

COPY

FILED
Superior Court Of California,
Sacramento

12/13/2021

reahm/gual

By _____, Deputy

Case Number:

34-2021-00306648

1 DAVID G. SPIVAK (SBN 179684)

david@spivaklaw.com

2 MAYA CHEAITANI (SBN 335777)

maya@spivaklaw.com

3 THE SPIVAK LAW FIRM

4 16530 Ventura Blvd., Suite 203

Encino, CA 91436

5 Telephone (213) 725-9094

6 Facsimile (213) 634-2485

7 Attorneys for Plaintiff,

MARIA ELENA DIAZ HERNANDEZ, and all others similarly situated

8 (Additional Attorney for Plaintiff on Following Page)

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **FOR THE COUNTY OF SACRAMENTO**

12 **(UNLIMITED JURISDICTION)**

13 MARIA ELENA DIAZ HERNANDEZ, on
14 behalf of herself, all others similarly situated,
15 and as an "aggrieved employee" on behalf of
other "aggrieved employees" under the Labor
Code Private Attorneys General Act of 2004,

16 *Plaintiff,*

17 vs.

18 GUITRON ALCAZAR ALCAZAR INC., a
19 California corporation doing business as El
20 Tapatio Mexican Cuisine; and DOES 1-50,
inclusive,

21 *Defendants.*

Case No.: 34-2021-00306648

CLASS ACTION

FIRST AMENDED COMPLAINT FOR:

1. Failure to Provide Meal and Rest Periods (Lab. Code §§ 226.7, 512 and 1198);
2. Wage Statement Penalties (Lab. Code § 226);
3. Waiting Time Penalties (Lab. Code §§ 201, 202, and 203);
4. Unfair Competition (Bus. & Prof. Code §§ 17200, et seq.); and
5. Civil Penalties (Lab. Code §§ 2698, et seq.).

JURY TRIAL DEMANDED



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, PC
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, MARIA ELENA DIAZ HERNANDEZ (hereafter “Plaintiff”), on behalf of
2 herself and all others similarly situated, complains and alleges as follows:

3 **INTRODUCTION**

4 1. Plaintiff brings this class and representative action against Defendant GUITRON
5 ALCAZAR ALCAZAR INC., a California corporation doing business as El Tapatio Mexican
6 Cuisine, and DOES 1–50, inclusive (collectively “Defendants”) for alleged violations of the
7 California Labor Code, Industrial Welfare Commission Order No. 5–2001 (hereafter “the Wage
8 Order”), and the Business and Professions Code.

9 2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to her
10 and other similarly situated current and former employees in California for unpaid wages and
11 other related relief. These claims are based on Defendants’ alleged failures to: (1) Provide all
12 meal and rest periods in compliance with California law, (2) Provide accurate and complete
13 itemized written wage statements, (3) Timely pay all final wages upon termination of
14 employment, and (4) Fairly compete. Accordingly, Plaintiff now seeks to recover unpaid wages
15 and related relief through this class action.

16 **JURISDICTION AND VENUE**

17 3. This court has subject matter jurisdiction because the aggregate claims of
18 Plaintiff, inclusive of all relief, place more than \$25,000 in controversy.

19 4. There is no basis for federal question subject matter jurisdiction in this case.
20 Specifically, Plaintiff asserts claims that solely arise under California law, rather than federal
21 law.

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

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

28 **PARTIES**

7. Plaintiff MARIA ELENA DIAZ HERNANDEZ is a resident of California. On
approximately February 28, 2020, Defendants began to employ Plaintiff in Auburn and Citrus
Heights in the position of cook. Defendants continuously employed her in that capacity until on



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 or about November 15, 2020 when her employment ended.

2 8. At all relevant times, Plaintiff was an "employee" within the meaning of Title 8
3 California Code of Regulations § 11050 and an "aggrieved employee" within the meaning of
4 Labor Code § 2699(c).

5 9. Defendant GUITRON ALCAZAR ALCAZAR INC. doing business as El Tapatio
6 Mexican Cuisine is a corporation organized and existing under the laws of California and also a
7 citizen of California based on Plaintiff's information and belief.

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

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

19 12. At all relevant times, in perpetrating the acts and omissions alleged herein,
20 Defendants and each of them acted pursuant to and in furtherance of a policy and/or practice, or
21 lack thereof, which resulted in Defendants not paying Plaintiff and other members of the below-
22 described class in accordance with applicable laws as alleged herein.

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

28 **CLASS ALLEGATIONS**

14. 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



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 is unaware of any difficulties likely to be encountered in managing this case as a class
2 action.

3 15. **Class Definition:** The Class is defined as follows: All individuals currently and
4 formerly employed in California as non-exempt, hourly employees by Defendants, including but
5 not limited to cooks, runners, servers, wait staff, bussers, bartenders, cocktail servers, hosts,
6 dishwashers, and persons in similar positions at any time during the period beginning four years
7 prior to the filing of this action and ending on the date that final judgment is entered in this action
8 (“Class” or “Class Members”).

9 16. **Reservation of Rights:** Pursuant to Rule of Court 3.765(b), Plaintiff reserves the
10 right to amend or modify the class definition with greater specificity, by further division into
11 subclasses and/or by limitation to particular issues.

12 17. **Numerosity:** The Class Members are so numerous that the individual joinder of
13 each individual Class Member is impractical. While Plaintiff does not currently know the exact
14 number of Class Members, Plaintiff is informed and believes that the actual number exceeds the
15 minimum required for numerosity under California laws.

