay them
16 the required additional wages for rest periods not provided to them.

17 33. Pursuant to California Labor Code § 512 and Industrial Welfare Commission
18 Order 7-2001, Defendants are required to provide Plaintiffs and the other members of the **Meal**
19 **Period Class** with an uninterrupted thirty (30) minute meal period for each five (5) hour work
20 period during any given workday.

21 34. Pursuant to California Labor Code § 226.7, Defendants are required to pay
22 Plaintiffs and the other members of the **Meal Period Class** one (1) additional hour of wages for
23 each meal period not provided in accordance with Wage order 11.

24 35. During the applicable limitations period, Defendants failed to provide Plaintiff
25 with an uninterrupted thirty (30) minute meal period for each five (5) hour work period,
26 including a second uninterrupted thirty (30) minute meal period on days he worked more than
27 ten (10) hours, and failed to pay him the required additional wages for rest periods not provided
to her.

1 36. Plaintiffs are informed and believe and thereon allege that Defendants maintain a
2 policy or practice of failing to provide other members of the **Meal Period Class** with
3 uninterrupted thirty (30) minute meal periods for each five (5) hour work period, including
4 second uninterrupted thirty (30) minute meal periods on days they worked more than ten (10)
5 hours, and failed to pay him the required additional wages for meal periods not provided to her.

6 37. Plaintiffs on behalf of themselves and the other members of the **Rest Period**
7 **Class** and the **Meal Period Class**, seeks declaratory and injunctive relief, damages for unpaid
8 wages owed, interest thereon and costs of suit pursuant to California Labor Code § 218.6, and
9 reasonable attorney's fees pursuant to California Code of Civil Procedure § 1021.5.

10 **THIRD CLAIM FOR RELIEF**

11 **FORFEITURE OF VACATION PAY**

12 **(By Plaintiffs and the Vacation Pay Class)**

13 38. Plaintiffs incorporate paragraphs 1 through 37 of the Complaint as if fully
14 alleged herein.

15 39. Under California Labor Code § 227.3 and applicable case law, vested paid
16 vacation benefits and other similar forms of paid time off that earned based on labor performed
17 are considered wages and cannot be subject to forfeiture without providing compensation for
18 forfeited days at the applicable rates required by law.

19 40. Pursuant to written company policies, members of the **California Vacation Pay**
20 **Class** have earned vested paid vacation days, including, but not limited to, "Personal Holidays"
21 and/or "Management Recognition Days," that are explicitly subject to unpaid forfeiture
22 pursuant to written company policies if they are not used within specified time periods.

23 41. During the applicable limitations period, Plaintiff has earned vested paid
24 vacation days, including, but not limited to, "Personal Holidays" and "Management Recognition
25 Days," without being compensated by Defendants for each vested paid vacation day.

26 42. Plaintiff is informed and believes and thereon alleges that Defendants have
27 maintained policies or practices of causing members of the **California Vacation Pay Class** to
forfeit vested paid vacation days, including, but not limited to, "Personal Holidays" and/or

1 “Management Recognition Days,” without compensating them for each vested paid vacation
2 day.

3 43. As a result of the above, Plaintiff seeks declaratory and injunctive relief,
4 damages for unpaid wages owed, interest thereon and costs of suit pursuant to California Labor
5 Code § 218.6, and reasonable attorney’s fees pursuant to California Code of Civil Procedure §
6 1021.5.

7 **FOURTH CLAIM FOR RELIEF**

8 **FAILURE TO PROVIDE ACCURATE, WRITTEN WAGE STATEMENTS**

9 **(By Plaintiffs and the All-Inclusive Class)**

10 44. Plaintiffs incorporate paragraphs 1 through 43 of the Complaint as if fully
11 alleged herein.

12 45. At all relevant times, Plaintiffs and the other members of the **All-Inclusive Class**
13 have been employees of Defendants entitled to the benefits and protections of California Labor
14 Code § 226. Pursuant to California Labor Code § 226(a), Plaintiffs and the other class members
15 were entitled to receive, semimonthly or at the time of each payment of wages, an accurate
16 itemized statement showing: a) gross wages earned; b) net wages earned; c) all applicable
17 hourly rates in effect during the pay period; and d) the corresponding number of hours worked
18 at each hourly rate by the employee.

19 46. Defendants failed to provide Plaintiffs accurate itemized statements in
20 accordance with California Labor Code § 226(a) because Plaintiffs’ wage statements did not,
21 among other things, accurately reflect all of the hours that they actually worked, the descriptions
22 for all of the hours they actually worked, and the corresponding rates of pay for all of the hours
23 they actually worked.

24 47. Plaintiffs are informed and believe and thereon allege that, at all relevant times
25 during the applicable limitations period, Defendants maintained a policy or practice of not
26 providing the other members of the **All-Inclusive Class** wage statements did not, among other
27 things, accurately reflect all of the hours that they actually worked, the descriptions for all of the
hours they actually worked, and the corresponding rates of pay for all of the hours they actually

1 worked.

2 48. Defendants' failure to provide Plaintiffs and the other members of the **All-**
3 **Inclusive Class** with accurate wage statements was knowing and intentional. Defendants had
4 the ability to provide Plaintiffs and the other class members with accurate wage statements but
5 intentionally provided wage statements that Defendants knew were not accurate.

6 49. As a result of being provided with inaccurate wage statements by Defendants,
7 Plaintiffs and the other members of the **All-Inclusive Class** have suffered an injury. Their legal
8 rights to receive accurate wage statements were violated and they were misled about the amount
9 of wages they had actually earned and were owed. In addition, the absence of accurate
10 information on their wage statements prevented immediate challenges to Defendants' unlawful
11 pay practices, has required discovery and mathematical computations to determine the amounts
12 of wages owed, has caused difficulty and expense in attempting to reconstruct time and pay
13 records, and/or has led to the submission of inaccurate information about wages and amounts
14 deducted from wages to state and federal government agencies.

15 50. Pursuant to California Labor Code § 226(e), Plaintiffs and the other members of
16 the **All-Inclusive Class** are entitled to recover the greater of actual damages, or penalties of fifty
17 dollars (\$50) for the initial pay period in which a violation of California Labor Code § 226(a)
18 occurred and one hundred dollars for each violation of California Labor Code § 226(a) in a
19 subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000) per
20 class member, and are also entitled to an award of costs and reasonable attorney's fees.

21 **FIFTH CAUSE OF ACTION**

22 **FAILURE TO TIMELY PAY ALL FINAL WAGES**

23 **(Cal. Lab. Code §§ 201-203)**

24 **(By Plaintiffs and the Former Employee Class)**

25 51. Plaintiffs incorporate paragraphs 1 through 50 of the Complaint as if fully
26 alleged herein.

27 52. At all relevant times, Plaintiffs and the members of the **Former Employee Class**
were employees of Defendants covered by California Labor Code § 201 or California Labor

1 Code § 202. Pursuant to California Labor Code § 201 or California Labor Code § 202, Plaintiffs
2 and the members of the **Former Employee Class** were entitled to payment of all wages earned
3 and unpaid prior to the termination of their employment. Members of the **Former Employee**
4 **Class** who are discharged employees were entitled to payment of their earned and unpaid wages
5 no later than the day on which their employment was terminated. Members of the **Former**
6 **Employee Class** who resigned were entitled to payment of their earned and unpaid wages
7 within 72 hours after giving notice of resignation or, if they had given at least 72 hours previous
8 notice, no later than the day their employment terminated.

9 53. Defendants failed to timely pay Plaintiffs all final wages earned and unpaid prior
10 to the termination of his employment with Defendants, including, but not limited to, additional
11 earned wages for rest and meal periods not provided to them, and earned wages in the forms of
12 vested paid vacation time and unlawfully deducted wages, in accordance with California Labor
13 Code § 201. Plaintiffs are informed and believe and thereon allege that, at relevant times during
14 the applicable limitations period, Defendants maintained a policy or practice of not providing
15 members of the **Former Employee Class** with a final paycheck encompassing all wages owed
16 upon termination or discharge of employment, including, but not limited to, additional earned
17 wages for rest and meal periods not provided to them, and/or earned wages in the forms of
18 vested paid vacation time and/or unlawfully deducted wages, in accordance with California
19 Labor Code § 201 or California Labor Code § 202.

20 54. Defendants' failure to pay Plaintiffs and members of the **Former Employee**
21 **Class** all wages earned prior to termination in accordance with California Labor Code § 201 or
22 California Labor Code § 202 was willful. Plaintiffs are informed and believe and thereon allege
23 that Defendants had the ability to pay all wages earned by members of the **Former Employee**
24 **Class** prior to termination in accordance with California Labor Code § 201 or California Labor
25 Code § 202, but intentionally adopted policies or practices incompatible with the requirements
26 of California Labor Code § 201 or California Labor Code § 202.

27 55. Pursuant to California Labor Code § 201 or California Labor Code § 202,
Plaintiffs and the members of the **Former Employee Class** are entitled to all wages earned

1 prior to the termination of their employment that Defendants did not pay them as well as
2 continuations of their wages, from the days they earned and unpaid wages were due upon the
3 termination of their employment until paid, up to a maximum of thirty (30) days, in amounts
4 subject to proof.

5 56. Accordingly, Plaintiffs and the members of the **Former Employee Class** are
6 entitled to recover the full amount of their unpaid wages and interest thereon pursuant to
7 California Labor Code § 218.6, continuation wages under California Labor Code § 203,
8 reasonable attorney's fees, and costs of suit.

9 **SIXTH CLAIM FOR RELIEF**

10 **UNAUTHORIZED DEDUCTIONS**

11 **(By Plaintiffs and the Unauthorized Deductions Class)**

12 57. Plaintiffs incorporate paragraphs 1 through 56 of the Complaint as if fully
13 alleged herein.

14 58. California Labor Code §§ 221 and 224 prohibit an employer from taking
15 deductions from an employee's wages without the employee's express written consent or other
16 legal authority for doing so.

17 59. At relevant times during the applicable limitations period, Defendants deducted
18 wages from Plaintiffs' paychecks without their express written consent or other legal authority
19 for doing so. Plaintiffs are informed and believe and thereon allege that, at relevant times during
20 the applicable limitations period, Defendants deducted wages from the paychecks of members
21 of the **Unauthorized Deduction Class** without their express written consent or other legal
22 authority for doing so.

23 60. By reason of the above, Plaintiffs and the members of the **Unauthorized**
24 **Deductions Class** are entitled to restitution for all unpaid amounts due and owing to within four
25 years (4) of the date of the filing of the Complaint until the date of entry of judgment. Further,
26 Plaintiffs, on behalf of themselves and the members of the **Unauthorized Deductions Class**,
27 seek interest thereon pursuant to California Labor Code § 218.6, costs pursuant to California
Labor Code § 218.6, and reasonable attorney's fees pursuant to California Code of Civil

1 Procedure § 1021.5.

2 **SEVENTH CLAIM FOR RELIEF**

3 **FAILURE TO INDEMNIFY**

4 **(By Plaintiffs and the Indemnification Class)**

5 61. Plaintiffs incorporate paragraphs 1 through 60 of the Complaint as if fully
6 alleged herein.

7 62. In pertinent part, California Labor Code § 2802(a) states, "An employer shall
8 indemnify his or her employee[s] for all necessary expenditures incurred by the employee in
9 direct consequence of the discharge of his or her duties." California Labor Code § 452 of the
10 Labor Code authorizes employers to prescribe the weight, color, quality, texture, style, form,
11 and make of uniforms required to be worn by their employees. However, the Wage Orders
12 impose an obligation on an employer that requires uniforms to be worn by its nonexempt
13 employees as a condition of employment to provide and maintain such uniforms, regardless of
14 the amount of the employees' compensation. The applicable wage order states, "When uniforms
15 are required by the employer to be worn by the employee as a condition of employment, such
16 uniforms shall be provided and maintained by the employer. The term "uniform" includes
17 wearing apparel and accessories of distinctive design or color." If the employer does not choose
18 to maintain employees' uniforms itself where it is required to do so, the Division of Labor
19 Standards Enforcement takes the position that the employer may pay each affected employee a
20 weekly maintenance allowance of an hour's pay at the state minimum wage rate (\$7.50 as of
21 January 1, 2007, and \$8.00 as of January 1, 2008) in lieu of maintaining the uniforms, assuming
22 that an hour is a realistic estimate of the time involved in maintaining the uniforms. The term
23 "uniform" is defined to include wearing apparel and accessories of distinctive design or color.

24 63. At relevant times during the applicable limitations period, Defendants required
25 Plaintiffs and the members of the **Indemnification Class** to purchase and maintain uniforms
26 and apparel unique to Defendants at their expense. Defendants failed to indemnify Plaintiffs and
27 the members of the **Indemnification Class** for such expenditures.

64. By reason of the above, Plaintiffs and the members of the **Indemnification Class**

1 are entitled to restitution for all unpaid amounts due and owing to within four years (4) of the
2 date of the filing of the Complaint until the date of entry of judgment. Further, Plaintiffs, on
3 behalf of themselves and the members of the **Indemnification Class**, seeks interest thereon
4 pursuant to California Labor Code § 218.6, costs pursuant to California Labor Code § 218.6,
5 and reasonable attorney's fees pursuant to California Code of Civil Procedure § 1021.5.

6 **EIGHTH CLAIM FOR RELIEF**

7 **UNFAIR COMPETITION**

8 **(By Plaintiffs and the California All-Inclusive Class)**

9 65. Plaintiffs incorporate paragraphs 1 through 64 of the Complaint as if fully
10 alleged herein.

11 66. The unlawful conduct of Defendants alleged herein amounts to and constitutes
12 unfair competition within the meaning of California Business & Professions Code §§ 17200, *et*
13 *seq.* California Business & Professions Code §§ 17200, *et seq.*, protects against unfair
14 competition and allows a person who has suffered an injury-in-fact and has lost money or
15 property as a result of an unfair, unlawful, or fraudulent business practice to seek restitution on
16 her own behalf and on behalf of other similarly situated persons in a class action proceeding.

17 67. As a result of Defendants' violations of the California Labor Code as during the
18 applicable limitations period as alleged herein, Plaintiffs have suffered an injury-in-fact and
19 have lost money or property in the form of earned wages. Specifically, Plaintiffs have lost
20 money or property as a result of not being paid for hours worked, not being paid at legal
21 overtime rates for all overtime hours worked, not being paid additional required wages for rest
22 and meal periods not provided to them, being provided with inaccurate written wage statements
23 that have had the effect of concealing other wage underpayments, Defendants' improper
24 deductions, and Defendants' failure to reimburse for necessary expenditures, and Defendants'
25 failure to timely pay all wages due or owed upon termination or resignation.

26 68. Plaintiffs are informed and believe that other similarly situated persons have
27 been subject to the same unlawful policies or practices of Defendants, including not being paid
for all wages earned, not being paid at overtime rates for all overtime hours worked, not being

1 paid additional required wages for rest and meal periods not provided to them, being provided
2 with inaccurate written wage statements that have had the effect of concealing other wage
3 underpayments, Defendants' improper deductions, and Defendants' failure to reimburse for
4 necessary expenditures, and/or Defendants' failure to timely pay all wages due or owed upon
5 termination or resignation.

6 69. Due to its unfair and unlawful business practices in violation of the California
7 Labor Code as alleged herein, Defendants have gained a competitive advantage over other
8 comparable companies doing business in the State of California that comply with their legal
9 obligations to compensate employees for all earned wages and to provide them with reasonable
10 means of verifying that they have been paid all earned wages with accurate written wage
11 statements.

12 70. Pursuant to California Business & Professions Code § 17203, Plaintiffs, on
13 behalf of themselves and the other members of the **All-Inclusive Class**, seek declaratory and
14 injunctive relief, and restitution of all monies rightfully belonging to them that Defendants did
15 not pay them or otherwise retained by means of its unlawful and unfair business practices.

16 71. Plaintiffs and the other members of the **All-Inclusive Class** are entitled to
17 recover reasonable attorney's fees in connection with their unfair competition claims pursuant
18 to California Code of Civil Procedure § 1021.5, the substantial benefit doctrine and/or the
19 common fund doctrine.

20 **NINTH CLAIM FOR RELIEF**

21 **CIVIL PENALTIES**

22 **(By Plaintiffs and the All-Inclusive Class)**

23 72. Plaintiffs incorporate paragraphs 1 through 71 of the Complaint as if fully
24 alleged herein.

25 73. During the applicable time period, Defendants violated California Labor Code §§
26 204, 223, 226(a), 226.7, 227.3, 510, 512, and 1194.

27 74. California Labor Code §§ 2699(a) and (g) authorize an aggrieved employee, on
behalf of himself and other current or former employees, to bring a civil action to recover civil

1 penalties pursuant to the procedures specified in California Labor Code § 2699.3.

2 75. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiffs and the other
3 aggrieved employees of Defendants are entitled to recover civil penalties for Defendants'
4 violations of California Labor Code §§ 200, 201, 202, 203, 204, 224, 226(a), 226.7, 227.3, 510,
5 512, 1194 and 2802 during the applicable limitations period in the following amounts:

6 A. For violations of California Labor Code §§ 200, 201, 202, 203, 224,
7 226.7, 1194, and 2802, one hundred dollars (\$100.00) for each aggrieved employee per pay
8 period for each initial violation and two hundred dollars (\$200.00) for each aggrieved employee
9 per pay period for each subsequent violation (penalty amounts established by California Labor
10 Code § 2699(f)(2));

11 B. For violations of California Labor Code § 204, one hundred dollars
12 (\$100.00) for each aggrieved employee for each initial violation and two hundred dollars
13 (\$200.00) for each aggrieved employee plus twenty-five percent (25%) of the amount
14 unlawfully withheld from each aggrieved employee for each subsequent, willful or intentional
15 violation (penalty amounts established by California Labor Code § 210);

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

20 D. For violations of California Labor Code §§ 510 and 512, fifty dollars
21 (\$50.00) for each aggrieved employee for each initial violation for pay period for which the
22 employee was underpaid in addition to an amount sufficient to recover unpaid wages and one
23 hundred dollars (\$100.00) for each underpaid employee for each pay period for which the
24 employee was underpaid in addition to an amount sufficient to recover unpaid wages (penalty
25 amounts established by California Labor Code § 558).

26 76. Plaintiffs have complied with the procedures for bringing suit specified in
27 California Labor Code § 2699.3. By letters dated January 8 and February 19, 2010, Plaintiffs
gave written notice by certified mail to the Labor and Workforce Development Agency

1 (“LWDA”) and Defendants of the specific provisions of the California Labor Code alleged to
2 have been violated, including the facts and theories to support the alleged violations. Plaintiffs
3 anticipate that the LWDA will soon provide Plaintiffs with written notice that it does not intend
4 to investigate the violations of the California Labor Code alleged herein.

5 77. Pursuant to California Labor Code § 2699(g), Plaintiffs and the other members of
6 the **All-Inclusive Class** are entitled to an award of reasonable attorney’s fees and costs in
7 connection with their claims for civil penalties.

8 **PRAYER FOR RELIEF**

9 78. WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly
10 situated, prays for relief and judgment against Defendants as follows:

11 A. An order that the action be certified as a class action with respect to
12 Plaintiffs’ claims for violations of California law;

13 B. An order that Plaintiffs be appointed class representatives;

14 C. An order that counsel for Plaintiffs be appointed class counsel;

15 D. Declaratory relief;

16 E. Injunctive relief;

17 F. Actual damages;

18 G. Liquidated damages;

19 H. Restitution;

20 I. Civil penalties;

21 J. Statutory penalties;

22 K. Pre-judgment interest;

23 L. Costs of suit;

24
25 ///

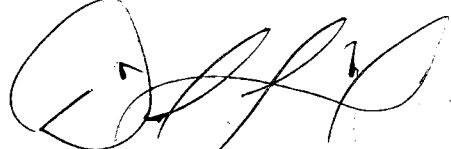
26
27 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

- M. Reasonable attorney's fees; and
- N. Such other relief as the Court deems just and proper.

Respectfully submitted,

THE SPIVAK LAW FIRM



Date: February 23, 2010

By:

DAVID G. SPIVAK, Attorney for
Plaintiff, ALINA GHRDILYAN,
EVGENIA SULTANIAN, and all others
similarly situated

EXHIBIT 13

1 CASE NUMBER: BC430633
2 CASE NAME: ALINA GHRDILYAN, ET AL., VERSUS
3 RJ FINANCIAL, ET AL.,
4 LOS ANGELES, CALIFORNIA MONDAY, APRIL 23, 2012
5 DEPARTMENT 41 HON. RONALD M. SOHIGIAN, JUDGE
6 APPEARANCES: (SEE TITLE PAGE.)
7 REPORTER: ANGELA Z. PARADELA, CSR NO. 9659
8 TIME: A.M. SESSION
9

10 (THE FOLLOWING PROCEEDINGS WERE HELD IN
11 OPEN COURT:)

12
13 THE COURT: OKAY. THANK YOU VERY MUCH. I'M GOING
14 TO ASK YOU LAWYERS TO WAIT FOR JUST A MOMENT.

15 AS YOU CAN PROBABLY TELL, FROM THE QUESTIONS
16 AND THE WAY I'VE BEEN TAKING NOTES, SO FORTH, I HAVE A CASE
17 IN MIND AND I HAVE BEEN WORKING ON IT BOTH WHILE YOU'VE BEEN
18 WITH ME AND DURING THE RECESSES LIKE WEEKENDS AND NIGHTS.
19 JUST A SECOND. I HAVE TWO MORE THINGS I HAVE TO BRING OUT.
20 I WILL DO SOME MORE WORK WITH YOU.

21 (A PAUSE IN THE PROCEEDINGS.)

22 THE COURT: OKAY. YOU PROBABLY ALREADY GOT THE
23 IMPRESSION THAT I AM A JUDGE WHO TRIES TO DOCUMENT AND SHOW
24 THE LEGAL PREMISES FOR PROCEDURAL STEPS WE TAKE, AND I INTEND
25 TO DO THAT. I JUST WANT TO TELL YOU WHAT I'M GOING TO DO
26 HERE AND I GUESS I WILL START THIS WAY.

27 I SAID I AM GOING TO BRING OUT TWO THINGS. I
28 BROUGHT OUT ONLY ONE.

1 (A PAUSE IN THE PROCEEDINGS.)

2 THE COURT: THE -- I'M GOING TO CALL YOUR ATTENTION
3 TO SOME CASES THAT HAVEN'T BEEN CITED. I'M GOING TO DEAL
4 WITH THE MERITS OF YOUR CLIENTS'S CASE. SO HERE WE GO.

5 UNDER CALIFORNIA CONSTITUTION ARTICLE VI,
6 SECTION 6 AND GOVERNMENT CODE 68070(B) AND 68603(A), THE
7 CALIFORNIA JUDICIAL COUNCIL HAS CONSTITUTIONALLY GRANTED AND
8 LEGISLATIVELY AFFIRMED POWER TO ADOPT RULES, REPORT
9 ADMINISTRATION PRACTICE AND PROCEDURE THAT ARE CONSISTENT
10 WITH STATUTES. THE CALIFORNIA RULES OF COURT HAVE THE FORCE
11 OF LAW AND BINDING AS PROCEDURAL STATUTES AS LONG AS THEY ARE
12 CONSISTENT WITH LEGISLATIVE ENACTMENTS AND CONSTITUTIONAL
13 GUARANTEES.

14 I WILL CITE YOU THREE CASES WHERE THAT POINT
15 IS MADE. THEY ARE IN RE JUAN -- THAT'S J-U-A-N -- C.,
16 (1993), 20 CALIFORNIA APPELLATE 4TH, 748, PARTICULARLY AT
17 PAGES 752 TO 753; ALICIA T. VERSUS COUNTY OF LOS ANGELES,
18 (1990), 222 CALIFORNIA APPELLATE 3D 869 AT 884, AND OATS
19 VERSUS OATS. OATS IS SPELLED O-A-T-S, (1983) 14 CALIFORNIA
20 APPELLATE 3D 416 AT 420. THIS IS HOW THE OATS VERSUS OATS
21 COURT EXPRESSED THIS VIEW.

22 RULES OF COURT HAVE THE FORCE OF POSITIVE LAW.
23 THEY ARE AS BINDING ON THIS COURT AS PROCEDURAL STATUTES
24 UNLESS THEY TRANSCEND LEGISLATIVE ENACTMENTS OR
25 CONSTITUTIONAL GUARANTEES.

26 SO THE HIERARCHY THEN WOULD BE CONSTITUTION,
27 STATUTES AND CALIFORNIA RULES OF COURT, AND THEN CASE LAW.

28 I SAY THAT BECAUSE THE CASE OF WHITTINGTON

1 VERSUS MCKINNEY -- WHITTINGTON IS SPELLED

2 W-H-I-T-I-N-G-T-O-N, VERSUS MCKINNEY, CAPITAL M, C, CAPITAL
3 K, I-N-N-E-Y, (1991), 234 CALIFORNIA APPELLATE 3D 123 --
4 CRITICIZED THE CONDUCT OF A NOW FORMER JUDGE, I BELIEVE, AT
5 THE ORANGE COUNTY SUPERIOR COURT, WHO ANNOUNCED A DECISION,
6 GAVE A STATEMENT OF DECISION ORALLY AND SAID IF YOU WANTED A
7 WRITTEN STATEMENT OF DECISION, YOU COULD MAKE REFERENCE TO
8 THE COURT TRANSCRIPT. THAT CASE, WHITTINGTON VERSUS MCKINNEY
9 WAS, AS I SAY, DECIDED IN 1991.

10 IN 2010, EFFECTIVE JANUARY 1, 2010, THE
11 CALIFORNIA RULES OF COURT WERE AMENDED WITH RESPECT TO, AMONG
12 OTHER PROVISIONS OF THE CALIFORNIA RULES OF COURT, RULE
13 3.1590 HAVING TO DO WITH ANNOUNCEMENT OF TENTATIVE DECISION
14 AND STATEMENT DECISION AND JUDGMENT.

15 THE (C) SUBSECTION OF RULE 15 -- RULE 3.1590
16 WAS AMENDED BY THE ELIMINATION OF SOME PROVISIONS AND BY
17 BEING INSERTION OF OTHER PROVISIONS. I'M GOING TO REFER TO
18 THE (C) SUBSECTION.

19 IT READS NOW, (READING:)

20 THE COURT IN ITS TENTATIVE DECISION MAY:
21 STATE THAT IT IS THE COURT'S PROPOSED
22 STATEMENT OF DECISION, SUBJECT TO A PARTY'S
23 OBJECTION UNDER SUBSECTION (G);

24 (2) INDICATE THAT THE COURT WILL PREPARE
25 A STATEMENT OF DECISION;

26 (3) ORDER A PARTY TO PREPARE A STATEMENT
27 OF DECISION; OR

28 (4) DIRECT THAT THE TENTATIVE DECISION

1 WILL BECOME THE STATEMENT OF DECISION UNLESS,
2 WITHIN 10 DAYS AFTER ANNOUNCEMENT OR SERVICE
3 OF THE TENTATIVE DECISION, A PARTY SPECIFIES
4 THOSE PRINCIPAL CONTROVERTED ISSUES AS TO
5 WHICH THE PARTY IS REQUESTING A STATEMENT OF
6 DECISION OR MAKES PROPOSALS NOT INCLUDED IN
7 THE TENTATIVE DECISION.

