

1 DAVID G. SPIVAK (SBN 179684)

david@spivaklaw.com

2 MAYA CHEAITANI (SBN 335777)

maya@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 MARIA ELENA DIAZ HERNANDEZ, and all others similarly situated

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

10 **FOR THE COUNTY OF SACRAMENTO**

11 **(UNLIMITED JURISDICTION)**

12
13 MARIA ELENA DIAZ HERNANDEZ, on
14 behalf of herself, all others similarly situated, the
15 general public, and as an “aggrieved employee”
16 on behalf of other “aggrieved employees” under
the Labor Code Private Attorneys General Act of
2004,

17 *Plaintiff(s),*

18 vs.

19 GUITRON ALCAZAR ALCAZAR INC., a
20 California corporation doing business as El
21 Tapatio Mexican Cuisine; GUITRON
22 ALCAZAR III, INC, a California corporation;
23 GUITRON ALCAZAR IV, LLC, a California
limited liability company; and DOES 3–50,
inclusive,

24 *Defendant(s).*

Case No. 34-2021-00306648

**DECLARATION OF DAVID SPIVAK
IN SUPPORT OF PLAINTIFF MARIA
ELENA DIAZ HERNANDEZ’S
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing Date: March 1, 2024

Hearing Time: 9:00 a.m.

Reservation No: A-306648-001

Hearing Dept.: 22, The Honorable
Lauri A. Damrell

Action filed: August 23, 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),

MARIA ELENA DIAZ HERNANDEZ, 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

DECLARATION OF DAVID SPIVAK IN SUPPORT OF PLAINTIFF MARIA ELENA DIAZ HERNANDEZ'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

I, DAVID SPIVAK, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California and am an attorney of record for Plaintiff Maria Elena Diaz Hernandez ("Plaintiff") in her lawsuit against Defendants Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine, Guitron Alcazar III Inc., and Guitron Alcazar IV, LLC (collectively "Defendants"). Plaintiff and Defendants are collectively referred to as the "Parties."

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

3. The Class Action and PAGA Settlement Agreement and Class Notice (the "Settlement") is attached hereto as **Exhibit 1**. The Settlement Class consists of all persons employed by Defendants in California and classified as non-exempt, hourly employees who worked for Defendants during the Class Period. The "Class Period" means the period from August 23, 2017 through the date of the order preliminarily approving the Settlement. *Id.* The "Aggrieved Employees" are all Class Members who worked for Defendants during the PAGA Period. The "PAGA Pay Period" begins August 26, 2020 and ends September 19, 2023. *Id.* The Settlement is written, signed by all necessary Parties, and attached to this declaration as stated above.

The Release Provisions

4. **Released Persons.** Under the Settlement, the release to be given by the Class Members (other than the Class representative) is limited to Defendants named in the Operative Complaint, together with their former and present directors, officers, shareholders, owners, agents, employees, members, attorneys, insurers, predecessors, successors, assigns subsidiaries, and affiliates. Settlement, ¶ 1.41.

5. **Released Claims.** Under the Settlement, the release to be given by the Class Members (other than the Class representative) is limited to the claim stated in the Operative Complaint, and those based solely upon the facts alleged in the Operative Complaint. Settlement, ¶ 6.

6. **Release Period.** Under the Settlement, the release to be given by the Class Members (other than the Class representative) is limited to liability that arose during the Class Period. See above. Settlement, ¶ 1.12.



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 7. **PAGA Release.** Under the Settlement, Plaintiff releases all claims for civil
2 penalties that could have been sought by the Labor Commissioner for the violations identified
3 in Plaintiff's pre-filing letter to the LWDA; Plaintiff does not release the claim for wages or
4 damages of any Aggrieved Employee unless such Aggrieved Employee is a Class Member. The
5 PAGA Release states as follows: All Non-Participating Class Members who are Aggrieved
6 Employees are deemed to release, on behalf of themselves and their respective former and present
7 representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released
8 Parties from all claims for PAGA penalties that were alleged, or reasonably could have been
9 alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Notice
10 and ascertained in the course of the Action including, failure to provide meal periods, failure to
11 authorize and permit rest periods, failure to issue proper wage statements, failure to timely pay
wages, failure to maintain required payroll records, and related claims. Settlement, ¶ 6.

12 **No Reversion**

13 8. The Settlement does not provide that any portion of the consideration paid or
14 deposited by the Defendants may revert to the Defendants.

15 **Taxes**

16 9. The Settlement provides that Defendants will separately pay the employer's
17 share of any applicable payroll taxes. Tax Allocation of Individual Class Payments. 20.00% of
18 each Participating Class Member's Individual Class Payment will be allocated to settlement of
19 wage claims (the "Wage Portion"). The Wage Portions are subject to tax withholding and will be
20 reported on an IRS W-2 Form. The 80.00% of each Participating Class Member's Individual
21 Class Payment will be allocated to settlement of claims for interest and penalties (the "Non-Wage
22 Portion"). The Non-Wage Portions are not subject to wage withholdings and will be reported on
23 IRS 1099 Forms. Participating Class Members assume full responsibility and liability for any
employee taxes owed on their Individual Class Payment. Settlement, ¶ 3.2.4.1.

24 10. The Settlement provides as follows with regard to the tax treatment of
25 settlement shares: Tax Allocation of Individual Class Payments. 20.00% of each Participating
26 Class Member's Individual Class Payment will be allocated to settlement of wage claims (the
27 "Wage Portion"). The Wage Portions are subject to tax withholding and will be reported on an
28 IRS W-2 Form. The 80.00% of each Participating Class Member's Individual Class Payment will
be allocated to settlement of claims for interest and penalties (the "Non-Wage Portion"). 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

Non-Wage Portions are not subject to wage withholdings and will be reported on IRS 1099 Forms. Participating Class Members assume full responsibility and liability for any employee taxes owed on their Individual Class Payment. Settlement, ¶ 3.2.4.1.

Factual and Procedural Background

11. **Plaintiff's Employment with Defendants.** Defendants are owners and operators of El Tapatio restaurants. Defendants employed Plaintiff as a cook in California from about February 28, 2020 until November 15, 2020.

12. **LWDA Notice.** On August 26, 2021, Plaintiff notified Defendants and the California Labor and Workforce Development Agency ("LWDA"), pursuant to the California Private Attorneys General Act of 2004, California Labor Code sections 2698, *et seq.* ("PAGA"), of alleged Labor Code violations committed by Defendants. A true and correct copy of the letter to the LWDA dated August 26, 2021 is attached hereto as **Exhibit 2**.

13. **Lawsuit.** On August 23, 2021, Plaintiff filed a Class Action Complaint in the Sacramento County Superior Court, Case No. 34-2021-00306648, against Defendants on behalf of herself and others similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Provide Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods (Lab. Code §§226.7, 512 and 1198); (4) Wage Statement Penalties (Lab. Code §§ 226 and 226.2); (6) Waiting Time Penalties (Lab. Code §§ 201-203); and (7) Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*). On December 10, 2021, Plaintiff filed her First Amended Complaint adding a claim under the Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* ("PAGA"). Defendants deny all of Plaintiff's 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 the complaint is attached hereto as **Exhibit 3**. A true and correct copy of Plaintiff's First Amended Complaint is attached hereto as **Exhibit 4**.

14. **Investigation.** On February 09, 2022, Plaintiff requested that Defendants informally disclose documents and data to enable Plaintiff 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 Plaintiff's claims. Plaintiff also requested a reasonable, randomly selected sample of Defendants' time and payroll records, and related personnel records. *Id.* Finally, Plaintiff requested Defendants' written policies



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 applicable to the claims at hand and asked Defendants to identify any and all comparable claims
2 against them.

3 15. The Parties thereafter engaged in an informal, voluntary exchange of information
4 in the context of privileged settlement discussions to facilitate an early mediation. Defendants
5 produced Plaintiff's entire personnel file (including policies and agreements she signed and
6 acknowledged) and copies of their relevant company written policies.

7 16. **Sampling.** Defendants contend that they employed 126 putative class members
8 during the period of September 10, 2020 to May 10, 2022. Defendants produced the records of
9 20.00% of the putative class members for the period of September 10, 2020 to May 10, 2022.
10 There were records for 26 employees in the sample. Plaintiff chose the sample. The sample was
11 randomly selected. The sample consisted of time and payroll records, and related records.

12 17. **Plaintiff's Data Analyst.** Plaintiff retained Sridhar Srinivasan, a data analyst, to
13 analyze the sample. Plaintiff also employed the Raosoft⁷ Sample Size calculator
14 (<http://www.raosoft.com/samplesize.html>) to determine if the sample size selected is statistically
15 reliable. *Bell v. Farmers Ins. Exch.* (2004) 115 Cal. App. 4th 715 and *Duran v. U.S. Bank* (2014)
16 59 Cal.4th 1. The *Bell* court found a relative margin of error of 32.4 percent was unacceptable
17 whereas the *Duran* court found a relative margin of error of 43.3 percent was unacceptable. Using
18 a margin of error of 32%, a confidence level of 95%, and a population size of 126, the Raosoft
19 Sample Size Calculator recommended a sample of 26. A true and correct copy of the results from
20 the Raosoft Sample Size Calculator are attached as **Exhibit 5** (Raosoft Sample Size Calculator
21 results print-out). Thus, the sample population that Plaintiff's data analyst evaluated is statistically
22 reliable. *Id.*

23 18. **Mediation.** On July 6, 2022, following much of the foregoing informal discovery
24 and exchange of information, the Parties participated in a mediation session presided over by
25 Mediator David L. Perrault, an experienced class action mediator. During the mediation, 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 Parties had a full day of productive negotiations and reached agreement on a class-wide settlement
2 during the mediation session. During the mediation sessions, each side, represented by her/its
3 respective counsel, recognized the risk of an adverse result in the Action. Though the case did not
4 settle at mediation, the Parties ultimately agreed to settle the Action and all other matters covered
5 by this Agreement pursuant to the terms and conditions of this Agreement.

6 19. **Defendants' Financial Condition.** At the mediation, it became clear that
7 Defendants had insufficient resources to cover the full extent of liability. As part of the settlement
8 negotiations, Defendants disclosed their profit and loss statements, balance sheets, and related
9 information for 2019, 2020, and 2021. I reviewed the financial records the aid of an accountant.
10 The information provided was sufficient to demonstrate the financial condition of the Defendants
11 and that they will unlikely be able to afford payment of a larger amount than the Settlement
12 amount. Based on such records, Plaintiff, on her own behalf and on behalf of the Class Members,
13 has agreed to settle the lawsuit on the terms set forth in the Settlement.

14 *Similar Actions*

15 20. **Relevant Litigation and Claims.** I am not aware of any class, representative,
16 or other collective action in any other court, in this, or any other jurisdiction, that asserts
17 claims similar to those asserted in this action, on behalf of the class or group of individuals,
18 some or all of whom would also be members of the class to find in this action. I have made
19 a reasonable inquiry of the other members of my law firm and my counsel to determine
20 whether they are aware of any such similar actions.

21 *Uncashed Checks*

22 21. **Unclaimed Property Fund.** The Settlement provides for the disposition of
23 uncashed checks as follows: For any Class Member whose Individual Class Payment check or
24 Individual PAGA payment check is uncashed and cancelled after the void date, the Administrator
25 shall transmit the funds represented by such checks to the California Controller's Unclaimed
26 Property Fund in the name of the Class Member thereby leaving no "unpaid residue" subject to
27 the requirements of California Code of Civil Procedure Section 384, subd. (b). Settlement, ¶ 4.4.5.
28 In my view, sending funds represented by uncashed checks to the Unclaimed Property Fund
instead of a *cy pres* recipient is the best way to insure that the Class Members and Aggrieved
Employees actually receive their portions of the 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

Ascertainable and Numerous Class

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

23. **Numerosity.** The Settlement Class has sufficiently numerous members to render joinder impractical. No set number is required as a matter of law to maintain a class action. The California Supreme Court has upheld a class of as few as 10 individuals. Defendants estimates that there are approximately 611 Class Members for the Class Period of August 23, 2017 to April 06, 2023. Plaintiff maintains that it would be impractical and economically inefficient to require each Settlement Class Member to separately maintain an individual action or be joined as a named plaintiff in this action. In light of these considerations, the Settlement Class' membership is sufficiently numerous. Additionally, there are 305 Aggrieved Employees for the PAGA Pay Period of August 26, 2020 to April 06, 2023.

Predominant Common Questions

24. A question of law or fact is common to the members of a class if it may be resolved through common proof. In this case, there are many predominant common questions. Plaintiff asserts all class members were subject to the same or similar operations and employment policies, practices, and procedures. The claims arise from Defendants' alleged policy-driven failure to provide meal periods, failure to authorize and permit rest periods, failure to issue proper wage statements, failure to timely pay wages, failure to maintain required payroll records, and related labor law violations, all of which Plaintiff claims constitute unfair business practices and give rise to PAGA penalties. Plaintiff asserts that common questions include, but are not limited to: (1) Whether Defendants failed to provide the class with all meal and rest periods in compliance with California law; (2) Whether Defendants failed to pay the class one additional hour of pay on workdays they failed to provide the class with one or more meal or rest periods in compliance with California law; (3) Whether Defendants knowingly and intentionally failed to provide the class with accurate wage statements; (4) Whether Defendants willfully failed to provide the class with timely final wages; and (5) Whether Defendants engaged in unfair competition within the meaning of Business and Professions Code section 17200, *et seq.*, with respect to the class.



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

Adequacy

26. The adequacy requirement is met where the plaintiff is 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 plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling conflicts of interest that might hinder the plaintiff's ability to represent the class.

27. To the best of my knowledge, neither Plaintiff nor I have any conflicts of interest with the absent Settlement Class Members. Plaintiff contends that she is an adequate class representative. Plaintiff 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 Plaintiff and the Class Members. Moreover, Plaintiff has demonstrated her 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 herself to the risk of attorneys' fees and costs awards against her if this lawsuit had been unsuccessful. Thus, Plaintiff is adequate to serve as settlement class representative.

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.



1 29. In December of 1995, the Supreme Court for the State of California admitted me
2 as an Attorney and Counselor at Law and licensed me to practice law in all the Courts of this
3 State. On May 11, 2012, I also became admitted to the District of Columbia Bar. In February
4 2013, I became admitted to the New York State Bar.