16 18. **Commonality and Predominance:** Common questions of law and fact exist as to
17 all Class Members and predominate over any questions which affect only individual Class
18 Members. These questions include, but are not limited to:

19 A. Whether Defendants failed to provide the Class Members with all meal and
20 rest periods in compliance with California law;

21 B. Whether Defendants knowingly and intentionally failed to provide the
22 Class Members with accurate written wage statements;

23 C. Whether Defendants willfully failed to provide the Class Members with
24 timely final wages upon termination of employment;

25 D. Whether Defendants willfully failed to maintain accurate employment
26 records of the Class Members;

27 E. Whether Defendants engaged in unfair competition within the meaning of
28 Business and Professions Code §§ 17200, et seq., with respect to the Class Members; and

F. Whether Class Members are entitled to restitution of money or property
that Defendants may have acquired from them through alleged Labor Code violations.

19. **Typicality:** Plaintiff’s claims are typical of the other Class Members’ claims.



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 is informed and believes and thereon alleges that Defendants have a policy and/or
2 practice, or lack thereof, which resulted in Defendants failing to comply with the California Labor
3 Code, the Wage Order, and the Business and Professions Code.

4 20. **Adequacy of Class Representative:** Plaintiff is an adequate class representative
5 in that she has no interests that are adverse to, or otherwise in conflict with, the interests of absent
6 Class Members. Plaintiff is dedicated to vigorously prosecuting this action on behalf of Class
7 Members. Plaintiff will fairly and adequately represent and protect the interests of Class
8 Members.

9 21. **Adequacy of Class Counsel:** Plaintiff's counsel are adequate class counsel in that
10 they have no known conflicts of interest with Plaintiff or absent Class Members, are experienced
11 in class action litigation, and are dedicated to vigorously prosecuting this action on behalf of
12 Plaintiff and absent Class Members.

13 22. **Superiority:** A class action is vastly superior to other available means for fair and
14 efficient adjudication of Class Members' claims and would be beneficial to the parties and the
15 Court. Class action treatment will allow a number of similarly situated persons to simultaneously
16 and efficiently prosecute their common claims in a single forum without the unnecessary
17 duplication of effort and expense that numerous individual actions would entail. In addition, the
18 monetary amounts due to many individual Class Members are likely to be relatively small and
19 would thus make it difficult, if not impossible, for individual Class Members to both seek and
20 obtain relief. Moreover, a class action will serve an important public interest by permitting Class
21 Members to effectively pursue the recovery of monies owed to them. Further, a class action will
22 prevent the potential for inconsistent or contradictory judgments inherent in individual litigation.

23 **STATEMENT OF FACTS**

24 23. On approximately February 28, 2020, Defendants began to employ Plaintiff in
25 Auburn and Citrus Heights in the position of cook. Defendants continuously employed her in that
26 capacity until on or about November 15, 2020 when her employment ended.

27 24. At all relevant times, Defendants issued wages to Plaintiff and all of the other Class
28 Members on a biweekly (26 paychecks/year) basis and paid them by the hour. At all relevant
times, Defendants classified Plaintiff and all of the other Class Members as non-exempt
employees entitled to the protections of the Labor Code and the Wage Order.

25 25. At all relevant times, Defendants failed to provide Plaintiff and all of the other



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 Class Members with all timely 30-minute, off-duty meal periods. Defendants required Plaintiff
2 and the Class Members to take their meal periods more than five hours into their work shifts.
3 Defendants also failed to pay premium wages for days on which they failed to provide Plaintiff
4 and all of the other Class Members with meal periods as required by law.

5 26. At all relevant times, Defendants failed to authorize and permit Plaintiff and all of
6 the other Class Members to take ten-minute, off-duty, paid rest breaks every four hours worked
7 or major portion thereof. Defendants denied Plaintiff and the Class Members all duty-free, ten-
8 minute rest breaks. Defendants also failed to pay premium wages for days on which they failed
9 to authorize and permit Plaintiff and all of the other Class Members to take rest breaks as required
by law.

10 27. At all relevant times, Defendants failed to issue to Plaintiff and all of the other
11 Class Members complete and accurate wage statements that state all hours worked at the correct
12 rates of pay, and all wages earned. Defendants knowingly and intentionally failed to state on the
13 wage statements they issued to Plaintiff and all of the other Class Members the unpaid wages
14 discussed above. The wage statements fail to state all meal period premium wages earned, all rest
15 break premium wages earned, the employer's name and address, all hours worked at the correct
16 rates of pay, all minimum wages earned, all regular wages earned, all overtime wages earned, and
all doubletime wages earned.

17 28. Defendants also failed to timely pay Plaintiff and all of the other Class Members
18 all earned wages as described above at the conclusion of employment. Defendants did not issue
19 their final paycheck to Plaintiff until eight days after her employment ended.

20 29. Defendants failed to provide Plaintiff and the Class Members with toilet and
21 storage facilities, change rooms, and acceptable work temperatures.

22 30. Defendants failed to maintain accurate employee records of Plaintiff and all of the
23 other Class Members.

FIRST CAUSE OF ACTION

FAILURE TO PROVIDE REST BREAKS AND MEAL PERIODS

(Lab. Code §§ 226.7, 512, and 1198)

(By Plaintiff and the Class against all Defendants)

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

28 32. At all relevant times during the applicable limitations period, Plaintiff and 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 Class Members have been employees of Defendants and entitled to the benefits and protections
2 of California Labor Code §§ 226.7, 512, 1198, and the Wage Order.

3 33. In relevant part, California Labor Code § 1198 states:

4 The maximum hours of work and the standard conditions of labor
5 fixed by the commission shall be the maximum hours of work and
6 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.

7 34. In relevant part, California Labor Code § 512 states:

8
9 An employer shall not employ an employee for a work period of
10 more than five hours per day without providing the employee with
11 a meal period of not less than 30 minutes, except that if the total
12 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.