8 NOW, I WILL NOT USE METHOD TWO. THAT'S THE
9 COURT WILL PREPARE A STATEMENT OF DECISION. I WILL USE
10 EITHER (1), (3), OR (4) EITHER SAYING THAT THIS IS A PROPOSED
11 STATEMENT OF DECISION SUBJECT TO OBJECTIONS UNDER SUBSECTION
12 (G), OR ORDER A PARTY TO PREPARE A STATEMENT OF DECISION, OR
13 DIRECT THAT THE TENTATIVE DECISION WILL BECOME THE STATEMENT
14 OF DECISION UNLESS WITHIN TEN DAYS A PARTY SPECIFIES
15 PRINCIPAL CONTROVERTED ISSUES AS TO WHICH THE PARTY IS
16 REQUESTING A STATEMENT OF DECISION OR MAKES PROPOSALS NOT
17 INCLUDED IN THE TENTATIVE DECISION.

18 I WOULD LIKE TO HEAR FROM BOTH SIDES NOW
19 CONCERNING WHICH OF THREE ALTERNATIVES WHICH I PROPOSED THEY
20 PREFER, AND THEN I WILL MAKE THE DECISION CONCERNING THAT
21 THAT IS PROPER. LET'S START WITH THE DEFENSE. DEFENDANT?

22 MR. SABZEVAR: YOUR HONOR, I PREFER THAT THE COURT
23 ISSUES A STATEMENT OF DECISION ITSELF AND NOT LEAVE IT TO THE
24 PARTIES OR TEN DAYS.

25 THE COURT: I TOLD YOU I'M NOT GOING TO PREPARE A
26 STATEMENT OF DECISION. I'M GOING TO USE EITHER METHOD (1),
27 (3), OR (4). (1) IS THIS IS THE PROPOSED STATEMENT OF
28 DECISION SUBJECT TO OBJECTIONS UNDER (D). (3) IS ORDER A

1 PARTY TO PREPARE A STATEMENT OF DECISION; OR (4), DIRECT THAT
2 THE TENTATIVE DECISION WILL BECOME THE STATEMENT OF DECISION
3 UNLESS WITHIN TEN DAYS AFTER ANNOUNCEMENT OR SERVICE OF THE
4 TENTATIVE DECISION, THE PARTY SPECIFIES THOSE PRINCIPAL
5 CONTROVERTED ISSUES AS TO WHICH THE PARTY IS REQUESTING A
6 STATEMENT OF DECISION OR MAKES PROPOSALS NOT INCLUDED IN THE
7 TENTATIVE DECISION.

8 MR. SABZEVAR: DEFENSE PREFERENCE IS NUMBER ONE.

9 THE COURT: STATE THAT THIS IS THE COURT'S
10 STATEMENT OF DECISION SUBJECT TO A PARTY'S OBJECTION UNDER
11 (G)?

12 MR. SABZEVAR: YES, YOUR HONOR.

13 THE COURT: PLAINTIFF?

14 MR. SPIVAK: WE PREFER TO WRITE THE DECISION, YOUR
15 HONOR, ONCE THE COURT HAS MADE ITS POSITION KNOWN.

16 THE COURT: ALL RIGHT.

17 MR. SPIVAK: BY "WE" I MEAN WE BELIEVE IT SHOULD BE
18 PREVAILING PARTY.

19 THE COURT: UH-HUH. I'M GOING TO USE -- I
20 APPRECIATE -- I'M GOING TO USE METHOD (4). THIS TENTATIVE
21 DECISION WILL BECOME THE STATEMENT OF DECISION UNLESS WITHIN
22 TEN DAYS AFTER ANNOUNCEMENT, AND SO FORTH. THAT'S
23 3.1590(C)(4).

24 SO WHAT I'M GOING TO DO NOW IS ANNOUNCE A
25 TENTATIVE WHICH, AS YOU CAN SEE, IS ALSO A CONDITIONAL
26 STATEMENT OF DECISION.

27 THIS CASE CAME BEFORE ME PRESIDING IN THIS
28 DEPARTMENT 41 ON THE 10TH OF APRIL, 2012, FOR TRIAL WITHOUT

1 JURY. DAVID G. SPIVAK, STATE BAR 179684, APPEARED AS
2 ATTORNEY FOR PLAINTIFFS ALINA GHRDILYAN AND EVGENIA
3 SULTANIAN, AND F. MICHAEL SABZEVAR, STATE BAR 172312 APPEARED
4 AS ATTORNEY FOR DEFENDANT, RAMIL ABALKHAD.

5 THE CASE WAS SUBMITTED FOR DECISION TODAY, THE
6 23RD OF APRIL, 2012.

7 IN THIS CASE, TWO PLAINTIFFS CLAIM THAT
8 DEFENDANT ABALKHAD IS LIABLE TO THEM ON VARIOUS
9 EMPLOYMENT-DERIVED THEORIES INCLUDING AND ESPECIALLY FOR
10 PENALTIES AND THAT THEY CAN ENFORCE VARIOUS REMEDIES AGAINST
11 THEM UNDER THE LABOR CODE PRIVATE ATTORNEY GENERAL ACT, WHICH
12 IS AT LABOR CODE 2698, AND FOLLOWING.

13 IN OPEN COURT ON THE 10TH OF APRIL, 2012, THE
14 ATTORNEYS CONFIRMED THAT THE OPERATIVE PLEADINGS ARE THE
15 PLAINTIFFS'S FIRST AMENDED COMPLAINT, ET CETERA, FILED
16 FEBRUARY 24, 2010, AND THE DEFENDANT'S ANSWER TO THEIR FIRST
17 AMENDED COMPLAINT FILED SEPTEMBER 13, 2010. I WILL MAKE A
18 COUPLE OF QUICK COMMENTS ABOUT THOSE TWO DOCUMENTS NOW.

19 THE FULL NAME OF THE PLAINTIFFS'S OPERATIVE
20 PLEADING IS FIRST AMENDED COMPLAINT FOR -- AND THEN THERE ARE
21 NINE THEORIES LISTED: FAILURE TO COMPENSATE EMPLOYEES FOR
22 ALL HOURS WORKED; NUMBER TWO IS FAILURE TO PROVIDE BOTH REST
23 AND MEAL PERIODS; NUMBER THREE IS FORFEITURE OF VESTED
24 VACATION BENEFITS; NUMBER FOUR IS FAILURE TO PROVIDE ACCURATE
25 WRITTEN WAGE STATEMENTS; NUMBER FIVE IS FAILURE TO TIMELY PAY
26 ALL FINAL WAGES; NUMBER SIX IS UNAUTHORIZED DEDUCTIONS;
27 NUMBER SEVEN IS FAILURE TO INDEMNIFY; NUMBER EIGHT IS UNFAIR
28 COMPETITION; AND NUMBER NINE IS CIVIL PENALTIES.

1 THE DEFENDANT'S ANSWER TO THE FIRST AMENDED
2 COMPLAINT WAS ON A JUDICIAL COUNCIL FORM PLEADING.

3 INSOFAR AS IT'S PERTINENT TO THIS PORTION OF
4 MY ANALYSIS, LABOR CODE 2699 READS, (READING:)

5 SUBSECTION (A), NOTWITHSTANDING ANY OTHER
6 PROVISION OF LAW, ANY PROVISION OF THIS CODE
7 THAT PROVIDES FOR A CIVIL PENALTY TO BE
8 ASSESSED AND COLLECTED BY THE LABOR AND
9 WORKFORCE DEVELOPMENT AGENCY OR ANY OF ITS
10 DEPARTMENTS, DIVISIONS, COMMISSIONS, BOARDS,
11 AGENCIES, OR EMPLOYEES FOR A VIOLATION OF THIS
12 CODE MAY, AS AN ALTERNATIVE, BE RECOVERED
13 THROUGH A CIVIL ACTION BROUGHT BY AN AGGRIEVED
14 EMPLOYEE ON BEHALF OF HIMSELF OR HERSELF AND
15 OTHER CURRENT OR FORMER EMPLOYEES PURSUANT TO
16 THE PROCEDURES SPECIFIED IN SECTION 2699.3.

17 THE PLAINTIFFS HAD ORIGINALLY DENOMINATED THIS
18 CASE AS A CLASS ACTION AND THEY CONTINUED THAT DESIGNATION
19 THROUGH VARIOUS OTHER FILINGS, BUT THEY HAVE NEVER OBTAINED
20 AN ORDER CERTIFYING THE CLASS. THEY CLAIM, THOUGH, THAT THEY
21 ARE ENTITLED TO PROCEED ON BEHALF OF OTHERS PURSUANT TO THE
22 CALIFORNIA LABOR CODE PRIVATE ATTORNEY GENERAL ACT AS TO
23 DEFENDANT ABALKHAD.

24 THE PLAINTIFFS HAD TRIED THIS CASE BEFORE ME
25 SOLELY AS TO CAUSE OF ACTION NINE. THEY CONCEDE THAT THIS
26 CASE IS STAYED IN THIS COURT IN PART BECAUSE OF THE FACT THAT
27 DEFENDANT RJ FINANCIAL, INC., ORIGINALLY THE ONLY NAMED
28 DEFENDANT, BUT BY VIRTUE OF THE FIRST AMENDED PLEADING, A

1 CODEFENDANT, THAT CORPORATION IS A DEBTOR IN CHAPTER 11
2 PROCEEDING, WHICH IS STILL PENDING.

3 PURSUANT TO 11 U.S.C. 362, THIS CASE WOULD BE
4 STAYED AS TO THAT PARTY. BUT MR. ABALKHAD HAS NOT BEEN SHOWN
5 TO BE A DEBTOR IN A BANKRUPTCY PROCEEDING AND DURING CLOSING
6 ARGUMENT OF THE 17TH OF APRIL, 2012, MR. SPIVAK CONFIRMED HIS
7 CLIENTS HAVE CLAIMS PENDING IN THE BANKRUPTCY CASE. THAT
8 WILL MEAN THAT THE CASE CAN PROCEED AND HAS PROCEEDED ON THE
9 BASIS PLEADED AGAINST MR. ABALKHAD AS AN INDIVIDUAL.

10 ALTHOUGH BECAUSE OF 11 U.S.C. 362, IT IS STAYED AS TO THE
11 CORPORATION.

12 THE PERSONS WHO GAVE TESTIMONY AT THE TRIAL
13 WERE JOSEPH HARSANY, H-A-R-S-A-N-Y, AN EMPLOYEE OF PAYROLL
14 CHECK WRITING SERVICE USED BY THE DEFENDANTS; BREK OYAMA --
15 BREK IS SPELLED B-R-E-K; AND OYAMA IS O-Y-A-M-A, MR. SPIVAK'S
16 PARALEGAL; RAMIL ABALKHAD, ONE OF THE DEFENDANTS, THE
17 PRESIDENT AND CHIEF EXECUTIVE OFFICER OF DEFENDANT RJ
18 FINANCIAL AND, INDEED, THAT -- APPARENTLY THAT COMPANY'S ONLY
19 OFFICER AND ONLY DIRECTOR. THE FOURTH WITNESS WAS ALINA
20 GHRDILYAN, ONE OF THE PLAINTIFFS, AND THE FIFTH WAS EVGENIA
21 SULTANIAN, ONE OF THE PLAINTIFFS, THE OTHER PLAINTIFF.

22 I'M GOING TO REFER TO THE LABOR CODE PRIVATE
23 ATTORNEY GENERAL ACT IN THE WAY THE ATTORNEYS HAVE -- IT
24 SEEMS TO ME TO BE SERVICEABLE -- AND I'M GOING TO REFER --
25 I'M GOING TO USE THE ACRONYM PAGA, P-A-G-A.

26 PAGA ACTIONS DO NOT HAVE BEEN MAINTAINED AS
27 CLASS ACTIONS. THEY CAN BE, BUT THEY ARE NOT REQUIRED TO BE.
28 THE AUTHORITY ON THAT IS ARIAS VERSUS SUPERIOR COURT, (2009),

1 46 CALIFORNIA 4TH, 969, 981 TO 982.

2 WE WILL GO INTO RECESS NOW. COME BACK AT
3 1:30, PLEASE.

4 (AT 11:58 A.M., A LUNCH RECESS WAS TAKEN.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 (THE FOLLOWING PROCEEDINGS WERE HELD AT 1:47 P.M.)
2 THE COURT: NOW, WE WILL GO BACK TO THE GHRDILYAN
3 AGAINST RJ CASE.

4 OKAY. WHEN WE LEFT, I HAD, I THINK, TALKED
5 ABOUT SOME GENERAL POINTS OF LAW HAVING TO DO WITH PAGA
6 ACTIONS, AND I WILL JUST OVERLAP SLIGHTLY.

7 I WAS SAYING THAT PAGA ACTIONS DO NOT HAVE TO
8 BE HAVE MAINTAINED AS CLASS ACTIONS. THEY CAN BE, BUT ARE
9 NOT REQUIRED TO BE. AND ONE OF AUTHORITIES ON THAT IS ARIAS,
10 A-R-I-A-S, VERSUS SUPERIOR COURT, (2009) 46 CALIFORNIA 4TH
11 969 FROM PAGES 981 TO 982. PAGA IS NOT THE EMPLOYEE'S
12 EXCLUSIVE REMEDY. THEY MAY SEPARATELY OR CONCURRENTLY SEEK
13 OTHER REMEDIES. LABOR CODE 2699(G) AND CALIBER BODY WORKS
14 VERSUS SUPERIOR COURT, (2005) 134 CALIFORNIA APPELLATE 4TH
15 365 AT 375.

16 THE KINDS OF PENALTIES THAT PAGA PLAINTIFFS
17 CAN SEEK TO RECOVER, ASSUMING THAT THE FACTS SUPPORT IT, ARE
18 THOSE FOR FAILURE TO PAY STATUTORILY PRESCRIBED WAGES --
19 THAT'S LABOR CODE 210 -- UNLAWFULLY WITHHELD WAGES -- THAT'S
20 LABOR CODE 225.5 -- OR FOR VIOLATING, FOR EXAMPLE, AN
21 INDUSTRIAL WELFARE COMMISSION ORDER -- THAT'S LABOR CODE 558.
22 AN AGGRIEVED EMPLOYEE -- THAT WOULD MEAN ANYONE EMPLOYED BY
23 THE ALLEGED VIOLATOR AND AGAINST WHOM ONE OR MORE VIOLATIONS
24 WAS COMMITTED -- AND I PICKED UP THAT DEFINITION FROM LABOR
25 CODE 2699(C) AND FROM THE COMMENTS IN AMALGAMATED TRANSIT
26 UNION VERSUS SUPERIOR COURT, (2009) 46 CALIFORNIA 4TH 993 AT
27 1004 TO 1005 -- AN AGGRIEVED EMPLOYEE CAN SUE TO RECOVER
28 CIVIL PENALTIES FOR VIOLATIONS OF THE LABOR CODE ON BEHALF OF

1 HIMSELF, OR HERSELF, AND OTHER CURRENT OR FORMER EMPLOYEES
2 AGAINST WHOM ONE OR MORE OF THE ALLEGED VIOLATIONS WAS
3 COMMITTED. THAT'S LABOR CODE 2699(G)(1).

4 THE ATTORNEYS HAVE FROM TIME TO TIME REFERRED
5 TO WHAT THEY HAVE CALLED THE BRINKER CASE.

6 NOW, WHAT THEY ARE REFERRING TO IS THE CASE
7 ENTITLED BRINKER RESTAURANT CORPORATION VERSUS SUPERIOR
8 COURT, REAL PARTY IN INTEREST, HOHNBAUM H-O-H-N-B-A-U-M. THE
9 VERSION OF THAT THAT I HAVE USED IN MY ANALYSIS AND
10 PREPARATION IS THE VERSION THAT WAS PRINTED AT 2012 DAILY
11 JOURNAL, DAILY APPELLATE REPORT, PAGE 4615, AND FOLLOWING.

12 I HAVE BEEN REQUIRED TO EVALUATE THE TESTIMONY
13 OF THE PARTY WITNESSES IN THIS CASE, THAT IS, MS. GHRDILYAN,
14 MS. SULTANIAN, AND MR. ABALKHAD WITH SOME CAUTION AND
15 RESERVATIONS. THOSE THREE PERSONS IN THEIR CAPACITIES AS
16 WITNESSES ARGUED AND WRANGLERED WITH THE QUESTIONERS DURING
17 TRIAL, AND SOME OF THAT WAS PROVOKED BY THE QUESTIONERS; SOME
18 OF IT WAS NOT. THAT BECOMES AN IMPORTANT FACTOR IN
19 EVALUATING RELATIVE CREDIBILITIES UNDER EVIDENCE CODE 780(A).
20 THOSE THREE PARTIES ALL HAVE AN INTEREST, BIAS, AND OTHER
21 MOTIVE FOR SLANTING THEIR TESTIMONY, OBVIOUSLY, AND THAT
22 BECOMES SIGNIFICANT UNDER EVIDENCE CODE 780(F) AND EVIDENCE
23 CODE 780(J).

24 MR. ABALKHAD HAS SUFFERED FELONY CONVICTIONS
25 ON HIS PLEA OF NOLO CONTENDERE AS TO PERJURY AND TAX EVASION
26 AND DID NOT OWN UP TO THAT COMPLETELY IN DISCOVERY. THAT'S
27 EVIDENCE -- THAT BECOMES PERTINENT UNDER EVIDENCE CODE 780(E)
28 AND EVIDENCE CODE 780(H), AND EVIDENCE CODE 780(I) AND IS

1 COMMENTED ON IN THE CASE OF RUSHEEN, R-U-S-H-E-E-N, VERSUS
2 DREWS, D-R-E-W-S, (2002) 99 CALIFORNIA APPELLATE 4TH 279 AT
3 PAGES 283 TO 284.

4 ASPECTS OF THE TESTIMONY OF THESE WITNESSES,
5 THESE THREE PEOPLE AS WITNESSES, WERE EXAGGERATED AND
6 OVERSTATED. THAT BECOMES PERTINENT UNDER EVIDENCE CODE
7 780(B).

8 FURTHERMORE, EVIDENCE CODE SECTION 412
9 PROVIDES THAT IF WEAKER AND LESS SATISFACTORY EVIDENCE IS
10 OFFERED WHEN IT WAS IN -- WHEN IT WAS WITHIN THE POWER OF THE
11 PARTY TO PRODUCE STRONGER AND MORE SATISFACTORY EVIDENCE, THE
12 EVIDENCE ACTUALLY OFFERED SHOULD BE VIEWED WITH DISTRUST.
13 THIS, OF COURSE, IS A PERMISSIBLE INFERENCE AND NOT A
14 MANDATORY ONE, BUT THIS COURT HAS, AS THE LAW INDICATES,
15 TAKEN THIS INTO CONSIDERATION.

16 BUT ALL THAT HAVING BEEN SAID, THE COURT DOES
17 NOT ACCEPT MR. SABZEVAR'S INVITATION TO REJECT THE ENTIRETY
18 OF THE PLAINTIFFS'S TESTIMONY. INSTEAD, THIS COURT HAS HAD
19 TO ACCEPT THE PART OF THE TESTIMONY OF THE WITNESSES WHICH
20 THIS COURT FOUND -- HAS FOUND TO BELIEVE TRUE AND -- AND WILL
21 REJECT THE REST. THIS IS PRECISELY WHAT THE COURT -- PARDON
22 ME -- IS AUTHORIZED TO DO OR ANY FINDER OF FACT WOULD BE
23 AUTHORIZED TO DO. ONE MODEL FOR THAT IS CACI INSTRUCTION
24 107, FOURTH PARAGRAPH.

25 THE DATES INVOLVED IN THIS CASE -- AND THE
26 DATES BECOME SIGNIFICANT -- ARE AS FOLLOWS. MS. SULTANIAN
27 WAS HIRED ON -- IN NOVEMBER, 2007, AND WAS FIRED ON NOVEMBER
28 19, 2009. MS. GHRDILYAN WAS HIRED IN AUGUST, 2008, AND WAS

1 FIRED ON DECEMBER 3, 2009. ONE OF THE QUESTIONS WHICH I HAVE
2 BEEN CALLED UPON TO ANSWER IS WHETHER MR. ABALKHAD AS AN
3 INDIVIDUAL WAS AN EMPLOYER OF PLAINTIFFS AND -- UNDER WAGE
4 ORDER 7. I FIND THAT HE WAS NOT. BUT I FIND THAT THE
5 THEORIES OF LIABILITY UNDER -- I SHOULD BACK OFF. BUT I FIND
6 THAT THE OTHER BASES FOR ASSERTING LIABILITY ON THE PART OF
7 MR. ABALKHAD DO HAVE MERIT, AND LIABILITY DOES ATTACH TO HIM
8 UNDER THOSE THEORIES.

9 THE THEORIES I'M REFERRING TO ARE LABOR CODE
10 558 TO WHICH LABOR CODE 510 AND 512 ARE APPENDED OR INCLUDED
11 SUBSTANTIVE PROVISIONS AND LABOR CODE 1197.1 TO WHICH THE
12 SUBSTANTIVE PROVISIONS OF LABOR CODE 1198 AND THE WAGE ORDER
13 ARE ASSOCIATED THEORIES OF LIABILITY.

14 IN OTHER WORDS, I AM FINDING THAT UNDER 558
15 LABOR CODE AND 1197.1 LABOR CODE FOR THE SUBSTANTIVE REASONS
16 REFERRED TO IN THE OTHER TWO SOURCES AS TO EACH OF THOSE
17 SECTIONS, THAT IS 510 AND 512 LABOR CODE, AND 1193 AND WAGE
18 ORDER, LIABILITY CAN ATTACH TO MR. ABALKHAD AND UNDER THE
19 CIRCUMSTANCES OF THIS CASE, WILL ATTACH.

20 I'M GOING TO MAKE A FINDING ON THAT, AS YOU
21 WILL SEE, IN FAVOR OF -- PARDON ME -- OF THE PLAINTIFFS'S
22 POSITION.

23 NOW, I SAY IN FAVOR OF THE PLAINTIFFS'S
24 POSITION BECAUSE THAT MEANS NOT JUST IN FAVOR OF THE
25 PLAINTIFFS BUT SINCE WE HAVE A PAGA ACTION, I AM REFERRING TO
26 THE PLAINTIFFS'S POSITION.

27 NOW -- PARDON ME. I WILL SAY THIS.

28 AS YOU CAN TELL, I AM AT SOME PAINS TO GO

1 THROUGH THE LEGAL REASONING AND STEPS PREPARATORY TO REACHING
2 A DECISION IN THIS CASE WITH SOME CARE BECAUSE IT MAY VERY
3 WELL BE THAT THIS CASE WILL REACH ITS WAY INTO THE APPELLATE
4 COURTS AND THAT IT IS ALSO POSSIBLE THAT THE APPELLATE COURTS
5 MAY DECIDE THIS CASE IN A PUBLISHED OPINION, AND I WILL SAY
6 THAT THE DETERMINATION I HAVE MADE ABOUT ABALKHAD AS AN
7 EMPLOYER -- I SAID THAT HE'S NOT -- OR ABALKHAD AS A
8 POTENTIALLY LIABLE PARTY UNDER LIABILITY-ENHANCING STATUTES
9 OTHER THAN LABOR CODE 558 AND LABOR CODE 1197.1, THAT IS, THE
10 ABALKHAD-FAVORING DETERMINATIONS I HAVE MADE ON THOSE POINTS,
11 ARE NOT BEYOND REASONABLE ARGUMENT.

12 MY DECISION IS, AS I HAVE EXPRESSED IT, AND I
13 BELIEVE THAT I AM CORRECT -- BUT I -- BUT I DO RECOGNIZE THAT
14 THERE ARE ARGUMENTS THAT CAN BE MADE -- AND THEY HAVE BEEN
15 MADE HERE IN THIS COURTROOM -- ON THOSE POINTS.

16 I HAVE COMPARED THE EMPLOYEE HANDBOOKS,
17 EXHIBIT 3 AND EXHIBIT D. IT APPEARS TO ME THAT EXHIBIT D
18 FROM THE EVIDENCE IN THIS CASE WAS NOT SUPPLIED BY ABALKHAD
19 DURING THE DISCOVERY PHASE OF THIS CASE. THE PARTICULAR
20 PROVISIONS THAT I AM DEALING WITH ARE THOSE HAVING TO DO WITH
21 OVERTIME AND LUNCH AND EXHIBIT 3 IS COMMENTED ON BY THE
22 PLAINTIFFS AS BEING DEFICIENT BECAUSE THEY SAY THAT A LUNCH
23 PERIOD MUST BE PROVIDED AFTER FIVE HOURS OF WORK, NOT SIX
24 HOURS OF WORK, AND THE PLAINTIFFS'S POSITION IS THAT THAT WAS
25 THE ONLY PERTINENT EMPLOYEE HANDBOOK.

26 I THINK THE PLAINTIFFS ARE RIGHT AS TO BOTH
27 THOSE CONTENTIONS. EXHIBIT 3 BEARS THE DATE OF JANUARY,
28 2003. PLAINTIFFS ADMIT THAT THIS IS THE CORRECT DATE. THAT

1 IS, IT SEEMS TO ME, THE OPERATIVE EMPLOYEE HANDBOOK. EXHIBIT
2 D WHICH HAS DIFFERENT PROVISIONS IN IT CONCERNING THE SAME
3 TOPICS WAS, IN MY VIEW, FIRST NOT PRODUCED DURING DISCOVERY;
4 SECOND, A WRITING THAT CAME INTO EXISTENCE IN AUGUST, 2010,
5 SUBSTANTIAL PERIOD OF TIME AFTER THE PLAINTIFFS HAD ALREADY
6 HAD THEIR EMPLOYMENT TERMINATED AND INDEED AUGUST, 2010, IS
7 EVEN AFTER THE PRESENT SUIT WAS FILED. THIS CAN BE SEEN FROM
8 EXHIBIT D PAGE 17, SECOND FULL PARAGRAPH.

9 AS I HAVE SAID, THIS SUIT WAS FILED ON THE
10 28TH OF JANUARY, 2010.

11 ONE OF THE COMPLICATING FACTORS IN THIS
12 CASE -- AND THE LAWYERS HAVE RECOGNIZED IT, AND IT'S OBVIOUS
13 TO ANYONE WITH ANY LEGAL EXPERIENCE -- IS THAT ALTHOUGH THE
14 LAWSUIT ORIGINALLY NAMED RJ FINANCIAL, INC., THAT DEFENDANT
15 IS A DEBTOR IN A CHAPTER 11 BANKRUPTCY. AS I HAVE SAID, THE
16 CASE IS OBVIOUSLY STAYED AS TO THAT PARTY, BUT THE PLAINTIFFS
17 HAVE HAD TO REORGANIZE THEIR CASE TO PRESS IT AGAINST
18 MR. ABALKHAD WHO IS NOT IN BANKRUPTCY AND IT SEEMS TO ME THEY
19 HAVE DONE SO SUCCESSFULLY.

20 THERE IS NO SERIOUS QUESTION BETWEEN THE SIDES
21 CONCERNING THE FOLLOWING PROPOSITIONS OF LAW. AN EMPLOYEE IS
22 ENTITLED TO OVERTIME COMPENSATION FOR WORK IN EXCESS OF EIGHT
23 HOURS IN ONE WORKDAY, FOR WORKING IN EXCESS OF 40 HOURS IN
24 ONE WORKWEEK, AND FOR WORK ON THE SEVENTH DAY IN ONE WORK
25 WEEK. THE OVERTIME COMPENSATION DIFFERS, BUT THOSE ARE
26 OVERTIME ITEMS.

27 IT IS ALSO TRUE -- BY THE WAY, THIS IS
28 PROVIDED FOR UNDER LABOR CODE 510(A). IT'S ALSO TRUE THAT

1 EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES WHO ARE
2 SPECIFICALLY EXEMPTED BY THE CALIFORNIA INDUSTRIAL WELFARE
3 AND COMMISSION ARE EXEMPT FROM THE HOURS WORKED AND DAYS
4 WORKED PER WEEK LIMITATIONS AS PROVIDED FOR IN LABOR CODE 515
5 BUT -- PARDON ME -- THE PLAINTIFFS IN THIS CASE DO NOT FALL
6 INTO THAT EXEMPTED CATEGORY AND INDEED THE DEFENDANT DOES NOT
7 CLAIM THAT THEY DO.