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

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

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

14 a. *Ricardo Sandoval v. Dept. of Treasury*, United States District Court,
15 Southern District of California (the Honorable Judith Keep presiding), 1998. Plaintiffs Special
16 Agent for the U. S. Customs Service alleged discrimination and retaliation in promotions and
17 discipline. The jury awarded compensatory damages. Court subsequently awarded additional
18 back pay and gave Plaintiffs a retroactive promotion. *See* "Lawsuit Puts Customs Service on Trial:
19 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.

20 b. *Jorge Guzman v. Department of Justice*, United States District Court,
21 Central District of California (the Honorable Lourdes Baird presiding), 1999. Plaintiffs Special
22 Agent for the Immigration and Naturalization Service alleged racial discrimination, retaliation
23 and police brutality by agents of the Office of the Inspector General. Jury found the Defendants
24 liable. Case settled shortly before the damages phase. *See* "U.S. to Pay \$400,000 to INS Agent in
25 Bias Suit; Courts: Complaint says he suffered 10 years of harassment on the job because he is
26 Latino, including falsified charges" by Patrick J. McDonnell, Los Angeles Times, January 21,
1999.

27 c. *Dr. Perry Crouch v. SHIELDS*, Los Angeles Superior Court, Compton (the
28 Honorable Michael Rutberg presiding), 2001. Plaintiff whistleblower brought civil rights claims



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 and wrongful termination claims against employer in a month-long jury trial. The jury awarded
2 compensatory and punitive damages. See "Activist Says Criticism of Rail Plan Cost His Job" by
3 Dan Weikel, Los Angeles Times, September 28, 2000; "Punitive Damages Awarded to Fired
4 Social Worker" by Dan Weikel, Los Angeles Times, June 10, 2000; "A Whistleblower's
5 Revenge" by Susan Goldsmith, New Times Los Angeles, June 8, 2000.

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

13 e. *Rick Pierce v. Department of Treasury*, Merit Systems Protection Board
14 (1999). Administrative Judge awarded compensatory damages to wrongfully terminated Customs
15 Agent, followed by an award of Attorneys' fees and costs.

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

21 g. *Alina Ghrdilyan v. RJ Financial, Inc., et al.*, LA Superior Court case no.
22 BC430633 (2012), the Honorable Ronald Sohigian presiding. To my knowledge, this case is the
23 first and only case to be successfully prosecuted through trial under the Labor Code Private
24 Attorney Generals Act of 2004, Labor Code §§ 2698, et seq. on behalf of plaintiffs and other
25 aggrieved employees against someone other than an employer for civil penalties including unpaid
26 wages. The case involves claims of unpaid overtime, unprovided rest and meal periods, unpaid
27 vacation, untimely interval and final wages, and unreimbursed expenses. For my work in that
28 case, the Court awarded me an hourly rate of \$600.00 hour based on my skill and experience.

33. Since 2007, I have prosecuted several traditional wage & hour class actions as the
sole or primary attorney for the plaintiffs, including *Pudelwitts v. Regent Parking, Inc.*, *Singery*
v. Quality Vessel Engineering, *Tesillo v. LA Executive Towing Service, Inc.*, and *Madison v. 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 *Limousine Connection*. One such case is *Jose Tapia v. Mangen Group, Inc.*, LASC case no.
2 BC377114, a garden-variety wage & hour class action with many of the same claims at issue in
3 this case. The Honorable Jane Johnson of the Los Angeles Superior Court, presiding over the
4 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.

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

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

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

13 b. *Cuellar v. Lovin Oven*, Orange County Superior Court, Case No. 30-2010-
14 000382146 (appointed Class Counsel and granted final approval of class action settlement by the
court on behalf of nonexempt employees).

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

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

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

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

27 g. *Huynh v. Carefusion Resources, LLC, et al.*, San Diego Sup.Ct., Case No.
28 37-2009-00103277-CU-OE-CTL (appointed Class Counsel and granted final approval of class



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 action settlement on behalf of medical devices employees).

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

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

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

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

14 l. *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court, Case No. S-
15 1500-CV-282679 (appointed Class Counsel and granted final approval of class action settlement
16 on behalf of dairy and agricultural laborers).

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

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

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

p. *Sandoval v. Rite Aid Corp.*, Los Angeles Superior Court, Case No.
BC431249 (granted class certification through contested motion and appointed Class Counsel in



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 case on behalf of former pharmacy employees based on late final wage payments in violation of
2 Labor Code §§ 201–203).

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

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

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

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

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

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

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

26 ***Class Action Treatment Is Superior***

27 36. A class action is also superior to other means of adjudicating the issues in this
28 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



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 through the Division of Labor Standards Enforcement (where there would be relatively little
2 money at stake, but the claims would be time-consuming to litigate)—a class action is plainly
3 superior to all of them. Thus, this consideration supports conditional class action treatment for
4 purposes of this Settlement only.

The Settlement is Presumptively Fair

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

Exposure & Risk Analysis

16 38. In the operative complaint, Plaintiff sues for unpaid wages, unprovided meal and
17 rest breaks, wage statement penalties, waiting time penalties, unfair competition, and civil
18 penalties. Plaintiff prepared "damages" estimates in advance of the mediation. Plaintiff
19 determined Defendants' maximum possible exposure for restitution and penalties to be
20 approximately \$4,049,788.11 (consisting of \$215,750.00 in missed meal period premium wages,
21 \$431,500.00 in missed rest break premium wages, \$209,500.00 for wage statement penalties,
22 \$212,525.86 for waiting time penalties, and \$3,236,000.00 for civil penalties under PAGA. True
23 and correct copies of the spreadsheets I prepared for mediation of this Action are collectively
24 attached to this declaration as **Exhibit 6**.

25 39. The estimates are in essence "home run" projections that omit data points that will
26 undoubtedly reduce the maximum possible damages award and do not factor in any of the risks
27 involved in litigating this Action. Plaintiff calculated the damages based on the number of
28 workweeks and pay periods provided by Defendants, Plaintiff's reports, and the sample data. *Id.*
Plaintiff also considered the possibility that Defendants could launch a *Pick Up Stix* campaign



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 and pursue individual release agreements from the Class Members. Plaintiff's Counsel applied
2 discounts to the maximum possible exposure to account for all other risks discussed below. While
3 it is difficult to assign anything but crudely-determined percentages of risk to any of the claims,
4 it is safe to say that the risk that a *Pick Up Stix* campaign would preclude recovery for such
5 employees is substantial and alone justifies a significant discount because Defendants would
6 likely by trial have gathered releases from the majority of the Class Members. A settlement for
7 approximately 16.91% of the potential recovery is a proportion substantially in excess of recovery
8 proportions sanctioned by existing case law.⁸

9 40. My initial estimates do not realistically account for the risks outlined below or the
10 risk that a class will not be certified. Therefore, I believe a class settlement for \$685,000.00 is fair
11 and reasonable.

12 41. **Risks Associated With the Arbitration Agreements.** The arbitration agreements
13 entered into between Defendant on the one hand, and Class Members, on the other, present a
14 significant risk to the success of Plaintiff's class action litigation. According to Defendants, they
15 began entering into arbitration agreements with Class Members after the lawsuit was filed. *Id.* As
16 the arbitration agreements in question restrict potential litigants from bringing class actions
17 against Defendant, Plaintiff would be effectively barred from pursuing claims on behalf of the
18 Class in Court. *Id.* Thus, there is a significant risk the Court could determine that those Class
19 Members who have not entered into arbitration agreements with Defendant do not constitute a
20 sufficiently numerous class to justify class action treatment. As such, by continuing to trial on
21 class-wide claims, Plaintiff would run the high risk of suffering defeat due to the existence of the
22 arbitration agreement. Moreover, the arbitration agreements would pose danger to any class
23 certification motion brought by Plaintiff. Because different defenses would apply to some Class
24 Members and not others – i.e., the existence of signed arbitration agreements – there is a risk that

25 ⁸ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998)
26 (“[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to
27 be within the targeted range of reasonableness.”); *Wise v. Ulta Salon, Cosmetics & Fragrance,*
28 *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 the Court could determine that Plaintiff's claims present too many individualized inquiries to
2 justify class certification. *Id.*

3 42. **Risks Associated with Defendants' Financial Condition.** As stated above,
4 Defendants' financial condition was the key factor in reaching this Settlement. Due to
5 Defendants' financial condition, even if Plaintiff prevailed on all claims at trial, she may never
6 recover the damages due to the risk of insolvency. A very large class action judgment would
7 almost certainly put the company out of business and/or would interfere with the company's
8 ability to carry out its contractual obligations.

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

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

28 45. **Risks Associated with the Rest Break Claims.** There are risks to Plaintiff's rest
period claim. Employers are not required to record rest periods and such periods are paid.
Defendants contend they provided non-exempt employees the opportunity to take rest periods in
accordance with California law. Further, Defendants' written policies on meal and rest periods



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 are consistent with the Wage Order. Thus, unlike meal periods, where there are often records
2 showing whether an employee clocked out or not, there is no such evidence to prove a missed rest
3 period or that the employer refused to authorize and permit one. *Id.* Managing such claims at trial
4 has become exceedingly difficult. Plaintiff will depend on sample witness testimony and surveys
5 to prove the claims. While a victory with such evidence is certainly possible, relevant caselaw
6 makes such claims risky from a trial management and due process perspective. *See Duran v. U.S.*
7 *Bank National Assn.* (2014) 59 Cal. 4th 1, 31 (explaining “[I]f sufficient common questions exist
8 to support class certification, it may be possible to manage individual issues through the use of
9 surveys and statistical sampling.”); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382;
Comcast Corporation v. Behrend (2013) 133 S.Ct. 1426.

10 46. **Risks Associated with the Waiting Time Penalty Claims.** Plaintiff also asserts
11 claims for wage statement violations, untimely wage violations, and PAGA penalties. Under
12 Labor Code section 226, wage statements must include various information, including the
13 applicable rates of pay, corresponding hours worked, and gross pay. Here, Plaintiff’s wage
14 statement claim has the same underlying risks as the above claims, as it is derivative of them. On
15 their face, the wage statements issued by Defendants comply with the requirements of Labor Code
16 section 226. Without proof willful behavior, Plaintiff will be unable to recover these penalties.

17 47. **Risks Associated With the PAGA Claim.** As the Operative Complaint makes
18 clear, Plaintiff predicates her PAGA claim on the same Labor Code violations as her other
19 claims. Plaintiff’s “damages” spreadsheet, **Exhibit 6**, states the length of the relevant time period
20 for the PAGA claim and the number of employees allegedly employed during that time period.
21 Plaintiff’s “damages” spreadsheet, **Exhibit 6**, also states the total amount of civil penalties for
22 which the Defendants is potentially liable if all allegations are proven. As I state above in
23 connection with Plaintiff’s claims for statutory penalties with regard to proof Defendants’ intent,
24 knowledge and willfulness, there are serious risks to proving Defendants acted intentionally,
25 knowingly, and willfully in violating the rights of Class Members under the Labor Code. Plaintiff
26 calculated the agreed-upon amount of civil penalties by considering the risks outlined above and
27 that the Settlement already provides substantial payments for the Labor Code violations that the
28 civil penalties claim is predicated on.

48. Regarding PAGA, a court has discretion to award a lesser amount than the
maximum penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.*



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

(2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendants has posed valid defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the PAGA claims likewise face significant uncertainty. There is a risk that the Court would consider the maximum civil penalty available to be confiscatory.

49. This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and required a significant discount for settlement purposes. For mediation purposes, Plaintiff's counsel estimated a maximum possible exposure of approximately \$3,236,000.00 in civil penalties. This estimate did not take into account any of the risks discussed above and assumed a violation for every single pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for the same pay period for the same alleged violations of different Labor Code provisions and derivative violations. Although two federal district court decisions held that "stacking" PAGA penalties in this fashion may be appropriate to determine the amount in controversy for purposes of removal jurisdiction, Plaintiff's 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 Code provisions. This may be because the PAGA does not provide for what many employers characterize as claim splitting and not merely stacking.

50. 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

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.*



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

egregious, intentional violations of the Labor Code.¹⁰

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

52. **Risks Associated With A Pick-Up Stix Campaign.** An employer enjoys the right to settle a putative class member's disputed wage claims individually, without the consent or involvement of class counsel. (See *Chindarah v. Pick Up Stix, Inc.* 171 Cal. App. 4th 796 (2009). As discussed above, Defendants may launch a "pick off" settlement campaign to pursue individual release agreements from the Class Members, thereby potentially narrowing the size of the Settlement Class – 611 members - until it is no longer numerous enough for class certification. *Id.* Plaintiff, then, may not have sufficient number of employees to represent. This led to a significant reduction of claim value in settlement negotiations.

53. While the evidence gathered through Plaintiff's discovery supports the merits of the claims asserted in this lawsuit, Plaintiff and her counsel recognize that continued litigation presents significant risks that support a downward departure from Defendants' estimated liability exposure. In view of the risks, the Settlement reflects my estimate of the total amount of damages, monetary penalties or other relief that the Class could reasonably expect to be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. It also represents a fair,

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 first amended complaint in *Ghrdilyan* is attached as **Exhibit 7**. 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 8**, 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



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

adequate, and reasonable compromise amount for these claims and warrants preliminary approval. *Id.*, *Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1376 (the financial condition of defendant predominated in assessing the reasonableness of settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty concerning defendant's financial stability "strongly supports the reasonableness of the settlement"); *See Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014 WL 2465049, * 3.

54. Above, Plaintiff lists the maximum amounts recoverable in this action. The Gross Settlement Amount of \$685,000.00 is 16.91% of this amount.

Allocation of the PAGA Payment

55. The settlement of PAGA penalties in the sum of \$4,000.00, of which 75% (\$3,000.00) will be paid to the LWDA and 25% (\$1,000.00) will be distributed to the Aggrieved Employees, is reasonable and appropriate under the circumstances. The Parties negotiated a good faith amount for PAGA Penalties to be paid to the LWDA and to the Aggrieved Employees. The portion to be paid to the LWDA was not the result of self-interest at the expense of other Aggrieved Employees.