13 An employer shall not employ an employee for a work period of
14 more than 10 hours per day without providing the employee with
15 a second meal period of not less than 30 minutes, except that if the
16 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.

17 35. In relevant part, § 12 of the Wage Order states:

18 **Rest Periods**

19
20 (A) “Every employer shall authorize and permit all employees
21 to take rest periods, which insofar as practicable shall be in the
22 middle of each work period. The authorized rest period time shall
23 be based on the total hours worked daily at the rate of ten (10)
24 minutes net rest time per four (4) hours or major fraction thereof.
25 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)
26 hours. Authorized rest period time shall be counted as hours
27 worked for which there shall be no deduction from wages.”

28 (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.”



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 36. In relevant part, § 11 of the Wage Order states:

2 **Meal Periods**

3 (A) “No employer shall employ any person for a work period
4 of more than five (5) hours without a meal period of not less than
5 30 minutes, except that when a work period of not more than six
6 (6) hours will complete the day’s work the meal period may be
7 waived by mutual consent of the employee and the employer.
8 Unless the employee is relieved of all duty during a 30-minute
9 meal period, the meal period shall be considered an ‘on duty’ meal
10 period and counted as time worked. An ‘on duty’ meal period shall
11 be permitted only when the nature of the work prevents an
12 employee from being relieved of all duty and when by written
13 agreement between the parties an on-the-job paid meal period is
14 agreed to. The written agreement shall state that the employee
15 may, in writing, revoke the agreement at any time.”

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

21 37. In relevant part, California Labor Code § 226.7 states:

22 (b) An employer shall not require an employee to work during
23 a meal or rest period mandated pursuant to an applicable statute,
24 or applicable regulation, standard, or order of the Industrial
25 Welfare Commission, the Occupational Safety and Health
26 Standards Board, or the Division of Occupational Safety and
27 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.

38. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff 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



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 a second 30-minute meal period when they worked more than 10 hours in a workday.

2 39. Pursuant to the Wage Order, Plaintiff and the Class Members were entitled to be
3 provided with net rest breaks of at least ten minutes for each four-hour period of work, or major
4 fraction thereof.

5 40. Defendants intentionally failed to provide Plaintiff and the Class Members with
6 all required 30-minute duty-free meal periods and 10-minute rest periods free from any work
7 duties in accordance with the Wage Order.

8 41. At all relevant times, Defendants failed to provide Plaintiff and all of the other
9 Class Members with all timely meal periods. Defendants denied Plaintiff and all of the other
10 Class Members their 30-minute off-duty meal period within the first five hours of work.
11 Defendants required the Plaintiff and the Class Members to take their meal periods more than
12 five hours into their work shifts. Furthermore, Defendants failed to pay premium wages for days
13 on which they failed to provide Plaintiff and all of the other Class Members with timely meal
14 periods.

15 42. At all relevant times, Defendants failed to authorize and permit Plaintiff and all
16 of the other Class Members to take ten-minute, paid, duty-free rest breaks every four hours
17 worked or major fraction thereof. Defendants did not seek an exemption from the rest period
18 protections of the Wage Order from the California Division of Labor Standards Enforcement.
19 Defendants denied Plaintiff and the Class Members all duty-free, ten-minute rest breaks.
20 Moreover, Defendants failed to pay Plaintiff and all of the other Class Members premium wages
21 on workdays Defendants failed to provide Plaintiff and all of the other Class Members with 10-
22 minute rest periods every four hours worked or major fraction thereof.

23 43. Plaintiff is informed and believes and thereon alleges that, at all relevant times
24 within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy
25 which resulted in Defendants not providing the Class with all off-duty meal periods and rest
26 breaks required by California law.

27 44. As a result of Defendants' unlawful conduct, Plaintiff and the Class Members
28 have suffered damages in an amount, subject to proof, to the extent they were not paid additional
wages owed for all meal periods and rest breaks not provided to them.

45. By reason of the above, pursuant to California Labor Code § 226.7, Plaintiff and
the Class Members are entitled to premium wages for workdays in which one or more off-duty



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 periods were not provided to them, and for workdays in which one or more rest breaks were
2 not provided to them.

3 **SECOND CAUSE OF ACTION**

4 **FAILURE TO PROVIDE ACCURATE WRITTEN WAGE STATEMENTS**

5 **(Lab. Code § 226)**

6 **(By Plaintiff and the Class against all Defendants)**

7 46. Plaintiff incorporates all paragraphs of the Complaint as if fully alleged herein.

8 47. At all relevant times during the applicable limitations period, Plaintiff and the
9 other Class Members have been employees of Defendants and entitled to the benefits and
10 protections of California Labor Code § 226.

11 48. Pursuant to California Labor Code § 226(a), Plaintiff and the other Class Members
12 were entitled to receive, bi-weekly or at the time of each payment of wages, an accurate itemized
13 statement showing:

14 (1) Gross wages earned,

15 (2) Total hours worked by the employee, except for any employee whose
16 compensation is solely based on a salary and who is exempt from payment of overtime under
17 subdivision (a) of § 515 or any applicable order of the Industrial Welfare Commission,

18 (3) The number of piece rate units earned and any applicable piece rate if the
19 employee is paid on a piece-rate basis,

20 (4) All deductions, provided that all deductions made on written orders of the
21 employee may be aggregated and shown as one item,

22 (5) Net wages earned,

23 (6) The inclusive dates of the period for which the employee is paid,

24 (7) The name of the employee and his or her social security number, except
25 that by January 1, 2008, only the last four digits of his or her social security number or an
26 employee identification number other than a social security number may be shown on the itemized
27 statement,

28 (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.