8 FOR THE REASONS THAT I HAVE MENTIONED EARLIER
9 ABOUT THE RESERVATIONS WITH WHICH THE TESTIMONY OF THE
10 WITNESSES HAVE TO BE INTERPRETED WITH, I DO NOT ATTEMPT TO
11 SUMMARIZE ALL THE TESTIMONY OF ALL THE WITNESSES.

12 IT IS ALSO TRUE THAT SUCCESSFUL EMPLOYEE
13 PLAINTIFFS WHO ARE AWARDED UNPAID OVERTIME ARE ENTITLED TO
14 INTEREST ACCRUING FROM THE DATE ON WHICH THE RIGHT TO RECOVER
15 THEIR OVERTIME VESTS. THIS WOULD BE ON THE MODEL INDICATED
16 IN CIVIL CODE 3287(A) COMPUTED TO THE DATE OF ENTRY OF
17 JUDGMENT. THIS IS LABOR CODE 1194(A), AND IT'S ALSO
18 DISCUSSED IN ESPINOSA VERSUS CLASSIC PIZZA, WHICH IS A CASE
19 THAT APPEARS IN 114 CALIFORNIA APPELLATE 4TH. THE PARTICULAR
20 PASSAGE THAT I'M MAKING REFERENCE TO IS AT PAGE 975.

21 THE TERM "WILLFUL" UNDER THE LABOR CODE --
22 THIS APPEARS IN LABOR CODE 203 -- IT MEANS ONLY THAT AN
23 EMPLOYER INTENTIONALLY FAILED OR REFUSED TO PERFORM AN ACT
24 THAT WAS REQUIRED TO BE DONE. THAT POINT IS MADE IN BARNHILL
25 VERSUS ROBERT SAUNDERS & COMPANY, (1981) 125 CALIFORNIA
26 APPELLATE 3D 1 AT PAGES 7 AND 8.

27 OBVIOUSLY, IN THE CURRENT CASE, UNLIKE THE
28 SITUATION IN BARNHILL, THERE'S NO EVIDENCE OF OFFSET. I'M

1 CITING BARNHILL JUST FOR THE PURPOSE OF THE DEFINITION OF THE
2 WORD "WILLFUL."

3 I WILL MAKE A COUPLE OF OTHER POINTS.

4 I RECOGNIZE THE INTENSITY WITH WHICH THE
5 DEFENSE HAS MAINTAINED THAT THIS IS A CASE DRIVEN BY
6 ATTORNEYS AND ATTORNEY'S FEES ON THE PLAINTIFFS'S SIDE. FOR
7 THE REASONS THAT I HAVE MENTIONED PREVIOUSLY, THAT IS, THAT
8 ONE OF THE PURPOSES OF PAGA IS PRECISELY TO INCENTIVIZE
9 ATTORNEYS TO -- TO FILE AND TO PROSECUTE SUCH CASES -- THAT
10 ARGUMENT EXISTS AND IT DOES HAVE A CERTAIN AMOUNT OF
11 OCCURRENCE, BUT I DO NOT REGARD IT AS BEING A STRONG
12 ARGUMENT. IT IS THE PURPOSE OF THE LAW PRECISELY TO PROVIDE
13 AN INCENTIVE FOR ATTORNEYS WHO MIGHT OTHERWISE BE UNABLE TO
14 HANDLE CASES OF THIS TYPE TO BE ABLE TO HANDLE CASES OF THIS
15 TYPE.

16 I WILL SAY THAT APPLICATIONS FOR ATTORNEYS'S
17 FEES, IF ANYBODY CLAIMS ENTITLEMENT TO ANY, CAN BE MADE BY
18 POST-JUDGMENT MOTION FOR ALLOWANCE OF ATTORNEY'S FEES AS
19 PARTS OF COSTS UNDER CIVIL CODE 1717(A), IF THAT'S WHAT
20 APPLIES, OR UNDER THE CORRESPONDING STATUTE IN THE LABOR
21 CODE. AND THE METHOD OF MAKING A POST-JUDGMENT MOTION FOR
22 ALLOWANCE IS REFERRED TO IN SUCH CASES AS ALLSTATE INSURANCE
23 VERSUS LEW, (1996) 46 CALIFORNIA APPELLATE 4TH 174 -- 1794 AT
24 1797, AND BANKES VERSUS LUCAS -- BANKES IS SPELLED
25 B-A-N-K-E-S, VERSUS LUCAS -- (1992) 9 CALIFORNIA --
26 9 CALIFORNIA APPELLATE 4TH, 365 AT 370.

27 I CITE THOSE TWO CASES NOT FOR THE PROPOSITION
28 THAT THEY APPLY IN LABOR CASES OR THAT THEY ARE DISPOSITIVE

1 ON THE ISSUE OF THE AMOUNT OF LEGAL FEES BUT JUST TO SHOW
2 THAT THAT IS AN APPROPRIATE TIME TO MAKE APPLICATIONS FOR
3 FEES.

4 IN THE PREMISES OF THIS CASE, THOUGH, FOR
5 REASONS THAT I WILL EXPLAIN IN JUST A SECOND, THE APPLICATION
6 FOR ATTORNEY'S FEES, IF THERE IS GOING TO BE ONE ON THE PART
7 OF THE PLAINTIFFS'S ATTORNEY, SHOULD BE, IT SEEMS TO ME, MADE
8 AFTER DISTRIBUTION OF ALL THE FUNDS THAT WILL BE DISTRIBUTED
9 UNDER MY AWARD WHICH I'M GOING TO MAKE UNDER PAGA SO THAT WE
10 DON'T HAVE THE SITUATION WHERE THE ATTORNEY IS PAID,
11 PLAINTIFFS'S ATTORNEY IS PAID FIRST OR SEEKS PAYMENT FIRST
12 WITHOUT ALSO DOING ALL THE, IT SEEMS TO ME, RATHER LABORIOUS
13 WORK THAT'S GOING TO BE REQUIRED UNDER PAGA, AND IT'S 25
14 PERCENT, 75 PERCENT SHARING ARRANGEMENT WITH THE PLAINTIFFS
15 TO GET 25 PERCENT AND WITH THE STATE OF CALIFORNIA TO GET THE
16 75 PERCENT.

17 SO I'M GOING TO TREAT THAT ASPECT OF THIS CASE
18 AS CALLING FOR ATTORNEY FEE MOTIONS, IF ANY ARE TO BE MADE,
19 AT A TIME AFTER THAT STEP OF CONCURSUS OF CLAIMS AND
20 DISTRIBUTION OF FUNDS HAS EITHER BEEN COMPLETELY FINISHED OR
21 HAS BEEN FINISHED WITH THE EXCEPTION OF A FEW SMALL
22 MINISTERIAL ACTS.

23 PARDON ME.

24 WITH RESPECT TO THE -- TO THE REMEDIES, IT
25 SEEMS TO ME THAT THE EVIDENCE STRONGLY SUPPORTS THE
26 PLAINTIFFS'S ARGUMENTS AS TO WHAT I WILL CALL THE 558-510-512
27 THEORY AND THE 1197.1-1198-WORK ORDER THEORY.

28 I THINK THAT THE EVIDENCE ESTABLISHES

1 VIOLATIONS OF THOSE SUBSTANTIVE PROVISIONS AND THAT THE
2 EVIDENCE ESTABLISHES A RIGHT TO RECOVER ON BEHALF OF THE
3 PAGA-AGGRIEVED EMPLOYEES AND ON BEHALF OF THE PLAINTIFFS BUT
4 IN AMOUNTS THAT ARE DIFFERENT FROM THOSE -- THE THEORIES ARE
5 THOSE ADVOCATED BY MR. SPIVAK AND HIS CLIENTS. THE AMOUNTS
6 ARE AMOUNTS THAT I AM GOING TO ALTER, THOUGH, AS WILL BE
7 CLEAR.

8 WITH RESPECT TO THE GHRDILYAN 558-510-512
9 LABOR CODE RECOVERY, I AM GOING TO AWARD \$7,654.60 -- THAT'S
10 EXACTLY AS CALCULATED BY MR. SPIVAK AND THOSE ARE -- THAT'S
11 IN FAVOR OF MS. GHRDILYAN AND AGAINST MR. ABALKHAD.

12 WITH RESPECT TO THE 1197.1 THEORY, WITH 1198
13 AND WORK ORDER BEING THE SUBSTANTIVE BASES, I AGREE WITH
14 MR. SPIVAK THAT MS. GHRDILYAN'S RECOVERY SHOULD BE \$14,218
15 AND THAT COMES OUT TO A TOTAL OF 21,872.60 FOR GHRDILYAN.

16 WITH RESPECT TO SULTANIAN, MY DETERMINATION IS
17 THAT REGARDING THE LABOR CODE 558-510-512 THEORY,
18 MS. SULTANIAN IS ENTITLED TO RECOVERY AGAINST MR. ABALKHAD OF
19 \$5,264.19, AND WITH RESPECT TO HER THEORY UNDER 1197.1 LABOR
20 CODE, MS. SULTANIAN IS ENTITLED TO RECOVER AGAINST
21 MR. ABALKHAD \$13,936.50. TOTAL IS \$19,200.69, AND THAT'S THE
22 AMOUNT THAT SULTANIAN IS ENTITLED TO RECOVER ON HER ACCOUNT
23 AGAINST MR. ABALKHAD.

24 THIS NOW BRINGS US TO THE AWARD IN FAVOR OF
25 THE SO-CALLED AGGRIEVED EMPLOYEES.

26 MY DETERMINATION IS THAT THE AGGRIEVED
27 EMPLOYEES'S CLAIMS ARE VALID AND MERITORIOUS CLAIMS; THAT
28 THEY CAN BE AND HAVE BEEN VALIDLY ASSERTED BY, PROSECUTED BY

1 THE TWO PLAINTIFFS IN OUR CASE.

2 I AM GOING, HOWEVER, NOT TO ACCEPT THE DOLLAR
3 FIGURES IN THE ULTIMATE SENSE THAT MR. SPIVAK AND HIS CLIENTS
4 HAVE ADVOCATED. IN DOING THIS, I AM GOING TO SPECIFICALLY
5 EXERCISE MY POWERS, WHICH IT SEEMS TO ME ARE IN THE NATURE OF
6 JUDICIAL DISCRETION, TO REDUCE THE AMOUNT OF RECOVERY FROM
7 THE AMOUNTS ADVOCATED BY MR. SPIVAK AND HIS CLIENTS.

8 WITH RESPECT TO THE LABOR CODE 558, 510, AND
9 512 THEORIES, AS TO THE AGGRIEVED EMPLOYEES, MY DETERMINATION
10 IS THAT THE AMOUNT WHICH MR. ABALKHAD MUST PAY IS NOT THE
11 \$2,164,278 AMOUNT THAT MR. SPIVAK ARGUED FOR BUT RATHER
12 \$125,000.

13 WITH RESPECT TO THE 1197.1-1198-WAGE-ORDER
14 CLAIM, MY DETERMINATION IS THAT THE AMOUNT THAT MR. ABALKHAD
15 WILL BE REQUIRED TO PAY IS NOT \$3,269,490, WHICH WAS THE
16 AMOUNT ADVOCATED BY MR. SPIVAK ON BEHALF OF HIS CLIENTS BUT
17 RATHER \$200,000.

18 NOW, THAT COMES OUT TO A TOTAL THEN OF
19 \$325,000.

20 NOW, IN DOING THIS, I HAVE EXERCISED MY
21 DISCRETION TAKING INTO CONSIDERATION THE FOLLOWING POINTS. I
22 AGREE WITH MR. SPIVAK'S CHARACTERIZATION OF MR. ABALKHAD AS A
23 PERSON WHO WAS INADEQUATELY OBSERVANT OF CALIFORNIA LAW.
24 MR. SPIVAK REFERS TO HIM AS A "SCOFFLAW." THAT'S A
25 JOURNALISTIC RATHER THAN A -- A LEGAL TERM. BUT I THINK HE
26 DID HAVE THE INTENTION SIMPLY OF TRYING TO RUN THINGS THROUGH
27 AND GET OFF AS CHEAPLY AS HE COULD WHILE HE WAS RUNNING HIS
28 BUSINESSES.

1 BUT I ALSO FIND THAT ONE OF THE PROBLEMS IN
2 THE OPERATION OF HIS BUSINESS WAS THAT HE GOT IN WAY OVER HIS
3 HEAD. HE SIMPLY EXPANDED BEYOND HIS OR HIS CORPORATION'S
4 CAPACITY PROPERLY TO RUN THESE BUSINESSES. HE RAN THEM AS
5 THOUGH HE WERE RUNNING A KIND OF SMALL OPERATIONS OUT OF HIS
6 HIP POCKET, AND I RECOGNIZE THAT THAT IS NOT A PRAISEWORTHY
7 BEHAVIOR, BUT IT SEEMS TO ME THAT IT IS NOT BEHAVIOR OF A
8 HIGHLY BLAMEWORTHY SENSE AND THAT IT IS BEHAVIOR WHICH MERITS
9 A REDUCTION OR SOFTENING OF THE PENALTIES.

10 NOW, I WILL ALSO SAY THE FOLLOWING. IF ON
11 APPEAL, THE APPELLATE COURT DETERMINES THAT I AM MISTAKEN
12 CONCERNING THE POTENTIAL OTHER THEORIES OF LIABILITY ASSERTED
13 BY MR. SPIVAK AND HIS CLIENTS AGAINST MR. ABALKHAD, I WILL
14 TELL YOU WHAT I WOULD HAVE AWARDED ON THOSE THEORIES SO THAT
15 IT MAY BE THAT THE APPELLATE COURT CAN SIMPLY TAKE WHAT I
16 HAVE SAID HERE AND RATHER THAN MAKING A DISPOSITION WHICH
17 REMANDS THE CASE FOR FURTHER CALCULATION OF DAMAGES, THE
18 APPELLATE COURT CAN SIMPLY INSERT THE MONETARY REMEDY THAT I
19 WOULD HAVE INSERTED MYSELF HAD I NOT BEEN PERSUADED THAT
20 MR. ABALKHAD WAS NOT LIABLE EXCEPT UNDER THE THEORIES THAT I
21 HAVE MADE REFERENCE TO.

22 HAD THAT BEEN DONE, I WOULD HAVE AWARDED AN
23 ADDITIONAL \$200,000 AS TO THE AGGRIEVED EMPLOYEES.

24 NOW, I WILL SAY THAT THESE AMOUNTS ARE, I
25 RECOGNIZE, EXTREMELY LENIENT AND PERMISSIVE TO MR. ABALKHAD.
26 IN OTHER WORDS, THIS IS NOT A CASE WHERE THE COURT HAS TRIED
27 TO SOCK IT TO HIM. IT IS, RATHER, A CASE IN WHICH I HAVE
28 TREATED IT AS A SERIES OF OFFENSES BUT ONE AS TO WHICH

1 MR. ABALKHAD SHOULD BE GIVEN AT LEAST SOME LENIENCY IN THE
2 FASHIONING OF A REMEDY. I THINK THAT'S IT. LET ME ASK THE
3 LAWYERS.

4 FIRST OF ALL, PLAINTIFFS'S LAWYER. ARE THERE
5 OTHER MATTERS AS TO WHICH YOUR CLIENTS CONTEND I SHOULD MAKE
6 A STATEMENT OF SOME KIND OR A FINDING OF SOME KIND?

7 MR. SPIVAK: WAS THERE SOME FINDING AS TO THE
8 ADDITIONAL \$200,000 WITH RESPECT TO THE INDIVIDUAL
9 PLAINTIFFS, YOUR HONOR?

10 YOU SPOKE TO THE OTHER CLAIMS WHICH PERHAPS
11 WOULD AFFECT THE APPELLATE COURT SHOULD IT SEND BACK FOR
12 CALCULATION.

13 THE COURT: YEAH.

14 MR. SPIVAK: I KNOW YOU GAVE AN AGGRIEVED EMPLOYEE
15 NUMBER BUT NOT FOR THE TWO PLAINTIFFS.

16 THE COURT: SHOW ME -- JUST A SECOND. COULD YOU,
17 PLEASE, TURN BACK TO -- OH, I GUESS I OUGHT TO SAY THAT. LET
18 ME DO THAT NOW.

19 THE PLAINTIFFS CONTEND THAT THERE WERE THESE
20 WRONGS AS TO BOTH THEMSELVES AND AS TO THE AGGRIEVED
21 EMPLOYEES, AND I WILL JUST REFER TO THEM IN SHORT, COMPRESSED
22 TERMS. AND ESSENTIALLY IT BOILS DOWN TO I THINK NINE
23 THEORIES AND I WILL ENUMERATE THEM NOW: OVERTIME, REST AND
24 MEAL PERIODS, WAGE STATEMENT, IN OTHER WORDS, LABOR CODE 226,
25 UNPAID TRAVEL EXPENSES AND MILEAGE -- THAT'S FOUR --
26 OFF-THE-CLOCK WORK, UNTIMELY PAYMENT OF WAGES, VACATION PAY
27 AT TERMINATION, AND FAILURE FAIRLY TO ADVISE THE EMPLOYEES OF
28 CHANGE IN THE COMMISSION STRUCTURE SO THAT WHAT HAPPENED WAS

1 THAT THEY WERE MADE TO DO WORK WITHOUT KNOWING -- WITHOUT, AS
2 IT TURNED OUT, WHAT THE ULTIMATE PAYMENT FOR IT WAS GOING TO
3 BE.

4 EACH OF THOSE CONTENTIONS -- EACH OF THOSE
5 THEORIES IS A THEORY THAT WOULD BE DECIDED IN FAVOR OF THE
6 PLAINTIFFS AND AGAINST THE -- AND AGAINST THE DEFENDANT
7 ABALKHAD EXCEPT FOR MY DETERMINATION THAT HE INDIVIDUALLY IS
8 NOT LIABLE. BUT IF HE IS LIABLE, THAT IS, IF THE APPELLATE
9 COURT DECIDES THAT I HAVE MADE AN ERROR REGARDING EXCESSIVELY
10 NARROW INTERPRETATION OF THE LABOR CODE PROVISIONS, I WOULD
11 AWARD EACH OF THE PLAINTIFFS AS PENALTIES \$60,000 EACH; 60
12 PLUS 60 IS 120.

13 NOW, I WILL SAY, AGAIN, I RECOGNIZE THAT THIS
14 IS WAY BELOW THE PLAINTIFFS'S TARGET NUMBER, BUT IT IS A
15 NUMBER THAT I THINK IS APPROPRIATE.

16 NOW, I WANT TO SAY SOMETHING ELSE ABOUT THIS,
17 AND THIS IS A COMPLICATION CREATED BY FACTORS THAT I HAD
18 REFERRED TO PREVIOUSLY. THIS IS THE BANKRUPTCY OF THE
19 CORPORATION.

20 WHAT I AM SAYING CONCERNING THESE OTHER
21 PENALTIES AND OTHER AMOUNTS, THAT IS, AMOUNTS I AM NOT
22 ACTUALLY AWARDING ARE FOR THE BENEFIT OF THE APPELLATE COURT
23 IN ASSISTING IT TO FRAME A DISPOSITIONAL ORDER IF THE CASE IS
24 SENT BACK TO THE SUPERIOR COURT UPON A REVERSAL IN PART OR IN
25 WHOLE.

26 I WANT TO PUT THESE PEOPLE IN A POSITION SO
27 THEY WILL HAVE A REMEDY ON BOTH SIDES WITHOUT THE NECESSITY
28 OF THE SUPERIOR COURT HAVING TO REVISIT THIS AND BY THE

1 SUPERIOR COURT TELLING THE APPELLATE COURT WHAT THE SUPERIOR
2 COURT WOULD HAVE DONE HAD THE SUPERIOR COURT'S REASONING NOT
3 FORECLOSED IT.

4 I AM EXTREMELY CONCERNED TO STATE THIS IN THAT
5 WAY SO THAT THE BANKRUPTCY PROCEEDINGS ARE NOT IN SOME WAY
6 SPOILED OR IMPROPERLY AFFECTED BY THE WORK DONE HERE IN THE
7 -- IN THE TRIAL COURT. AND I AM TRYING TO SUPPLY ALL OF THE
8 INFORMATION THAT I CAN WHILE STILL BEING TRUE TO AND
9 OBSERVANT OF THE NECESSITY FOR TRYING TO ACHIEVE AS MUCH
10 FINALITY AS I CAN WHILE STILL ASSISTING IN THE LITIGATION
11 PROCESS AS MUCH AS THIS COURT CAN.

12 NOW, I HAVE PREVIOUSLY DISCUSSED AND I WILL
13 MAKE A PART OF MY STATEMENT OF DECISION HERE THE SET OF DATES
14 THAT PIVOT AROUND THE APPEAL. AS I HAVE SAID PREVIOUSLY, THE
15 CASE THAT I HAVE BEEN TRYING, THIS CASE, WAS FILED ON THE
16 26TH OF JANUARY, 2010. THE DEFENDANT WAS AT THAT TIME ONLY
17 RJ FINANCIAL, AND THE CASE WAS DENOMINATED A CLASS ACTION. A
18 LITTLE LESS THAN MONTH AFTER THAT, ON THE 24TH OF FEBRUARY,
19 2010, THE PLAINTIFFS FILED A FIRST AMENDED COMPLAINT. THEY
20 ADDED MR. ABALKHAD AS A NAMED DEFENDANT. THEY CONTINUED WITH
21 THE DESIGNATION OF THIS CASE AS A CLASS ACTION.

22 ON THE 8TH OF MARCH, 2010, THE PLAINTIFFS
23 FILED A 170.6 AS TO JUDGE WILLIAM FAHEY OF THIS COURT.

24 ON THE 22ND OF MARCH, 2010, THE LAWYER WHO THE
25 TESTIMONY HAS IDENTIFIED AS MR. SANFORD FREY, F-R-E-Y -- THAT
26 NAME ALSO APPEARS ON THE DOCUMENT I'M GOING TO DESCRIBE --
27 FILED A NOTICE OF STAY AS TO THE CORPORATE DEFENDANT,
28 REFERRING TO THE CHAPTER 11 BANKRUPTCY. THAT BANKRUPTCY

1 PETITION APPEARS TO HAVE BEEN FILED ON THE 7TH OF JANUARY,
2 2010, THAT IS, BEFORE THE CASE WAS EVER FILED.

3 THAT ACCOUNTS FOR THE MODIFICATION OF THE NAME
4 OF THE PARTIES TO INCLUDE ABALKHAD AS AN INDIVIDUAL. I THINK
5 IT IS THAT OBVIOUS THAT -- BUT I WANT TO MAKE IT VERY, VERY
6 CLEAR THAT THIS IS NOT ONLY OBVIOUS, BUT IT IS A FACT THAT --
7 THIS CASE IS STAYED AS TO THE RJ FINANCIAL CORPORATION UNDER
8 THE STATUTORY CITATION I HAVE GIVEN, 11 U.S.C. 362.

9 MR. ABALKHAD'S DEFAULT WAS TAKEN IN THIS CASE
10 AND IN AUGUST OF 2010, HE MOVED TO SET ASIDE THE DEFAULT. IN
11 THAT SET OF PAPERS, THERE WAS THE CLAIM MADE THAT PLAINTIFFS
12 ADDED ABALKHAD ON THE 26TH OF MARCH, 2010. AS I HAVE
13 INDICATED, THAT WAS NOT TRUE. IT WAS ON THE 26TH -- 24TH OF
14 FEBRUARY, 2010, BUT THAT WAS NOT A SIGNIFICANT INACCURACY
15 BECAUSE IN THE COURT'S VIEW, ABALKHAD WAS ENTITLED TO HAVE
16 THE DEFAULT SET ASIDE.

17 NOW IS THERE ANYTHING THAT I AM SUPPOSED TO
18 SAY?

19 MR. SPIVAK: I DON'T THINK SO, YOUR HONOR.

20 THE COURT: OKAY. HOW ABOUT YOU, MR. SABZEVAR?

21 MR. SABZEVAR: NO, YOUR HONOR.

22 THE COURT: ALL RIGHT. HERE'S WHAT I'M GOING TO DO
23 THEN.

24 I'M GOING TO SET A HEARING OUT IN THE FUTURE.
25 FIRST OF ALL, THE STATEMENT OF DECISION IS SUFFICIENT IF IT
26 STATES ALL THE FACTS. IT NEED NOT STATE EVIDENTIARY FACTS.
27 I THINK THE STATEMENT OF DECISION I HAVE MADE DOES THAT.

28 SECONDLY, I'M GOING TO ORDER THE PLAINTIFFS

1 THROUGH COUNSEL TO PREPARE, SERVE, OBTAIN APPROVAL AS TO FORM
2 FROM DEFENDANT ABALKHAD. THIS MAY REQUIRE A MEET AND CONFER
3 AND COURT EXPECTS COUNSEL TO BE ATTENTIVE AND COOPERATIVE IN
4 THIS REGARD. SO SUBMIT THAT TO DEFENSE COUNSEL AND LODGE
5 WITH THE COURT A JUDGMENT SUITABLE FOR COURT'S SIGNATURE IN
6 CONFORMITY WITH THE FOREGOING.

7 I AM GOING TO ORDER ALSO THAT THE PARTIES
8 AND/OR COUNSEL PICK UP ALL EXHIBITS LODGED WITH THE CLERK AND
9 ALL EXHIBITS MARKED AND/OR RECEIVED IN EVIDENCE, EACH SIDE TO
10 PICK UP THE ITEM PROFFERED BY THAT SIDE FOR RECEIPT INTO
11 EVIDENCE WITHIN FIVE DAYS FROM THE COURT'S SIGNING OF THE
12 JUDGMENT.

13 NOW, TODAY IS THE 23RD OF APRIL, 2010 -- 2012,
14 I SHOULD SAY. I WANT TO HAVE A HEARING AT WHICH THE JUDGMENT
15 IS PRESENTED TO ME FOR SIGNATURE AND I WANT TO DO THESE
16 THINGS AT THAT HEARING. I WANT TO SETTLE THE FORM AND
17 SUBSTANCE OF THE DECISION -- OF THE JUDGMENT. IF THERE'S ANY
18 OTHER WORK THAT NEEDS TO BE DONE, I WANT TO DO THAT AT THIS
19 HEARING. I WANT TO DETERMINE WHAT, IF ANYTHING, REMAINS TO
20 BE DONE REGARDING FUTURE PROCEEDINGS IN THIS CASE, AND I WANT
21 TO DETERMINE WHAT THE STATUS OF THIS CASE IS AND I WANT TO
22 HAVE THE LAWYERS FOR THE PARTIES PERSONALLY PRESENT.

23 MY IDEA WOULD BE THE JUDGMENT SHOULD BE
24 SUBMITTED BEFORE THE HEARING BUT THAT PLAINTIFFS'S COUNSEL
25 SHOULD BRING WITH HIM A DUPLICATE ORIGINAL OF THE JUDGMENT IN
26 CASE THE PAPERWORK HANDLING PRODUCES A SITUATION WHERE I
27 CAN'T LAY MY HANDS ON THE JUDGMENT THAT I AM SUPPOSED TO SIGN
28 IMMEDIATELY. I LOOK TO THE ATTORNEYS NOW FOR SOME

1 SUGGESTIONS AS TO THE DATE WHEN THAT HEARING SHOULD BE
2 SCHEDULED.

3 MR. SABZEVAR, DO YOU HAVE ANY IDEAS ABOUT WHEN
4 I SHOULD SCHEDULE IT?

5 MR. SABZEVAR: FORTY-FIVE DAYS, YOUR HONOR?

6 THE COURT: FORTY-FIVE DAYS.

7 MR. SPIVAK: THAT'S FINE FOR PLAINTIFFS.

8 THE COURT: SO TODAY IS THE 23RD. LET'S SET IT FOR
9 HEARING ON THE -- LET'S GO OUT MORE THAN 45 DAYS.

10 AS YOU CAN SEE, FROM THE 4TH TO THE 8TH, I
11 WON'T BE ABLE TO WORK WITH YOU -- OF JUNE. I WON'T BE ABLE
12 TO WORK WITH YOU. SO WOULD IT ALL RIGHT WITH YOU LAWYERS IF
13 I PICK THE 21ST OF JUNE, 2012, 8:30, THIS DEPARTMENT?