Attorneys' Fees and Costs

56. I intend to request Class Counsel Attorneys' Fees of \$228,333.30 (one-third of the GSA) and Class Counsel's litigation costs incurred in prosecuting this Action, which I currently estimate to be approximately \$10,272.41 and will be no more than \$20,000.00 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 Global*, U.S. District Court, Southern District of California, Case No. 13-CV-0357 (one-third of fund); *Fischer, et al. v. National Distribution Centers LP, et al.*, Riverside Sup.Ct., Case No. RIC1114952 (one-third of fund); *Shaw, et al. v. Interthinx, Inc.*, United States District Court for the District of Colorado, Case No. 13-CV-01229-REB-BNB (one-third of fund); *Ogbuehi v. Comcast of California/ Colorado/ Florida/ Oregon, Inc.*, United States District Court, Eastern District of California, Case No. EDCV13-00672-KJM-KJN (one-third of fund); *Lynch, et al. v. American Guard Services*, Los Angeles Superior Court, Case No. BC462681 (one-third of fund); *Volney-Parris v. Southern California Edison Company*, Los Angeles Superior Court, Case No. BC493038 (one-third of fund); *Hidalgo, et al. v. Sun Hill*, Los Angeles Superior Court, Case No. BC480808 (one-third of fund); *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court, Case 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).

57. The amount of fees and costs requested are commensurate with (1) the risk Class Counsel took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel



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 turned down to devote time to this matter. Class Counsel also interviewed and obtained
2 information from putative class members, met and conferred with Defendants' counsel on
3 numerous occasions, reviewed and analyzed hundreds of pages of data and documents provided
4 by Defendants and obtained through other sources, researched applicable law, and estimates of
"damages" for purposes of settlement discussions, among other tasks.

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

10 59. A true and correct copy of the retainer agreement which includes the fee division
11 agreement between The Spivak Law Firm and United Employees Law Group is attached as
12 **Exhibit 9.**

Class Representative Service Payment

13 60. The Settlement provides that Plaintiff may seek a Class Representative Service
14 Payment of \$15,000.00. This amount is entirely reasonable given Plaintiff's efforts in this Action
15 and the risks she undertook on behalf of Class Members. Here, Plaintiff has devoted many hours
16 advancing the interests of the Settlement Class. Plaintiff has done this by, among other things,
17 retaining experienced counsel, providing them with information about her work history with
18 Defendants and Defendants' policies and practices with respect to the wage and hour claims at
19 issue, assisting counsel in identifying witnesses, traveling to and participating in mediation, and
20 being actively involved in the settlement process to ensure a fair result for the Settlement Class
21 as a whole. In doing this, Plaintiff has been exposed to significant risks, including the risk of an
22 order to pay Defendants' attorneys' fees and costs if this action had been unsuccessful (*See* Labor
23 Code §§ 218.5-218.6). The efforts and risks that Plaintiff undertook on behalf of the Settlement
24 Class shows that the proposed Class Representative Service Payment is fair, adequate, and
25 reasonable, and thus warrant preliminary approval. Plaintiff Maria Elena Diaz Hernandez's
26 declaration, filed concurrently with mine, provides further information supporting her request for
the Class Representative Service Payment.

27 61. Plaintiff began her investigation and retention of attorneys to pursue the claims at
28 issue on approximately February 17, 2021. Awarding Plaintiff 2.19% of the GSA is entirely



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 reasonable given Plaintiff's efforts in this case undertaken on behalf of absent Class Members. In
2 this case, Plaintiff has devoted several hours of her time advancing the interests of the Class
3 Members and also expects to devote additional hours of her time with Class Counsel overseeing
4 the administration of the Settlement if the Court grants final approval of the Settlement. *See*
5 *generally* Declaration of Maria Elena Diaz Hernandez. Plaintiff has done this by, among other
6 things, retaining experienced counsel, providing them with extensive information about her work
7 history with Defendants and Defendants' policies and practices with respect to the wage and hour
8 claims at issue, assisting them in contacting absent Class Members to gather information,
9 participating in a full day of mediation, foregoing pursuit of her individual claims in favor of a
10 fair class-wide resolution, and being actively involved in the settlement process to ensure a fair
11 result for the Class Members as a whole.

12 62. As Class Representative, Plaintiff agreed to (1) consider the interests of the class
13 just as she would consider her own interests and, in some cases, to put the interests of the class
14 before her own interests; (2) actively participate in the lawsuit, as necessary, by among other
15 things, answering interrogatories, producing documents to Defendants and giving deposition and
16 trial testimony if requested; (3) travel to give such testimony; (4) recognize and accept that any
17 resolution of the lawsuit by dismissal or settlement, is subject to court approval, and must be
18 designed in the best interest of the class as a whole; (5) follow the progress of the lawsuit and
19 provide all relevant facts to Class Counsel; (6) champion many other people with similar claims
20 and injuries because of the importance of the case and that necessity that all Class Members
21 benefit from the lawsuit; and (7) fight for a resolution in which the individual recovery to each
22 Class Member, including Plaintiff, may be relatively small. Plaintiff agreed to shoulder all of
23 these responsibilities in exchange for a proportionate share of funds made available for
24 distribution to the Class Members. Plaintiff had no guarantee of an Class Representative Service
25 Payment. This justifies the Class Representative Service Payment sought.

26 63. In taking the actions outlined above, Plaintiff has exposed herself to significant
27 risks, including the risk that she could have been ordered to pay Defendants' attorneys' fees and
28 costs if this Action had been unsuccessful (*see* Lab. Code §§ 218.5-218.6), as well as the risk that
she could, in the future, face a potentially hostile work environment and worsened career
prospects for suing a prior employer for wage and hour violations and serving as the Plaintiff in
a class action lawsuit. Additionally, Plaintiff has exposed herself to the risk that she could end up



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 receiving less than Defendants would have paid her at the beginning of the Action via a C.C.P. §
2 998 offer or other individual settlement offer to drop her class allegations. On many occasions,
3 California courts have ordered wage and hour plaintiffs and would be class representatives to pay
4 outrageous fee and/or cost awards for unsuccessful claims. A few examples are:

- 5 a. *Zalewa v. Tempo Research Corp.*, No. B238142, 2013 WL 766535 (CA 2nd Dist.
6 March 1, 2013) (court awarded the employer \$2,210,360 in attorney's fees to be
7 paid by employee for employee's unsuccessful suit for unpaid bonuses). A true
8 and correct copy of the court's order is attached to this declaration as **Exhibit 10**.
- 9 b. *Cun v. Café Tiramisu LLC*, No. A131241, 2011 WL 5979937 (CA 1st Dist. Nov.
10 30, 2011) (court ordered the employee to pay \$36,612.50 in attorney's fees and
11 costs to employer for unsuccessful suit for unpaid wages). A true and correct copy
12 of the court's order is attached to this declaration as **Exhibit 11**.
- 13 c. *Csaszi v. Sharp Healthcare*, No. D038558, 2003 WL 352422 (CA 4th Dist. Feb.
14 18, 2003) (court ordered the employee to pay \$20,269 in attorney's fees and costs
15 to the employer for unsuccessful suit for unpaid wages and overtime). A true and
16 correct copy of the court's order is attached to this declaration as **Exhibit 12**.
- 17 d. *Villalobos v. Guertin*, No. CIV. S-07-2778 LKK/GGH, 2009 WL 4718721
18 (U.S.D.C. Eastern Dist. Dec. 3, 2009) (court ordered Plaintiff's counsel to pay
19 \$21,180 in attorney's fees and \$1,525.80 in costs to defense counsel for unpaid
20 wages). A true and correct copy of the court's order is attached to this declaration
21 as **Exhibit 13**.

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

28 64. As I explain further below, Plaintiff's individual share of the Net Settlement
Amount will be less than that of some absent Class Members. Under the Settlement, Class
Members will receive a *pro rata* distribution of the Settlement proceeds proportionate to the
period of time he or she worked for Defendants during the Class Period, compared to the total of



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 the total period of time worked by all Class Members during the Class Period, as reflected by
2 Defendants' records. Because Plaintiff may have been employed for a shorter period during the
3 Class Period, some Class Members will have worked more Work Weeks than Plaintiff and, as a
4 result, receive larger shares in the recovery – *even though they did not actively participate in the*
5 *lawsuit*. While this is a risk that Plaintiff assumed when she brought her lawsuit, it is unfair to
6 limit Plaintiff's Class Representative Service Payment to an amount not much greater than an
7 absent Class Members' share of the recovery. To encourage employees like Plaintiff to don the
8 helm of class champions (and thereby advance the important public policies behind class actions),
9 the Court should award something substantial to Plaintiff for her readiness to receive less than
absent Class Members while assuming all the risk and delay of payment.

10 65. The average putative class member in this case would be unlikely to pursue
11 individually the claims Plaintiff brought against Defendants because such claims would be too
12 small to justify the cost and the risk. A putative class member will be unlikely to find an attorney
13 who is willing to pursue an individual's claims because the claims are too small to justify the
14 hundreds of hours of legal work necessary to prove each claim. Only the class action vehicle,
15 which allows for the aggregation of hundreds of risky small dollar value claims, makes such
16 claims advantageous for an attorney to pursue on a contingency basis and there can be no class
17 action without a class member assuming the great fiduciary responsibilities of as class
18 representative. This Court should allow the Class Representative Service Payment requested
19 because to do otherwise would discourage employees (and attorneys) from bringing class actions
in the first place.

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

24 67. Plaintiff faced the risk that she could face worsened career prospects for suing a
25 former employer for wage and hour violations and serving as the Plaintiff in a class action lawsuit.
26 *See generally* Declaration of Maria Elena Diaz Hernandez. Because she filed a lawsuit in the
27 California Superior Court, a public record now exists that Plaintiff sued her employer for Labor
28 Code violations – a fact that won't be lost on prospective employers considering her for a job.
Common sense dictates that an employer will think twice about hiring someone who sued her last



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 employer. Legal experts have recognized this fact. Attached to this declaration as **Exhibit 14** is a
2 true and correct copy of the article “Employees: Better Think Twice Before Suing Your Employer
3 (Four Reasons Why).” Attached to this declaration as **Exhibit 15** is a true and correct copy of the
4 article “What To Expect If You Sue Your Employer.” California even has laws to address this
5 risk: Labor Code § 1102.5 prohibits retaliation against employees who speak up about Labor
6 Code violations and Labor Code § 98.6 prohibits discrimination against employees who bring
7 Labor Code violations to the attention of the Labor Commissioner. Thus, the risk to Plaintiff’s
8 future employment shows that the Class Representative Service Payment sought is fair, adequate,
and reasonable, and warrants final approval of the Court.

9 68. Class Counsel depended on Plaintiff’s input to prosecute this lawsuit. Plaintiff
10 made this case possible for a number of reasons. First, Plaintiff challenged her employers on an
11 unlawful practice that led to Defendants paying a large percentage of the unpaid wages in question
12 plus interest to the remainder of its employees – in spite of Defendants’ financial limitations.
13 Plaintiff provided Class Counsel with detailed descriptions of how Defendants’ business operates,
14 the hours and scheduling of employees, and the nature of the work Class Members performed.
See generally Declaration of Maria Elena Diaz Hernandez.

15 69. By agreeing to settle the case in the best interest of the Class Members, Plaintiff
16 has given up the right to pursue individual claims and recover substantially more in unpaid wages,
17 interest, waiting time penalties, pay stub penalties, and civil penalties that she will release as part
18 of the Settlement. Plaintiff did not seek an individual settlement for her claims at all, instead
19 choosing to prosecute the claims on behalf of the Class Members.

20 70. In view of the risks, Plaintiff achieved a result the Class can be proud of. There
21 were significant risks (outlined in the preliminary approval motion) to any award on behalf of the
22 Class Members and still Plaintiff achieved a settlement of \$685,000.00. This outstanding result
23 calls for significant awards to Plaintiff for making the result possible. If the Court is disinclined
24 to award Plaintiff all or part of the Class Representative Service Payment requested, Class
25 Counsel request that the Court allocate the difference to Plaintiff from Class Counsel’s requested
attorney fee award.

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

27 71. Above, Plaintiff estimates Plaintiff’s anticipated Individual Class Payment.



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



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

72. **Individual Class Payments.** At \$14.48 per hour (the average Class Member's hourly wage), the average estimated Individual Class Payment to Class Members is the equivalent of over 44 hours of unpaid wages (the primary remedies sought) ($\$642.66 / \$14.48 = 44.38$ hours). Thus, this is a result the Class can be proud of in view of the significant risks.

73. Plaintiff estimates that there are 23,061 Work Weeks for the Class Period. So, each Work Week has a value of approximately \$17.03 ($\$392,666.70$ Net Settlement Amount / 23,061 Work Weeks = \$17.03). Plaintiff had 37 Work Weeks during the Class Period. Based on this, it is anticipated that Plaintiff Maria Elena Diaz Hernandez will receive an Individual Class Payment of approximately \$630.01 as a Class Member (37 Work Weeks x \$17.03 = \$630.01) while the average estimated Individual Class Payment to Class Members will be approximately \$642.66. Some Class Members – those who worked more Work Weeks during the Class Period - will receive more, and some less. The highest possible Individual Class Payment to a Class Member (i.e., to those who qualify for all Work Weeks in the Class Period) will be approximately \$5,305.24. The lowest possible Individual Class Payment to a Class Member (i.e., to those who qualify for only one Work Week in the Class Period) will be approximately \$17.03. Some Class Members – those who worked more Work Weeks during the Class Period - will receive more, and some less.