49. Pursuant to California Labor Code § 226(e), an employee suffering injury as a



1 result of a knowing and intentional failure by an employer to comply with subdivision (a) is
2 entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period
3 in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a
4 subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and
5 is entitled to an award of costs and reasonable attorneys' fees.

6 50. Pursuant to California Labor Code § 226(e), an employee is deemed to suffer
7 injury if the employer fails to provide a wage statement. Also, an employee is deemed to suffer
8 injury if the employer fails to provide accurate and complete information as required by California
9 Labor Code § 226(a) and the employee cannot "promptly and easily determine" from the wage
10 statement alone one or more of the following:

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

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

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

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

21 51. "Promptly and easily determine," as stated in California Labor Code § 226(e),
22 means a reasonable person would be able to readily ascertain the information without reference
23 to other documents or information.

24 52. As alleged herein, at all relevant times during the applicable limitations
25 period, **[FIX THE JUSTIFICATION ON RIGHT SIDE.]** Defendants violated Labor Code
26 § 226 because they did not properly and accurately itemize each Aggrieved Employee's gross
27 wages earned, net wages earned, the total hours worked, the corresponding number of hours
28 worked at each rate by the Aggrieved Employee and other requirements of Labor Code § 226.
Defendants failed to state in the wage statements they issued to Plaintiff and all of the other Class
Members all their hours worked and wages earned, including, but not limited to, regular and
overtime wages for work they performed off-the-clock after clocking-out. Defendants knowingly



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 and intentionally failed to state on the wage statements they issued to Plaintiff and all of the other
2 Class Members the earned but unpaid wages described above. The wage statements do not state
3 all meal period premium wages earned, all rest break premium wages earned, the employer's
4 name and address, all hours worked at the correct rates of pay, all minimum wages earned, all
5 regular wages earned, all overtime wages earned, and all doubletime wages earned. Defendants
6 issued wage statements to Plaintiff and the Class Members that do not state the correct name and
7 address of the employer. As a result, Defendants have violated California Labor Code § 226.

8 53. Defendants' failure to provide Plaintiff and the other Class Members with accurate
9 wage statements was knowing and intentional. Defendants had the ability to provide Plaintiff and
10 the other Class Members with accurate wage statements but intentionally provided wage
11 statements that Defendants knew were not accurate.

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

22 55. Pursuant to California Labor Code § 226(e), Plaintiff and the other Class Members
23 are entitled to recover the greater of actual damages, or penalties of fifty dollars (\$50) for the
24 initial pay period in which a violation of California Labor Code § 226(a) occurred and one
25 hundred dollars for each violation of California Labor Code § 226(a) in a subsequent pay period,
26 not to exceed an aggregate penalty of four thousand dollars (\$4,000) per Class Member, and are
27 also entitled to an award of costs and reasonable attorneys' fees.

28 56. Accordingly, with respect to this cause of action, on behalf of herself and the other
Class Members, Plaintiff prays for the herein stated relief and for an award of all reasonable costs
and attorneys' fees, including interest thereon, as permitted by law, all in amounts subject to
proof.



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

1 **THIRD CAUSE OF ACTION**

2 **WAITING TIME PENALTIES**

3 **(Lab. Code §§ 201, 202, and 203)**

4 **(By Plaintiff and the Class against all Defendants)**

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

6 58. At all relevant times during the applicable limitations period, Plaintiff and the
7 Class have been non-exempt employees of Defendants and entitled to the benefits and
8 protections of California Labor Code §§ 201–203, and the Wage Order.

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

11 60. Labor Code § 202 provides that all earned and unpaid wages of an employee who
12 quits after providing at least 72-hours notice before quitting are due and payable at the time of
13 quitting and that all earned and unpaid wages of an employee who quits without providing at
14 least 72-hours notice before quitting are due and payable within 72 hours.

15 61. By failing to pay earned minimum and premium wages to Plaintiff and the Class,
16 Defendants failed to timely pay them all earned and unpaid wages in violation of Labor Code
17 § 201 or § 202.

18 62. Plaintiff is informed and believes that Defendants' failures to timely pay all final
19 wages to her and the Class Members have been willful in that Defendants have the ability to pay
20 final wages in accordance with Labor Code §§ 201, and 202 but have intentionally adopted
21 policies or practice that are incompatible with those requirements.

22 63. Labor Code § 203 provides that the wages of an employee continue on a daily
23 basis as a penalty for up to 30 days where an employer willfully fails to timely pay earned and
24 unpaid wages to the employee in accordance with Labor Code § 201, or § 202.

25 64. Defendants failed to pay Plaintiff and all of the other Class Members whose
26 employment ended all of the earned but unpaid wages described above by the conclusion of their
27 employment with Plaintiff, including unprovided meal period premium wages, unprovided rest
28 break premium wages, minimum wages, regular wages, overtime wages, doubletime wages.
Additionally, Defendants failed to issue to Plaintiff and all of the other Class Members whose
employment ended their final paychecks until the next regular pay day following the termination.
Plaintiff had to wait eight days following her termination for her last paycheck.



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

65. Plaintiff is informed and believes that Defendants' failures to weekly and timely pay Plaintiff and the Class 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.

66. Pursuant to Labor Code § 203, Plaintiff seeks waiting time penalties on behalf of herself and the Class, in amounts subject to proof not to exceed 30 days of waiting time penalties for each Class Member.

FOURTH CAUSE OF ACTION

UNFAIR COMPETITION

(Bus. & Prof. Code §§ 17200, et seq.)

(By Plaintiff and the Class against all Defendants)

67. Plaintiff incorporates all paragraphs of the Complaint as if fully alleged herein.

68. At all relevant times during the applicable limitations period, Plaintiff and the other Class Members have been employees of Defendants and entitled to the benefits and protections of the Business and Professions Code §§ 17200, et seq.