14 MR. SABZEVAR: THAT'S FINE, YOUR HONOR.

15 THE COURT: ARE YOU GOING TO BE AVAILABLE ON THOSE
16 DATES?

17 MR. SPIVAK: YES, YOUR HONOR.

18 THE COURT: ARE YOU GOING TO BE ABLE TO DO THE
19 THINGS I TALKED ABOUT, SETTLING THE FORM AND SUBSTANCE OF THE
20 JUDGMENT?

21 MR. SPIVAK: YES, YOUR HONOR.

22 MR. SABZEVAR: THAT'S FINE.

23 THE COURT: THANK YOU VERY MUCH. I APPRECIATE YOUR
24 PARTICIPATION AND -- AND YOUR ADVOCACY, AND I WILL SEE YOU
25 WHEN WE NEXT HAVE TO WORK ON THE CASE.

26 NOW, I WILL TELL YOU SOMETHING ELSE. PLEASE
27 STAY ALERT AND PLEASE LOOK IN ADVISES TO ATTORNEYS, OR
28 NOTICES, OR WHATEVER WE ARE GOING TO DO IN THE NEXT THREE OR

1 FOUR WEEKS. HERE'S OUR SITUATION.

2 AS OF 15TH OF MAY, WE WON'T HAVE REPORTERS IN
3 THESE DEPARTMENTS ANYMORE FOR TRIAL MATTERS -- THEY WILL HAVE
4 TO BE SUPPLIED BY THE PARTIES -- AND WE WON'T HAVE THE
5 REPORTERS EXCEPT TWO LAW AND MOTION SESSIONS A WEEK. THE
6 IDEA IS IT WILL BE ONE MORNING AND ONE AFTERNOON. THAT WILL
7 BE ALL THE REPORTERS WE ARE GOING TO HAVE SUPPLIED BY THE
8 COURT.

9 MOREOVER, THEY ARE GOING TO, AS I MENTIONED TO
10 YOU PREVIOUSLY, THEY ARE GOING TO REDUCE THE STAFF.

11 SO I HAD GIVEN YOU DATE, BUT I AM NOT ONE
12 HUNDRED PERCENT CERTAIN ABOUT HOW THAT DATE IS GOING TO WORK.
13 PLEASE KEEP YOUR EYES AND EARS OPEN. IF THERE'S SOME FOUL UP
14 OR SOMETHING, DO WHATEVER YOU NEED TO DO TO MAKE IT RIGHT. I
15 MEAN, WE ARE -- I WISH I COULD SAY SOMETHING THAT SOUNDED
16 MORE EMPHATIC AND MORE DEFINITIVE, BUT I CAN'T. I JUST DON'T
17 KNOW WHAT'S GOING TO HAPPEN.

18 WHAT I WANT TO DO IS TO FINISH UP YOUR CASE
19 AND GET YOU ALONG FOR THE NEXT STEP FOR OBVIOUS REASONS. AND
20 I DON'T WANT THE COLLAPSE OF THE SYSTEM'S ABILITY TO HANDLE
21 MATTERS TIMELY TO REDOUND TO YOUR DISADVANTAGE OR TO
22 ADDITIONAL EXPENSE ON THE PART OF EITHER SIDE THAT MIGHT
23 OTHERWISE BE AVOIDED IF YOU LAWYERS KEPT YOUR EYES PEELED FOR
24 WHAT'S HAPPENING IN THE COURTS AND IF I WERE ABLE TO PREDICT
25 A LITTLE BIT, I JUST CAN'T PREDICT THAT. I DON'T EVEN KNOW.
26 BUT KEEP YOUR EYES OPEN. TRY TO DO WHAT'S RIGHT, AND I WILL
27 TRY TO DO WHAT'S RIGHT. IT'S ABOUT THE BEST I CAN DO FOR
28 YOU.

1 ALL RIGHT. THANK YOU ALL VERY MUCH.

2 MR. SPIVAK: THANK YOU, YOUR HONOR.

3 MR. SABZEVAR: THANK YOU, YOUR HONOR.

4 THE COURT: SEE YOU WHEN WE NEXT HAVE TO WORK ON

5 THE CASE.

6 (PROCEEDINGS CONCLUDED.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

DEPARTMENT 41 HON. RONALD M. SOHIGIAN, JUDGE

CASE NO. BC430633
CERTIFIED COPY

MONDAY, APRIL 23, 2012

REPORTED BY:
ANGELA ZARATAN PARADELA
OFFICIAL COURT REPORTER
CSR NO. 9659

EXHIBIT 14

2013 WL 766535
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.
Court of Appeal,
Second District, Division 2, California.

Pearline ZALEWA et al., Plaintiffs and Respondents,
v.
TEMPO RESEARCH CORPORATION et al., Defendants and Appellants.

B238142 | Filed March 1, 2013

APPEAL from a judgment of the Superior Court of Los Angeles County. [Charles F. Palmer](#), Judge. Reversed and remanded. (Los Angeles County Super. Ct. No. BC319156)

Attorneys and Law Firms

Dickstein Shapiro, [Arthur Silbergeld](#), [Christine de Bretteville](#) for Defendants and Appellants.

Altshuler Berzon, [Michael Rubin](#), [Eileen B. Goldsmith](#); Law Offices of Joseph D. Tuchmayer, [Joseph D. Tuchmayer](#); Law Offices of Todd Arron, [Todd S. Arron](#) for Plaintiffs and Respondents.

Opinion

[BOREN](#), P.J.

***1** We remanded this employment case to the trial court to determine (1) if attorney fees are authorized by statute following our reversal of the judgment in favor of plaintiffs, and (2) if fees are authorized, are they warranted by the facts of the case. On remand, both sides submitted demands for attorney fees to the trial court. The court awarded fees to plaintiff former employees as the “**prevailing** party” under [Labor Code section 218.5](#).¹

We reverse. Plaintiffs were not the **prevailing** party: they lost the case because their demands for bonuses were unfounded. Given that plaintiffs had no right to bonuses after they were laid off, defendants’ payment of money to some former employees during the litigation was a gift that cannot be viewed—as a matter of law—as a “catalyst” warranting an award of attorney fees to plaintiffs.

FACTS²

Plaintiffs are former employees of defendant Rifocs, a fiber optics company. In 1999, Rifocs merged with codefendant Textron. The merged entity was subsequently acquired by codefendant Tempo Research Corporation. The 1999 merger agreement contained a bonus clause. The bonus was intended to reward key employees for past performance and give them an incentive to remain with the company after the merger. Plaintiff employees were not third party beneficiaries of the merger agreement, which expressly forbids them from suing to enforce its terms.

To qualify for a bonus, plaintiffs had to be employed by the corporation at the end of the calendar year from 2000 through 2003. Plaintiffs received bonuses pursuant to the merger agreement beginning in December 2000. Plaintiff Laws received a bonus of \$10,000 for 2000–2001 and Zalewa received a bonus of \$75,000 for 2000–2002.

In 2001, defendants began employee layoffs because the market for fiber optics cooled. Defendants’ employment roster declined from 125 employees in April 2001 to seven employees in 2003. After being laid off, plaintiffs received no further

bonuses; however, they were entitled to—and received—severance pay. They signed releases agreeing not to sue on any claim arising from their employment with defendants.

In 2004, plaintiffs filed suit alleging Labor Code violations, unfair business practices, breach of contract, conversion, promissory estoppel, bad faith, and private attorney general (PAGA) penalties. In July 2005, defendants offered payments to laid-off employees, though not to the plaintiffs. After defendants made the payments, plaintiffs amended their complaint to allege a class action and assert a new claim for a “residual bonus.” A class was certified in 2007.

A bench trial was conducted in 2008. The court found that plaintiffs are entitled to recover a direct bonus, but no residual bonus. Because the bonus was unpaid wages, plaintiffs were awarded prejudgment interest and attorney fees under § 218.5. The court denied penalties to plaintiffs, finding that it would be unjust because defendants voluntarily tendered almost all of the outstanding direct bonus amounts to class members. The court awarded 11 employees \$0 because they were paid *more* money by defendants than they were owed. The remaining eight former employees were awarded sums ranging from \$455 to \$35,719. The court awarded plaintiffs’ counsel attorney fees of \$881,715. The court rejected plaintiffs’ claim under PAGA for lack of standing, because plaintiffs left defendants’ employ before PAGA took effect in 2004.

*2 Plaintiffs appealed the judgment because they felt entitled to residual bonuses and waiting time penalties, among other things. Defendants cross-appealed, challenging the trial court’s award of a direct bonus, its invalidation of the releases signed by plaintiffs, and the court’s award of attorney fees.

This Court reversed the judgment in favor of plaintiffs.

First, the trial court improperly invalidated the releases signed by plaintiffs after finding that defendants reasonably and in good faith believed that they did not owe plaintiffs a bonus. In a bona fide dispute over wages, defendants can legitimately offer plaintiffs money in return for their release of all claims. There was no evidence that the releases were coerced or improperly obtained. We wrote that plaintiffs “could, and did, accept payments that exceeded their earned severance, in return for releasing all claims, when there was a bona fide dispute over the wages owing. This is proper, even if the payment made by defendants was less than the bonus amounts claimed by the employees.”

Second, the trial court erred by finding that plaintiffs are entitled to a direct bonus. Although plaintiffs benefit from the bonus clause, the merger agreement prohibits them from suing to enforce its terms. Further, plaintiffs did not rely on any written or oral promises from defendants that they would receive a bonus even if they were laid off from their jobs due to depressed economic conditions. Because plaintiffs are not entitled to a bonus after they were laid off, they are not entitled to waiting time penalties, other Labor Code penalties, or prejudgment interest.

Finally, we reversed the trial court’s award of \$881,715 in attorney fees. We remanded the case to the trial court to determine whether an award of attorney fees is authorized by statute and warranted by the facts. Notably, we did *not* specify that either plaintiffs or defendants might be entitled to fees.³

On remand, the parties filed cross-motions for attorney fees. Plaintiffs requested an award of \$307,146 as the **prevailing** party pursuant to § 218.5, reasoning that this litigation was the catalyst for defendants’ July 2005 payments. Plaintiffs did not request attorney fees for litigation occurring after the 2005 payments, because the claims that went to trial were found by this Court to lack merit.

Defendants countered with a request for \$2,210,360 in costs and attorney fees incurred at trial and on appeal. Defendants argued that they are the **prevailing** parties: the appeal showed that they had no obligation to pay anything to plaintiffs. Like plaintiffs, defendants relied upon § 218.5 as authority for their right to recover attorney fees. In opposition to plaintiffs’ request for fees, defendants observed that their 2005 payments were made to nonparties, not to plaintiffs, and plaintiffs are not the **prevailing** parties because they did not recover any relief against defendants at trial. In defendants’ view, the “catalyst” theory is inapposite because no public interest was vindicated by plaintiffs’ lawsuit.

THE TRIAL COURT’S RULING

*3 The trial court denied defendants' motion for attorney fees. Citing § 218.5, the court granted plaintiffs' motion for fees, finding that plaintiffs are the prevailing parties, even if they did not obtain a favorable judgment in the litigation. The court reasoned that plaintiffs' lawsuit was a catalyst, provoking defendants to make the 2005 payments to some former employees. Plaintiffs initially won their lawsuit in the trial court and other employees recovered their bonuses from defendants in administrative proceedings; these factors demonstrated that the lawsuit was not frivolous, groundless or unreasonable. Finally, plaintiffs made demands for their bonus before the action was filed but were rebuffed, demonstrating that the litigation was necessary. Plaintiffs' attorneys were awarded a total of \$346,947.

DISCUSSION

1. Appeal and Review

The appeal arises from a postjudgment order awarding attorney fees and costs. (Code Civ. Proc., § 904.1, subd. (a)(2); *Raff v. Raff* (1964) 61 Cal.2d 514, 519; *Breckler v. Thaler* (1978) 87 Cal.App.3d 189, 193.) An attorney fee award generally is reviewed for an abuse of discretion; however, when the parties dispute whether the trial court was legally authorized to make an award because "the criteria for making an award" were unmet, this calls for statutory construction and presents a question of law. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213–1214; *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) Specifically, we are asked whether § 218.5 permits, under a catalyst theory, an award of attorney fees to plaintiffs who did not prevail on any of the claims made in their lawsuit. Review is de novo, because the issue is whether there is a legal basis for awarding attorney fees. (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1426; *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 149.)

2. Overview of § 218.5

Section 218.5 reads, in relevant part, "In any action brought for the nonpayment of wages ... the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action." The statute is a reciprocal fee recovery provision that works in favor of either employees or employers, whichever is the prevailing party in a lawsuit claiming unpaid wages. (*Earley v. Superior Court, supra*, 79 Cal.App.4th at p. 1427.) In employee class action suits, class representatives assume a fiduciary responsibility on behalf of absent parties and are potentially responsible for defense fees if their case fails. (*Id.* at pp. 1434–1436.) An unpaid bonus is treated as a claim for unpaid wages. (*Hunter v. Ryan* (1930) 109 Cal.App. 736, 738.)

3. The Catalyst Theory

The catalyst theory arises from the private attorney general doctrine codified in Code of Civil Procedure section 1021.5.⁴ It allows courts to award attorney fees to a "successful party" in an action that results in "the enforcement of an important right affecting the public interest" if there is (a) a significant benefit conferred on the general public or a large class of persons, (b) the financial burden of private enforcement makes the award appropriate, and (c) the fees should not be paid out of any recovery. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565 (*Graham*).)

*4 The doctrine " " "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." " " (*Graham, supra*, 34 Cal.4th at p. 565.) It does not apply when a lawsuit's "primary effect was the vindication of [plaintiff's] personal right and economic interest." (*Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 637.)

"Under the catalyst theory, attorney fees may be awarded even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation.... In order to be eligible for attorney fees[,] a plaintiff must not only be a catalyst to defendant's changed behavior, but the lawsuit must have some merit [] and the plaintiff must have engaged in a reasonable attempt to settle its dispute with the defendant prior to

litigation.” (*Graham, supra*, 34 Cal.4th at pp. 560–561.)

“ ‘A plaintiff will be considered a “successful party” where an important right is vindicated “by activating defendants to modify their behavior.” ’ ” (*Graham, supra*, 34 Cal.4th at p. 567.) Plaintiff need not secure a favorable final judgment to succeed: the case may be won on a preliminary issue; or by convincing a public agency to implement state law; or by reaching a settlement with a corporation in a shareholder derivative suit. (*Id.* at pp. 565–567, citing cases.) In *Graham*, the plaintiffs sued Chrysler for making false statements about the towing capacity of its trucks, inspiring the company to offer to repurchase or replace the trucks. The lawsuit caused Chrysler to change its behavior, “implicated an issue of public safety, and [] benefited thousands of consumers and potentially thousands more by acting as a deterrent to discourage lax responses to known safety hazards.” (*Id.* at pp. 577–578.)

4. Plaintiffs’ Right to Recover Attorney Fees

Plaintiffs originally brought suit in 2004 “on behalf of themselves and the general public.” They requested attorney fees pursuant to § 218.5. While the case was pending, but before plaintiffs amended their complaint to include class allegations, defendants paid money to some of the laid-off employees, but not to plaintiffs. Plaintiffs proceeded to trial, where they won their unpaid bonus money. The victory was short-lived, as defendants had a successful appeal.

To determine the prevailing party under § 218.5, we import the definition used in the Code of Civil Procedure (*On-Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, 1085–1087), which defines a prevailing party as “the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant.” (*Code Civ. Proc.*, § 1032, subd. (a)(4).) Plaintiffs did not have a net monetary recovery against defendants. In fact, they recovered nothing. Under the plain language of § 218.5, plaintiffs were not the prevailing party because all of their claims against defendant were denied.

While no court has yet applied the catalyst theory to a case arising from § 218.5, plaintiffs argue that the theory should apply, based on defendants’ July 2005 payments to some former employees. It is unclear whether the permissive fee shifting described in the catalyst theory applies to a statute like § 218.5, which mandates an award of attorney fees to the “prevailing party.” Assuming the catalyst theory applies to Labor Code cases, its application does not assist plaintiffs in their quest for attorney fees.

*5 The opinion in the prior appeal shows that plaintiffs had no right to collect a bonus after they were laid off from their jobs with defendants. By extension, the laid-off, nonparty employees who received payments from defendants in July 2005 also had no right to collect a bonus. Had the employees not accepted the 2005 payments, they would have received nothing in the litigation. In the eyes of the law, defendants’ 2005 payments were a gift, not a contractual or statutory obligation to remit unpaid wages.

When deciding whether to award attorney fees, the court reviews the facts “not only to determine the lawsuit’s catalytic effect but also its merits. Attorney fees should not be awarded for a lawsuit that lacks merit.” (*Graham, supra*, 34 Cal.4th at p. 576.) Plaintiffs cannot be a “successful party” if a reviewing court flatly rejects their case on the merits. (*Marine Forests Society v. California Coastal Com.* (2008) 160 Cal.App.4th 867, 877.) Although plaintiffs’ lawsuit provoked the 2005 payments, the lawsuit itself lacked merit, because plaintiffs demanded bonuses and penalties that they were not entitled to collect.

A lawsuit that provokes a defendant to make a gift is not a ground for awarding attorney fees: no significant benefit is conferred on the public or a large class of persons by such a lawsuit (*Graham, supra*, 34 Cal.4th at p. 578), and defendants engaged in no detrimental behavior that needed to be changed. As discussed in our prior opinion, defendants had the right to behave the way they did, laying off employees they could not afford to keep and denying bonuses to employees who were not on the payroll at year’s end. (Compare *Tipton–Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 607–610 [city instituted remedial practices in its police department after plaintiff sued for race and sex discrimination, justifying application of the “catalyst” theory of fee recovery]; *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1103 [catalyst theory applied when plaintiffs successfully challenged the governor’s constitutional veto authority, which conferred a significant benefit on the general public]; *Hogar Dulce Hogar v. Community Development Com. of City of Escondido* (2007) 157 Cal.App.4th 1358,

1368 [plaintiffs successfully obtained an amendment to a tax sharing agreement and a \$1.35 million reimbursement to a city housing fund, giving rise to catalyst fees].)

In sum, this lawsuit was instigated by a handful of employees who felt entitled to collect a bonus for years after they stopped working. By no stretch of imagination did this lawsuit aim to vindicate an important right affecting the public interest; nor did it confer a significant benefit on the general public or a large class of persons; nor did it cure detrimental behavior by defendants, who did not engage in improper conduct. This was not a lawsuit “ ‘that genuinely provide[d] a public benefit.’ ” (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 255.) The catalyst theory does not apply here.

5. Defendants’ Right to Recover Attorney Fees

Section 218.5 is a reciprocal attorney fees statute that requires an award of fees to the “prevailing party” so long as one of the parties demands those fees upon the initiation of the action. Here, plaintiffs demanded fees pursuant to § 218.5 when they filed suit. Defendants were the prevailing parties on appeal, which resolved the entire lawsuit in their favor. (Code Civ. Proc., § 1032, subd. (a)(4) [prevailing party is the defendant if neither plaintiff nor defendant obtains any relief, and the defendant when the plaintiff recovers no relief against that defendant].) Plaintiffs did not prevail on any claims.

*6 Plaintiffs contend that their claims for fees under § 218.5 were inextricably intertwined with their PAGA claim, making it impossible to award attorney fees to defendants as the prevailing party under § 218.5. As the trial court found, plaintiffs had no standing to bring a PAGA claim because PAGA did not exist when plaintiffs were terminated from their employment with defendants. In any event, § 218.5 lists only one remotely pertinent exception: “This section does not apply to any action for which attorney’s fees are recoverable under Section 1194.”⁵ Plaintiffs did not proceed under section 1194, a one-way fee shifting statute authorizing attorney fees to employees who prevail on their minimum wage or overtime compensation claims.

Section 218.5 contains no equitable exemption allowing the courts to give a pass to employees who invoke its provisions then lose their case, causing the employer to become the prevailing party in the litigation. Defendants are the prevailing party under § 218.5, and are entitled to recover reasonable attorney fees they incurred in this litigation, including the two appeals.⁶

DISPOSITION

The postjudgment order awarding attorney fees and costs to plaintiffs is reversed. The case is remanded to the trial court to determine a reasonable award of attorney fees and costs for defendants. Defendants are entitled to recover their costs on appeal, as the prevailing party.

We concur:

ASHMANN–GERST, J.

FERNS, J.*

Footnotes

¹ Labor Code section 218.5 will be referred to in this opinion as § 218.5.

² The facts are largely derived from our opinion in *Zalewa v. Tempo Research Corporation* (Sept. 27, 2010) B210429 (nonpub. opn., as modified Oct. 27, 2010).

³ Plaintiffs misinformed the trial court that the case was remanded to resolve “whether and in what amount plaintiffs are entitled to

reasonable fees for having achieved [a] substantial result for so many of the affected employees.” (Italics added.) The opinion does not give a nod to plaintiffs’ claim for fees.

- 4 The statute reads, in relevant part, “Upon motion, a court may award attorneys’ fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement ... are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.”
- 5 [Section 218.5](#) contains several express exceptions: it does not apply to an action brought by the Labor Commissioner; it does not apply to a surety issuing a bond pursuant to the Business and Professions Code; and it does not apply to an action to enforce a mechanics lien under the Civil Code. The statute does not mention PAGA.
- 6 The issue of attorney fees following reversal of the judgment first arose in plaintiffs’ petition for rehearing, when it was procedurally inopportune to resolve a new issue, hence the remand. We never intended to confuse the trial court by remanding for further proceedings on the issue of attorney fees.
- * Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to [article VI, section 6 of the California Constitution](#).

EXHIBIT 15

2011 WL 5979937
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, First District, Division 5, California.

Maria Tun CUN, Plaintiff and Appellant,
v.
CAFE TIRAMISU LLC, Defendant and Respondent.

No. A131241. | (San Francisco County Super. Ct. No. CGC-09-484879). | Nov. 30, 2011.

Attorneys and Law Firms

[Michael Paul Guta](#), Law Offices of John E. Hill, Oakland, CA, for Plaintiff and Appellant.

[Wesley Jerome Fastiff](#), [Michael Gayland Pedhirney](#), Littler Mendelson, San Francisco, CA, for Defendant and Respondent.

Opinion

[NEEDHAM](#), J.

***1** Maria Tun Cun appeals from an order awarding attorney fees to respondent Café Tiramisu LLC, pursuant to [Labor Code section 218.5](#), after the court granted respondent's motion for summary judgment. Appellant contends: (1) [Labor Code section 218.5](#) did not apply, because the action she brought for unpaid wages was really for unpaid overtime, for which an award of attorney fees is available only to successful plaintiffs under [Labor Code section 1194](#); (2) the court should have apportioned the attorney fees between appellant's unpaid wages claim and her constructive termination claim, for which no attorney's fee award is available; and (3) the court improperly awarded amounts for attorney services rendered in defense of claims other than those asserted by appellant. We will affirm the order.

I. FACTS AND PROCEDURAL HISTORY

In February 2009, appellant Maria Tun Cun, along with Vicente Tapia Gonzalez and Evangelina Tun Cun, filed a complaint against respondent Café Tiramisu LLC.¹

Maria asserted three causes of action. In a cause of action for recovery of unpaid wages, she alleged that she was employed by Café Tiramisu between February 9, 2005 until her termination on March 21, 2007, she was "owed wages" and was "owed for accrued paid time off," and she was entitled to a statutory penalty for unpaid wages under [Labor Code section 203](#) and reasonable attorney fees and costs pursuant to [Labor Code section 218.5](#). In a cause of action for constructive termination in violation of public policy, Maria alleged that Café Tiramisu's "conduct in refusing to pay plaintiffs wages owed created an intolerable working condition, necessitating plaintiffs to leave employment." In her cause of action for unfair business practices, she alleged that Café Tiramisu violated [Business and Professions Code section 17200](#) by committing these same acts.

In her prayer for relief, Maria sought, among other things, damages and "reasonable attorney's fees, pursuant to [Labor Code Section 218.5](#)." Nowhere in the complaint did Maria allege that Café Tiramisu owed her for unpaid overtime.

A first amended complaint, filed in April 2010, retained Maria's allegations and causes of action. Like the original complaint, it did not allege entitlement to unpaid overtime.

Café Tiramisu filed a motion for summary judgment or, in the alternative, summary adjudication. In September 2010, the court granted the motion, finding that Maria could not **prevail** on any of her causes of action as a matter of law because, before the lawsuit, the parties had entered into settlement agreements by which Maria released all of her employment-related claims.

Judgment was entered against Maria on September 21, 2010. The judgment noted that Café Tiramisu, as the **prevailing** party, was eligible to recover its reasonable attorney fees and costs.²

Café Tiramisu filed a motion for attorney fees on November 18, 2010, contending it was the **prevailing** party and entitled to recover its fees and costs under [Labor Code section 218.5](#). Café Tiramisu requested \$36,612.50 in fees, supporting its request with a declaration from one of its attorneys and invoices for the fees incurred.

*2 Maria opposed the motion. She contended that Café Tiramisu was not entitled to recover attorney fees under [Labor Code section 218.5](#), which authorizes recovery by the **prevailing** party, because her action was for overtime wages governed by [Labor Code section 1194](#), which authorizes recovery only by successful plaintiffs. She further contended that Café Tiramisu could not recover for the portion of attorney fees incurred in connection with her claim for wrongful termination. Café Tiramisu's reply brief addressed these arguments.

By written order filed on or about January 5, 2011, the court granted the motion and awarded Café Tiramisu attorney fees in the full amount of \$36,612.50. This appeal followed.

II. DISCUSSION

As mentioned, Maria contends the court erred because: (1) [Labor Code section 218.5](#) was inapplicable because her claim for unpaid wages was really a claim for unpaid overtime; (2) the court failed to apportion the attorney fees spent on the claim for unpaid wages as opposed to her claim for wrongful termination; and (3) Café Tiramisu should not recover for fees incurred in defending against claims by others. We address each contention in turn.

A. Recovery of Attorney Fees Under [Labor Code Section 218.5](#)

Café Tiramisu sought recovery for its attorney fees, and the trial court awarded them, pursuant to [Labor Code section 218.5](#).³ [Section 218.5](#) provides in pertinent part: "In any action brought for the *nonpayment of wages*, fringe benefits, or health and welfare or pension fund contributions, the court *shall* award reasonable attorney's fees and costs to the **prevailing** party if any party to the action requests attorney's fees and costs upon the initiation of the action." (Italics added.)

Each requirement of [section 218.5](#) was met. First, Maria brought an action for the nonpayment of wages. In her original and amended complaints, Maria claimed that she was "owed wages" and, in addition, had accrued and was owed "paid time off pursuant to [Labor Code \[sections\] 226.7 and 227.3](#)." [Section 226.7](#) refers to pay for time worked during mandated meal periods, and [section 227.3](#) refers to vested vacation pay; both are considered "wages." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1114 [time worked during mandatory meal periods]; *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 784 [vested vacation pay].)