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

75. **Individual PAGA Payments.** I estimate that the average Aggrieved Employee Individual PAGA Payment will be \$3.28. *Id.* Plaintiff's Individual PAGA Payment, her individual share of 25% of the PAGA Penalties, will be less than that of some absent Aggrieved Employees. Under the Settlement, each Aggrieved Employee will receive a *pro rata* distribution of 25% of the PAGA Penalties proportionate to the number of paychecks he or she had with Defendants during the PAGA Pay Period, compared to the total of all paychecks of all Aggrieved Employees during the PAGA Pay Period, as reflected by Defendants' records. Plaintiff estimates that there are 8,474 Aggrieved Employee paychecks for the PAGA Pay Period. So, each Aggrieved Employee paycheck from the PAGA Pay Period has a value of

1 approximately \$0.12 (25% of \$4,000.00 in PAGA Penalties / 8,474 Aggrieved Employee
2 paychecks = \$0.12). It is anticipated that Plaintiff Maria Elena Diaz Hernandez will receive an
3 Individual PAGA Payment of approximately \$0.71 as an Aggrieved Employee (6 paychecks
4 during the PAGA Pay Period x \$0.12 paycheck value = \$0.71) while the average estimated
5 Individual PAGA Payment to an Aggrieved Employee will be approximately \$3.28 (\$1000.00,
6 25% of PAGA Penalties / Aggrieved Employee paychecks during the PAGA Pay Period = \$3.28
7 Individual PAGA Payment). Some Aggrieved Employees – those who had more paychecks
8 during the PAGA Pay Period - will receive more, and some less. The highest possible Individual
9 PAGA Payment to an Aggrieved Employee (i.e., to those who qualify for all paychecks in the
10 PAGA Pay Period) will be approximately \$9.41. The lowest possible Individual PAGA Payment
11 to an Aggrieved Employee (i.e., to those who qualify for only one paycheck in the PAGA Pay
12 Period) will be approximately \$0.12.

13 ***Proposed Preliminary Approval Order***

14 76. Plaintiff files a proposed Preliminary Approval Order with this declaration. The
15 proposed Preliminary Approval Order includes the Class Notice (Exhibit A to the Preliminary
16 Approval Order), in English with Spanish translations. Based on my investigation, the Class
17 Members all understand English, Spanish or both. The Settlement Agreement is not attached to
18 the proposed Preliminary Approval Order. I have carefully reviewed both the terms and the
19 terminology of the proposed Preliminary Approval Order and accompanying Class Notice to
20 confirm that the various documents are internally consistent, consistent with each other, and
21 consistent with the Settlement Agreement.

22 77. **Identity of Administrator.** The proposed Preliminary Approval Order states
23 the name of the Administrator, and describes the nature of the services that the Administrator
24 will be required to perform, either directly or by reference to the Settlement Agreement.

25 78. Omitted by Plaintiff.

26 79. Omitted by Plaintiff.

27 80. Neither the proposed Preliminary Approval Order nor the Class Notice require
28 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 nor the Class Notice require an objecting party to, either personally or



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

3 81. **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 82. **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 83. **No Claim Form.** The Settlement does not require a claim form.

12 *The Class Notice*

13 84. 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 Defendants' 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 Class Notice (attached as Exhibit
18 A to the Settlement) provides Class Members with all pertinent information that they need to fully
19 evaluate their options and exercise their rights under the Settlement. Specifically, it clearly and
20 concisely explains, among other things: (1) what the Settlement is about; (2) who is a Settlement
21 Class Member; (3) how Class Counsel will be paid; (4) how to submit an exclusion request not
22 to be bound by the Settlement; (5) how to object to the Settlement; (6) how the Settlement will
23 be allocated; (7) how payments to Class Members will be calculated; (8) how the disputes will be
24 resolved; and (9) the estimated settlement shares for each Class Member. Additionally, the Notice
25 will include the number of eligible Work Weeks a Class Member had during the Class Period.
26 Accordingly, the Notice should be approved because it describes the Settlement with sufficient
27 clarity and specificity to explain to Class Members what this action is about, their rights under
28 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 85. The Settlement does not require Class Members to submit claims to
2 participate.

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

6 87. 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 88. 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 89. 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 90. The Class Notice describes the releases by Plaintiff and the Class Members.

18 91. 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 92. The Class Notice instructs the objecting Class Member that the objection must
26 be delivered to the Administrator. The Class Notice states the name and address of the
27 Administrator. It also states the date by which the objection must be mailed or otherwise
28 delivered.

 93. The information required to be provided by an objecting Class Member on the
Class Notice does not exceed the minimum information necessary to (i) identify the objector



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

3 94. The Class Notice (i) instructs the Class Member seeking exclusion that the
4 request for exclusion must be mailed or delivered to the Administrator, (ii) states the name
5 and address of the Administrator, and (iii) states the date by which the request for exclusion
6 must be mailed or otherwise delivered.

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

10 96. The Class Notice indicates that the request for exclusion from the Class Settlement
11 will not result in exclusion from the PAGA portion of the Settlement.

12 *Administrator Duties*

13 97. The duties of the Settlement Administrator are spelled out in the Settlement and in
14 the bid provided by CPT Group, Inc. a true and correct copy of which is attached hereto as **Exhibit**
15 **16**.

16 *Administration Costs*

17 98. With regard to the settlement administration costs provision (Settlement §3.2.3),
18 it is reasonable. Before agreeing to CPT Group, Inc. the Parties sought and reviewed bids from
19 other reputable third-party administrators: (A) Phoenix Settlement Administrators = \$13,000.00;
20 (B) CPT Group, Inc. = \$12,250.00; and C) ILYM Group, Inc. = \$16,550.00. A true and correct
21 copy of the bid from ILYM Group, Inc. is attached hereto as **Exhibit 17**. A true and correct copy
22 of the bid from Phoenix Settlement Administrators is attached hereto as **Exhibit 18**. The bid
23 provided by CPT Group, Inc. was the lowest. Thus, the settlement administration costs provision
24 should be given preliminary approval.

25 99. Omitted by Plaintiff.

26 *PAGA Provisions of the Settlement*

27 100. The memorandum of points and authorities that accompanies this declaration
28 explains the terms of the provisions of the Settlement that apply to PAGA and civil penalties.

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



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

1 102. The Settlement states as follows with regard to the release of the PAGA claim:
2 All Non-Participating Class Members who are Aggrieved Employees are deemed to release, on
3 behalf of themselves and their respective former and present representatives, agents, attorneys,
4 heirs, administrators, successors, and assigns, the Released Parties from all claims for PAGA
5 penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period
6 facts stated in the Operative Complaint and the PAGA Notice and ascertained in the course of the
7 Action including, failure to provide meal periods, failure to authorize and permit rest periods,
8 failure to issue proper wage statements, failure to timely pay wages, failure to maintain required
9 payroll records, and related claims.

10 103. The PAGA Release is limited to the Defendants named in the Operative
11 Complaint, together with their former and present directors, officers, shareholders, owners,
12 agents, employees, members, attorneys, insurers, predecessors, successors, assigns
13 subsidiaries, and affiliates. See Settlement, ¶ 1.4.1 (“Released Parties”).

14 104. The Settlement releases only those claims described in the notice sent by the
15 plaintiff to the LWDA, and only to the extent that they are alleged in the complaint. The
16 Settlement states: All Non-Participating Class Members who are Aggrieved Employees are
17 deemed to release, on behalf of themselves and their respective former and present
18 representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released
19 Parties from all claims for PAGA penalties that were alleged, or reasonably could have been
20 alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Notice
21 and ascertained in the course of the Action including, failure to provide meal periods, failure to
22 authorize and permit rest periods, failure to issue proper wage statements, failure to timely pay
23 wages, failure to maintain required payroll records, and related claims. Settlement, ¶ 6.

24 ///

25 ///

26 ///

27 ///



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

Notice of Settlement to the LWDA

105. Pursuant to Labor Code § 2699(1)(2), Plaintiff has provided notice of this settlement to the LWDA with the filing and service of this motion. A true and correct copy of Plaintiff's submission with the LWDA and a confirmation email is attached hereto as **Exhibit 19**.

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

Executed on Wednesday, February 07, 2024 at Los Angeles, California.



DAVID SPIVAK,
Declarant



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

EXHIBIT 1

1 DAVID G. SPIVAK (SBN 179684)

david@spivaklaw.com

2 MAYA CHEAITANI (SBN 335777)

maya@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 MARIA ELENA DIAZ HERNANDEZ, 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 SACRAMENTO**

12 **(UNLIMITED JURISDICTION)**

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

17 *Plaintiff(s),*

18 vs.

19 GUITRON ALCAZAR ALCAZAR INC. DBA
20 EL TAPATIO MEXICAN CUISINE, a
21 California corporation; GUITRON ALCAZAR
22 III INC., a California corporation; GUITRON
23 ALCAZAR IV, LLC, a California limited
liability company; and DOES 1–50, inclusive,

24 *Defendant(s).*

Case No. 34-2021-00306648

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

Action filed: August 23, 2021

Dept: 28, The Honorable Lauri A.
Damrell

- 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

9

10

18
19
20
21
22
23
24
25
26
27
28

This Class Action and PAGA Settlement Agreement (“Agreement”) is made by and between plaintiff Maria Elena Diaz Hernandez (“Plaintiff”) and defendants Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine, Guitron Alcazar III Inc., and Guitron Alcazar IV, LLC (collectively “Defendants”). The Agreement refers to Plaintiff and Defendants collectively as “Parties,” or individually as “Party.”

1. DEFINITIONS.

1.1. “Action” means the Plaintiff’s lawsuit alleging wage and hour violations against Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine, Guitron Alcazar III Inc., and Guitron Alcazar IV, LLC captioned “Maria Elena Diaz Hernandez, on behalf of herself, and all others similarly situated, and as an ‘aggrieved employee’ on behalf of other ‘aggrieved employees’ under the Labor Code Private Attorneys General Act of 2004, *Plaintiff(s)*, vs. defendants Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine, Guitron Alcazar III Inc., and Guitron Alcazar IV, LLC ; and DOES 1 through 50, inclusive, *Defendant(s)*,” Case No. 34-2021-00306648 initiated on August 23, 2021 and pending in Superior Court of the State of California, County of Sacramento.

1.2. “Administrator” means CPT Group, Inc., the neutral entity the Parties have agreed to appoint to administer the Settlement.

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

1.4. “Aggrieved Employee” means a person employed by Defendants in California and classified as non-exempt, hourly employee who worked for Defendants during the PAGA Period.

1.5. “Class” means all persons employed by Defendants in California and classified as non-exempt, hourly employees who worked for Defendants during the Class Period.

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

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 expenses, respectively, incurred to prosecute the Action.

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

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

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

1.11. “Class Notice” means the COURT APPROVED NOTICE OF CLASS ACTION SETTLEMENT AND HEARING DATE FOR FINAL COURT APPROVAL, to be mailed to 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.

1.12. “Class Period” means the period from August 23, 2017 to the date of the order preliminarily approving the Settlement.

1.13. “Class Representative” means the named Plaintiff in the operative complaint in the Action seeking Court approval to serve as the Class Representative.

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

1.15. “Court” means the Superior Court of California, County of Sacramento.

1.16. “Defendants” means named Defendants Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine, Guitron Alcazar III Inc., and Guitron Alcazar IV, LLC.

1.17. “Defense Counsel” means Laura C. McHugh of Dugan McHugh Law Corporation.

1.18. “Effective Date” means the date by when both of the following have occurred: (a) the Court enters a Judgment on its Order Granting Final Approval of the Settlement; and (b) the Judgment is final. The Judgment is final as of the latest of the following occurrences: (a) if no Participating Class Member objects to the Settlement, the day the Court enters Judgment; (b) if one or more Participating Class Members objects to the Settlement, the day after the deadline for filing a notice of appeal from the Judgment; or if a timely appeal from the Judgment is filed, the seventh calendar day after any appellate proceeding opposing the settlement has been finally

1 dismissed with no material changes to the terms of this settlement and there is no right to pursue
2 further remedies.

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.

9 1.22. "Gross Settlement Amount" means \$685,000.00 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 Payment and the Administrator's Expenses. Defendants will pay the Gross Settlement
14 Amount in two (2) equal \$342,500.00 installment payments, outlined further below.

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

18 1.24. "Individual PAGA payment" means the Aggrieved Employee's pro rata share of
19 25% of the PAGA Penalties calculated according to the number of Pay Periods worked during the
20 PAGA Period.

21 1.25. "Judgment" means the judgment entered by the Court based upon the Final
22 Approval.

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

25 1.27. "LWDA PAGA payment" means the 75% of the PAGA Penalties paid to the
26 LWDA under Labor Code section 2699, subd. (i).

27 1.28. "Net Settlement Amount" means the Gross Settlement Amount, less the following
28 payments in the amounts approved by the Court: Individual PAGA payments, the LWDA PAGA
payment, Class Representative Service Payment, 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 1.29. “Non-Participating Class Member” means any Class Member who opts out of the
2 Settlement by sending the Administrator a valid and timely Request for Exclusion.

3 1.30. “PAGA Pay Period” means any Pay Period during which an Aggrieved Employee
4 worked for Defendants for at least one day during the PAGA Period.

5 1.31. “PAGA Period” means the period from August 26, 2020 to the date of the order
6 preliminarily approving the Settlement.

7 1.32. “PAGA” means the Private Attorneys General Act (Labor Code §§ 2698. et seq.).

8 1.33. “PAGA Notice” means Plaintiff’s August 26, 2021 letter to Defendants and the
9 LWDA providing notice pursuant to Labor Code section 2699.3, subd.(a).

10 1.34. “PAGA Penalties” means the total amount of PAGA civil penalties to be paid from
11 the Gross Settlement Amount, allocated 25% to the Aggrieved Employees (\$1,000.00) and the
12 75% to LWDA (\$3,000.00) in settlement of PAGA claims.

13 1.35. “Participating Class Member” means a Class Member who does not submit a valid
14 and timely Request for Exclusion from the Settlement.

15 1.36. “Plaintiff” means Maria Elena Diaz Hernandez, the named Plaintiff in the Action.

16 1.37. “Preliminary Approval” means the Court’s Order Granting Preliminary Approval
17 of the Settlement.

18 1.38. “Preliminary Approval Order” means the proposed Order Granting Preliminary
19 Approval and Approval of PAGA Settlement.

20 1.39. “Released Class Claims” means the claims being released as described in
21 Paragraph 6.2 below.

22 1.40. “Released PAGA Claims” means the claims being released as described in
23 Paragraph 6.2 below.

24 1.41. “Released Parties” means: Defendants and each of their former and present
25 directors, officers, shareholders, owners, agents, employees, members, attorneys, insurers,
26 predecessors, successors, assigns subsidiaries, and affiliates.

27 1.42. “Request for Exclusion” means a Class Member’s submission of a written request
28 to be excluded from the Class Settlement signed by the Class Member.

1.43. “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

1 her Objection to the Settlement. Class Members to whom Notice Packets are resent after having
2 been returned undeliverable to the Administrator shall have an additional 14 calendar days beyond
3 the Response Deadline has expired.