69. The unlawful conduct of Defendants alleged herein amounts to and constitutes unfair competition within the meaning of California Business & Professions Code §§ 17200, et seq. Due to their unfair and unlawful business practices as alleged herein, Defendants have unfairly gained a competitive advantage over other comparable companies doing business in California that comply with their legal obligations to, among other things, pay their employees premium wages for workdays in which they did not provide employees with one or more meal and rest periods.

70. As a result of Defendants' unfair competition as herein alleged, Plaintiff and the other Class Members have suffered injuries in fact and lost money or property. Defendants deprived Plaintiff and the other Class Members of premium wages for workdays in which they did not provide employees with one or more meal and rest periods.

71. Pursuant to California Business & Professions Code § 17203, Plaintiff and the other Class Members are entitled to restitution of all monies rightfully belonging to them that Defendants did not pay them, or that Defendants otherwise retained by means of their unlawful and unfair business practices.



72. Plaintiff 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.

FIFTH CAUSE OF ACTION

CIVIL PENALTIES

(By Plaintiff and the Class against all Defendants)

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

74. The "Aggrieved Employees" are all members of the Class defined above who Defendants employed during the period beginning August 26, 2020, and ending on the date that final judgment is entered in this action.

75. 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.

76. 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 Plaintiff on such intervals for all wages earned and all hours worked. On
2 information and belief, Plaintiff alleges that Defendants also failed to pay the Aggrieved
3 Employees on such intervals for all wages earned and all hours worked.

4 77. During the applicable time period, Defendants violated California Labor Code §§
5 201, 202, 203, 204, 226, 226.7, 512, 1174, 1198, and 2350.

6 78. 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 79. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff and the Class are
10 entitled to recover civil penalties for each of the Defendants' violations of California Labor Code
11 §§ 201, 202, 203, 204, 226, 226.7, 512, 1174, 1198, and 2350 during the applicable limitations
12 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 § 512, fifty dollars (\$50.00) for
22 each Aggrieved Employee for initial violation and one hundred dollars (\$100.00) for each
23 Aggrieved Employee for each subsequent violation, per pay period (penalty amounts established
24 by California Labor Code § 558).

25 D. For violations of California Labor Code § 1174, five hundred dollars
26 (\$500.00) for each Aggrieved Employee for each violation of Labor Code § 1174 (penalty
27 amounts established by Labor Code § 1174.5).

28 E. For violations of California Labor Code §§ 201, 202, 203, 226.7, 1198
and 2350, 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 §



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

2699(f)(2)).

80. Plaintiff has complied with the procedures for bringing suit specified in California Labor Code § 2699.3. By letter dated August 26, 2021, Plaintiff filed written notice online with the Labor and Workforce Development Agency (“LWDA”) and gave written notice by certified mail to 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 the notice to the LWDA dated August 26, 2021 is attached as Exhibit A. Plaintiff accompanied her LWDA notice with a fee in the amount of \$75.00. The LWDA has failed to take action in response within 65 calendar days of the date of Plaintiff’s notice, but Plaintiff anticipates that the LWDA will provide written notice to Plaintiff informing her that it does not intend to investigate these allegations.

81. 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.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, prays for relief and judgment against Defendants as follows:

- A. An order that the action be certified as a class action;
- B. An order that Plaintiff be appointed class representative;
- C. An order that counsel for Plaintiff be appointed class counsel;
- D. Unpaid Wages;
- E. Actual Damages;
- F. Statutory Damages;
- G. Liquidated Damages;
- H. Civil Penalties;
- I. Restitution;
- J. Declaratory and injunctive relief;
- K. Equitable relief;
- L. Pre-judgment interest;
- M. Statutory penalties;
- N. Costs of suit;



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(213) 725-9094 Tel
(213) 634-2485 Fax
SpivakLaw.com

- O. Interest;
P. Reasonable attorneys' fees; and
Q. Such other relief as the Court deems just and proper.

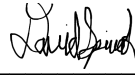
DEMAND FOR JURY TRIAL

Plaintiff, on behalf of herself and all others similarly situated, hereby demands a jury trial on all issues so triable.

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: December 10, 2021

By 

DAVID SPIVAK,
MAYA CHEAITANI,
Attorneys for Plaintiff, MARIA ELENA DIAZ
HERNANDEZ, 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, CERTIFIED MAIL, AND EMAIL

August 26, 2021

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

Re: Maria Elena Diaz Hernandez / El Tapatio

To Whom It May Concern:

Pursuant to the Labor Code Private Attorneys General Act of 2004, Labor Code sections 2698, *et seq.*, Maria Elena Diaz Hernandez (hereafter “Diaz Hernandez” or “Complainant”) provides notice that Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine, a California corporation, and related entities (collectively “the El Tapatio Employers” or “the Employers”) violated her rights and those of all other individuals the El Tapatio Employers have employed or otherwise contracted with in California as cooks, runners, servers, wait staff, bussers, bartenders, cocktail servers, hosts, dishwashers, individuals performing work comparable to the aforementioned, and individuals in similar positions (hereafter the “Aggrieved Employees”) under Labor Code sections 201, 202, 203, 204, 226, 226.7, 512, 1174, and 1198. On behalf of herself and all other Aggrieved Employees, Diaz Hernandez hereby provides this notice to the Labor & Workforce Development Agency and the El Tapatio Employers and their agents and representatives.

///

///

///

At all relevant times, the El Tapatio Employers have employed persons, conducted business, and engaged in illegal payroll practices and policies, throughout California. Diaz Hernandez and all of the other Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission Order No. 5-2001 (hereafter “the Wage Order”) section 2, subdivision (F) and “Aggrieved Employees” within the meaning of Labor Code section 2699(c).