Second, Café Tiramisu was the **prevailing** party. Its summary judgment was granted, and judgment was entered in its favor, with Maria taking nothing by her amended complaint. ([Code Civ. Proc. § 1032, subd. \(a\)\(4\)](#).)

Third, Maria expressly requested attorney fees and costs pursuant to [section 218.5](#) upon the initiation of her action, in both the original and amended complaints. Accordingly, Café Tiramisu was entitled to recover its reasonable attorney fees under

section 218.5.

Maria's sole argument to the contrary is that her cause of action for unpaid wages was really a claim for unpaid *overtime*, such that section 1194, rather than section 218.5, should govern. Section 1194, subdivision (a) provides for one-way fee shifting to a successful plaintiff only: "Notwithstanding any agreement to work for a lesser wage, any *employee* receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee *is entitled to recover* in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, *reasonable attorney's fees*, and costs of suit." (Italics added.)

*3 Because section 1194 authorizes an award of attorney fees only to a successful plaintiff, and not to the **prevailing** party, Maria contends that the trial court erred and Café Tiramisu was not entitled to an award of attorney fees. Indeed, section 218.5 provides: "This section does not apply to any action for which attorney's fees are recoverable under Section 1194." The question Maria presents, therefore, is whether her claim for unpaid wages was really a claim for overtime compensation.

Maria's effort to recast her complaint as one seeking recovery for unpaid overtime is unpersuasive. Neither her original complaint nor the amended complaint mentions "overtime," "overtime wages," or section 1194. It refers instead to "wages," paid time off (also wages), and section 218.5.

Ignoring this, Maria argues that the claim she eventually tried to *prove* was that she was not paid wages at the overtime rate. In particular, in opposition to respondent's summary judgment motion, she contended that she repeatedly worked overtime hours, presented payroll records evincing overtime hours, and purportedly asserted that it was her exhaustion from overtime hours that led to her constructive termination.⁴

Maria's argument is unconvincing. The fact that she was eventually unable to support her broadly-alleged claim for unpaid wages except with evidence of unpaid overtime does not mean that her "action" was really for overtime compensation. (See §§ 218.5, 1194.) Nor does it convert the action she brought into a different action she had never specifically alleged. To hold otherwise would reward a plaintiff for not having any evidence to support her claims as pled, and penalize a defendant who incurs attorney fees in defending against the claims *as they were pled*. Thus, while Maria may have tried to prove her cause of action for unpaid wages with evidence of unpaid overtime, the court did not err in concluding that the "action" Maria actually "brought" was for nonpayment of wages within the meaning of section 218.5, not for nonpayment of overtime within the meaning of section 1194.

Maria further argues that this court, by its August 2011 decision in appeal number A129899 from the grant of summary judgment, characterized her claim as one for overtime wages. Her argument has no merit. In the first place, our August 2011 opinion in appeal number A129899 was not before the trial court when it granted the attorney fees motion in January 2011, and Maria does not explain how the trial court could have erred in January based on our characterization of her claim in August. Furthermore, any characterization of Maria's cause of action in appeal number A129899 would not be germane to this case, because it did not involve the issue we address now. At issue in appeal number A129899 was whether the settlement release was enforceable; we were not called upon in that case, as we are in this case, to decide whether her cause of action for unpaid wages was really a cause of action for unpaid overtime. Lastly, contrary to Maria's representations, we did *not* characterize Maria's claim as one for overtime wages. Rather, we stated: "On April 2, 2010, a First Amended Complaint (Complaint) was filed; appellant alleged causes of action for recovery of *unpaid wages*, constructive termination and unfair business practices." (Italics added.) While we acknowledged that Maria ended up claiming damages for unpaid overtime in her summary judgment motion, we also noted that her underlying complaint to the Department of Labor contended that she was "entitled to additional unpaid wages, *including* for unpaid overtime," but not exclusively for unpaid overtime. (Italics added.) In short, for all of these reasons, our opinion in appeal number A129899 does not establish that the trial court erred in deciding respondent's motion for attorney fees.

*4 Maria also refers us to *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420 (*Earley*). There, petitioners had brought a class action to recover unpaid overtime compensation. (*Id.* at p. 1423.) They objected to an order requiring petitioners to notify absent class members that they might be liable for attorney fees and costs if their claim was unsuccessful. (*Id.* at pp. 1423–1424.) To decide the appeal, the appellate court had to determine, among other things, if section 1194 alone governed whether attorney fees could be awarded in the defendant's favor, or if section 218.5 also applied, such that the two statutes could be read together to allow the **prevailing** party to recover attorney fees. (*Earley*, at p. 1426.) The court ruled that only

section 1194 applied to the petitioner's cause of action for unpaid overtime, in light of legislative history, the distinct legislative source of the right to overtime compensation, and the fact that the Legislature specifically provided that only plaintiffs should recover attorney fees in overtime cases. (*Earley*, at pp. 1429–1431.) The court concluded: “The only reasonable interpretation which would avoid nullification of section 1194 would be one which bars employers from relying on section 218.5 to recover fees in any action for *minimum* wages or *overtime* compensation. Section 218.5 would still be available for an action brought to recover nonpayment of contractually agreed-upon or bargained-for ‘wages, fringe benefits, or health and welfare or pension fund contributions.’ [Footnote omitted.]” (*Earley*, at p. 1430.)

Maria's reliance on *Earley* is unavailing. There, the plaintiffs expressly *alleged* a claim for unpaid overtime. (*Earley, supra*, 79 Cal.App.4th at p. 1424.) Here, Maria did not bring a claim specifically for unpaid overtime, but a broader claim for unpaid wages, which did not refer to overtime but instead to other types of wages. In other words, while *Earley* decided that only section 1194 applies to an action alleged explicitly and solely to recover unpaid overtime, Maria did not *allege* such an action to recover unpaid overtime.⁵

B. Apportionment Among Causes of Action

Maria argues that the trial court erred in failing to apportion the attorney fees between the first cause of action for unpaid wages and her cause of action for wrongful termination. We disagree.

In general, where attorney fees are recoverable for one cause of action but not another, a court need not apportion attorney fees between the causes of action if there is an issue common to the causes of action or the issues are so interrelated that it would be impossible to separate them. (See, e.g., *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129–130; *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1083–1086; *Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133.)

Here, Maria expressly based her wrongful termination claim on her allegation that her resignation from Café Tiramisu was due to its “refusal to pay [her] wages owed.” As such, the issue of whether Café Tiramisu owed Maria wages was common to both the unpaid wages claim and the constructive termination claim. Furthermore, Maria's unfair business practice claim was based on the acts underlying her other claims. Thus, from the outset, all of Maria's causes of action required resolution of one common issue: whether Café Tiramisu owed Maria “wages.”

*5 Moreover, the successful defense to *all* of Maria's causes of action was the same: Maria was not entitled to pursue any of the claims, or obtain any recovery by her lawsuit, because of the settlement agreement in which she released all of her employment-related claims. For this reason as well, the court did not err in deciding not to apportion fees among the causes of action.

C. Apportionment as to Other Plaintiffs

Maria further argues that the trial court awarded fees for work Café Tiramisu's attorneys performed in defending against the claims of the other plaintiffs. She asserts the trial court awarded attorney fees for the “deposition of Spinoso and Scopetta which necessarily involved all three plaintiff's cases.” She also states: “respondent's attorneys time records does not distinguish between deposition time for Mr. Scopetta and Spinosso [sic] spent on the claim of Tapia–Gonzalez which was settled and Evangelina Tun Cun [record citation] which respondent sought attorney fees by a separate Motion and which appeal is pending before this court.”

As Café Tiramisu points out, however, Maria did not raise this argument in the trial court. Although she argued that the court should apportion the time spent on the wrongful termination claim, she did not raise any issue concerning time purportedly spent on other cases or with respect to other plaintiffs. The issue is therefore waived. (See *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28–29.)

Maria fails to establish error.

III. DISPOSITION

The order is affirmed.

We concur: [SIMONS](#), Acting P.J., and [BRUINIERS](#), J.

Footnotes

- ¹ The appeal of Evangelina Tun Cun is pending in appeal number A131240. Because Evangelina Tun Cun and Maria Tun Cun have the same last names, we will refer to them by their first names for purposes of clarity, without disrespect.
- ² Maria appealed from the summary judgment (appeal number A129899), contending that the settlement agreements were void under [Labor Code section 206.5](#). In August 2011, we affirmed the judgment.
- ³ Except where otherwise indicated, all statutory references hereafter are to the Labor Code.
- ⁴ Maria's opposition to the motion for attorney fees quoted an excerpt from her opposition to the summary judgment motion as follows: " 'Maria Tun Cun's pay stubs for several periods immediately before she was constructively terminated show she worked as many as 140 hours in a bimonthly pay period.... It is mathematically impossible to work more than 96 hours in a bimonthly pay period without working overtime hours (i.e. more than 40 hours in any week).' "
- ⁵ It might be argued that Maria's first "cause of action" covered both a claim for unpaid overtime *and* a claim for other unpaid wages, and an attorney fees award cannot include amounts incurred in defense of the unpaid overtime claim. Maria does not make an apportionment argument on this ground, so we need not and do not decide this issue.

EXHIBIT 16

2003 WL 352422
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Fourth District, Division 1, California.

Cecilia CSASZI, Plaintiff and Appellant,

v.

SHARP HEALTHCARE, Defendant and Respondent.

No. D038558. | (Super.Ct.No. 740594). | Feb. 18, 2003.

Former employee brought action against former employer, claiming employer was liable for unlawful discrimination and unpaid wages pertaining to on-call time. The Superior Court, San Diego County, No. 740594, [S. Charles Wickersham, J.](#), granted employer's motion for summary adjudication with respect to discrimination claims, and, following a bench trial, entered judgment for employer on wage claim. Employee appealed. The Court of Appeal, [Haller, J.](#), held that: (1) employee's motion to reconsider summary adjudication order based on new or different facts was untimely; (2) employee failed to set forth any new or different facts, and thus motion to reconsider summary adjudication order was properly denied; (3) employee did not qualify for mandatory relief from summary adjudication order allegedly entered as a result of attorney's neglect or mistake; (4) attorney who failed to file an opposition to employer's summary adjudication motion engaged in positive misconduct, justifying relief from summary adjudication order; (5) employer was not required to compensate employee for time spent on-call but not actually answering calls at same rate established for time she spent on-call and actually answering calls; and (6) statute authorizing award of attorney fees only to successful plaintiff in actions seeking to recover unpaid overtime did not prohibit award of attorney fees to employer.

Affirmed in part and reversed in part.

APPEAL from a judgment of the Superior Court of San Diego County, [S. Charles Wickersham](#), Judge. Affirmed in part and reversed in part.

Opinion

[HALLER, J.](#)

***1** Cecilia Csaszi sued her former employer, Sharp Healthcare¹ (Sharp), claiming Sharp was liable for unlawful discrimination and unpaid wages pertaining to on-call time. The court granted summary adjudication on all claims except for the unpaid wages cause of action. After a court trial on this claim, the court found Csaszi did not prove she was owed any wages, and entered final judgment in Sharp's favor on all of Csaszi's causes of action. The court denied Csaszi's motions seeking relief from the summary adjudication ruling. ([Code Civ. Proc., §§ 473, 1008.](#)) Csaszi appeals.

We affirm the portions of the judgment finding in Sharp's favor on Csaszi's claim for unpaid wages and awarding Sharp attorney fees for prevailing on this claim. ([Lab.Code, § 218.5.](#)) We reverse the portion of the judgment entered on the summary adjudication of Csaszi's employment discrimination causes of action. The trial court shall vacate its order granting summary adjudication on these causes of action, permit the parties to file opposition and reply briefs, and then consider Sharp's summary adjudication motion on its merits.

FACTUAL AND PROCEDURAL SUMMARY

In March 1996, Sharp hired Csaszi as a utilization review/quality assurance nurse responsible for evaluating patients for discharge at Tri-City Medical Center. Two and one-half years later, Csaszi's supervisors readjusted the workloads of Csaszi and a co-worker. Csaszi was unhappy about the change in her assignment, and complained about what she believed was unfair treatment. In March 1999, Csaszi was given several written notices regarding perceived problems with her performance and the need to improve to avoid being terminated. Two months later, in May 1999, Sharp terminated Csaszi, stating she had failed to properly perform her job assignments and acted in an improper manner toward other health care employees.

In December 1999, Csaszi filed a complaint against Sharp, alleging (1) employment discrimination claims (wrongful termination in violation of public policy, unlawful discrimination and retaliation in violation of the Fair Employment and Housing Act (FEHA), and wrongful demotion in retaliation for complaining about racial discrimination); and (2) a claim for the failure to properly pay "on-call" wages in violation of [Labor Code section 201](#).

Sharp moved for summary adjudication on Csaszi's discrimination claims on the grounds that Csaszi could not establish she was performing her job in a satisfactory manner, Sharp had legitimate, nondiscriminatory reasons for terminating Csaszi, and Csaszi had no evidence that Sharp's stated reasons were a pretext for unlawful discrimination. Csaszi's attorney, Michael W. Loker, did not file an opposition to that motion, even though (as detailed below) Loker told Csaszi that he *had* filed an opposition.

On November 22, 2000, the court granted Sharp's summary adjudication motion, ruling that Sharp met its burden to establish a legitimate reason for Csaszi's termination and Csaszi failed to present any evidence that the proffered reason for the termination was untrue or pretextual.

***2** On the date scheduled for trial on her remaining claim, Csaszi appeared with attorney Loker, and informed the trial court that she wished to terminate Loker. The trial court granted the request and, over Sharp's objections, granted Csaszi's request for a 90-day trial continuance.

On December 14, 2000, Csaszi, represented by new counsel William Evans, filed a [Code of Civil Procedure section 1008](#) motion ([section 1008](#)), requesting the court to reconsider its summary adjudication ruling. The court denied the motion, finding the motion was not timely (it was filed more than 10 days after the summary adjudication order was entered) and Csaszi "fail[ed] to set forth any 'new or different facts, circumstances, or law' that would affect the outcome of" the summary adjudication motion.

On March 9, 2001, a court trial began on Csaszi's remaining claim for unpaid wages relating to her on-call time. After considering all the evidence (which will be detailed below), the court found Csaszi failed to meet her burden to show she was entitled to unpaid wages for her on-call time.

The next month, on April 6, 2001, Csaszi moved for relief from the summary adjudication order under [Code of Civil Procedure section 473](#) ([section 473](#)). In support, Csaszi submitted her declaration, the declaration of her former attorney (Loker), and proposed responsive papers to Sharp's summary adjudication motion. The court denied the [section 473](#) motion, stating Csaszi "made no showing that a judgment, dismissal, order, or other proceeding has been taken against her as a result of her or her attorney's mistake, inadvertence, surprise, or excusable neglect, as is required by the section."

Sharp then moved for its attorney fees as the prevailing party on the FEHA and unpaid wage claims. The court initially granted the motion on both grounds, but after oral argument, concluded that Csaszi's "discrimination case was not totally groundless" and therefore awarded only those fees pertaining to the unpaid wage claim (\$20,269) based on [Labor Code section 218.5](#).

On appeal, Csaszi challenges the denial of her motions to vacate the summary adjudication and the court's rulings pertaining to the unpaid wage claim.

DISCUSSION

I. Motion for Reconsideration

Csaszi first contends the court abused its discretion in denying her motion to reconsider the summary adjudication order under [section 1008](#), which permits a court to revoke a previous order based on new or different facts and an adequate justification for the failure to previously produce those facts. The contention is unavailing.

^[1] First, the motion was untimely. [Section 1008](#) requires that a reconsideration motion be brought “within 10 days after service upon the party of written notice of entry of the order...” (See *Advanced Building Maintenance v. State Comp. Ins. Fund* (1996) 49 Cal.App.4th 1388, 1392, 57 Cal.Rptr.2d 310.) Sharp served written notice of entry of the order on November 22, 2000, and Csaszi filed her reconsideration motion 22 days later, on December 14, 2000.

*3 ^[2] Additionally, the trial court properly denied the motion on the basis that Csaszi “fail[ed] to set forth any ‘new or different facts, circumstances, or law’ that would affect the outcome of” the summary adjudication motion. Csaszi did not proffer any new facts or law relevant to the summary adjudication ruling. Instead, she focused exclusively on explaining the circumstances of her prior attorney’s failure to adequately represent her. These circumstances do not constitute the type of “new or different facts” that permit a reconsideration of the trial court’s order under [section 1008](#).

II. Section 473 Ruling

Csaszi alternatively contends the trial court erred in denying her [section 473](#) motion seeking to vacate the summary adjudication order because of her attorney’s neglect.

A. Relevant Facts

In moving for relief under [section 473](#), Csaszi requested the trial court to vacate the summary adjudication order because the motion was granted without the benefit of her opposition papers and the failure to file an opposition was caused by her attorney’s misconduct. In support, she submitted her own declaration and copies of facsimiles (faxes) received from attorney Loker, which set forth the following facts:

Csaszi retained Loker in September 1999. Loker thereafter filed the complaint and, in April 2000, “began discovery requests.” In May 2000, Loker notified Csaszi he had attended a case management conference, and the trial date was scheduled for October 20, 2000. During the next two months, Csaszi made numerous attempts to contact Loker, but Loker did not return any of Csaszi’s telephone calls or respond to her written correspondence. In August 2000, Csaszi’s husband went to the superior court and discovered that Sharp had obtained a continuance of the trial to December 1, 2000.

On September 7, 2000, Loker called Csaszi and told her Sharp wanted to take her deposition. Csaszi expressed her concern about being unable to contact Loker, but Loker did not explain why he failed to respond to her calls and letters, and said only that he now intended to “move” on Csaszi’s case. Csaszi thereafter met with Loker on two separate days to prepare for her deposition. Sharp deposed Csaszi on three different dates, and each time Loker was present to represent her.

On October 12, Sharp filed its summary adjudication motion, but Loker did not tell Csaszi of this filing. Loker thereafter scheduled depositions of three Sharp employees, but these depositions were postponed for unspecified reasons and later rescheduled to October 30. On October 26, Csaszi met with Loker to review her deposition transcript, and she also gave Loker \$1,000 to pay for the three upcoming Sharp employee depositions. On that date, Loker also informed Csaszi about Sharp’s summary adjudication motion for the first time. Loker told her he would be filing an opposition to the summary judgment motion, but did not tell her the opposition was due on October 26.

*4 On October 30, Csaszi met with Loker to determine why the Sharp employees’ depositions were cancelled that morning. During that meeting Loker did not tell Csaszi that he had filed an ex parte application to continue the hearing on the summary judgment motion.

Ten days later, on November 9, Loker faxed Csaszi a note stating that he was in the library and that he would:

“[F] ile our response in opposition to the summary judgment today and argument is on [November] 17th, for which you will be present. Contrary to my message yesterday, I do not need your signature at this time, but I do need to see you Saturday, and I need you to drop off today the filing fee for the opposition to the Summary Judgment, payable to the Clerk of the Superior Court, in the amount of \$116. Also, the copies of your deposition are payable at this time, because I am using them in our opposition, in the amount of \$615.46, which should be by separate check, made payable to this office.... Therefore, though I need not, and cannot meet today (*because of the fact that I am in the law library today all day working on the opposition*), please drop off two drafts for the filing fee and deposition copy fee, in the amounts noted respectively. Also please leave a time in which we may meet Saturday, if you are not otherwise occupied. *I am optimistic.*” (Italics added.)

Csaszi thereafter wrote the requested checks, but Loker was not in his office when she delivered them. Csaszi telephoned Loker on a daily basis for the next eight days, but was unable to reach him and Loker did not respond to these calls. In the early morning of November 17 (the date scheduled for oral argument on the summary adjudication motion), Csaszi received a fax from Loker stating:

“The court announced yesterday that it will review the briefs submitted and rule telephonically on 22 Dec. (on the summary judgment). *I will fax you our opposition if you haven’t received.* Therefore there are no hearings today. P.S. *There was no charge for filing the opposition, a rule change.* You may ‘void’ that check, which I will destroy. Tx.” (Italics added.)

In fact, Loker never filed an opposition. Further, the applicable rules have never required a party opposing a summary judgment to pay a fee. (See Super. Ct. San Diego County, Fee Schedule & Forms List .)

In response to this fax, Csaszi repeatedly attempted to contact Loker, but was unable to reach him. Csaszi then directly contacted the superior court, and learned from the court that a trial call on her remaining claim was scheduled for December 1, 2000. The morning of December 1, Loker faxed Csaszi a note stating there was no hearing and that he intended to meet with her during the weekend to discuss the overtime pay claim. Csaszi nonetheless attended the trial call, and at the hearing, the court said that Loker was scheduled to call the court at 9:30 a.m. Csaszi confirmed that Loker was still her attorney.

*5 That weekend, Csaszi met with Loker and discussed the unpaid wage claim, but Loker refused to discuss the court’s summary adjudication ruling. The next day, Csaszi appeared at court with a written statement stating that she wanted to obtain new counsel, and the court granted the motion.

In support of her [section 473](#) motion, Csaszi also submitted Loker’s declaration which stated in relevant part: “I did not prepare an opposition to Defendant Sharp’s motion for summary adjudication on the discrimination claims. I did not feel that Csaszi would prevail on the discrimination claims and I felt that to oppose Sharp’s motion might impair her credibility on the remaining issues dealing with the overtime claim and that she would incur additional costs in opposing the discrimination part of the case. However, I was apparently unable to adequately convey my feelings regarding her chances of prevailing on these issues to her. I thought I had convinced her of my recommendations prior to the scheduled opposition to Sharp’s summary adjudication motion. She did inform me that she wanted to proceed with her discrimination claims at the December 4, 2000, hearing. [¶] There was no fault attributable to Plaintiff in any failure to make a timely filing of the opposition to Defendant’s Motion For Summary Adjudication.”

B. Legal Analysis

Under [section 473](#), a party may potentially seek two types of relief for orders entered as a result of an attorney’s neglect or mistake: one that is mandatory and one that is discretionary. (*Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481, 1486, 37 Cal.Rptr.2d 575 (*Metropolitan Service*).)

First, under the mandatory provision, a court “shall” grant relief whenever an application for relief meets the six-month statutory time period *and* the motion is “accompanied by an attorney’s sworn affidavit attesting to his or her mistake,

inadvertence, surprise, or neglect” (§ 473; see *In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438, 1442, 96 Cal.Rptr.2d 546.) “The purpose of this law is to relieve the innocent client of the burden of the attorney’s fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits.” (*Metropolitan Service, supra*, 31 Cal.App.4th at p. 1487, 37 Cal.Rptr.2d 575.)

^[3] This mandatory relief provision is inapplicable here because Loker, Csaszi’s former attorney, did not “attest[] to [a] mistake, inadvertence, surprise, or neglect....” Instead, in his affidavit, attorney Loker said he did not file an opposition because he made the tactical decision not to oppose the motion. This assertion does not satisfy the statute’s requirement that the attorney admit a “mistake, inadvertence, surprise, or neglect.” (§ 473, see *Metropolitan Service, supra*, 31 Cal.App.4th at p. 1487, 37 Cal.Rptr.2d 575 [mandatory relief provisions apply “if the attorney *admits* neglect”], italics added.)²

^[4] But even if a party cannot satisfy section 473’s mandatory relief requirements, the party may obtain relief under the statute’s discretionary provisions. Specifically, a court “may” grant relief if the moving party shows an order was taken against him or her because of the attorney’s *excusable neglect*. (§ 473; see *Metropolitan Service, supra*, 31 Cal.App.4th at pp. 1486-1487, 37 Cal.Rptr.2d 575.) Generally, conduct falling below the professional standard of care is considered inexcusable and therefore discretionary relief cannot be granted based on such conduct. (See *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 895, 187 Cal.Rptr. 592, 654 P.2d 775 (*Carroll*); *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 682, 68 Cal.Rptr.2d 228.) Csaszi asserts Loker’s conduct in failing to oppose the summary judgment was the result of professional incompetence. Therefore Loker’s conduct was not “excusable” under section 473.

*6 However, an exception to the rule requiring a showing of excusable neglect applies if the party establishes the attorney’s neglect was of an extreme degree amounting to “‘positive misconduct.’” (*Carroll, supra*, 32 Cal.3d at pp. 898-899, 187 Cal.Rptr. 592, 654 P.2d 775; see *Fleming v. Gallegos* (1994) 23 Cal.App.4th 68, 72-73, 28 Cal.Rptr.2d 350.) “‘Positive misconduct is found where there is a total failure on the part of counsel to represent his client.’” (*People v. One Parcel of Land* (1991) 235 Cal.App.3d 579, 584, 286 Cal.Rptr. 739; *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 738-739, 216 Cal.Rptr. 300.) The attorney’s conduct is said to obliterate the existence of the attorney-client relationship and therefore cannot be imputed to the client. (*Carroll, supra*, 32 Cal.3d at p. 898, 187 Cal.Rptr. 592, 654 P.2d 775 [“‘[a]n attorney’s authority to bind his client does not permit him to impair or destroy the client’s cause of action or defense,’” quoting *Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347, 353].)

Carroll held an attorney who “grossly mishandled” a document production did not engage in “‘positive misconduct’” because he otherwise acted on behalf of his client in the litigation including attending his client’s deposition, propounding and timely responding to interrogatories, propounding requests for admissions, settling with one of the defendants, and timely filing a section 473 motion. (*Carroll, supra*, 32 Cal.3d at pp. 899-900, 187 Cal.Rptr. 592, 654 P.2d 775.) *Carroll* contrasted these circumstances with the situations in *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 38 Cal.Rptr. 693 and *Orange Empire Nat. Bank v. Kirk, supra*, 259 Cal.App.2d 347, 66 Cal.Rptr. 240, where the courts found attorney misconduct had effectively deprived a party of representation. (*Carroll, supra*, 32 Cal.3d at pp. 899-900, 187 Cal.Rptr. 592, 654 P.2d 775.) In *Daley*, the plaintiff’s attorney abandoned his client by failing to communicate with the plaintiff, serve necessary parties, and appear at critical hearings. (*Daley v. County of Butte, supra*, 227 Cal.App.2d at pp. 391-392, 38 Cal.Rptr. 693.) In *Orange Empire*, the defendant’s attorney failed to assert a defense, appear at the trial, or file relief from a default judgment within the statutory period. (*Orange Empire Nat. Bank v. Kirk, supra*, 259 Cal.App.2d at p. 354, 66 Cal.Rptr. 240.)

We conclude the circumstances here fall within the *Daley-Orange Empire* line of cases. Although Loker filed the complaint and was initially involved in some limited discovery, Loker completely abandoned Csaszi at a critical time by failing to file an opposition to the summary adjudication motion. Further, by falsely telling Csaszi that he was filing, *and had filed*, an opposition to the summary adjudication motion, Loker did more than abandon his client—he affirmatively precluded Csaszi from protecting herself and seeking other counsel to file an opposition or seeking timely section 1008 relief. Loker additionally continued to affirmatively harm Csaszi’s interests when he asserted in his declaration in support of her section 473 motion that his decision not to file the summary judgment motion was a tactical decision, an assertion that is flatly contradicted by his own words reflected on the faxes sent to his client. This false assertion prevented Csaszi from obtaining mandatory relief under the statute.

*7 In light of Loker’s misrepresentations to Csaszi and his submission of a declaration that contradicts his written correspondence to his client, Loker’s activities amounted to positive misconduct justifying relief under section 473. In so

concluding, we are unpersuaded by Sharp's reliance on a list of the various contacts between Loker and Csaszi during the relevant times. If anything, Loker's sporadic contacts with Csaszi made the situation worse by misleading Csaszi into believing he was taking care of her interests. (See *Fleming v. Gallegos*, *supra*, 23 Cal.App.4th at p. 73, 28 Cal.Rptr.2d 350 [trial court erred by failing to find attorney abandonment where plaintiff's "attorneys displayed an unwillingness to either prosecute her lawsuit or to cease representing her"].) Further, these contacts do not show a lack of abandonment, instead they reveal merely that Loker remained Csaszi's attorney of record. *Carroll* does not require that an attorney-client relationship be formally severed before positive misconduct may be proven.