4 1.44. “Settlement” means the disposition of the Action effected by this Agreement and
5 the Judgment.

6 1.45. “Workweek” means any week during which a Class Member worked for
7 Defendants for at least one day, during the Class Period.

8 **2. RECITALS.**

9 2.1. On August 23, 2021, Plaintiff commenced this Action by filing a Complaint
10 alleging causes of action for failure to provide meal periods, failure to authorize and permit rest
11 periods, failure to issue proper wage statements, failure to timely pay wages, failure to maintain
12 required payroll records, and related claims. On December 10, 2021, Plaintiff filed a First
13 Amended Complaint alleging causes of action for failure to provide meal periods, failure to
14 authorize and permit rest periods, failure to issue proper wage statements, failure to timely pay
15 wages, failure to maintain required payroll records, and related allegations. The First Amended
16 Complaint is the operative complaint in the Action (the “Operative Complaint.”). On July 26,
17 2022, Plaintiff added Defendants in place of Doe Defendants 1 and 2, respectively. Defendants
18 deny the allegations in the Operative Complaint, deny any failure to comply with the laws
19 identified in the Operative Complaint and deny any and all liability for the causes of action
20 alleged.

21 2.2. Pursuant to Labor Code section 2699.3, subd.(a), Plaintiff gave timely written
22 notice to Defendants and the LWDA by sending the PAGA Notice.

23 2.3. On May 25, 2022, the Parties participated in an all-day mediation presided over
24 by Mr. David L. Perrault Esq. which led to this Agreement to settle the Action (describe
25 alternative means of negotiation.

26 2.4. Prior to negotiating the Settlement, Plaintiff obtained, through informal
27 discovery, the number of comparable employees, the number of workweeks, the number of pay
28 periods, average rates of pay, sample time records, sample payroll records, written policies,
financial records, and related information. Plaintiff’s investigation was sufficient to satisfy the
criteria for court approval set forth in *Dunk v. Foot Locker Retail, Inc.* (1996) 48 Cal.App.4th 1794,

1 1801 and *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129-130
2 (“*Dunk/Kullar*”).

3 2.5. The Court has not granted class certification.

4 2.6. The Parties, Class Counsel and Defense Counsel represent that they are not aware
5 of any other pending matter or action asserting claims that will be extinguished or affected by the
6 Settlement.

7 **3. MONETARY TERMS.**

8 3.1. Gross Settlement Amount. Except as otherwise provided by Paragraph 9 below,
9 Defendants promise to pay \$685,000.00 and no more as the Gross Settlement Amount and to
10 separately pay any and all employer payroll taxes owed on the Wage Portions of the Individual
11 Class Payments. Defendants have no obligation to pay the Gross Settlement Amount (or any
12 payroll taxes) prior to the deadline stated in Paragraph 6.1 of this Agreement. The Administrator
13 will disburse the entire Gross Settlement Amount without asking or requiring Participating Class
14 Members or Aggrieved Employees to submit any claim as a condition of payment. None of the
15 Gross Settlement Amount will revert to Defendant.

16 3.2. Payments from the Gross Settlement Amount. The Administrator will make and
17 deduct the following payments from the Gross Settlement Amount, in the amounts specified by
18 the Court in the Final Approval:

19 3.2.1. To Plaintiff: Class Representative Service Payment to the Class
20 Representative of not more than \$15,000.00 (in addition to any Individual Class Payment and any
21 Individual PAGA payment the Class Representative is entitled to receive as a Participating Class
22 Member). Defendants will not oppose Plaintiff’s request for a Class Representative Service
23 Payment that does not exceed these amounts. As part of the motion for Class Counsel Fees
24 Payment and Class Litigation Expenses Payment, Plaintiff will seek Court approval for any and
25 a Class Representative Service Payment no later than 16 court days prior to the Final Approval
26 Hearing. If the Court approves a Class Representative Service Payment less than the amount
27 requested, the Administrator will retain the remainder in the Net Settlement Amount. The
28 Administrator will pay the Class Representative Service Payment using IRS Form 1099. Plaintiff
assumes full responsibility and liability for employee taxes owed on the Class Representative
Service Payment.

1 3.2.2. To Class Counsel: A Class Counsel Fees Payment of not more than
2 33.33%, which is currently estimated to be \$228,333.30 and a Class Counsel Litigation Expenses
3 Payment of not more than \$20,000.00. Defendants will not oppose requests for these payments
4 provided that do not exceed these amounts. Plaintiff and/or Class Counsel will file a motion for
5 Class Counsel Fees Payment and Class Litigation Expenses Payment no later than 16 court days
6 prior to the Final Approval Hearing. If the Court approves a Class Counsel Fees Payment and/or
7 a Class Counsel Litigation Expenses Payment less than the amounts requested, the Administrator
8 will allocate the remainder to the Net Settlement Amount. Released Parties shall have no liability
9 to Class Counsel or any other Plaintiff's Counsel arising from any claim to any portion any Class
10 Counsel Fee Payment and/or Class Counsel Litigation Expenses Payment. The Administrator
11 will pay the Class Counsel Fees Payment and Class Counsel Expenses Payment using one or more
12 IRS 1099 Forms. Class Counsel assumes full responsibility and liability for taxes owed on the
13 Class Counsel Fees Payment and the Class Counsel Litigation Expenses Payment and holds
14 Defendants harmless, and indemnifies Defendants, from any dispute or controversy regarding any
15 division or sharing of any of these Payments.

16 3.2.3. To the Administrator: An Administrator Expenses Payment not to exceed
17 \$25,000.00 except for a showing of good cause and as approved by the Court. To the extent the
18 Administration Expenses are less or the Court approves payment less than \$25,000.00, the
19 Administrator will retain the remainder in the Net Settlement Amount.

20 3.2.4. To Each Participating Class Member: An Individual Class Payment
21 calculated by (a) dividing the Net Settlement Amount by the total number of Work Weeks worked
22 by all Participating Class Members during the Class Period and (b) multiplying the result by each
23 Participating Class Member's Work Weeks.

24 3.2.4.1. Tax Allocation of Individual Class Payments. 20.00% of
25 each Participating Class Member's Individual Class Payment will be allocated to settlement of
26 wage claims (the "Wage Portion"). The Wage Portions are subject to tax withholding and will be
27 reported on an IRS W-2 Form. The 80.00% of each Participating Class Member's Individual
28 Class Payment will be allocated to settlement of claims for interest and penalties (the "Non-Wage
Portion"). The Non-Wage Portions are not subject to wage withholdings and will be reported on
IRS 1099 Forms. Participating Class Members assume full responsibility and liability for any
employee taxes owed on their Individual Class Payment.

3.2.4.2. Effect of Non-Participating Class Members on Calculation of Individual Class Payments. Non-Participating Class Members will not receive any Individual 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.

3.2.5. To the LWDA and Aggrieved Employees: PAGA Penalties in the amount of \$4,000.00 to be paid from the Gross Settlement Amount, with 75% (\$3,000.00) allocated to the LWDA PAGA payment and 25% (\$1,000.00) allocated to the Individual PAGA payments.

3.2.5.1. The Administrator will calculate each Individual PAGA payment by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties \$1,000.00 by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods. Aggrieved Employees assume full responsibility and liability for any taxes owed on their Individual PAGA payment.

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

4. SETTLEMENT FUNDING AND PAYMENTS.

4.1. Class Work Weeks and Aggrieved Employee Pay Periods. Based on a review of its records to date, Defendants estimate there are 611 Class Members who collectively worked a total of 23,061 Work Weeks, and 305 Aggrieved Employees who worked a total of 8,474 PAGA Pay Periods.

4.2. Class Data. Not later than 15 days after the Court grants Preliminary Approval of the Settlement, Defendants will simultaneously deliver the Class Data to the Administrator, in the form of a Microsoft Excel spreadsheet. To protect Class Members' privacy rights, the Administrator must maintain the Class Data in confidence, use the Class Data only for purposes of this Settlement and for no other purpose, and restrict access to the Class Data to Administrator employees who need access to the Class Data to effect and perform under this Agreement. Defendants have a continuing duty to immediately notify Class Counsel if they discover that the Class Data omitted class member identifying information and to provide corrected or updated

Class Data as soon as reasonably feasible. Without any extension of the deadline by which Defendants must send the Class Data to the Administrator, the Parties and their counsel will expeditiously use best efforts, in good faith, to reconstruct or otherwise resolve any issues related to missing or omitted Class Data.

4.3. Funding of Gross Settlement Amount. Defendants shall fully fund the Gross Settlement Amount, and also fund the amounts necessary to fully pay Defendants' share of payroll taxes by transmitting the funds to the Administrator as follows:

4.3.1. Within thirty (30) calendar days of the Effective Date, Defendants shall pay the first of two (2) equal \$342,500.00 installment payments on the Gross Settlement Amount into the Settlement Account and shall pay the remaining \$342,500.00 installment payment within 180 days of the first installment payment.

4.4. Distributions from the Installment Payments toward the Gross Settlement Amount. There will be multiple distributions of the Gross Settlement Amount as follows:

4.4.1. **First Distribution.** Within fourteen (14) calendar days of the Effective Date, or within ten (10) calendar days of the deadline for the First payment (whichever is later), the Settlement Administrator shall distribute, *pro rata*, the portion of the Gross Settlement Amount Defendants paid by that date, including *pro rata* portions of the Individual Class Payments, Individual PAGA Payments, LWDA PAGA payment, Class Representative Service Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Administrator's expenses.

4.4.2. **Second Distribution.** Within ten (10) calendar days of the Second Installment Payment, the Settlement Administrator shall distribute, *pro rata*, the portion of the Gross Settlement Amount Defendants paid since the first distribution, including *pro rata* portions of the Individual Class Payments, Individual PAGA Payments, LWDA PAGA payment, Class Representative Service Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Administrator's expenses.

Disbursements of the pro rata portions of the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment and the Class Representative Service Payment shall not precede disbursement of pro rata portions of the Individual Class Payments and Individual PAGA payments.

4.4.3. The Administrator will issue checks for the Individual Class Payments

1 and/or Individual PAGA payments and send them to the Class Members via First Class U.S. Mail,
2 postage prepaid. The face of each check shall prominently state the date (not less than 180 days
3 after the date of mailing) when the check will be voided. The Administrator will cancel all checks
4 not cashed by the void date. The Administrator will send checks for Individual Settlement
5 Payments to all Participating Class Members (including those for whom Class Notice was
6 returned undelivered). The Administrator will send checks for Individual PAGA payments to all
7 Aggrieved Employees including Non-Participating Class Members who qualify as Aggrieved
8 Employees (including those for whom Class Notice was returned undelivered). The
9 Administrator may send Participating Class Members a single check combining the Individual
10 Class Payment and the Individual PAGA payment. Before mailing any checks, the Administrator
must update the recipients' mailing addresses using the National Change of Address Database.

11 4.4.4. The Administrator must conduct a Class Member Address Search for all
12 other Class Members whose checks are returned undelivered without USPS forwarding address.
13 Within 7 days of receiving a returned check the Administrator must re-mail checks to the USPS
14 forwarding address provided or to an address ascertained through the Class Member Address
15 Search. The Administrator need not take further steps to deliver checks to Class Members whose
16 re-mailed checks are returned as undelivered. The Administrator shall promptly send a
17 replacement check to any Class Member whose original check was lost or misplaced, requested
by the Class Member prior to the void date.

18 4.4.5. For any Class Member whose Individual Class Payment check or
19 Individual PAGA payment check is uncashed and cancelled after the void date, the Administrator
20 shall transmit the funds represented by such checks to the California Controller's Unclaimed
21 Property Fund in the name of the Class Member thereby leaving no "unpaid residue" subject to
22 the requirements of California Code of Civil Procedure Section 384, subd. (b).

23 4.4.6. The payment of Individual Class Payments and Individual PAGA
24 payments shall not obligate Defendants to confer any additional benefits or make any additional
25 payments to Class Members (such as 401(k) contributions or bonuses) beyond those specified in
this Agreement.

26 **5. [OMITTED]**

27 **6. RELEASES OF CLAIMS.** Effective on the date when Defendants fully fund the entire
28 Gross Settlement Amount and funds all employer payroll taxes owed on the Wage Portion of the

1 Individual Class Payments, Plaintiff, Class Members, and Class Counsel will release claims
2 against all Released Parties as follows:

3 6.1 Plaintiff's Releases. Plaintiff and her respective former and present spouses,
4 representatives, agents, attorneys, heirs, administrators, successors, and assigns generally, release
5 and discharge Released Parties from all claims, transactions, or occurrences that occurred during
6 the Class Period, including, but not limited to: (a) all claims that were, or reasonably could have
7 been, alleged, based on the facts contained, in the Operative Complaint and (b) all PAGA claims
8 that were, or reasonably could have been, alleged based on facts contained in the Operative
9 Complaint, Plaintiff's PAGA Notice, or ascertained during the Action and released under 6.2,
10 below ("Plaintiff's Releases.") Plaintiff's Releases do not extend to any claims or actions to
11 enforce this Agreement, or to any claims for vested benefits, unemployment benefits, disability
12 benefits, social security benefits, workers' compensation benefits that arose at any time, or based
13 on occurrences outside the Class Period. Plaintiff acknowledges that she may discover facts or
14 law different from, or in addition to, the facts or law that Plaintiff now knows or believes to be
15 true but agrees, nonetheless, that Plaintiff's Release shall be and remain effective in all respects,
16 notwithstanding such different or additional facts or her discovery of them.

17 6.1.1 Plaintiff's Waivers of Rights Under California Civil Code Section 1542.
18 For purposes of Plaintiff's Release, Plaintiff expressly waives and relinquishes the provisions,
19 rights, and benefits, if any, of section 1542 of the California Civil Code, which reads:

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

24 6.2 Release by Participating Class Members Who Are Not Aggrieved Employees:
25 All Participating Class Members, on behalf of themselves and their respective former and present
26 representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released
27 Parties from (i) all claims that were alleged, or reasonably could have been alleged, based on the
28 Class Period facts stated in the Operative Complaint and ascertained in the course of the Action
including, failure to provide meal periods, failure to authorize and permit rest periods, failure to

1 issue proper wage statements, failure to timely pay wages, failure to maintain required payroll
2 records, and related allegations. Except as set forth in Section 6.3 of this Agreement, Participating
3 Class Members do not release any other claims, including claims for vested benefits, wrongful
4 termination, violation of the Fair Employment and Housing Act, unemployment insurance,
5 disability, social security, workers' compensation, or claims based on facts occurring outside the
6 Class Period.