Statement of Facts

On approximately February 28, 2020, the El Tapatio Employers began to employ Diaz Hernandez in Auburn and Citrus Heights in the position of cook. The El Tapatio Employers continuously employed her in that capacity until on or about November 15, 2020 when her employment ended.

At all relevant times, the El Tapatio Employers issued wages to Diaz Hernandez and all of the other Aggrieved Employees on a biweekly (26 paychecks/year) basis and paid them by the hour. At all relevant times, the El Tapatio Employers classified Diaz Hernandez and all of the other Aggrieved Employees as non-exempt employees entitled to the protections of the Labor Code and the Wage Order.

At all relevant times, the El Tapatio Employers failed to provide Diaz Hernandez and all of the other Aggrieved Employees with all timely 30-minute, off-duty meal periods. The El Tapatio Employers required the Diaz Hernandez and the Aggrieved Employees to take their meal periods more than five hours into their work shifts. The El Tapatio Employers also failed to pay premium wages for days on which it failed to provide Diaz Hernandez and all of the other Aggrieved Employees with meal periods as required by law.

At all relevant times, the El Tapatio Employers failed to authorize and permit Diaz Hernandez and all of the other Aggrieved Employees to take ten-minute, off-duty, paid rest breaks every four hours worked or major portion thereof. The El Tapatio Employers denied Diaz Hernandez and the Aggrieved Employees all duty-free, ten-minute rest breaks. The El Tapatio Employers also failed to pay premium wages for days on which it failed to authorize and permit Diaz

Hernandez and all of the other Aggrieved Employees to take rest breaks as required by law.

At all relevant times, the El Tapatio Employers failed to issue to Diaz Hernandez and all of the other Aggrieved Employees complete and accurate wage statements that state all hours worked at the correct rates of pay, and all wages earned. The El Tapatio Employers knowingly and intentionally failed to state on the wage statements they issued to Diaz Hernandez and all of the other Aggrieved Employees the unpaid wages discussed above. The wage statements fail to state all meal period premium wages earned, all rest break premium wages earned, the employer's name and address, all hours worked at the correct rates of pay, all minimum wages earned, all regular wages earned, all overtime wages earned, and all doubletime wages earned.

The El Tapatio Employers also failed to timely pay Diaz Hernandez and all of the other Aggrieved Employees all earned wages as described above during and at the conclusion of employment. The El Tapatio Employers did not issue their final paycheck to Diaz Hernandez until two weeks after her employment ended.

The El Tapatio Employers failed to provide Diaz Hernandez and all of the other Aggrieved Employees with toilet and storage facilities, change rooms, and acceptable work temperatures.

The El Tapatio Employers failed to maintain accurate employee records of Diaz Hernandez and all of the other Aggrieved Employees.

For the reasons stated herein, Diaz Hernandez alleges the following violations of the Labor Code and the Wage Order on behalf of herself and all of the other Aggrieved Employees:

- (a) The El Tapatio Employers failed to provide Diaz Hernandez and all of the other Aggrieved Employees all meal periods in compliance with California law;

- (b) The El Tapatio Employers failed to authorize and permit Diaz Hernandez and all of the other Aggrieved Employees to take rest breaks in compliance with California law;
- (c) The El Tapatio Employers failed to compensate Diaz Hernandez and all of the other Aggrieved Employees at one hour's pay for each day in which the El Tapatio Employers failed to provide them with one or more meal periods as required by law;
- (d) The El Tapatio Employers failed to compensate Diaz Hernandez and all of the other Aggrieved Employees at one hour's pay for each day in which the El Tapatio Employers failed to authorize and permit them to take one or more rest breaks as required by law;
- (e) The El Tapatio Employers knowingly and intentionally failed to provide Diaz Hernandez and all of the other Aggrieved Employees with accurate wage statements;
- (f) The El Tapatio Employers willfully failed to timely pay Diaz Hernandez and all of the other Aggrieved Employees all earned and unpaid wages during their employment with the El Tapatio Employers and when their employment ended;
- (g) The El Tapatio Employers failed to provide Diaz Hernandez and all of the other Aggrieved Employees with toilet and storage facilities, change rooms, and acceptable work temperatures; and
- (h) The El Tapatio Employers failed to maintain accurate employment records pertaining to Diaz Hernandez and all of the other Aggrieved Employees.

Accordingly, Diaz Hernandez now seeks civil penalties on behalf of herself and all of the other Aggrieved Employees based on the El Tapatio Employers' alleged violations of the Labor Code and the Wage Order.

The Wage Order

The Wage Order applies to “all persons employed in the public housekeeping industry whether paid on a time, piece rate, commission, or other basis.” Wage Order, § 1. The Wage Order defines "Public Housekeeping Industry" to mean

any industry, business, or establishment which provides meals, housing, or maintenance services whether operated as a primary business or when incidental to other operations in an establishment not covered by an industry order of the Commission, and includes, but is not limited to the following:

- (1) Restaurants, night clubs, taverns, bars, cocktail lounges, lunch counters, cafeterias, boarding houses, clubs, and all similar establishments where food in either sold or liquid form is prepared and served to be consumed on the premises;
- (2) Catering, banquet, box lunch service, and similar establishments which prepare food for consumption on or off the premises;
- (3) Hotels, motels, apartment houses, rooming houses, camps, clubs, trailer parks, office or loft buildings, and similar establishments offering rental of living, business, or commercial quarters;
- (4) Hospitals, sanitariums, rest homes, child nurseries, child care institutions, homes for the aged, and similar establishments offering board or lodging in addition to medical, surgical, nursing, convalescent, aged, or child care;
- (5) Private schools, colleges, or universities, and similar establishments which provide board or lodging in addition to educational facilities;

///

- (6) Establishments contracting for development, maintenance or cleaning of grounds; maintenance or cleaning of facilities and/or quarters of commercial units and living units; and
- (7) Establishments providing veterinary or other animal care services.