Although a [section 473](#) motion lies within the sound discretion of the trial court, " 'the trial court's discretion is not unlimited and must be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.' [Citation.] The law strongly favors trial and disposition on the merits. Therefore any doubts in applying [section 473](#) must be resolved in favor of the party seeking relief. When the moving party promptly seeks relief and there is no prejudice to the opposing party, very slight evidence is required to justify relief. We will more carefully scrutinize an order denying relief than one which permits a trial on the merits." (*Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1343, 4 Cal.Rptr.2d 195; see *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1180-1181, 75 Cal.Rptr.2d 809.) Applying these principles here, we conclude the trial court abused its discretion in failing to vacate the summary adjudication based on Csaszi's showing that her counsel engaged in "positive misconduct."

¹⁵¹ We note that Sharp does not argue, nor does the law permit, this court to sustain the trial court's denial of the [section 473](#) motion on the alternate ground that Csaszi's proposed opposition to the summary adjudication motion does not raise a triable issue of fact. In considering the propriety of a court's ruling on a [section 473](#) motion, an appellate court is limited to the question whether the court abused its discretion in granting or denying the motion, and may not reach the substantive issue as to whether the position proffered by the party seeking relief has merit. (*Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 786-787, 59 Cal.Rptr.2d 332; see 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 184 at p. 692, 59 Cal.Rptr.2d 332.)³

Finally, we reject Sharp's argument that the trial court properly denied the [section 473](#) motion because the motion constituted an "end-run" around [section 1008](#) governing reconsideration motions. Because Csaszi satisfied the requirements of a [section 473](#) motion, the fact that the motion was not timely under [section 1008](#) does not defeat the grounds for granting the motion under [section 473](#).

III. Unpaid Wage Claim

*8 Csaszi next contends the court erred in failing to find in her favor on the unpaid wage claim, which was tried before the court sitting without a jury.

The evidence at trial showed that Csaszi was assigned to on-call shifts during which she was given a pager and was responsible for answering telephone calls pertaining to patients discharged outside of regular business hours. Sharp paid its on-call employees \$2.50 per hour for time spent on-call but not actually working, i.e., being available for a call. For time spent actually answering a call (known as "call-back time"), Sharp paid its employees one and one-half times the employee's regular hourly rate of pay, regardless whether this time reflected overtime work. Csaszi was paid \$2.50 for each hour that she reported she was on-call, and would have been paid her overtime rate if she had reported any time answering calls.

The essential basis of Csaszi's unpaid wages claim at trial was that Sharp was required to pay her time and one-half for her on-call time (when she was not actually answering calls) instead of \$2.50 because this time was devoted primarily to her employer's interests. In support, Csaszi relied on federal law providing that an employee should be fully compensated for on-call time if the time is spent " 'primarily for the benefit of the employer and his business.' " (*Armour & Co. v. Wantock* (1944) 323 U.S. 126, 132, 65 S.Ct. 165, 89 L.Ed. 118.)

To show that her on-call time was spent primarily for Sharp's benefit, Csaszi testified that when she was on-call she was unable to attend to her personal activities and she was paged "very frequently." She said that during her entire on-call period, she would sit in a room with a telephone, facsimile machine and documents needed to perform her job duties. Csaszi claimed she could not shop, cook, sleep, travel, interact with her family or otherwise engage in any personal activities. Csaszi sought \$40,380, calculated as the total number of on-call hours multiplied by the time and one-half rate subtracted by the amount she

was paid per hour (\$2.50). Csaszi had no record of the time she actually responded to calls, explaining that she never identified this time on her timesheets because she did not understand how to do so.⁴

In contrast to this evidence, Sharp presented the testimony of its human resource director who said that employees were instructed on the manner in which they should report call-back time and that the employees did not need to limit their activities while waiting for a call. Sharp employees corroborated this testimony. These employees testified that while on-call, they wore pagers and attended to various personal activities, including cooking, shopping, attending church services, and entertaining. The pagers given to the employees had a range of at least 250 miles, and therefore the employees were free to travel throughout Southern California. Csaszi's co-workers testified they received varying numbers of calls while on-call, which averaged two to four per week, and that they knew how to claim this call-back time on their timesheets. The employees were required to respond to a pager within a 15- or 20-minute period. The employees were always paid time and one-half for the time they were actually answering a call.

***9** After considering the evidence, the court stated: "The issue to be decided is whether the requirements of being on-call as a discharge planner precluded [Csaszi] from using the time effectively for her own purposes, thus entitling her to back wages. [Citations.] [¶] The Court finds that although [Csaszi] may have subjectively believed that she needed to avoid engaging in personal activities while on-call, the evidence shows that the job duties of being on-call did not require her to do so. The fact that Ms. Csaszi elected not to engage in personal activities while on-call may be laudable, but it does not transform the on-call time to working time compensable under statute. Both the written policies of the employer as well as the actions of the employees indicate that the express and implied agreement was that employees would be paid \$2.50 for time spent on-call but not actually working and one and one-half times their regular hours rate for time spent actually working while on-call. [¶] Based on the above-stated findings and the fact that [Csaszi] did not offer any evidence specifying the dates or hours she actually worked while on-call, the Court finds that [Csaszi] has failed to meet her burden to show that she is entitled to back wages...."

^[6] We find no error. Although there is no California law directly on point, federal law sets forth appropriate standards for determining Csaszi's claim to additional wages for on-call time. Under this law, an employee must be fully compensated for on-call time spent primarily for the employer's benefit, and the question whether the time is spent primarily for the employer depends on numerous factors and a consideration of these factors in the context of the particular circumstances of the case. (See *Armour & Co. v. Wantock*, *supra*, 323 U.S. at p. 133; *Berry v. County of Sonoma* (9th Cir.1994) 30 F.3d 1174, 1183.) Although no single factor is dispositive, the predominant considerations are the agreement of the parties and the degree to which the employee is free to engage in personal activities. (*Owens v. Local No. 169, Assn. of Western Pulp & Paper Workers* (9th Cir.1992) 971 F.2d 347, 350-354.) The court must balance the factors permitting personal pursuits against the factors restricting personal pursuits to determine whether the employee is "so restricted that he is effectively engaged to wait." (*Berry v. County of Sonoma*, *supra*, 30 F.3d at p. 1183.)

Applying these principles, the trial court found Sharp's evidence credible, and concluded that the time Csaszi spent on-call was not time that was required to be spent predominately for the employer's benefit. Substantial evidence supports the court's factual conclusion. The court, as the finder of fact, was entitled to reject Csaszi's contrary evidence.

In nonetheless challenging the court's factual conclusions, Csaszi contends that Sharp's agreement to pay \$2.50 during on-call hours "amounted to an admission that [Sharp] maintained control over the employees" and therefore the trial court was required to find as a matter of law that Sharp was under a mandatory obligation to pay the same pay rate that it applied for call-back work.

***10** This argument is unsupported factually and legally.

First, the fact that Sharp paid employees \$2.50 per hour to be available to respond to phone calls was not an admission that the time spent was primarily for Sharp's benefit. Instead, Sharp's human resources director specifically testified that employees were paid for being on-call as "an incentive for carrying the pager and being available on call." She explained the pay was "additional compensation that was paid to carry the pager, to be available during a specific time should additional work be needed by that individual." She emphasized that during this waiting time, the "time is not controlled [by Sharp]" and that employee "is free to move around, engage in personal activities."

Csaszi's position is also legally unsupported. Csaszi relies solely on *Paniagua v. City of Galveston, Texas* (5th Cir.1993) 995 F.2d 1310 and *Berry v. County of Sonoma, supra*, 30 F.3d at p. 1178. In *Paniagua*, the court specifically rejected the identical argument asserted here-that an employer's agreement to compensate employees for the inconvenience of being on call "automatically render[s] the time spent on standby 'working time'...." (995 F.2d at p. 1317.) In *Berry*, the court noted that an employer's agreement to provide "at least some type of compensation for on-call waiting time may suggest the parties characterize waiting time as work ...," but the court made clear that this was merely one of many factors in the overall analysis. (*Berry v. County of Sonoma, supra*, 30 F.3d at p. 1181 .)

The trial court here expressly noted the evidence showing that Sharp paid \$2.50 for on-call waiting time, but stated that based on the totality of the circumstances, this payment was merely compensation for the inconvenience of carrying a pager and did not reflect that the time spent by on-call employees was for the employer's benefit. Substantial evidence supported the trial court's conclusion.

Csaszi failed to establish that the trial court erred in reaching its factual conclusions with respect to the unpaid wage claim or that the court erred in applying these factual findings to the applicable legal principles.

IV. Attorney Fees

^[7] The trial court awarded \$20,269 in attorney fees to Sharp under [Labor Code section 218.5](#), which provides in relevant part: "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action."⁵

Csaszi contends the court erred in awarding fees under this section because the applicable statute is [section 1194](#), which contains a "one-way" fee provision, permitting attorney fees only for a prevailing employee and not for a prevailing employer. [Section 1194](#), subdivision (a) states: "[n]otwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance ..., including interest thereon, reasonable attorney's fees, and costs of suit."

***11** Both [sections 218.5](#) and [1194](#) potentially apply to an action seeking overtime wages, but establish different attorney fees rules. In *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 95 Cal.Rptr.2d 57, the court noted the potential conflict between the code sections, and concluded the Legislature intended that [section 1194](#) alone applies to recovery of attorney fees for overtime compensation claims, even though such claims could be construed as seeking payment of wages under [section 218.5](#). In a well-reasoned decision, the court explained that the only reasonable interpretation of the Legislature's one-way fee shifting rule in [section 1194](#) "would be one which bars employers from relying on [section 218.5](#) to recover fees in any action for *minimum* wages or *overtime* compensation. [Section 218.5](#) would still be available for an action brought to recover nonpayment of contractually agreed-upon or bargained for 'wages....' [¶] Such a harmonization of these two sections is fully justified. An employee's right to wages and overtime compensation clearly have different sources. Straight-time wages ... are a matter of private contract between the employer and employee. Entitlement to overtime compensation, on the other hand, is mandated by statute and is based on an important public policy.... 'California courts have long recognized [that] wage and hour laws "concern not only health and welfare of the workers themselves, but also the public health and general welfare." ... [¶] There can be no doubt that the one-way fee-shifting rule in [section 1194](#) was meant to 'encourage injured parties to seek redress-and thus simultaneously enforce [the minimum wage and overtime laws]-in situations where they otherwise would not find it economical to sue.' [Citation.] To allow employers to invoke [section 218.5](#) in an overtime case would defeat that legislative intent and create a chilling effect on workers who have had their *statutory* rights violated. Such a result would undermine statutorily-established public policy. That policy can only be properly enforced by a recognition that [section 1194](#) alone applies to overtime compensation claims." (*Earley v. Superior Court, supra*, 79 Cal.App.4th at p. 1430, 95 Cal.Rptr.2d 57.)

We agree with the *Earley* court that when an employee seeks overtime wages, the attorney fees rules are exclusively set forth in [section 1194](#). However, that principle is inapplicable here because Csaszi never alleged, or sought to prove at trial, that Sharp failed to pay her for overtime work. Instead, Csaszi brought her claim to enforce Sharp's alleged agreement that it would pay time and one-half for time spent working outside of the hospital's physical environment and that on-call time constituted "working" under established legal principles. The claim at issue concerned solely a matter of private contract

between the employer and employee, i.e., that Sharp had agreed to pay a certain wage for time answering calls, and that because her time spent waiting for those calls primarily benefited Sharp, Sharp was required to compensate her at this same established wage rate. Because Csaszi never claimed or presented evidence that she was working overtime without overtime pay, the case does not come within the ambit of [section 1194](#). Thus, the court properly concluded that attorney fees were mandatory to the prevailing employer under [section 218.5](#).

*12 Csaszi alternatively argues that even if [section 218.5](#) is the correct statute to apply, the code section does not permit a defendant to recover attorney fees because the fees must be requested at “the initiation of the action.” (§ 218.5.) Csaszi, however, ignores the beginning part of this sentence which provides for reasonable attorney fees “if *any* party to the action requests attorney’s fees and costs upon the initiation of the action .” (§ 218.5, italics added.) Read in context, this statutory language does not limit an attorney fees award to a plaintiff, and instead merely requires that the prevailing party show it had sought attorney fees at the beginning of the litigation. Here, Sharp stated in its answer that it was seeking to be “awarded its costs of suit and attorney fees incurred therein....” That statement is sufficient to satisfy [section 218.5](#)’s requirement that attorney fees be requested at the “initiation of the action.”

DISPOSITION

We affirm the portions of the judgment finding in Sharp’s favor on Csaszi’s claim for unpaid wages and awarding attorney fees to Sharp for prevailing on this claim. We reverse the portion of the judgment dismissing Csaszi’s first, second, third and fifth causes of action based on the summary adjudication. The court is ordered to vacate its order granting summary adjudication on these causes of action, permit Csaszi to file an opposition, and consider Sharp’s motion on the merits.

The parties to bear their own costs on appeal.

WE CONCUR: [KREMER](#), P.J., and [BENKE](#), J.

Footnotes

- ¹ Although it appears that the correct name of Csaszi’s former employer is Sharp Mission Park, the defendant is named in the caption of Csaszi’s complaint as Sharp Healthcare. Our review of the record on appeal does not reveal an amendment to the complaint correcting the defendant’s name.
- ² Because Csaszi did not submit an attorney fault declaration satisfying the mandatory relief provision requirements, we do not reach the issue raised by the parties in their supplemental briefs whether [section 473](#)’s mandatory provision applies to provide relief for summary adjudication orders, an issue that has been the subject of different conclusions by the appellate courts. (Compare [English v. Ikon Business Solutions, Inc.](#) (2001) 94 Cal.App.4th 130, 114 Cal.Rptr.2d 93 with [Avila v. Chua](#) (1997) 57 Cal.App.4th 860, 67 Cal.Rptr.2d 373.)
- ³ We recognize that this rule may lead to an empty victory for Csaszi if she is unable to come forward with any real evidence that she was discriminated against based on her race. However, the standard of review on a [section 473](#) motion does not permit this court to reach the merits of the underlying claim. Moreover, the policy of providing a party with a hearing on the merits of his or her claim in the trial court outweighs any possible judicial economy objectives that would be served if we were to consider the merits of the discrimination claim based solely on Csaszi’s proposed opposition filings contained in the appellate record.
- ⁴ Although it appears that Csaszi was not paid the time and one-half for all of her call-back time, at trial she never claimed any unpaid wages for such time, presumably because she never recorded this *call-back* time on her timesheets except for one occasion. Thus, this appeal concerns only the question whether Csaszi was owed any wages for her *on-call* time.
- ⁵ All further statutory references are to the Labor Code.

End of Document

© 2014 Thomson Reuters. No claim to original U.S. Government Works.

EXHIBIT 17

2009 WL 4718721
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

Boanerges VILLALOBOS, et al., Plaintiffs,
v.
James GUERTIN, et al., Defendants.

No. CIV. S-07-2778 LKK/GGH. | Dec. 3, 2009.

Attorneys and Law Firms

[Adam Wang](#), Law Office of Adam Wang, San Jose, CA, for Plaintiffs.

Kimberley Ann Worley, [Stephen R. Holden](#), Holden Law Group, Auburn, CA, for Defendant.

Opinion

ORDER

[LAWRENCE K. KARLTON](#), Senior District Judge.

***1** On August 19, 2009, the court granted defendants' motion for judgment on the pleadings, dismissing four of plaintiffs' causes of action for failure to state a claim, and dismissing the fifth and sole remaining cause of action for lack of subject matter jurisdictions. Defendants have submitted a bill of costs and separately moved for attorneys' fees, both of which have been opposed by plaintiffs. The court resolves the matter on the papers and after oral argument. For the reasons stated below, defendants' motion for fees and costs is granted in part.

I. BACKGROUND

Defendants Heidi and James Guertin allegedly operate a business under the name Norcal Plastering. Plaintiffs, four individuals formerly employed by Norcal, filed suit purporting to represent themselves and others similarly situated. The complaint stated five causes of action, for violations of (1) [California Labor Code section 1194](#), (2) the Fair Labor Standards Act, (3) [California Labor Code section 226.7](#), (4) [California Labor Code section 203](#), and (5) [California Business and Professions Code section 17203](#).

On August 19, 2009, the court held that plaintiffs' allegations were insufficient to support the second through fifth claims. The Fair Labor Standards Act claim failed because plaintiffs had not alleged facts sufficient to support the inference that Norcal Plastering or plaintiffs themselves engaged in interstate commerce, a predicate for liability under the act. Order at 8–11. The Third, Fourth, and Fifth claims failed because the allegations therein pertained to entities not party to this suit. *Id.* at 11–12. The court denied plaintiff's request for leave to amend to correct these deficiencies, explaining that plaintiffs had notice of these deficiencies before the scheduling order was entered, but that plaintiffs had taken no action to correct them until discovery in the case had closed. The court dismissed these claims, and declined to retain supplemental jurisdiction over plaintiffs' sole remaining claim. Judgment on the pleadings under [Fed.R.Civ.P. 12\(c\)](#) was entered for defendants on August 19, 2009.

Defendants filed a bill of costs and motion for attorneys fees. Plaintiffs oppose both, arguing that defendants were not

“prevailing parties” because, as plaintiffs understood this court’s August 19, 2009 order, the state law claims had been dismissed without prejudice, and plaintiffs were free to refile the federal claim in federal court. Plaintiffs alternatively argue that even if defendants prevailed, they are not entitled to a fee award under the court’s inherent power or under any statute.

II. DISCUSSION

A. Defendants Are A Prevailing Party

Under all of the fee shifting authorizations at issue in this case, fees and costs are only available to prevailing parties. Under California law, “a defendant in whose favor a dismissal is entered” is a prevailing party. [Cal.Code Civ. P. § 1032\(a\)\(4\)](#). Under federal law, a party has not prevailed unless it “experienced an alteration in the legal relationship” with the other parties. [Avery v. First Resolution Management Corp.](#), 568 F.3d 1018, 1024 (9th Cir.2009). Plaintiffs argue that the court’s order permits plaintiffs to refile each of their claims, and that as a result, no such change has occurred. *Id.*, [Oscar v. Alaska Dep’t of Educ. & Early Dev.](#), 541 F.3d 978, 982 (9th Cir.2008).

*2 Plaintiffs misunderstand the nature of the prior order and its effect under California and federal law. [Fed.R.Civ.P. 41\(b\)](#) provides that “[u]nless the dismissal order states otherwise ... any dismissal not under [Rule 41]—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.” Thus, although the dismissal order did not specifically state that it was “on the merits” or “with prejudice,” dismissal of the second through fifth claims was precisely such an adjudication. [Stewart v. United States Bancorp](#), 297 F.3d 953, 956 (9th Cir.2002). Plaintiffs’ contention that a dismissal for failure to allege the elements of a cause of action is not a substantive dismissal is without merit. *Id.*

Plaintiffs’ first claim, which was dismissed for lack of subject matter jurisdiction, was not adjudicated on the merits. [Avery](#), 568 F.3d at 1024. The fact that plaintiff may refile this one claim does not defeat defendants’ claim to prevailing party status as to the others.

B. Particular Fee Shifting Provisions

Defendants argue that they are entitled to fees under [28 U.S.C. section 1927](#), under [Cal. Lab.Code section 218.5](#), and under the court’s inherent authority. The court discusses each in turn.

1. [28 U.S.C. § 1927](#)

“Any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” [28 U.S.C. § 1927](#). Here, defendants have not identified any act by which plaintiffs multiplied the proceedings. Filing of the initial complaint cannot itself violate this section. “Because the section authorizes sanctions only for the ‘multipli[cation of] proceedings,’ it applies only to unnecessary filings and tactics once a lawsuit has begun.” [Moore v. Keegan Mgmt. Co. \(In re Keegan Mgmt. Co., Sec. Litig.\)](#), 78 F.3d 431, 435 (9th Cir.1996). Nor did plaintiffs’ counsel’s response to depositions noticed by defendants “multipl[y] the proceedings.”

Rather than identify affirmative acts, defendants argue that plaintiffs’ counsel multiplied proceedings by failing to withdraw and dismiss the case after the close of discovery. The only authority provided for this interpretation of [section 1927](#) is a case from the Southern District of Florida. See [Murray v. Playmaker Servs., LLC](#), 548 F.Supp.2d 1378, 1383 (S.D.Fla.2008). The court respectfully disagrees, and thereby declines to conclude that an attorney multiplies proceedings simply by failing to voluntarily dismiss an existing lawsuit.

2. The Court's Inherent Powers

The court has an inherent authority to order payment of fees as a sanction “when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, delaying or disrupting litigation, or has taken actions in the litigation for an improper purpose.” *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir.2001) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 and n. 10, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)); see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). In this case, defendants argue that plaintiffs have done a poor job of litigating this case, and that this demonstrates that they filed their a purported class action for the allegedly improper purpose of pressuring defendants to settle, rather than for any belief as to the action's merits. This argument is unsupported. Although, as noted in the order granting defendants' motion for judgment on the pleadings, plaintiffs did little in the litigation of this case, this does not demonstrate bad faith or other grounds for sanction under the court's inherent authority.

*3 Defendants also argue that plaintiffs have demonstrated bad faith by filing a complaint in state court that re-alleges the four the state-law claims previously filed in this court. Whether that filing is in bad faith is an issue for the state court.

3. Cal. Lab.Code § 218.5

Lastly, defendants argue that the court should award fees under [California Labor Code section 218.5](#). This statute provides that “in any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party.” [Cal. Lab.Code § 218.5](#). The Ninth Circuit has held that this provision may be applied in suits filed in federal court. *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815 (9th Cir.2009) (affirming award of fees to a prevailing plaintiff); see also *Diamond v. John Martin Co.*, 753 F.2d 1465, 1467 (9th Cir.1985) (“federal courts in diversity actions apply state law with regard to the allowance (or disallowance) of attorneys' fees.”). The court concludes that this section applies to one of plaintiffs' claims, that an award of fees is mandatory and not limited to cases in which plaintiffs acted wrongfully, and that defendants prevailed for purposes of this statute.

First, [section 218.5](#) does not apply to all wage claims. The statute contains an exemption, specifying that “[t]his section does not apply to any action for which attorney's fees are recoverable under [\[California Labor Code\] Section 1194](#).”¹ [Section 1194](#) governs actions alleging failure to pay minimum wages or overtime. Of the claims brought in this suit, plaintiffs concede that their claim for failure to pay for missed meal periods is a claim “for nonpayment of wages” under [section 218.5](#).² See *Murphy v. Kenneth Cole Production, Inc.*, 40 Cal.4th 1094, 1115, 56 Cal.Rptr.3d 880, 155 P.3d 284 (2007) (characterizing money owed for missed meal periods as wages rather than a penalty). Plaintiffs argue that their claims for waiting time penalties and for restitution of unpaid overtime do not fall within [section 218.5](#), and defendants do not dispute this argument.

Second, plaintiffs request that the court apply federal cases interpreting fee shifting under Title VII of the Civil Rights Act to the California Labor Code. Under Title VII, a court awards fees to a prevailing defendant only when the plaintiff's claim was frivolous, unreasonable, groundless, or brought in bad faith. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). *Christiansburg*'s holding was predicated on the fact that Title VII grants courts discretion to award fees. *Christiansburg*, 434 U.S. at 416; see also 42 U.S.C. § 2000e–5(k) (“the court, in its discretion, may allow the prevailing party, ... a reasonable attorney's fee.”).³ The Court's holding directed the lower courts in their exercise of this discretion. [Section 218.5](#), in contrast, provides that the court “shall” award fees. “As used in the Labor Code, ‘shall’ is mandatory.” *Smith v. Rae–Venter Law Group*, 29 Cal.4th 345, 357, 127 Cal.Rptr.2d 516, 58 P.3d 367 (2002), *superceded on other grounds as stated in* *Eicher v. Advanced Business Integrators, Inc.*, 151 Cal.App.4th 1363, 1384, 61 Cal.Rptr.3d 114 (2007) (citing Cal. Stats.2003, ch. 93, § 1). Under California law, when a statute provides for a mandatory fee award, a court has only discretion to deny the award when it is unclear whether the party prevailed, a circumstance not present here. [Cal.Code. Civ. P. § 1032\(a\)\(4\)](#), *On–Line Power, Inc. v. Mazur*, 149 Cal.App.4th 1079, 1087, 57 Cal.Rptr.3d 698 (2007). It appears that no published California case, nor any federal case, has held that when a claim is of a type encompassed by [section 218.5](#), a party must show anything more than that it prevailed to be entitled to a mandatory award of fees.⁴

*4 Finally, plaintiffs argue that defendants did not prevail on this claim because it was not brought as to them. As noted above, the court dismissed plaintiffs' meal period claim in part because the allegations supporting the claim referred to persons other than defendants. Plaintiffs now argue that in so doing, the court concluded that this claim was not brought as to defendants in this suit, such that defendants were not party to, and therefore did not prevail on, this claim. This argument fails. Although plaintiffs' allegations of particular conduct referred to other persons, plaintiffs' prayer for relief sought from defendants an award of meal time premium payments. Defendants therefore prevailed on this claim.

C. Reasonableness and Scope of The Fees

Although defendants are entitled to an award of fees only in connection with one of plaintiffs' claims, defendants may recover all fees incurred on issues pertinent to this claim regardless of whether those issues were also pertinent to other claims. *Diamond*, 753 F.2d at 1467 (quoting *Reynolds Metals Co. v. Alperson*, 25 Cal.3d 124, 129, 158 Cal.Rptr. 1, 599 P.2d 83 (1979)).

Defendants request \$29,964.00 in fees, for 85.6 hours of work in the case not including the time spent on the motion for a fee award, billed at \$315 per hour.⁵ The court has previously held that \$300 per hour is a reasonable local rate for attorneys with defense counsel's experience, and reduces the hourly rate accordingly.

Defendants have not specified how this time was spent. At least some of this time must have been spent on issues not pertinent to plaintiffs' meal period claim. Notably, a significant fraction of the memorandum submitted in support of defendants' motion for judgment on the pleadings was specific to plaintiffs' Fair Labor Standards Act claim. (Doc. No. 23–1 pages 4–6; Doc. No. 26 pages 4–5). Defendants are not entitled to recover fees expended in connection with this issue. *Diamond*, 753 F.2d at 1467. Defendants' contention that disclosure of the amount of time spent on this issue would breach attorney-client or work-product privileges is meritless. "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (concerning fee awards under 42 U.S.C. § 1988). Here, the court reduces the number of hours by the maximum amount that the court estimates were likely to have been spent on issues not pertinent to the meal period claim (which in this case means on issues solely pertinent to the FLSA claim). The record indicates that defendant's stated 85.6 hours were spent on preparation and filing of an answer, status report, motion for judgment on the pleadings, and on preparation for and attendance of a status conference, at least two depositions, and the hearing on the motion for judgment on the pleadings. See Declaration of Kimberly A. Worley Setting Forth Memorandum of Costs (Doc. No. 32–2). The court concludes that at most 15 hours of this time were spent on the FLSA issue, and reduces the fee award accordingly.

*5 Thus, defendants are entitled to a fees for 70.6 hours of work at \$300 per hour, or \$21,180. Plaintiff has not objected to defendants' statement of costs (other than to argue that defendants are not a prevailing party). Defendants are therefore further entitled to an award of \$1,525.80 in costs.