6.3 Release by Non-Participating Class Members Who Are Aggrieved Employees:

7 All Non-Participating Class Members who are Aggrieved Employees are deemed to release, on
8 behalf of themselves and their respective former and present representatives, agents, attorneys,
9 heirs, administrators, successors, and assigns, the Released Parties from all claims for PAGA
10 penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period
11 facts stated in the Operative Complaint and the PAGA Notice and ascertained in the course of the
12 Action including, failure to provide meal periods, failure to authorize and permit rest periods,
13 failure to issue proper wage statements, failure to timely pay wages, failure to maintain required
14 payroll records, and related claims.

15 **7. MOTION FOR PRELIMINARY APPROVAL.** The Parties agree to jointly prepare and
16 file a motion for preliminary approval ("Motion for Preliminary Approval") that complies with
17 the Court's current checklist for Preliminary Approvals.

18 7.1 Plaintiff's Responsibilities. Plaintiff will prepare and deliver to Defense Counsel
19 all documents necessary for obtaining Preliminary Approval, including: (i) a draft of the notice,
20 and memorandum in support, of the Motion for Preliminary Approval that includes an analysis
21 of the Settlement under *Dunk/Kullar* and a request for approval of the PAGA Settlement under
22 Labor Code Section 2699, subd. (f)(2)); (ii) a draft proposed Order Granting Preliminary Approval
23 and Approval of PAGA Settlement; (iii) a draft proposed Class Notice; (iv) a signed declaration
24 from the Administrator attaching its "not to exceed" bid for administering the Settlement and
25 attesting to its willingness to serve; competency; operative procedures for protecting the security
26 of Class Data; amounts of insurance coverage for any data breach, defalcation of funds or other
27 misfeasance; all facts relevant to any actual or potential conflicts of interest with Class Members;
28 and the nature and extent of any financial relationship with Plaintiff, Class Counsel or Defense
Counsel; (v) a signed declaration from Plaintiff confirming willingness and competency to serve

1 and disclosing all facts relevant to any actual or potential conflicts of interest with Class Members,
2 and/or the Administrator; (v) a signed declaration from each Class Counsel firm attesting to its
3 competency to represent the Class Members; its timely transmission to the LWDA of all necessary
4 PAGA documents (initial notice of violations (Labor Code section 2699.3, subd. (a)), Operative
5 Complaint (Labor Code section 2699, subd. (1)(1)), this Agreement (Labor Code section 2699,
6 subd. (1)(2)); (vi) a redlined version of the parties' Agreement showing all modifications made to
7 the Model Agreement ready for filing with the Court; and (vii) all facts relevant to any actual or
8 potential conflict of interest with Class Members, and/or the Administrator. In their Declarations,
9 Plaintiff and Class Counsel Declaration shall aver that they are not aware of any other pending
10 matter or action asserting claims that will be extinguished or adversely affected by the Settlement.

11 7.2 Responsibilities of Counsel. Class Counsel and Defense Counsel are jointly
12 responsible for expeditiously finalizing and filing the Motion for Preliminary Approval no later
13 than 30 days after the full execution of this Agreement; obtaining a prompt hearing date for the
14 Motion for Preliminary Approval; and for appearing in Court to advocate in favor of the Motion
15 for Preliminary Approval. Class Counsel is responsible for delivering the Court's Preliminary
16 Approval to the Administrator.

17 7.3 Duty to Cooperate. If the Parties disagree on any aspect of the proposed Motion
18 for Preliminary Approval and/or the supporting declarations and documents, Class Counsel and
19 Defense Counsel will expeditiously work together on behalf of the Parties by meeting in person
20 or by telephone, and in good faith, to resolve the disagreement. If the Court does not grant
21 Preliminary Approval or conditions Preliminary Approval on any material change to this
22 Agreement, Class Counsel and Defense Counsel will expeditiously work together on behalf of
23 the Parties by meeting in person or by telephone, and in good faith, to modify the Agreement and
24 otherwise satisfy the Court's concerns.

25 **8. SETTLEMENT ADMINISTRATION.**

26 8.1 Selection of Administrator. The Parties have jointly selected CPT Group, Inc. to
27 serve as the Administrator and verified that, as a condition of appointment, CPT Group, Inc.
28 agrees to be bound by this Agreement and to perform, as a fiduciary, all duties specified in this
Agreement in exchange for payment of Administration Expenses. The Parties and their Counsel
represent that they have no interest or relationship, financial or otherwise, with the Administrator

other than a professional relationship arising out of prior experiences administering settlements.

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

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

8.4 Notice to Class Members.

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

8.4.2 Using best efforts to perform as soon as possible, and in no event later than 14 days after receiving the Class Data, the Administrator will send to all Class Members identified in the Class Data, via first-class United States Postal Service (“USPS”) mail, the Class Notice with Spanish translation substantially in the form attached to this Agreement as Exhibit A. The first page of the Class Notice shall prominently estimate the dollar amounts of any Individual Class Payment and/or Individual PAGA payment payable to the Class Member, and the number of Work Weeks and PAGA Pay Periods (if applicable) used to calculate these amounts. Before mailing Class Notices, the Administrator shall update Class Member addresses using the National Change of Address database.

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

8.4.4 The deadlines for Class Members’ written objections, Challenges to Work Weeks and/or Pay Periods, and Requests for Exclusion will be extended an additional 14 days beyond the 60 days otherwise provided in the Class Notice for all Class Members whose notice is re-mailed. The Administrator will inform the Class Member of the extended deadline with the

1 re-mailed Class Notice.

2 8.4.5 If the Administrator, any of the Defendants or Class Counsel is contacted
3 by or otherwise discovers any persons who believe they should have been included in the Class
4 Data and should have received Class Notice, the Parties will expeditiously meet and confer in
5 person or by telephone, and in good faith, in an effort to agree on whether to include them as Class
6 Members. If the Parties agree, such persons will be Class Members entitled to the same rights as
7 other Class Members, and the Administrator will send, via email or overnight delivery, a Class
8 Notice requiring them to exercise options under this Agreement not later than 14 days after receipt
9 of Class Notice, or the deadline dates in the Class Notice, which ever are later.

9 8.5 Requests for Exclusion (Opt-Outs).

10 8.5.1 Class Members who wish to exclude themselves (opt-out of) the Class
11 Settlement must send the Administrator, by fax, email, or mail, a signed written Request for
12 Exclusion not later than 60 days after the Administrator mails the Class Notice (plus an additional
13 14 days for Class Members whose Class Notice is re-mailed). A Request for Exclusion is a letter
14 from a Class Member or her representative that reasonably communicates the Class Member's
15 election to be excluded from the Settlement and includes the Class Member's name, address and
16 email address or telephone number. To be valid, a Request for Exclusion must be timely faxed,
17 emailed, or postmarked by the Response Deadline.

18 8.5.2 The Administrator may not reject a Request for Exclusion as invalid
19 because it fails to contain all the information specified in the Class Notice. The Administrator
20 shall accept any Request for Exclusion as valid if the Administrator can reasonably ascertain the
21 identity of the person as a Class Member and the Class Member's desire to be excluded. The
22 Administrator's determination shall be final and not appealable or otherwise susceptible to
23 challenge. If the Administrator has reason to question the authenticity of a Request for Exclusion,
24 the Administrator may demand additional proof of the Class Member's identity. The
25 Administrator's determination of authenticity shall be final and not appealable or otherwise
26 susceptible to challenge.

27 8.5.3 Every Class Member who does not submit a timely and valid Request for
28 Exclusion is deemed to be a Participating Class Member under this Agreement, entitled to all
benefits and bound by all terms and conditions of the Settlement, including the Participating Class
Members' Releases under Paragraphs 6.2 and 6.3 of this Agreement, regardless of whether the

1 Participating Class Member actually receives the Class Notice or objects to the Settlement.

2 8.5.4 Every Class Member who submits a valid and timely Request for
3 Exclusion is a Non-Participating Class Member and shall not receive an Individual Class Payment
4 or have the right to object to the class action components of the Settlement. Because future PAGA
5 claims are subject to claim preclusion upon entry of the Judgment, Non-Participating Class
6 Members who are Aggrieved Employees are deemed to release the claims identified in Paragraph
6.4 of this Agreement and are eligible for an Individual PAGA payment.

7 8.6 Challenges to Calculation of Work Weeks. Each Class Member shall have 60
8 days after the Administrator mails the Class Notice (plus an additional 14 days for Class Members
9 whose Class Notice is re-mailed) to challenge the number of Class Work Weeks and PAGA Pay
10 Periods (if any) allocated to the Class Member in the Class Notice. The Class Member may
11 challenge the allocation by communicating with the Administrator via fax, email or mail. The
12 Administrator must encourage the challenging Class Member to submit supporting
13 documentation. In the absence of any contrary documentation, the Administrator is entitled to
14 presume that the Work Weeks contained in the Class Notice are correct so long as they are
15 consistent with the Class Data. The Administrator's determination of each Class Member's
16 allocation of Work Weeks and/or Pay Periods shall be final and not appealable or otherwise
17 susceptible to challenge. The Administrator shall promptly provide copies of all challenges to
18 calculation of Work Weeks and/or Pay Periods to Defense Counsel and Class Counsel and the
Administrator's determination the challenges.

19 8.7 Objections to Settlement.

20 8.7.1 Only Participating Class Members may object to the class action
21 components of the Settlement and/or this Agreement, including contesting the fairness of the
22 Settlement, and/or amounts requested for the Class Counsel Fees Payment, Class Counsel
23 Litigation Expenses Payment and/or Class Representative Service Payment.

24 8.7.2 Participating Class Members may send written objections to the
25 Administrator, by fax, email, or mail. In the alternative, Participating Class Members may appear
26 in Court (or hire an attorney to appear in Court) to present verbal objections at the Final Approval
27 Hearing. A Participating Class Member who elects to send a written objection to the
28 Administrator must do so not later than 60 days after the Administrator's mailing of the Class
Notice (plus an additional 14 days for Class Members whose Class Notice was re-mailed).

1 8.7.3 Non-Participating Class Members have no right to object to any of the class
2 action components of the Settlement.

3 8.8 Administrator Duties. The Administrator has a duty to perform or observe all
4 tasks to be performed or observed by the Administrator contained in this Agreement or otherwise.

5 8.8.1 Website, Email Address and Toll-Free Number. The Administrator will
6 establish and maintain and use an internet website to post information of interest to Class
7 Members including the date, time and location for the Final Approval Hearing and copies of the
8 Settlement Agreement, Motion for Preliminary Approval, the Preliminary Approval, the Class
9 Notice, the Motion for Final Approval, the Motion for Class Counsel Fees Payment, Class
10 Counsel Litigation Expenses Payment and Class Representative Service Payment, the Final
11 Approval and the Judgment. The Administrator will also maintain and monitor an email address
12 and a toll-free telephone number to receive Class Member calls, faxes and emails.

13 8.8.2 Requests for Exclusion (Opt-outs) and Exclusion List. The Administrator
14 will promptly review on a rolling basis Requests for Exclusion to ascertain their validity. Not
15 later than 5 days after the expiration of the deadline for submitting Requests for Exclusion, the
16 Administrator shall email a list to Class Counsel and Defense Counsel containing (a) the names
17 and other identifying information of Class Members who have timely submitted valid Requests
18 for Exclusion (“Exclusion List”); (b) the names and other identifying information of Class
19 Members who have submitted invalid Requests for Exclusion; (c) copies of all Requests for
20 Exclusion from Settlement submitted (whether valid or invalid).

21 8.8.3 Weekly Reports. The Administrator must, on a weekly basis, provide
22 written reports to Class Counsel and Defense Counsel that, among other things, tally the number
23 of: Class Notices mailed or re-mailed, Class Notices returned undelivered, Requests for
24 Exclusion (whether valid or invalid) received, objections received, challenges to Work Weeks
25 and/or Pay Periods received and/or resolved, and checks mailed for Individual Class Payments
26 and Individual PAGA payments (“Weekly Report”). The Weekly Reports must include provide
27 the Administrator’s assessment of the validity of Requests for Exclusion and attach copies of all
28 Requests for Exclusion and objections received.

8.8.4 Workweek and/or Pay Period Challenges. The Administrator has the
authority to address and make final decisions consistent with the terms of this Agreement on all
Class Member challenges over the calculation of Work Weeks and/or Pay Periods. The

1 Administrator's decision shall be final and not appealable or otherwise susceptible to challenge.

2 8.8.5 Administrator's Declaration. Not later than 14 days before the date by
3 which Plaintiff is required to file the Motion for Final Approval of the Settlement, the
4 Administrator will provide to Class Counsel and Defense Counsel, a signed declaration suitable
5 for filing in Court attesting to its due diligence and compliance with all of its obligations under
6 this Agreement, including, but not limited to, its mailing of Class Notice, the Class Notices
7 returned as undelivered, the re-mailing of Class Notices, attempts to locate Class Members, the
8 total number of Requests for Exclusion from Settlement it received (both valid or invalid), the
9 number of written objections and attach the Exclusion List. The Administrator will supplement
10 its declaration as needed or requested by the Parties and/or the Court. Class Counsel is responsible
11 for filing the Administrator's declaration(s) in Court.

12 8.8.6 Final Report by Administrator. Within 10 days after the Administrator
13 disburses all funds in the Gross Settlement Amount, the Administrator will provide Class Counsel
14 and Defense Counsel with a final report detailing its disbursements by employee identification
15 number only of all payments made under this Agreement. At least 15 days before any deadline
16 set by the Court, the Administrator will prepare, and submit to Class Counsel and Defense
17 Counsel, a signed declaration suitable for filing in Court attesting to its disbursement of all
18 payments required under this Agreement. Class Counsel is responsible for filing the
19 Administrator's declaration in Court.