Wage Order, § 2(P). At all relevant times during the applicable limitations period, the El Tapatio Employers, Diaz Hernandez, and all of the Aggrieved Employees were covered by the Wage Order because the El Tapatio Employers operated, and Diaz Hernandez, and all of the Aggrieved Employees, worked for one or more restaurants. Accordingly, Diaz Hernandez and all of the other Aggrieved Employees are entitled to the protections the Wage Order provides.

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

In relevant part, section 2(K) of the Wage Order states,

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

In relevant part, Labor Code section 1198 states, “The employment of any employee ... under conditions of labor prohibited by the [Wage Order] is unlawful.”

In relevant part, Labor Code section 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 not 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. 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. . . .
- (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 workday that the meal period is not provided.

In addition, Labor Code section 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.

At all relevant times, the El Tapatio Employers failed to provide Diaz Hernandez and all of the other Aggrieved Employees with all timely meal periods. The El Tapatio Employers denied Diaz Hernandez and all of the other Aggrieved Employees their 30-minute off-duty meal period within the first five hours of work. The El Tapatio Employers required the Diaz Hernandez and the Aggrieved Employees to take their meal periods more than five hours into their work shifts. Furthermore, the El Tapatio Employers failed to pay premium wages for days on which they failed to provide Diaz Hernandez and all of the other Aggrieved Employees with timely meal periods. Accordingly, Diaz Hernandez now seeks civil penalties for these Labor Code violations that the El Tapatio Employers have committed against her and all of the other Aggrieved Employees as follows:

1. \$100 for each aggrieved employee for each initial violation of Labor Code section 226.7, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code section 2699(f)(2));
2. \$50 for each aggrieved employee for each initial violation of Labor Code section 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 Labor Code section 558); and

3. \$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(f)(2)).

Failure to Authorize and Permit Rest Periods
(Lab. Code §§ 226.7 & 1198)

Section 2(K) of the Wage Order states,

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

In relevant part, Labor Code section 1198 states,

The employment of any employee . . . under conditions of labor prohibited by the [Wage Order] is unlawful.

Section 12 of the Wage Order provides, in relevant part:

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 ½) 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 workday that the rest period is not provided.

In addition, Labor Code section 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.

The El Tapatio Employers failed to authorize and permit Diaz Hernandez and all of the other Aggrieved Employees to take ten-minute, paid, duty-free rest breaks every four hours worked or major fraction thereof. The El Tapatio Employers did not seek an exemption from the rest period protections of the Wage Order from the California Division of Labor Standards Enforcement. The El Tapatio Employers denied Diaz Hernandez and the Aggrieved Employees all duty-free, ten-minute rest breaks. Moreover, the El Tapatio Employers failed to pay Diaz Hernandez and all of the other Aggrieved Employees premium wages on workdays the El Tapatio Employers failed to provide Diaz Hernandez and all of the other Aggrieved Employees with 10-minute rest periods every four hours

worked or major fraction thereof. Accordingly, Diaz Hernandez now seeks civil penalties for these Labor Code violations that the El Tapatio Employers have committed against her and all of the other Aggrieved Employees as follows:

1. \$100 for each aggrieved employee for each initial violation of Labor Code section 226.7, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code section 2699(f)(2)); 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(f)(2)).

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

Labor Code section 226(a) requires an employer to provide an employee, either semi-monthly or at the time of each wage payment, with an accurate and itemized written wage statement that shows:

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 all relevant times during the applicable limitations period, the El Tapatio Employers violated Labor Code section 226 because they did not 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 Labor Code section 226. The El Tapatio Employers failed to state in the wage statements they issued to Diaz Hernandez and all of the other Aggrieved Employees all their hours worked and wages earned, including, but not limited to, regular and overtime wages for work they performed off-the-clock after clocking-out (as described above). The El Tapatio Employers knowingly and intentionally failed to state on the wage statements they issued to Diaz Hernandez and all of the other Aggrieved Employees the earned but unpaid wages described above. The wage statements do not state all meal period premium wages earned, all rest break premium wages earned, the employer's name and address, all hours worked at the correct rates of pay, all minimum wages earned, all regular wages earned, all overtime wages earned, and all doubletime wages earned. The El Tapatio Employers issued wage statements to Diaz Hernandez and the Aggrieved Employees that do not state the correct name and address of the employer.

Accordingly, Diaz Hernandez seeks civil penalties for the Labor Code violations that the El Tapatio Employers have committed against her and all of the other

Aggrieved Employees as follows: \$250 for each aggrieved employee for each initial violation of Labor Code section 226(a), and \$1,000 for each aggrieved employee for each subsequent violation (penalties set by Labor Code section 226.3).

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

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

The El Tapatio Employers failed to compensate Diaz Hernandez and all of the other Aggrieved Employees for wages earned, including unprovided meal period premium wages, unprovided rest break premium wages, minimum wages, regular wages, overtime wages, and doubletime wages, at the intervals stated above. As a result, the El Tapatio Employers failed to timely pay all earned wages due during employment within the time periods set by Labor Code section 204. Accordingly, Diaz Hernandez now seeks civil penalties for the Labor Code violations that the El Tapatio Employers have committed against her and all of the other Aggrieved Employees as follows: \$100 for each aggrieved employee for each initial violation of Labor Code section 204, and \$200 for each aggrieved employee for each subsequent violation, plus 25% of the amount unlawfully withheld from each aggrieved employee (penalties set by Labor Code section 210).