D. Who Pays The Fees

Cal. Labor Code section 218.5 provides that fees shall be awarded to the prevailing party, but does not specify where the award shall come from. Nothing in the parties' briefing indicates whether fees awarded under section 218.5 should be paid by plaintiffs' counsel or by plaintiffs themselves. Moreover, had plaintiffs' counsel offered argument on this issue, it would have been against his clients' interests. None of the cases citing section 218.5 have addressed this issue, and the court is not aware of any California law regarding fee awards generally.

It may be that as a general rule, fee awards, rather than sanctions, are to be paid by the party rather than counsel. In this particular case, however, where there is no controlling authority, equity demands that the award be paid by plaintiffs' counsel. As explained more fully in the prior order, dismissal resulted from counsel's failure to properly plead, and counsel's subsequent failure to identify his mistakes or to prosecute this litigation. It may be that defendants would have prevailed absent these failings, but the court has no way to evaluate that possibility. Although plaintiff's counsel's conduct is not sanctionable under federal law, when California law compels an award of fees, the exceptional circumstances of this case compel the court to conclude that this award should lie against plaintiff's counsel.

IV. CONCLUSION

For the reasons stated above, defendants' motion for attorney fees, Doc. No. 35 is GRANTED IN PART.

1. Plaintiff's counsel is ordered to pay \$21,180 in fees and \$1,525.80 in costs to defense counsel.
2. Counsel shall file an affidavit accompanying the payment which states that it is paid personally by counsel, out of personal funds, and is not and will not be billed, directly or indirectly, to the client or in any way made the responsibility of the client as attorneys' fees or costs.

IT IS SO ORDERED.

Footnotes

- ¹ The statute contains several other exceptions not pertinent here. In addition, for [section 218.5](#) to apply, at least one party must have requested fees at the initiation of the action. In this case, both the complaint and the answer request fees.
- ² Plaintiffs refer to this claim as their fourth. However, plaintiffs' meal break claim was enumerated as their third claim. Complaint ¶¶ 28–32.
- ³ *Christiansburg* explicitly juxtaposed Title VII's fee shifting provision, which provided discretion to award fees to any prevailing party, against statutes providing a mandatory award of fees to prevailing plaintiffs, e.g. the Fair Labor Standards Act, [29 U.S.C. § 216\(b\)](#), and against statutes providing discretion to award fees but only as to certain parties, e.g., the Privacy Act, [5 U.S.C. § 552a\(g\)\(2\)\(B\)](#). *Christiansburg*, 434 U.S. 415–16, n. 5, n. 6.
- ⁴ Although not citable as precedent by California courts, an unpublished decision of the California Court of Appeal held that [section 218.5](#) provided for mandatory fee awards to plaintiffs and defendants, despite possible policy concerns akin to those identified in *Christiansburg*. *Torres v. Auto Chlor Sys. of N. Cal.*, 2007 Cal.App. Unpub. LEXIS 7706, 2007 WL 2774706 (Cal.App. 6th Dist. Sept. 25, 2007).
- ⁵ Defense counsel declares that this is her standard rate, as an attorney with fifteen years of experience.

EXHIBIT 18

05-30-2013 | 05:13 PM | Author: [Robin Shea](#)

Employees: Better Think Twice Before Suing Your Employer (Four Reasons Why)



Earlier, I busted on "my own side" by giving [four reasons why employers shouldn't be so quick to fire their employees](#). To be fair, this week I'll talk about the other side -- four reasons why employees shouldn't be too quick to sue their employers.

DISCLAIMER: I am a defense lawyer. That means that, in any kind of workplace legal dispute, I am on the employer's side, not the employee's side. Always. Even though many of my best friends are employees and plaintiffs' lawyers. The following is not legal advice.

So, you don't have to believe what I'm about to say. But I make this post in good faith, based on my experience and observations in many years of employment litigation.

Are you still here? Cool! Here we go.

1. Even if you got the shaft at work, it is unlikely that you were treated illegally. The law does not require employers to treat their employees like "family," or to be nice, or even to be particularly fair. In fact, employers can usually be downright jerks as long as they are equally jerky to everybody. They can be arbitrary and play favorites as long as they're not making distinctions based on "protected" categories, like race or sex.

If you read this blog very often, you know that I am a strong advocate of treating employees respectfully, fairly, and with dignity. So is everybody in Human Resources who's worth a darn. But we feel that way because it's the right thing to do, not because it's the law.

The American legal system would collapse in a heap if people could sue every time their feelings were hurt. Our system is designed to prevent only the worst kinds of behavior -- you know, like murder, armed robbery, and driving 70 in a 55. It's supposed to keep us from being at each others' throats. That's it. Anything more is left to our respective senses of common decency. (Scary, I know!)

If you sue your employer, it won't be enough for you to prove that your employer made the wrong decision, or even that your employer was a no-goodnik. If you don't have a valid *legal* claim against your employer, then you will ultimately lose your case. One big reason to think twice before you sue.

2. Litigation is long, drawn-out, stressful, and painful. The only people who really enjoy litigation are lawyers. No one else could possibly be that sick. And, here's a secret: not even lawyers are that crazy about litigation. Judges (who are usually lawyers) are always after the parties to try to settle, which would end the case before the judge has to hear it. Lawyers are usually the same way -- they are rarely averse to settlement, although they'll fight to the death if that's what the client wants. Why do you think most courts nowadays have mandatory mediation? If even lawyers don't necessarily like litigation, just think about how much you will hate it.

"Well," you retort, "if lawsuits are that bad, then my employer will pay any amount to get rid of it, right? So it's still worth it to sue."

Well, no. Or, at least, not necessarily. You see, your employer gets sued a lot. This is what they call a "cost of doing business" in the United States. It is true that your lawsuit will be stressful and disruptive for your company. But it will be a lot more stressful and disruptive for you, who are not used to the court system or dealing with lawyers, and you don't even know whether it's a trap when the employer's lawyer says hello to you and offers to shake hands.

The distraction and stress of a lawsuit may also make it more difficult for you to do well in your new job. And having to continually dwell on an unpleasant experience (as you'll have to do while your lawsuit lasts) is difficult and stressful.

3. You may find out that your co-workers are not on your side. You feel very strongly that your employer did you wrong. You find a lawyer willing to take your case. You sue, and start taking depositions of all of your co-workers, who were your BFFs when you worked there. Well. It turns out that your BFFs weren't such BFFs after all. They say, "I liked Maudie, but I felt that she was out of line, and in my opinion she was treated fairly." And then you have the co-worker who saw you when you were not at your best, and she testifies about all the things you said to her in confidence when you were having a rotten day. Which are embarrassing. And which do not help your case. On the record. In a verbatim transcript, for cryin' out loud.

What happened to these people?

Most plaintiffs' lawyers will tell you that the co-workers are afraid of retaliation by the company if they don't side with the company and diss you. I am sure that happens sometimes, but I don't think it explains the majority of these situations. What I see most of the time are two phenomena:

***Most people consider a lawsuit an "act of war."** They probably *were* on your side when you all worked together and went out for mai tais and kvetched about what was going on at the office. But that was just gossip, harmless venting. Nobody thought you were really going to sue! And now, thanks to you, they're being dragged in front of lawyers and court reporters and judges and juries, and they're ticked off. And maybe what they said to you in confidence about the boss is coming out -- while the boss is sitting across the table with a stern-looking lawyer in a pinstripe suit. *AWKWARD!* No wonder they've turned on you.

***Some employees really, sincerely do believe the company was in the right.** Is the boss perfect? Of course not. But he's an overall decent guy who tries to be fair and treat employees right. And maybe you shouldn't have been so stubborn/absent from work/insubordinate/lazy yourself.

Recall No. 2, above. Finding out that your co-workers don't support you is one of the "painful" parts.

4. You may be opening up your own life to scrutiny. This is another "painful" part. In order to get more money, and because you really *were* very upset when you were fired, your lawyer includes a claim for emotional distress in your lawsuit. Next thing you know, the company has asked for your medical and psychiatric records dating back 10 years. And maybe you saw a shrink a few times and have been diagnosed as bipolar. Along with a few physical conditions that are not appropriate to mention in a family blog. Surely you don't have to share that information with the company's lawyers! Do you?

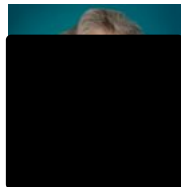
YOU ALMOST CERTAINLY DO. If you claim emotional distress (you don't have to, but you may not get as much money if you don't), most courts say you have put your own emotional condition at issue and the employer is entitled to find out how much of your (just as an example) bipolar disorder was caused by your termination and how much you had all along (in which case the company isn't responsible for it).

Your employer may also be able to dig into your past employment record, including that time you got fired from a previous job after you tested positive for angel dust, your criminal background, your five previous marriages, and your history of filing lawsuits. Perhaps you have nothing to hide. But a lot of people (most?) have a few skeletons that they'd just as soon not have the rest of the world know about.

What you probably *don't* have to worry about

Now, note what I have not mentioned: (1) That your employer will fire you for filing the lawsuit (assuming you did it while still employed); or (2) that your employer will blacklist you, and you'll never work again if you sue. The reason that I did not mention these is that they very rarely happen. Retaliation -- either during employment or afterward -- for filing a lawsuit in good faith against an employer is usually illegal, and almost all employers know that. If it happens and you can prove it, you might have a pretty good case. But don't bet on being able to do that.

Of course, I'm not saying you should never file a lawsuit against an employer, but it should almost always be a last resort. It's better to try resolving your dispute through the company's grievance procedure or open-door policy, or by going to Human Resources. If you're terminated, you may be better off negotiating a nice separation package and shaking the dust from your feet. If all of those fail, and if you've taken a good, critical look at your own performance and behavior, and still feel strongly that you were mistreated, then by all means consult with a lawyer who represents **employees** in workplace disputes. But keep in mind these hidden costs of litigation that you'll face, no matter how strong your case may be.



Visit the [Employment and Labor Law Insider](#) for additional insights from [Robin Shea](#), a partner with the national labor and employment law firm Constangy, Brooks & Smith, LLP.

For more information about LexisNexis products and solutions connect with us through our [corporate site](#).

Tags: [employee lawsuits](#)

EXHIBIT 19

April 29, 2014

HUFF
POST BUSINESS

What to Expect If You Sue Your Employer

Posted: 01/10/12 02:03 PM ET

In the last half century or so, workers in the U.S. have seen improved working conditions through policies and laws addressing discrimination, harassment, whistleblower protection and safety violations. But when these protective measures are disregarded, enforcing them falls on individual workers who must pursue their claims through arbitration, investigations by external agencies (such as the EEOC) or litigation. Whatever the reason a worker might consider taking such actions, before filing any internal or external complaint or lawsuit -- or even threatening to do so -- there are some things to keep in mind. And the first thing to keep in mind is that there are a lot of myths about what it means to sue an employer.

The first myth is that the employer is afraid of a lawsuit. Employers do not like lawsuits, but they do not fear them. If they did, the worker never would have had a legal claim in the first place. Why? Because if the employer sincerely feared a lawsuit, they would have respected the law in the first place. And not only are managers who violate workplace laws unlikely to be held accountable for their actions, there are many ways they can benefit from a lawsuit, even one their own conduct brought on.

They can benefit by finding a lawful reason to fire the complaining worker, or by providing witnesses against the complainant who are either "similarly situated" (such as members of the same protected group), or who work closely with them and are persuaded to testify against the worker. By courting these people, sympathizing with their conflicting emotions regarding the worker and providing opportunities and benefits previously withheld, the manager conditions the workforce to consider ways in which distancing from the worker, and aligning with the interests of management, are in their own interests.

Once this step is taken, greater acts of distancing -- through gossip, rumors, and shunning -- make it easier for former allies and others to turn against the worker. When this happens, the manager who may have instigated the lawsuit in the first place is able to score points with higher management by demonstrating that it is "the difficult employee" -- not the manager, who is the problem, and the manager who has provided a solution -- witnesses to discredit the worker's claims.

The second myth is that once a lawsuit is filed, further adverse action will not be taken against the worker because that would be viewed as retaliation. Your employer can and will retaliate against you in a multitude of ways, many of them legal.

Federal laws protect against retaliation for certain protected acts, such as reporting sexual harassment, discrimination, and some types of "whistle blowing." But federal law also permits employers to fire such employees for legitimate reasons -- such as theft, making threats, or acts of violence.

No matter how law-abiding a worker might be, once involved in litigation against an employer, accusations of wrongdoing are likely to commence, and escalate. For that reason, by encouraging the workforce to view the litigating worker as a threat to their own livelihoods, chronically unhappy and complaining, and mentally unstable, it takes little time before gossip escalates to accusation, and the worker is accused of an escalating series of "inappropriate" behaviors and often, crimes.

Should the worker express any anger or outrage at the mistreatment they receive, that anger will be viewed as a threat. Increasingly, employers are using the slightest pretext of "threats" or accusations of theft to bring in the police and have employees publicly escorted off the premises -- a humiliating tactic that is sure to instill fear in the workforce and further erode the worker's support and reputation, regardless of whether or not there was any basis to the accusation. (And while it remains unlawful to terminate an employee for false pretext, proving pretext is difficult and the damage will have already been done.)

The third myth is that once an employer realizes they could be sued for their actions, they will obey the law. If a worker threatens to sue, or an employer receives a letter from a worker's attorney, they may well clean up their act. But chances are, every level of higher management will be alerted and go on the defense, which to their legal team will mean an offense.

They will immediately notify all coworkers that a lawsuit is pending and not to destroy any emails or other correspondence about, to or from the worker, and not to discuss the case with the worker. And when they get those memos informing them that their (potentially embarrassing) emails will end up in the hands of their bosses, those coworkers are not going to resent their bosses, they are going to resent the worker whose legal action brought it on.

At this stage, the workforce, not management, will fuel the aggression aimed at the worker. Management will encourage the workforce to keep a close eye on the worker, and document any detail, no matter how seemingly benign, that shows the worker is unstable, unproductive, or ineffective. As the workforce takes note of the severe toll on the worker who filed the complaint, they will

not only alter their perceptions of the worker to justify avoiding and testifying against them, but they will also be far less likely to ever voice a similar complaint of their own in the future -- in other words, the more severe the punishment, the less likely management will have to fear future workers coming forward with similar complaints.

The fourth myth is that if a worker does sue, they can win big money, and be vindicated. If a worker does sue, and does win, they will be very, very happy. Why? Because by the time an employment case gets to the point of "winning," the worker will have spent years fighting. They will be emotionally and financially exhausted. They will have gone into great debt to pay legal costs; even if their case was litigated on a contingency fee basis, they will have had to pay a costly retainer, costs of mediations, investigations, depositions and travel expenses. And the worker will have had one heck of a time finding work, because not only will s/he be exhausted by legal battles, they will have had little time or strength to be productive in the process.

They will also be stained by no references, a record of suing an employer -- which no potential employer wants to see -- and a reputation that has been severely damaged through rumors.

And as for that big money verdict? There are caps on what a worker can get and juries are often very conservative -- many a career has been valued at less than a whiplash, because jurors like to think they would never find themselves in such a mess, and that no one should receive big money for not being able to work, when the juror may well work a lifetime for less. And anything over \$150,000 is currently taxed at one-third; a whiplash settlement, however, is currently not taxed.

The fifth myth is that the case will never get to trial and will settle out of court. Most cases do settle out of court, and when they do, they either settle fairly early in the game, or right before trial. In the meantime, the employer's legal team will bank on delays to wear the worker out. Until that time, efforts to resolve the matter will be in vein -- the only early resolution once a suit is filed will likely be at terms favorable to the employer. In the meantime, the worker's work and even home computers will be subpoenaed, along with their medical records. Investigators may have monitored the worker, and contacted past employers -- who will have been told all kinds of unsavory things about their former employee -- even family members, friends and neighbors may be questioned, scrutinized and had their own reputations slandered.

Suing an employer is the last thing a worker should ever do if the aim is a successful career. But sometimes an employer goes so far, breaches so many laws and causes so much damage that a worker cannot possibly recover without a legal remedy. And if that happens, the worker must be prepared. They must safeguard against the assured betrayals from close friends and colleagues, the adversarial scrutiny of their lives and communications, and an avalanche of accusations and smears upon their professional and personal lives.

And for the employer facing potential litigation, it is far easier to resolve a conflict with a worker than it is to close ranks and destroy them. Rare is the lawsuit that an effective manager can't prevent by acting with integrity in the first place, and rare is the lawsuit that an effective employee can't prevent, by knowing when the management is just no good and it's best to walk away.

Follow Janice Harper on Twitter: www.twitter.com/Janice_Harper

6 people are discussing this article with **11 comments**

Comments are closed on this entry.

Highlighted Most Recent Oldest Most Faved My Conversations

Pippen
287 Fans

2

My question to myself lately has been :

Are we teaching our college age young adults - Profits over People ? Money Talks and BS walks ? Your nothing unless you financially rape your environment and destroy your economic enemies ?

Is this what we're teaching them? Because they are snugly fitting in nicely to the Money Rules All mode of capitalism.

Why can't we start a business without any intent to reflect a profit beyond paying employees a living wage building a community and moving the business into the next year with strength. Profits would not be a priority and people would be valued. The prosperity alone would jolt this countries GNP.

What shocks me are the massive amount of business leaders and upper level managers I know personally who go to church and pretend to be a respected member of the faithful community followers of faith after having offshored 20,000 employees so they can garner a bonus and a shot at CEO even though they have a salary of upper

6 figures for years.

At church they hug people, neighbors, other leaders talk about their childrens future.
How they found God.

I almost want to vomit typing this.

11 JAN 2012 5:02 AM

FAVE SHARE MORE

DHC

SUPER USER · 56 Fans

1

Another precise and informative article. Well done.

10 JAN 2012 7:11 PM

FAVE SHARE MORE

kjk326

2 Fans

Excellent article, right on topic. I went through this nightmare & found just how chilling & hostile a formerly friendly environment can become overnight. People who were your close friends hesitate to talk to you and avoid being seen with you. Your every move is put under the microscope and twisted into some type of bad behavior while the person who committed the illegal act is lauded and promoted and you are made to feel like a social outcast at best and I say this even though in the end I prevailed. You are left so emotionally drained, sadly it seems to be the American way; forget ethics, it's the dollar that prevails. Most of all I don't know how HR people sleep at night when they defend someone they know clearly committed an illegal act,

10 JAN 2012 8:34 PM

FAVE SHARE MORE

ARTICLE AUTHOR

Janice Harper

HUFFPOST BLOGGER · 218 Fans

Thank you for sharing your experience. I think it's significant that you say in the end you prevailed -- sadly, that is the sixth myth -- that it will all be worth it. It rarely is. The toll on the worker who pursues an employment claim is enormous, and few attorneys, no matter how skilled, adequately prepare plaintiffs for what's up ahead. I'm so sorry you had to go through it.

Yet we have made great advances in working conditions in the U.S. in part due to lawsuits, and there are cases where workers are left with no recourse but to turn to the courts. In those cases, the more a person knows what to expect and how to be prepared, the better the emotional outcome. Thank you again for sharing your story.

10 JAN 2012 8:55 PM

FAVE SHARE MORE

3 PEOPLE IN THE CONVERSATION

Read Conversation →

noahmarder

512 Fans · Exposing the regressive lies, one by one

There is no justice in this country. What else is new? Risk/reward probably favors stealing from your employer rather than suing them. At least with theft, your career is ruined only if you get caught. You also have a better chance of stealing significant money than of winning anything but an airtight case. I don't see a moral problem either, so long as what is stolen doesn't exceed the damage done by the employer, plus the effort required for the theft, plus the chance of being caught multiplied by the penalty

for being caught. It is the employer, after all, who has taken away any legal remedies through the retaliation mechanisms described in the article.

10 JAN 2012 9:09 PM

FAVE SHARE MORE

Pippen

287 Fans

If you think all of that is bad apply it to Texas where employment is an "at will" state. Another way of putting this would be outright slavery and the slave master can fabricate reality on how they feel that morning and your life is forever changed.

America sets itself apart from 3rd world countries with the argument that we have a

- 1 Superior Justice System
- 2 Freedom of religion
- 3 Separation of Church and State
- 4 Opportunity to pursue your capitalist dreams of career and family
- 5 That taxes pay for your well being (roads, FDA, national safety etc..)
- 6 National security (threat of invasion and subjugation by an enemy rule...)
- 7 Democratically elected officials (fair voting)

I want you to look hard at those 7 American beliefs. See any of them that are actually working as intended ? Or are they working as intended ?

Did we just wake up or is this something that has emerged from the closet when GW Bush took office?

11 JAN 2012 4:52 AM

FAVE SHARE MORE

EXHIBIT 20



Reference No. 20230811-PJI-01

August 11, 2023

Emily Hounq Ly
The Spivak Law Firm
1801 Century Park East, 25th Floor
Los Angeles, CA 90067

RE: SALAZAR/ALL CARING - Class and PAGA Settlement

Dear Emily,

Thank you for this opportunity to provide a quote for your above-captioned settlement. Using the parameters you described, Simpluris' total estimated cost is \$9,746. As a courtesy, we are offering a \$3,746 discount, for a discounted total of \$6,000.

Please let me know if you have questions. I look forward to this opportunity to work together.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Patrick J. Ivie".

PATRICK J. IVIE
Chief Sales Executive

m: 310-995-6455
o: 714-975-5260
e: pivie@simpluris.com



3194-C Airport Loop Drive, Costa Mesa, CA 92626
www.simpluris.com | 1 (800) 779 - 2104



3194-C Airport Loop Drive
Costa Mesa, CA 92626
800-779-2104
www.simpluris.com

Estimate Number:	20230811-PJI-01	Prepared By:	Patrick J. Ivie
Estimate Date:	8/11/2023	Telephone Number (mobile):	310.995.6455
Estimate Expiration Date:	11/9/2023	Email:	pivie@simpluris.com

Attorney Contact
Attorney: **Emily Hough Ly**
Firm: The Spivak Law Firm
Email: emily@spivaklaw.com

Opposing Counsel Contact
Attorney:
Firm:
Email:

Case Name: SALAZAR/ALL CARING Class and PAGA Settlement

Assumptions

In addition to the assumptions enumerated below, this estimate assumes that

- (1) Simpluris will receive data in a single, complete file; (2) there will be no substantial change to class size or in response rate;
- (3) administration costs will be paid from the QSF, and (4) Simpluris will submit revisions to this estimate to account for any material changes to scope.

Anticipated Class Size:	100	Undeliverable Rate:	10%
Claims Rate:	N/A	Mail Skip Trace Success Rate:	85%
Opt-out Rate:	1%	Call Rate:	4%
Language(s) for Communication	EN/SP	Average Call Length:	3 Minutes
Reminder Mailing:	Yes	Fund Distribution:	Simpluris
Unclaimed Funds:	Escheat	Number of Distributions:	1
State(s):	CA	Tax Year(s):	1
Length of Administration:	9 Months		

Case Setup

- Undertake postings on Simpluris website of key documents as ordered by the Court (e.g. orders and the Settlement Agreement)
- Data compilation: develop case-specific response tracking

Category	Unit Value	# of Units	Total
Project Manager - Case Setup	\$110.00	2	\$220.00
Case Document Web Postings	\$250.00	1	\$250.00
Database Manager - Initial Data Analysis	\$125.00	2	\$250.00
Total:			\$720.00

Notice and Communications

- 7-page Packet: Notice, Opt Out Form and Dispute Form, mailed in English and Spanish
- Single Postcard Reminder Mailing

Category	Unit Value	# of Units	Total
Spanish Translation assuming 3,500 words	\$0.25	3,500	\$875.00
Bilingual Notice Packet assuming total of 14 images	\$3.00	100	\$300.00
Postage	\$0.63	100	\$63.00
NCOA/CASS/LACS	\$0.25	100	\$25.00
Undeliverable Processing and Skip Trace	\$0.50	10	\$5.00
Remail Notice (assuming 85% skip trace success)	\$4.00	9	\$34.00
Remail Postage	\$0.63	9	\$5.36
Single Postcard Reminder Mailing	\$0.20	100	\$20.00
Postage	\$0.48	100	\$48.00
Mailing Supervisor	\$50.00	3	\$150.00
Total:			\$1,525.36

Contact Center

- Establish case-specific toll-free number and 24/7 IVR
- Assuming 3-minute calls

Category	Unit Value	# of Units	Total
IVR Call Center Setup	\$450.00	1	\$450.00
IVR Monthly Maintenance	\$100.00	9 Months	\$900.00
IVR (includes toll-free number charges)	\$15.00	1	\$15.00
Subtotal			\$1,365.00

Administration

- Process incoming class and counsel communications, disputes, opt-outs, and objections

Category	Unit Value	# of Units	Total
Database Manager	\$125.00	2	\$250.00
Project Manager	\$110.00	2	\$220.00
Disputes Processing	\$3.50	5	\$17.50
Opt-out Processing	\$3.50	1	\$3.50
Reporting to Counsel (hours)	\$100.00	4	\$400.00
Total:			\$891.00

Award Disbursement

- Establish 26 CFR § 1.468B-1 compliant Qualified Settlement Fund ("QSF")
- Disburse award payments and tax documents
- Uncashed checks will be sent to the State Unclaimed Property Fund
- Conduct regular and annual IRS-mandated QSF reporting and reconciliation (one per calendar year)
- Complete all required filings with state and federal tax authorities

Category	Unit Value	# of Units	Total
Disbursement Data Preparation	\$125.00	2	\$250.00
Disbursement Manager - Data Validation	\$90.00	2	\$180.00
Setup Banking Account/QSF	\$675.00	1	\$675.00
QSF Monthly Reconciliation and Maintenance	\$100.00	9	\$900.00
Print & Mail Distribution Check with W2 and 1099	\$0.65	100	\$65.00
Postage	\$0.63	100	\$63.00
Process Returned Checks (assuming 5%)	\$0.25	5	\$1.25
Skip Trace Search Undeliverable Checks	\$0.50	5	\$2.50
Remail Checks (includes postage)	\$1.60	5	\$8.00
Escheat Uncashed Checks	\$500.00	1	\$500.00
QSF Reporting and Final Declaration	\$500.00	1	\$500.00
QSF Annual Tax Reporting and Reconciliation	\$1,350.00	1	\$1,350.00
Distribution Manager	\$90.00	2	\$180.00
Total:			\$4,674.75

Case Completion

- Final audit and review
- Send final declaration and reporting to counsel

Category	Unit Value	# of Units	Total
Data Manager-Final Reporting	\$125.00	2	\$250.00
Clerical-Clean Up Any Misc.	\$50.00	2	\$100.00
Project Manager-Wrap-up Final Issues	\$110.00	2	\$220.00
Total:			\$570.00

Total Estimated Cost of Administration:	\$9,746
Less Client Courtesy Discount:	-\$3,746
Total Administration Cost, with Discount:	\$6,000

Terms and Conditions

All administration services to be provided by Simpluris to Client, are provided subject to the following terms and conditions ("Agreement"):

1. Services: Simpluris agrees to provide Client those services set forth in the Proposal (the "Services") to which these terms and conditions are attached and which has been provided to Client. As compensation for such Services, Client agrees to pay the fees for Services outlined in the Proposal. Simpluris will often take direction from Client's representatives, employees, agents and or professionals (collectively, the "Client Parties") with respect to the Services. The parties agree that Simpluris may rely upon, and Client agrees to be bound by, any direction, advice or information provided by the Client Parties to the same extent as if provided by Client. Client agrees and understands that Simpluris shall not provide Client or any other party with any legal advice.

2. Fee Estimates Not Binding: Simpluris and Client acknowledge that it is difficult to determine all necessary work required for the Services or the total amount of fees that may be incurred in performing the Services. Client agrees that fees for Services described in the Proposal are estimated based on the requirements provided by Client. Actual fees charged by Simpluris may be greater or less than such estimate. Client specifically agrees that it will be responsible for the payment of all such fees. Simpluris will provide estimates and budgets, but they are not intended to be binding; are subject to unforeseen circumstances, and by their nature are inexact.