20 **9. CLASS SIZE ESTIMATES and ESCALATOR CLAUSE**. Based on its records,
21 Defendants estimate that, as of the date of this Settlement Agreement, (1) there are 611 Class
22 Members and 23,061 Total Work Weeks during the Class period and (2) there were 305
23 Aggrieved Employees who worked 8,474 Pay Periods during the PAGA Period. If the Work
24 Weeks and/or Class Members as of the date the Court approves the settlement exceeds the
25 referenced 23,061 Work Weeks and/or 611 Class Members by more than 10.00%, the Gross
26 Settlement Amount, including the Class Counsel Fees Payment, the Class Representative Service
27 Payment, and the LWDA payment, will increase proportionally according to the number of
28 additional Work Weeks or Class Members, whichever results in a higher increase in the Gross
Settlement Amount. In the alternative, in the event that this escalator provision is triggered, then
Defendants have the option to elect to end the Class Period so as to have an earlier end date at the

1 Defendants' discretion in order to limit the covered workweeks to 25,368 in lieu of paying an
2 increase to the Settlement Amount. The Settlement Administrator will calculate the workweeks
3 worked by the Class Members during the Class Period, the amount to be paid pro rata, and the
4 individual settlement payments to eligible Class Members. Defendants' data will be presumed to
5 be correct, unless a particular Class Member proves otherwise to the Settlement Administrator by
6 credible evidence. All disputes as to workweeks worked will be resolved and decided by the
7 Settlement Administrator and the Settlement Administrator's decision on all disputes as to
8 workweeks worked will be final and non-appealable.

9 **10. DEFENDANTS' RIGHT TO WITHDRAW.** If the number of valid Requests for
10 Exclusion identified in the Exclusion List exceeds 10.00% of the total of all Class Members,
11 Defendants may, but are not obligated to, elect to withdraw from the Settlement. The Parties
12 agree that, if Defendants withdraw, the Settlement shall be void ab initio, have no force or effect
13 whatsoever, and that neither Party will have any further obligation to perform under this
14 Agreement; provided, however, Defendants will remain responsible for paying all Settlement
15 Administration Expenses incurred to that point. Defendants must notify Class Counsel and the
16 Court of its election to withdraw not later than 7 business days after the Administrator sends the
17 final Exclusion List to Defense Counsel; late elections will have no effect.

18 **11. NO PUBLICATION CLAUSE.** Plaintiff agrees to refrain from any publication or any
19 type of communication, oral or written, of a disparaging nature pertaining to Defendants or their
20 owners, officers, agents, directors, supervisors, employees, or representatives including without
21 limitation Amparo Estela Alcazar, Amador (Hector) Alcazar, and Ivan Alcazar. Plaintiff further
22 agrees and covenants that the same restrictions shall apply with respect to representatives of the
23 media and any of the Parties' social media accounts, including without limitation, Facebook,
24 Twitter, Instagram, Snapchat, LinkedIn, Glassdoor, or any other social media platform. However,
25 nothing in this Agreement shall prevent Plaintiff from discussing or disclosing information about
26 unlawful acts in the workplace, such as the Labor Code violations at issue in this lawsuit,
27 harassment or discrimination or any other conduct that she has reason to believe is unlawful.
28 Moreover, nothing in this agreement prohibits Plaintiff and/or Defendants from providing truthful
information as required by law in a legal proceeding or government investigation. Any such

required testimony or comments in such legal proceedings or government investigations shall not be deemed a breach of confidentiality in violation of this paragraph.

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

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

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

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

12.4 Waiver of Right to Appeal. Provided the Judgment is consistent with the terms and conditions of this Agreement, specifically including the Class Counsel Fees Payment and Class Counsel Litigation Expenses Payment reflected set forth in this Settlement, the Parties, their respective counsel, and all Participating Class Members who did not object to the Settlement as

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

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

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

14. ADDITIONAL PROVISIONS.

14.1 No Admission of Liability, Class Certification or Representative Manageability for Other Purposes. This Agreement represents a compromise and settlement of highly disputed claims. Nothing in this Agreement is intended or should be construed as an admission by Defendants that any of the allegations in the Operative Complaint have merit or that Defendants have any liability for any claims asserted; nor should it be intended or construed as an admission by Plaintiff that Defendants' defenses in the Action have merit. The Parties agree that class certification and representative treatment is for purposes of this Settlement only. If, for any reason the Court does grant Preliminary Approval, Final Approval or enter Judgment, Defendants

1 reserve the right to contest certification of any class for any reasons, and Defendants reserve all
2 available defenses to the claims in the Action, and Plaintiff reserves the right to move for class
3 certification on any grounds available and to contest Defendants' defenses. The Settlement, this
4 Agreement and Parties' willingness to settle the Action will have no bearing on, and will not be
5 admissible in connection with, any litigation (except for proceedings to enforce or effectuate the
6 Settlement and this Agreement).

7 14.2 Certification for Settlement Purposes: Plaintiff and Defendants agree that, for
8 purposes of settlement only, certification of the class as defined herein is appropriate and meets
9 the standards set forth in Federal Rule of Civil Procedure 23 and/or California Code of Civil
10 Procedure section 382.

11 14.3 Confidentiality Prior to Preliminary Approval. Plaintiff, Class Counsel,
12 Defendants and Defense Counsel separately agree that, until the Motion for Preliminary Approval
13 of Settlement is filed, they and each of them will not disclose, disseminate and/or publicize, or
14 cause or permit another person to disclose, disseminate or publicize, any of the terms of the
15 Agreement directly or indirectly, specifically or generally, to any person, corporation, association,
16 government agency, or other entity except: (1) to the Parties' attorneys, accountants, or spouses,
17 all of whom will be instructed to keep this Agreement confidential; (2) counsel in a related matter;
18 (3) to the extent necessary to report income to appropriate taxing authorities; (4) in response to a
19 court order or subpoena; or (5) in response to an inquiry or subpoena issued by a state or federal
20 government agency.

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

14.4 No Solicitation. The Parties separately agree that they and their respective
counsel and employees will not solicit any Class Member to opt out of or object to the Settlement,
or appeal from the Judgment. Nothing in this paragraph shall be construed to restrict Class

1 Counsel's ability to communicate with Class Members in accordance with Class Counsel's ethical
2 obligations owed to Class Members.

3 14.5 Integrated Agreement. Upon execution by all Parties and their counsel, this
4 Agreement together with its attached exhibits shall constitute the entire agreement between the
5 Parties relating to the Settlement, superseding any and all oral representations, warranties,
6 covenants, or inducements made to or by any Party.

7 14.6 Attorney Authorization. Class Counsel and Defense Counsel separately warrant
8 and represent that they are authorized by Plaintiff and Defendants, respectively, to take all
9 appropriate action required or permitted to be taken by such Parties pursuant to this Agreement
10 to effectuate its terms, and to execute any other documents reasonably required to effectuate the
11 terms of this Agreement including any amendments to this Agreement.

12 14.7 Cooperation. The Parties and their counsel will cooperate with each other and
13 use their best efforts, in good faith, to implement the Settlement by, among other things,
14 modifying the Settlement Agreement, submitting supplemental evidence and supplementing
15 points and authorities as requested by the Court. In the event the Parties are unable to agree upon
16 the form or content of any document necessary to implement the Settlement, or on any
17 modification of the Agreement that may become necessary to implement the Settlement, the
18 Parties will seek the assistance of a mediator and/or the Court for resolution.

19 14.8 Enforcement. The parties agree that the Sacramento County Superior Court shall
20 have jurisdiction to enforce the terms of this Agreement pursuant to California Civil Procedure
21 Code section 661.6. In the event that a motion to enforce this Agreement is required to be filed
22 due to a party's failure to comply with the terms herein, the prevailing party shall be awarded
23 reasonable attorney's fees and costs, which shall be in addition to any amounts to be paid under
24 this settlement.

25 14.9 No Prior Assignments. The Parties separately represent and warrant that they
26 have not directly or indirectly assigned, transferred, encumbered, or purported to assign, transfer,
27 or encumber to any person or entity and portion of any liability, claim, demand, action, cause of
28 action, or right released and discharged by the Party in this Settlement.

14.10 No Tax Advice. Neither any Plaintiff, Class Counsel, Defendants nor Defense
Counsel are providing any advice regarding taxes or taxability, nor shall anything in this
Settlement be relied upon as such within the meaning of United States Treasury Department

1 Circular 230 (31 CFR Part 10, as amended) or otherwise.

2 14.11 Modification of Agreement. This Agreement, and all parts of it, may be
3 amended, modified, changed, or waived only by an express written instrument signed by all
4 Parties or their representatives, and approved by the Court.

5 14.12 Agreement Binding on Successors. This Agreement will be binding upon, and
6 inure to the benefit of, the successors of each of the Parties.

7 14.13 Applicable Law. All terms and conditions of this Agreement and its exhibits will
8 be governed by and interpreted according to the internal laws of the state of California, without
9 regard to conflict of law principles.

10 14.14 Cooperation in Drafting. The Parties have cooperated in the drafting and
11 preparation of this Agreement. This Agreement will not be construed against any Party on the
12 basis that the Party was the drafter or participated in the drafting.

13 14.15 Confidentiality. To the extent permitted by law, all agreements made, and orders
14 entered during Action and in this Agreement relating to the confidentiality of information shall
15 survive the execution of this Agreement.

16 14.16 Use and Return of Class Data. Information provided to Class Counsel pursuant
17 to Cal. Evid. Code §1152, and all copies and summaries of the Class Data provided to Class
18 Counsel by Defendants in connection with the mediation, other settlement negotiations, or in
19 connection with the Settlement, may be used only with respect to this Settlement, and no other
20 purpose, and may not be used in any way that violates any existing contractual agreement, statute,
21 or rule of court. Not later than 90 days after the date when the Court discharges the
22 Administrator's obligation to provide a Declaration confirming the final pay out of all Settlement
23 funds, Plaintiff shall destroy, all paper and electronic versions of Class Data received from
24 Defendants unless, prior to the Court's discharge of the Administrator's obligation, Defendants
25 make a written request to Class Counsel for the return, rather than the destructions, of Class Data.

26 14.17 Headings. The descriptive heading of any section or paragraph of this Agreement
27 is inserted for convenience of reference only and does not constitute a part of this Agreement.

28 14.18 Calendar Days. Unless otherwise noted, all reference to "days" in this Agreement
shall be to calendar days. In the event any date or deadline set forth in this Agreement falls on a
weekend or federal legal holiday, such date or deadline shall be on the first business day
thereafter.

1 14.19 Notice. All notices, demands or other communications between the Parties in
2 connection with this Agreement will be in writing and deemed to have been duly given as of the
3 third business day after mailing by United States mail, or the day sent by email or messenger,
4 addressed as follows:

5 To Plaintiff:
6 DAVID G. SPIVAK
7 david@spivaklaw.com
8 THE SPIVAK LAW FIRM
9 8605 Santa Monica Bl
10 PMB 42554
11 West Hollywood, CA 90069
12 Telephone: (213) 725-9094
13 Facsimile: (213) 634-2485

14 WALTER L. HAINES
15 walter@uelglaw.com
16 UNITED EMPLOYEES LAW GROUP, PC
17 8605 Santa Monica Blvd., PMB 63354
18 West Hollywood, CA 90069
19 Telephone: (562) 256-1047
20 Facsimile: (562) 256-1006

21 To Defendants:
22 Laura C. McHugh, Esq.
23 Dugan McHugh Law Corporation
24 641 Fulton Ave
25 Ste 100
26 Sacramento, CA 95825
27 laura@duganmchugh.com

28 14.20 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.

 14.21 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

1 date to bring a case to trial under CCP section 583.310 for the entire period of this settlement
2 process.

3
4 Dated: 08 / 29 / 2023

By:



MARIA ELENA DIAZ HERNANDEZ

6
7 Dated: _____

By: _____

Amador Alcazar
President
Guitron Alcazar Alcazar Inc. dba El
Tapatio Mexican Cuisine, Guitron
Alcazar III Inc., and Guitron Alcazar
IV, LLC

12
13 THE SPIVAK LAW FIRM

14 Dated: 08 / 29 / 2023

By:



DAVID G. SPIVAK, Attorneys for
Plaintiff, MARIA ELENA DIAZ
HERNANDEZ, and all others similarly
situated

18
19 UNITED EMPLOYEES LAW GROUP

20 Dated: August 29, 2023

By:



WALTER L. HAINES, Attorneys for
Plaintiff, MARIA ELENA DIAZ
HERNANDEZ, and all others similarly
situated

24
25 DUGAN MCHUGH LAW CORPORATION

26
27 Dated: _____

By: _____

LAURA C. MCHUGH, Attorneys for
Defendants, Guitron Alcazar Alcazar

1 date to bring a case to trial under CCP section 583.310 for the entire period of this settlement
2 process.

3
4 Dated: _____

By: _____
MARIA ELENA DIAZ HERNANDEZ

6
7 Dated: 08 / 08 / 2023

By: Amador Alcazar
Amador Alcazar
President
Guitron Alcazar Alcazar Inc. dba El
Tapatio Mexican Cuisine, Guitron
Alcazar III Inc., and Guitron Alcazar
IV, LLC

12
13 THE SPIVAK LAW FIRM

14 Dated: _____

By: _____
DAVID G. SPIVAK, Attorneys for
Plaintiff, MARIA ELENA DIAZ
HERNANDEZ, and all others similarly
situated

18
19 UNITED EMPLOYEES LAW GROUP

20 Dated: _____

By: _____
WALTER L. HAINES, Attorneys for
Plaintiff, MARIA ELENA DIAZ
HERNANDEZ, and all others similarly
situated

24
25 DUGAN MCHUGH LAW CORPORATION

26
27 Dated: 08/07/2023

By: Laura
LAURA C. MCHUGH, Attorneys for
Defendants, Guitron Alcazar Alcazar

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

Inc. dba El Tapatio Mexican Cuisine,
Guitron Alcazar III Inc., and Guitron
Alcazar IV, LLC

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: *Maria Elena Diaz Hernandez, et al. v. Guitron Alcazar Alcazar Inc. dba El Tapatio*
4 *Mexican Cuisine, et al.* and number 34-2021-00306648)

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 Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine, Guitron Alcazar III Inc., and Guitron Alcazar IV, LLC (collectively “Defendants”) for alleged wage and hour violations. The Action was filed by one of Defendants’ employees, Maria Elena Diaz Hernandez (“Plaintiff”) and seek payment of (1) wages and other relief for a class of non-exempt, hourly employees (“Class Members”) who worked for Defendants during the Class Period (August 23, 2017 to the date of the order preliminarily approving the Settlement); and (2) penalties under the California Private Attorney General Act (“PAGA”) for all non-exempt, hourly employees who worked for Defendants during the PAGA Period (August 26, 2020 to the date of the order preliminarily approving the Settlement) (“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 \$ [REDACTED] (less withholding) and your Individual PAGA payment is estimated to be \$ [REDACTED]**. 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.)