///

Failure to Timely Pay Wages Upon Termination of Employment
(Lab. Code §§ 201-203)

Under Labor Code § 2019, 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 with §§ 201 and 202, the 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.

The El Tapatio Employers failed to pay Diaz Hernandez and all of the other Aggrieved Employees whose employment ended all of the earned but unpaid wages described above by the conclusion of their employment with Diaz Hernandez, including unprovided meal period premium wages, unprovided rest break premium wages, minimum wages, regular wages, overtime wages, doubletime wages. Additionally, the El Tapatio Employers failed to issue to Diaz Hernandez and all of the other Aggrieved Employees whose employment ended their final paychecks until the next regular pay day following the termination. Diaz Hernandez had to wait eight days following her termination for her last paycheck. By failing to pay Diaz Hernandez and all of the other Aggrieved Employees as set forth above at the end of employment, the El Tapatio Employers are liable for violations of Labor Code §§ 201, 202, and 203.

Accordingly, on behalf of herself and all of the other Aggrieved Employees, Diaz Hernandez seeks civil penalties from the El Tapatio Employers 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 for per aggrieved employee per pay period in which subsequent violations of § 203 occurred (penalties set by Labor Code § 2699(f)(2)).

Failure to Provide Toilet and Storage Facilities, Lockers, Change Rooms, and Acceptable Work Temperatures
(Lab. Code §§ 1198 and 2350)

Labor Code § 2350 states,

Every factory, workshop, mercantile or other establishment in which one or more persons are employed, shall be kept clean and free from the effluvia arising from any drain or other nuisance, and shall be provided, within reasonable access, with a sufficient number of toilet facilities for the use of the employees. When there are five or more employees who are not all of the same gender, a sufficient number of separate toilet facilities shall be provided for the use of each sex, which shall be plainly so designated.

Section 13 of Wage Order states,

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean.

NOTE: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

Section 15 of Wage Order states,

...

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

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

Throughout the relevant time period, the El Tapatio Employers failed to provide any toilet facilities for use by Diaz Hernandez and all of the other Aggrieved Employees within reasonable access. Accordingly, on behalf of herself and aggrieved employees, Diaz Hernandez demands that the El Tapatio Employers cure the violations of Labor Code § 2350 and provide sufficient toilets to all aggrieved employees. The El Tapatio Employers also failed to provide lockers, closets, storage facilities, and changing rooms for use by Diaz Hernandez and all of the other Aggrieved Employees. Moreover, the El Tapatio Employers failed

to provide acceptable temperatures for the work areas it expected Diaz Hernandez and all of the other Aggrieved Employees to perform their job duties in. If within 33 days of this notice, the El Tapatio Employers fail to notify my office in writing by certified mail that they have cured the violations of Labor Code § 2350 and the Wage Order mentioned above, Diaz Hernandez, on behalf of herself and all of the other Aggrieved Employees, will commence a civil action and seek civil penalties from the El Tapatio Employers as follows:

1. \$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)); and
2. \$100 for each aggrieved employee for each initial violation of California Labor Code § 2350, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174 & 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 Wage Order states,

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

- (1) Full name, home address, occupation and social security number.
- (2) Birth date, if under 18 years, and designation as a minor.
- (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
- (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the Employee.

- (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
- (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

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

The El Tapatio Employers failed to compensate Diaz Hernandez and all of the other Aggrieved Employees for all hours worked at the correct rates of pay, including all meal period premium wages earned, all rest break premium wages earned, the employer's name and address, all hours worked at the correct rates of pay, all minimum wages earned, all regular wages earned, all overtime wages earned, and all doubletime wages earned. As a result, the El Tapatio Employers have failed to accurately maintain all records required by section 1174 and the Wage Order, including but not limited to Diaz Hernandez and all of the other Aggrieved Employees' total hours worked, total wages paid, and applicable hourly rates during each payroll period. Accordingly, Diaz Hernandez seeks civil penalties on behalf of herself and all of 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(f)(2)).

Conclusion

As noted above, this letter constitutes the required notice under the Labor Code Private Attorneys General Act of 2004. Please be advised that Maria Elena Diaz Hernandez will seek both reasonable attorneys' fees and costs under Labor Code section 2699(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: Maria Elena Diaz Hernandez
Walter L. Haines Esq.

Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine
c/o Laura C. McHugh Esq.
Dugan McHugh Law Corporation
641 Fulton Ave
Ste 100
Sacramento, CA 95825

Efren Guitron Mora
c/o El Tapatio Mexican Cuisine
5637 Sunrise Blvd.
Citrus Heights, CA 95610

PROOF OF SERVICE

State of California,
County of Los Angeles

1. I am a citizen of the United States and am employed in the County 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.

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.

On Friday, December 10, 2021, I served the foregoing document described as **FIRST AMENDED COMPLAINT** on interested parties by placing a true and correct copy thereof enclosed in a sealed envelope, with postage fully prepaid, addressed as follows:

Laura McHugh, Esq.
Duggan McHugh Law Corporation
641 Fulton Avenue, Suite 100
Sacramento, CA 95825
laura@dugganmchugh.com
consuelo@dugganmchugh.com

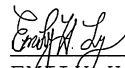
____ (BY MAIL) I caused such an envelope to be mailed by placing it for collection and mailing, in the course of ordinary business practice, with other correspondence of The Spivak Law Firm, 16530 Ventura Blvd., Suite 203, Encino, California 91436.

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.

EXECUTED on Friday, December 10, 2021, at Los Angeles, California.

XXXX (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

____ (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