3. Billing and Payment: Simpluris will invoice Client on a regular basis unless a specific timeframe is otherwise set forth in the Proposal. Client shall pay all invoices within 30 days of receipt. Amounts unpaid after thirty (30) days are subject to a service charge at the rate of 1.5% per month or, if less, the highest rate permitted by law. Services are not provided on a contingency basis and Client shall remain liable to Simpluris for all fees incurred by Simpluris in performing the Services, regardless of any circumstance that impacts the outcome of Client's matter, including but not limited to, court decisions, actions by the parties, or a failure to consummate a settlement.

4. Further Assurances: Client agrees that it will use its best efforts to include provisions reasonably acceptable to Simpluris in any relevant court order, settlement agreement or similar document that provide for the payment of Simpluris' fees and expenses hereunder. No agreement to which Simpluris is not a party shall reduce or limit the full and prompt payment of Simpluris' fees and expenses as set forth herein and in the Proposal.

5. Rights of Ownership: The parties understand that the software programs and other materials furnished Simpluris to Client and/or developed during the course of the performance of Services are the sole property of Simpluris. The term "program" shall include, without limitation, data processing programs, specifications, applications, routines, and documentation. Client agrees not to copy or permit others to copy the source code from the support software or any other programs or materials furnished to Client. Fees and expenses paid by Client do not vest in Client any rights in such property, it being understood that such property is only being made available for Client's use during and in connection with the Services provided by Simpluris.

6. Bank Accounts: Simpluris will establish a demand deposit checking account (i.e. non-interest bearing) for funds received related to a distribution, unless directed otherwise in writing by the parties or unless the settlement agreement stipulates otherwise. Simpluris may derive financial benefits from financial institutions in connection with the deposit and investment of settlement funds with such institutions, including without limitation, discounts on eligible banking services and fees, and compensation for services Simpluris performs for financial institutions to be eligible for FDIC deposit insurance. The amounts held pursuant to these Terms and Conditions are at the sole risk of Client and, without limiting the generality of the foregoing, Simpluris shall have no responsibility or liability for any diminution of the fund that may result from any deposit made with a financial institution including any losses resulting from a default by such institution or other credit losses. It is acknowledged and agreed that Simpluris will have acted prudently in depositing the fund at such institution.

7. Retention of Documents & Data: Unless otherwise required in writing by the Client or court orders, all returned/undeliverable physical documents will be securely shredded after the data has been confirmed uploaded to our systems. Simpluris will retain bank and tax documents for such period of time as it determines is required to maintain compliance with various federal and state law requirements. Unless otherwise required in writing by the Client or court orders, Simpluris will adhere to the Company's data deletion policies and will destroy all remaining project-related information from our systems three (3) years after the conclusion of the project. Storage beyond three (3) years is available upon request and will be billed as incurred.

8. Limitation of Liability; Disclaimer of Warranties: Simpluris warrants that it will perform the Services diligently, with competence and reasonable care. In no event will Simpluris be liable to Client or any third party for any claims, losses, costs, penalties, fines, judgments, tax activities, lost profits or business opportunities, business interruptions or delay, special, exemplary, punitive, consequential, indirect or incidental damages relating to the performance of the Services, regardless of whether Client's claim is for breach of contract, tort (including negligence and strict liability) or otherwise, regardless of whether such damage was foreseeable and whether such party has been advised of the possibility of such damages. Simpluris' cumulative liability for damages to Client hereunder will be limited to the total fees charged or chargeable to Client for the particular portion of the Services affected by Simpluris' omission or error. THE WARRANTIES SET FORTH IN THIS SECTION ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE.

9. Force Majeure: To the extent performance by Simpluris of any of its obligations hereunder is substantially prevented or delayed by reason of any act of God, flood, fire, earthquake or explosion, war, terrorism, invasion, riot or other civil unrest, embargoes or blockades in effect on or after the date

that Simpluris began performing Services, epidemic, pandemic, quarantine, civil commotion, national or regional emergency, strikes, labor stoppages or slowdowns or other industrial disturbances, passage of Law or any action taken by a governmental or public authority, including imposing an export or import restriction, quota, or other restriction or prohibition or any complete or partial government shutdown, or national or regional shortage of adequate power or telecommunications or transportation or because of any other matter beyond Simpluris' reasonable control, then Simpluris' performance shall be excused and this Agreement, at Simpluris' option, be deemed suspended during the continuation of such condition and for a reasonable time thereafter.

10. Rights in Data: Client agrees that it will not obtain, nor does Simpluris convey, any rights of ownership in the programs, system data, or materials provided or used by Simpluris in the performance of the Services.

11. Electronic Communications: During the provision of the Services, the parties may wish to communicate electronically with each other at a business e-mail address. However, the electronic transmission of information cannot be guaranteed to be secure or error free and such information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete or otherwise be adversely affected or unsafe to use. Accordingly, each party agrees to use commercially reasonable procedures to check for the then most commonly known viruses and to check the integrity of data before sending information to the other electronically, but each party recognizes that such procedures cannot be a guarantee that transmissions will be virus free. It remains the responsibility of the party receiving an electronic communication from the other to carry out a virus check on any attachments before launching any documents whether received on disk or otherwise.

12. Notice: Any notice required or permitted hereunder shall be in writing and shall be delivered personally, by, or sent by registered mail, postage prepaid, or overnight courier to the address identified by each Party in the Proposal. Notice shall be deemed given when so delivered personally, or, if mailed, five days after the date of deposit in United States mail, or, if sent by courier, one business day after delivery to such courier service. Notice should be addressed to an officer or principal of Client and Simpluris, as the case may be.

13. Waiver: Failure or delay on the part of a party to exercise any right, power or privilege hereunder shall not operate as a waiver thereof or any of other subject, right, power or privilege.

14. Termination: Client may terminate the Services at any time upon 30 days prior written notice to Simpluris. Termination of Services shall in no event relieve Client of its obligation make any payments due and payable to Simpluris for Services rendered up to the effective date of Termination. Simpluris may terminate this Agreement (i) for any reason upon no less than 60 days prior written notice to the Client; or (ii) upon 15 calendar days' prior written notice if the Client is not current in payment of fees.

15. Jurisdiction: These Terms and Conditions will be governed by and construed in accordance with the laws of the state of California, without giving effect to any choice of law principles.

16. Survival: Any remedies for breach of this Agreement, this Section and the following Sections will survive any expiration or termination of this Agreement: Section 4 - Limitation of Liability; Disclaimer of Warranties, Section 6 – Rights in Data, and Section 12- Jurisdiction, 14 -Confidentiality, and Section 15 – Indemnification.

17. Confidentiality: Simpluris maintains reasonable and appropriate safeguards to protect the confidentiality and security of data provided by Client to Simpluris in connection with the Services. If, pursuant to a court order or other proceeding, a third-party requests that Simpluris to disclose any confidential data provided by or for Client, Simpluris will promptly notify the Client unless prohibited by applicable law. Client will then have the option to provide Simpluris with qualified legal representation at Client's expense to defend against such request. If, pursuant to a court order, Simpluris is required to disclose data, produce documents, or otherwise act in contravention of the obligation to maintain confidentiality set forth in these terms and conditions, Simpluris will not be liable for breach of said obligation.

18. Indemnification: Client will indemnify and hold Simpluris (and the officers, employees, affiliates and agents) harmless against any losses whatsoever incurred by Simpluris, arising out of any action by a third party, including governmental agencies, in connection with , or related to (i) any breach of the terms by Client; (ii) the processing and handling of any payment by Simpluris in accordance with Client's instructions, including without limitation, the imposition of any stop payment or void payment on any check or the wrongful dishonor of a check by Simpluris pursuant to Client's instructions.

19. Severability: If any term or condition or provisions of this Agreement shall be held to be invalid, illegal, unenforceable or in conflict with the law of any jurisdiction, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

20. Database Administration: Simpluris' database administration for Client assumes that Client will provide complete data that includes all information required to send notifications and calculate and mail settlement payments. Data must be provided in a complete, consistent, standardized electronic format. Simpluris' standardized format is Microsoft Excel, however, Simpluris may accept other formats at its discretion. Further developments or enhancements to non-standardized data will be billed to Client by Simpluris on a time and materials basis according to Simpluris' Standard Rates.

21. Entire Agreement: These Terms and Conditions together with the Proposal constitutes the entire agreement between the parties with respect of the subject matter hereof and supersede all prior understandings, agreements, or representations by or among the parties, written or oral, to the extent they relate in any way to the subject matter hereof.

EXHIBIT 21



PHOENIX

CLASS ACTION ADMINISTRATION SOLUTIONS

August 11, 2023

CASE ASSUMPTIONS

Class Members	100
Opt Out Rate	1%
Opt Outs Received	1
Total Class Claimants	99
Subtotal Admin Only	\$7,618.47

Flat Fee Total \$7,000.00

For 100 Class Members

Pricing Good for Scope of Estimate Only

All Aspects of Escheating to the State of CA Included

Language Translation, Printing & Mailing Included

Case: Salazar v. All Caring, Opt-Out Administration

Phoenix Contact: Michael E. Moore

Contact Number: 949.331.0131

Email: mike@phoenixclassaction.com

Requesting Attorney: Emily Houg Ly

Firm: The Spivak Law Firm

Contact Number: (818) 205-9033

Email: emily@spivaklaw.com

Assumptions and Estimate are based on information provided by counsel. If class size changes, PSA will need to adjust this Estimate accordingly. Estimate is based on **100** Class Members. PSA assumes class data will be sent in Microsoft Excel or other usable format with no or reasonable additional formatting needed. A rate of \$150 per hour will be charged for any additional analysis or programming.

Case & Database Setup / Toll Free Setup & Call Center / NCOA (USPS)

Administrative Tasks:	Rate	Hours/Units	Line Item Estimate
Programming Manager	\$100.00	2	\$200.00
Programming Database & Setup	\$100.00	2	\$200.00
Toll Free Setup*	\$150.00	1	\$150.00
Call Center & Long Distance	\$2.00	10	\$20.00
NCOA (USPS)	\$25.00	1	\$25.00
Total			\$595.00

* Up to 120 days after disbursement

Data Merger & Scrub / Notice Packet, Opt-Out Form & Postage / Language Translation / Website

Project Action	Rate	Hours/Units	Line Item Estimate
Notice Packet Formatting	\$100.00	2	\$200.00
Language Translation	\$1,000.00	1	\$1,000.00
Data Merge & Duplication Scrub	\$0.10	100	\$10.00
Notice Packet & Opt-Out Form	\$1.45	100	\$145.00
Estimated Postage (up to 2 oz.)*	\$0.87	100	\$87.00
Static Website	\$200.00	1	\$200.00
Check Cashing Reminder Postcard Postage Included	\$0.60	21	\$12.47
Total			\$1,654.47

* Prices good for 90 days. Subject to change with the USPS Rate or change in Notice pages or Translation, if any.



PHOENIX

CLASS ACTION ADMINISTRATION SOLUTIONS

Skip Tracing & Remailing Notice Packets / Tracking & Programming Undeliverables

Project Action:	Rate	Hours/Units	Line Item	Estimate
Case Associate	\$55.00	4		\$220.00
Skip Tracing Undeliverables	\$1.00	20		\$20.00
Remail Notice Packets	\$0.75	17		\$12.75
Estimated Postage	\$0.87	17		\$14.79
Programming Undeliverables	\$50.00	1		\$50.00
			Total	\$317.54

Database Programming / Processing Opt-Outs, Deficiencies or Disputes

Project Action:	Rate	Hours/Units	Line Item	Estimate
Programming Database	\$150.00	2		\$300.00
Non Opt-Out Processing	\$200.00	1		\$200.00
Case Associate	\$55.00	3		\$165.00
Opt-Outs/Deficiency/Dispute Letters	\$10.00	4		\$40.00
Case Manager	\$85.00	2		\$170.00
			Total	\$875.00

Calculation & Disbursement Programming/ Create & Manage QSF/ Mail Checks

Project Action:	Rate	Hours/Units	Line Item	Estimate
Programming Calculations	\$135.00	1		\$135.00
Disbursement Review	\$135.00	1		\$135.00
Programming Manager	\$95.00	1		\$95.00
QSF Bank Account & EIN	\$135.00	1		\$135.00
Check Run Setup & Printing	\$135.00	4		\$540.00
Mail Class Checks *	\$0.90	99		\$89.10
Estimated Postage	\$0.64	99		\$63.36
			Total	\$1,192.46

* Checks are printed on 8.5 x 11 in. sheets with W2/1099 Tax Filing & Instructions for downloading tax forms from PHX secure portal



PHOENIX

CLASS ACTION ADMINISTRATION SOLUTIONS

Tax Reporting & Reconciliation / Re-Issuance of Checks / Conclusion Reports and Declarations				
Project Action:	Rate	Hours/Units	Line Item	Estimate
Case Supervisor	\$115.00	2		\$230.00
Remail Checks (Postage Included)	\$1.70	20		\$34.00
Case Associate	\$55.00	3		\$165.00
Reconcile Uncashed Checks	\$85.00	5		\$425.00
Conclusion Reports	\$115.00	2		\$230.00
Case Manager Conclusion	\$85.00	3		\$255.00
Final Reporting & Declarations	\$115.00	3		\$345.00
IRS & QSF Annual Tax Reporting * (1 State Tax Reporting Included)	\$1,000.00	1		\$1,000.00
Check to Cy-Pres	\$150.00	1		Included
Uncashed Checks to the State of California Controllers Office Estimated <u>19</u> Total Class Members	\$300.00	1		\$300.00
Total				\$2,984.00

* All applicable California State & Federal taxes, which include SUI, ETT, and SDI, and FUTA filings. Additional taxes are Defendant's responsibility.

Estimate Total: \$7,618.47



PHOENIX

CLASS ACTION ADMINISTRATION SOLUTIONS

TERMS AND CONDITIONS

Provisions: The case estimate is in good faith and does not cover any applicable taxes and fees. The estimate does not make any provision for any services or class size not delineated in the request for proposal or stipulations. Proposal rates and amounts are subject to change upon further review, with Counsel/Client, of the Settlement Agreement. Only pre-approved changes will be charged when applicable. No modifications may be made to this estimate without the approval of PSA (Phoenix Settlement Administrators). All notifications are mailed in English language only unless otherwise specified. Additional costs will apply if translation into other language(s) is required. Rates to prepare and file taxes are for Federal and California State taxes only. Additional charges will apply if multiple state tax filing(s) is required. **Pricing is good for ninety (90) days.**

Data Conversion and Mailing: The proposal assumes that data provided will be in ready-to-use condition and that all data is provided in a single, comprehensive Excel spreadsheet. PSA cannot be liable for any errors or omissions arising due to additional work required for analyzing and processing the original database. A minimum of two (2) business days is required for processing prior to the anticipated mailing date with an additional two (2) business days for a National Change of Address (NCOA) update. Additional time may be required depending on the class size, necessary translation of the documents, or other factors. PSA will keep counsel apprised of the estimated mailing date.

Claims: PSA's general policy is to not accept claims via facsimile. However, in the event that facsimile filing of claims must be accepted, PSA will not be held responsible for any issues and/or errors arising out of said filing. Furthermore, PSA will require disclaimer language regarding facsimile transmissions. PSA will not be responsible for any acts or omissions caused by the USPS. PSA shall not make payments to any claimants without verified, valid Social Security Numbers. All responses and class member information are held in strict confidentiality. Additional class members are \$10.00 per opt-out.

Payment Terms: All postage charges and 50% of the final administration charges are due at the commencement of the case and will be billed immediately upon receipt of the data and/or notice documents. PSA bills are due upon receipt unless otherwise negotiated and agreed to with PSA by Counsel/Client. In the event the settlement terms provide that PSA is to be paid out of the settlement fund, PSA will request that Counsel/Client endeavor to make alternate payment arrangements for PSA charges that are due at the onset of the case. The entire remaining balance is due and payable at the time the settlement account is funded by Defendant, or no later than the time of disbursement. Amounts not paid within thirty (30) days are subject to a service charge of 1.5% per month or the highest rate permitted by law.

Tax Reporting Requirements

PSA will file the necessary tax returns under the EIN of the QSF, including federal and state returns. Payroll tax returns will be filed if necessary. Under the California Employment Development Department, all taxes are to be reported under the EIN of the QSF with the exception of the following taxes: Unemployment Insurance (UI) and Employment Training Tax (ETT), employer-side taxes, and State Disability Insurance (SDI), an employee-side tax. These are reported under Defendant's EIN. Therefore, to comply with the EDD payroll tax filing requirements we will need the following information:

1. Defendant's California State ID and Federal EIN.
2. Defendant's current State Unemployment Insurance (UI) rate and Employment Training Tax (ETT) rate. This information can be found in the current year DE 2088, Notice of Contribution Rates, issued by the EDD.
3. Termination dates of the class members, or identification of current employee class members, so we can account for the periods that the wages relate to for each class member.
4. An executed Power of Attorney (Form DE 48) from Defendant. This form is needed so that we may report the UI, SDI, and ETT taxes under Defendant's EIN on their behalf. If this form is not provided we will work with the EDD auditors to transfer the tax payments to Defendant's EIN.
5. Defendant is responsible for reporting the SDI portion of the settlement payments on the class member's W-2. PSA will file these forms on Defendant's behalf for an additional fee and will issue an additional W-2 for each class member under Defendant's EIN, as SDI is reported under Defendant's EIN rather than the EIN of the QSF. The Power of Attorney (Form DE 48) will be needed in order for PSA to report SDI payments.

EXHIBIT 22

Case Name: SALAZAR/ALL CARING re

Friday, August 11, 2023

Requesting Law Firm
Contact
E-Mail
ILYM Contact
E-Mail
Contact Number

The Spivak Law Firm
Emily Houg Ly
emily@spivaklaw.com
Lisa Mullins
Lisa@ilymgroup.com
714.878.8836

ESTIMATE FOR ADMINISTRATION SOLUTIONS

Opt-Out

ASSUMPTIONS	
Total Number of Class Members	100
Estimated Percentage of Undeliverable Mail	20%
NCOA	Yes
Certified Spanish Translations	Yes

Activity	Rate Type	Unit Cost	Volume	Amount
CASE STARTUP				
Initial Setup - Import and Formatting of Data*	Hourly	\$150.00	1	\$150.00
Programming of Class Database	Hourly	\$175.00	1	\$175.00

**ILYM assumes that data will be in a standard format. Client will be notified immediately if not in standard format to correct data or ILYM can convert to standard format @ \$150.00 per hour.*

Subtotal \$325.00

PROJECT MANAGEMENT				
Project Manager (Case notification and maintenance)	Hourly	\$120.00	2	\$240.00
Staff Hours for Processing Opt-Outs, Disputes & Objections	Hourly	\$70.00	1	\$70.00
Staff Hours for Processing Returned Mailed	Hourly	\$70.00	1	\$70.00
Report Processing	Hourly	\$70.00	2	\$140.00
NCOA	Per Piece	\$50.00	1	\$50.00
Toll-Free Call Center	Flat Fee	\$50.00	1	\$50.00
ILYM Group Static Website, Includes Hosting	Flat Fee	\$750.00	1	\$750.00
Certified Spanish Translations	Flat Fee	\$1,250.00	1	\$1,250.00
Weekly Reports	Flat Fee	\$500.00	1	Waived

Subtotal \$2,620.00

ILYM | GROUP, Inc.

SETTLEMENT ADMINISTRATION EXPERTS

Activity	Rate Type	Unit Cost	Volume	Amount
----------	-----------	-----------	--------	--------

NOTIFICATION/MAILING				
Fulfillment Notice, English and Spanish	Per Piece	\$2.00	100	\$200.00
USPS First Class Postage	Per Piece	\$0.83	100	\$83.00
Remails (Forward/Skip Trace Undeliverables)	Per Piece	\$2.50	20	\$50.00
Storage, Photocopies, Deliveries	Flat Fee	\$179.00	1	\$179.00

Subtotal \$512.00

DISTRIBUTION (Includes EIN, Bank Acct * /QSF Setup)				
Distribution Setup & Management	Hourly	\$150.00	2	\$300.00
Account Reconciliation & Distribution Reporting	Hourly	\$125.00	2	\$250.00
Check, Print & Mail (Including W2/1099 Stub & Release)**	Per Check	\$1.00	100	\$100.00
USPS First Class 1oz Postage	Per Piece	\$0.63	100	\$63.00
Remails (Forward/Skip Trace Undeliverables)	Per Piece	\$1.50	10	\$15.00
Check Cashing Reminder Postcard	Per Piece	\$1.00	65	\$65.00
Preparation of Taxes	Hourly	\$120.00	4	\$480.00
Annual Filing of Tax Return	Per Year	\$1,500.00	1	\$1,500.00

***Additional Bank fees may apply*

Subtotal \$2,773.00

CASE CONCLUSION				
Data Manager Final Reporting	Hourly	\$100.00	1	\$100.00
Project Manager Final Reporting	Hourly	\$120.00	1	\$120.00
Process Uncashed Funds to the State	Flat Fee	\$250.00	1	\$250.00
Declaration	Hourly	\$125.00	2	\$250.00

Subtotal \$720.00

Total Case Estimate: \$6,950.00

Terms and Conditions

All services to be provided by ILYM Group, Inc. (hereinafter, "ILYM") to Client shall be subject to the following terms and conditions:

Services: Subject to the terms hereof, ILYM agrees to provide the Client with Administration Services (hereinafter, "services") as specified in the Proposal provided to Client to which these Terms and Conditions are attached. The estimate is in good faith and does not cover any applicable taxes and fees. The estimate does not make provision for any services or class members/size not delineated in the request for proposal or stipulations. Such services do not in any way constitute legal services or advice. ILYM is performing its services as an Independent Contractor and neither it nor its employees shall be deemed to be employees of the Client.

Mailing and Data Conversion: ILYM's database administration assumes the Client will provide complete data that includes all information required to send notifications and complete the administration process. Data must be provided in a complete, consistent, standardized electronic format. ILYM's standard format is Microsoft Excel, however, ILYM may accept other formats at its discretion. Further developments or enhancements to non-standardized data will be billed to Client by ILYM on a time and materials basis, according to ILYM's Standard Rates.

Charges for Services: Charges to the Client for services shall be on a time and materials basis at our prevailing rates, as the same may change from time to time. Any fee estimates set forth in the proposal are estimates only, based on information provided by Client to ILYM. Actual fees charged by ILYM to Client may be greater or less than such estimate, and Client shall be responsible for the payment of all such charges and expenses in accordance with Section 5 hereof. Charges incurred related to resolving post distribution withholdings and related corrective files due to voids and re-issues of payments and related correspondence with state and federal taxing authorities will not be charged to the Client to the extent that funds are received from the taxing authorities offset these charges. ILYM may derive financial benefits from financial institutions in connection with the deposit and investment of settlement funds with such institutions, including without limitation, discounts on eligible banking services and fees, and loans at favorable rates.

Indemnification: Client will indemnify and hold ILYM (and the officers, employees, affiliates and agents harmless against any Losses incurred by ILYM, arising out of, in connection with, or related to (i) any breach of the terms by Client; (ii) the processing and handling of any payment by ILYM in accordance with Client's instructions, including without limitation, the imposition of any stop payment or void payment on any check or the wrongful dishonor of a check by ILYM pursuant to Client's instructions.

Payment of Charges: ILYM reserves the right to request payment of postage charges and 50% of the final administration charges at the start of the case. ILYM bills are due upon receipt unless otherwise negotiated and agreed to with the Client. In the event settlement terms provide that ILYM is to be paid out of the Settlement Fund, ILYM will request that Counsel endeavor to make alternate payment arrangements for ILYM charges that are due at the onset of the case. The entire remaining balance is due and payable at the time the Settlement Account is funded by, or no later than the time of disbursement. Decisions of the court and actions of the parties, including disapproval or withdrawal of a settlement, do not affect the Client's liability to ILYM for payment of services. Services are not provided on a contingency fee basis.

Confidentiality: ILYM maintain reasonable and appropriate security measures and safeguards to protect the security and confidentiality of Client data provided to ILYM by Client in connection herewith. Should ILYM ever be notified of any judicial order or other proceedings in which a third party seeks to obtain access to the confidential data created by or for the Client, ILYM will promptly notify the Client, unless prohibited by applicable law. The Client shall have the option to (1) provide legal representation at the Client's expense to avoid such access or (2) promptly reimburse ILYM for any of its costs, including attorneys' fees, reasonably incurred in avoiding, attempting to avoid or providing such access and not paid by the entity seeking the data. If ILYM is required, pursuant to a court order, to produce documents, disclose data, or otherwise act in contravention of the obligations imposed by this Agreement, or otherwise, with respect to maintaining the confidentiality, proprietary nature and secrecy of the produced documents or disclosed data, ILYM will not be liable for breach of said obligation.

Data Rights: ILYM does not convey nor does the Client obtain any right in the programs, system data, or materials utilized or provided by ILYM in the ordinary course of business in the performance of this Agreement.

Document Retention: Unless directed otherwise in writing by Client, ILYM will destroy undeliverable mail on the effective date of the settlement or the date that the disposition of the case is no longer subject to appeal or review, whichever is later. ILYM will maintain claim forms and other correspondence for one year after final distribution of funds or benefits, or until the date that the disposition of the case is no longer subject to appeal or review, whichever is later.

Limitation of damages: ILYM is not responsible to the Client for any special, consequential or incidental damages incurred by Client. Any liability of ILYM to the Client shall not exceed the total amount billed to the Client for the particular services that give rise to any loss.

Termination: The services to be provided under this Agreement may be terminated, at will by the Client upon at least 30 calendar days' prior written notice to ILYM. The Client's obligation to pay for services or projects in progress at the time of notice of withdrawal shall continue throughout that 30 day period. ILYM may terminate this Agreement (i) with 10 calendar days' prior written notice, if the Client is not current in payment of charges or (ii) in any event, upon at least 3 months' prior written notice to the Client.

Notice: Any notice required or permitted hereunder shall be in writing and shall be delivered personally, or sent by registered mail, postage prepaid, or overnight courier service to the responsible officer or principal of ILYM or the Client, as applicable, and shall be deemed given when so delivered personally, or, if mailed, five days after the date of deposit in United States mail, or, if sent by courier, one business day after delivery to such courier service.

Force Majeure: To the extent performance by ILYM of any of its obligations hereunder is substantially prevented by reason of any act of God or by reason of any other matter beyond ILYM's reasonable control, then such performance shall be excused and this Agreement, at ILYM's option, be deemed suspended during the continuation of such condition and for a reasonable time thereafter.

Waiver of Rights: No failure or delay on the part of a party in exercising any right hereunder will operate as a waiver of, or impair, any such right. No single or partial exercise of any such right will preclude any other or further exercise thereof or the exercise of any other right. No waiver of any such right will be effective unless given in a signed writing.

Jurisdiction: The parties hereto submit to the jurisdiction of the Court of the applicable case for purposes of any suit, action or proceeding to enforce any provision of, or based on any right arising out of, this Agreement. The parties hereto hereby waive any objection to the laying of venue of any such suit, action or proceeding in the Court.

Entire Agreement: These terms and conditions and the proposal embody the entire agreement between the parties with respect to the subject matter hereof, and cancels and supersedes all prior negotiations, representations, and agreements related thereto, either written or oral, except to the extent they are expressly incorporated herein. No changes in, additions to, or waivers of, the terms and conditions set forth herein will be binding upon any party, unless approved in writing by such party's authorized representative.

EXHIBIT 23

EXHIBIT 24

EXHIBIT 25