19 The above estimates are based on Defendants’ records showing that **you worked [REDACTED] Work Weeks** during the Class Period and **you worked [REDACTED] Pay Periods** during the PAGA Period. If you believe that you worked more Work Weeks during either period, you can submit a challenge by the deadline date. See Section 4 of this Notice.

22 The Court has already preliminarily approved the proposed Settlement and approved this Notice. The Court has not yet decided whether to grant final approval. 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 Plaintiff and her 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 the 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 wage claims 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 wage 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	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. Once excluded, you will be a Non-Participating Class Member and no longer eligible for an Individual Class Payment. Non-Participating Class Members cannot object to any portion of the proposed Settlement. See Section 6 of this Notice. You cannot opt-out of the PAGA portion of the proposed Settlement. Defendants must pay Individual PAGA payments to all Aggrieved Employees and the Aggrieved Employees must give up their rights to pursue Released Claims (defined below).
Participating Class Members Can Object to the Class Settlement but not the PAGA Settlement Written Objections Must be Submitted by	All Class Members who do not opt-out ("Participating Class Members") can object to any aspect of the proposed Settlement. The Court's decision whether to finally approve the Settlement will include a determination of how much will be paid to Class Counsel and Plaintiff who pursued the Action on behalf of the Class. You are not personally responsible for any payments to Class Counsel or Plaintiff, but every dollar paid to Class Counsel and Plaintiff reduces the overall amount paid to Participating Class Members. You can object to the amounts requested by Class Counsel or Plaintiff if you think they are unreasonable. See Section 7 of this Notice.

You Can Participate in the [REDACTED] Final Approval Hearing	The Court’s Final Approval Hearing is scheduled to take place on [REDACTED]. 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. See Section 8 of this Notice.
You Can Challenge the Calculation of Your Work Week / Pay Periods Written Challenges Must be Submitted by [REDACTED]	The amount of your Individual Class Payment and LWDA PAGA payment (if any) depend on how many Work Weeks you worked at least one day during the Class Period and how many Pay Periods you worked at least one day during the PAGA Period, respectively. The number Class Period Work Weeks and number of PAGA Period Pay Periods you worked 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 [REDACTED]. See Section 4 of this Notice.

1. WHAT IS THE ACTION ABOUT?

Plaintiff is a former employee of Defendants. The Action accuses Defendants of violating California labor laws by failure to provide meal periods, failure to authorize and permit rest periods, 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, Plaintiff has also asserted a claim for civil penalties under the California Private Attorneys General Act (Labor Code §§ 2698, et seq.) (“PAGA”). Plaintiff is represented by attorneys in the Action: David G. Spivak of The Spivak Law Firm, and Walter L. Haines of United Employees Law Group, PC (“Class Counsel.”)

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

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

So far, the Court has made no determination whether Defendants or Plaintiff is correct on the merits. In the meantime, Plaintiff and Defendants hired an experienced, neutral mediator in an effort to resolve the Action by negotiating an to end the case by agreement (settle the case) rather than continuing the expensive and time-consuming process of litigation. The negotiations were successful. By signing a lengthy written settlement agreement (“Agreement”) and agreeing to jointly ask the Court to enter a judgment ending the Action and enforcing the Agreement, Plaintiff and Defendants have 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.

Plaintiff and Class Counsel strongly believe the Settlement is a good deal for you because they believe that: (1) Defendants have agreed to pay a fair, reasonable and adequate amount considering the strength of the claims and the risks and uncertainties of continued litigation; and

(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.

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

1. Defendants Will Pay \$685,000.00 as the Gross Settlement Amount (Gross Settlement). Defendants have agreed to deposit the Gross Settlement into an account controlled by the Administrator of the Settlement. The Administrator will use the Gross Settlement to pay the Individual Class Payments, Individual PAGA payments, Class Representative Service Payment, Class Counsel's attorney's fees and expenses, the 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 begin to fund the Gross Settlement as follows: Within thirty (30) calendar days of the Effective Date, Defendants shall pay the first of two (2) equal \$342,500.00 installment payments on the Gross Settlement Amount into the Settlement Account and shall pay the remaining \$342,500.00 installment payment within 180 days of the first installment payment. The Administrator will make a distribution after each installment payment as follows:

First Distribution. Within fourteen (14) calendar days of the Effective Date, or within ten (10) calendar days of the deadline for the First payment (whichever is later), the Settlement Administrator shall distribute, *pro rata*, the portion of the Gross Settlement Amount Defendants paid by that date, including *pro rata* portions of the Individual Class Payments, Individual PAGA Payments, LWDA PAGA payment, Class Representative Service Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Administrator's expenses.

Second Distribution. Within ten (10) calendar days of the Second Installment Payment, the Settlement Administrator shall distribute, *pro rata*, the portion of the Gross Settlement Amount Defendants paid since the first distribution, including *pro rata* portions of the Individual Class Payments, Individual PAGA Payments, LWDA PAGA payment, Class Representative Service Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Administrator's expenses.

2. Disbursements of the pro rata portions of the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment and the Class Representative Service Payment shall not precede disbursement of pro rata portions of the Individual Class Payments and Individual PAGA payments.

3. 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.

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

A. Up to \$228,333.30 (33.33% of the Gross Settlement to Class Counsel for

1 attorneys' fees and up to \$20,000.00 for their litigation expenses. To date, Class Counsel have
2 worked and incurred expenses on the Action without payment.

3 B. Up to \$15,000.00 as a Class Representative Award to Plaintiff for filing
4 the Action, working with Class Counsel and representing the Class. A Class Representative
5 Award will be the only monies Plaintiff will receive other than her Individual Class Payment and
6 any Individual PAGA payment.

7 C. Up to \$25,000.00 to the Administrator for services administering the
8 Settlement.

9 D. Up to \$4,000.00 for PAGA Penalties, allocated 75% to the LWDA PAGA
10 payment and 25% in Individual PAGA payments to the Aggrieved Employees based on their
11 PAGA Period Pay Periods.

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

14 If the Work Weeks and/or Class Members as of the date the Court approves the settlement
15 exceeds the referenced 23,061 Work Weeks and/or 611 Class Members by more than 10.00%,
16 the Gross Settlement Amount, including the Class Counsel Fees Payment, the Class
17 Representative Service Payment, and the LWDA payment, will increase proportionally according
18 to the number of additional Work Weeks or Class Members, whichever results in a higher increase
19 in the Gross Settlement Amount.

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

24 6. Taxes Owed on Payments to Class Members. Plaintiff and Defendants are asking
25 the Court to approve an allocation of 20.00% of each Individual Class Payment to taxable wages
26 ("Wage Portion") and 80.00% to interest and penalties ("Non-Wage Portion."). The Wage Portion
27 is subject to withholdings and will be reported on IRS W-2 Forms. Defendants will separately
28 pay employer payroll taxes they owes 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 Plaintiff 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
Payments received from the proposed Settlement. You should consult a tax advisor if you have
any questions about the tax consequences of the proposed Settlement.

7. Need to Promptly Cash Payment Checks. The front of every check issued for

1 Individual Class Payments and Individual PAGA payments will show the date when the check
2 expires (the void date). If you don't cash it by the void date, your check will be automatically
cancelled, and the monies

3 ☒ will be deposited with the California Controller's Unclaimed Property Fund in your
4 name.

5 ☐ will irrevocably lost to you because they will be paid to a non-profit organization or
foundation ("Cy Pres").

6 If the monies represented by your check is sent to the Controller's Unclaimed Property,
7 you should consult the rules of the Fund for instructions on how to retrieve your money.

8 8. Requests for Exclusion from the Class Settlement (Opt-Outs). You will be treated
9 as a Participating Class Member, participating fully in the Class Settlement, unless you notify the
10 Administrator in writing, not later than [REDACTED], that you wish to opt-out. The easiest way to notify
11 the Administrator is to send a written and signed Request for Exclusion by the [REDACTED] Response
12 Deadline. The Request for Exclusion should be a letter from a Class Member or her representative
13 setting forth a Class Member's name, present address, telephone number, and a simple statement
electing to be excluded from the Settlement. Excluded Class Members (i.e., Non-Participating
Class Members) will not receive Individual Class Payments, but will preserve their rights to
personally pursue wage and hour claims against Defendants.

14 You cannot opt-out of the PAGA portion of the Settlement. Class Members who exclude
15 themselves from the Class Settlement (Non-Participating Class Members) remain eligible for
Individual PAGA payments and are required to give up their right to assert PAGA claims against
Defendants based on the PAGA Period facts alleged in the Action.

16 9. The Proposed Settlement Will be Void if the Court Denies Final Approval. It is
17 possible the Court will decline to grant Final Approval of the Settlement or decline enter a
18 Judgment. It is also possible the Court will enter a Judgment that is reversed on appeal. Plaintiff
19 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.

20 10. Administrator. The Court has appointed a neutral company, [REDACTED] CPT Group, Inc. (the
21 "Administrator") to send this Notice, calculate and make payments, and process Class Members'
22 Requests for Exclusion. The Administrator will also decide Class Member Challenges over Work
23 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.

24 11. Participating Class Members' Release. After the Judgment is final and Defendants
25 have fully funded the Gross Settlement (and separately paid all employer payroll taxes),
26 Participating Class Members will be legally barred from asserting any of the claims released under
27 the Settlement. This means that unless you opted out by validly excluding yourself from the Class
Settlement, you cannot sue, continue to sue, or be part of any other lawsuit against Defendants or
related entities for wages based on the Class Period facts and PAGA penalties based on PAGA

1 Period facts, as alleged in the Action and resolved by this Settlement.

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

3 All Participating Class Members, on behalf of themselves and their respective former and
4 present representatives, agents, attorneys, heirs, administrators, successors, and assigns,
5 release Released Parties from (i) all claims that were alleged, or reasonably could have
6 been alleged, based on the Class Period facts stated in the Operative Complaint and
7 ascertained in the course of the Action including failure to provide meal periods, failure
8 to authorize and permit rest periods, failure to issue proper wage statements, failure to
9 timely pay wages, failure to maintain required payroll records, and related allegations.
10 Except as set forth in Section 6.3 of the Settlement Agreement, Participating Class
11 Members do not release any other claims, including claims for vested benefits, wrongful
12 termination, violation of the Fair Employment and Housing Act, unemployment
13 insurance, disability, social security, workers' compensation, or claims based on facts
14 occurring outside the Class Period.

15 12. Aggrieved Employees' PAGA Release. After the Court's judgment is final, and
16 Defendants have paid the Gross Settlement (and separately paid the employer-side payroll taxes),
17 all Aggrieved Employees will be barred from asserting PAGA claims against Defendants, whether
18 or not they exclude themselves from the Settlement. This means that all Aggrieved Employees,
19 including those who are Participating Class Members and those who opt-out of the Class
20 Settlement, cannot sue, continue to sue, or participate in any other PAGA claim against
21 Defendants or their related entities based on the PAGA Period facts alleged in the Action and
22 resolved by this Settlement.

23 The Aggrieved Employees' Releases for Participating and Non-Participating Class
24 Members are as follows:

25 All Participating and Non-Participating Class Members who are Aggrieved Employees
26 are deemed to release, on behalf of themselves and their respective former and present
27 representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released
28 Parties, from all claims for PAGA penalties that were alleged, or reasonably could have been
alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Notice
and ascertained in the course of the Action including failure to provide meal periods, failure to
authorize and permit rest periods, failure to issue proper wage statements, failure to timely pay
wages, failure to maintain required payroll records, and related allegations.

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

30 1. Individual Class Payments. The Administrator will calculate Individual Class
31 Payments by (a) dividing the Net Settlement Amount by the total number of Work Weeks worked
32 by all Participating Class Members, and (b) multiplying the result by the number of Work Weeks
33 worked by each individual Participating Class Member.

34 2. Individual PAGA payments. The Administrator will calculate Individual PAGA

1 payments by (a) dividing \$1,000.00 by the total number of PAGA Pay Periods worked by all
2 Aggrieved Employees and (b) multiplying the result by the number of PAGA Period Pay Periods
worked by each individual Aggrieved Employee.

3 3. Workweek/Pay Period Challenges. The number of Class Work Weeks you worked
4 during the Class Period and the number of PAGA Pay Periods you worked during the PAGA
5 Period, as recorded in Defendants' records, are stated in the first page of this Notice. You have
6 until [REDACTED] to challenge the number of Work Weeks and/or Pay Periods credited to you. You can
submit your challenge by signing and sending a letter to the Administrator via mail, email or fax.
Section 9 of this Notice has the Administrator's contact information.

7 You need to support your challenge by sending copies of pay stubs or other records. The
8 Administrator will accept Defendants' calculation of Work Weeks and/or Pay Periods based on
9 Defendants' records as accurate unless you send copies of records containing contrary
10 information. You should send copies rather than originals because the documents will not be
11 returned to you. The Administrator will resolve Workweek and/or Pay Period challenges based
on your submission and on input from Class Counsel (who will advocate on behalf of
Participating Class Members) and Defendants' Counsel. The Administrator's decision is final.
You can't appeal or otherwise challenge its final decision.

12 5. HOW WILL I GET PAID?

13 Within thirty (30) calendar days of the Effective Date, Defendants shall pay the first of
14 two (2) equal \$342,500.00 installment payments on the Gross Settlement Amount into the
15 Settlement Account and shall pay the remaining \$342,500.00 installment payment within 180
days of the first installment payment.

16 1. Participating Class Members. After each instalment payment by Defendants
17 toward the Gross Settlement Amount, the Administrator will send, by U.S. mail, a single pro rata
18 check to every Participating Class Member (i.e., every Class Member who doesn't opt-out)
including those who also qualify as Aggrieved Employees. The single check will combine the
19 Individual Class Payment and the Individual PAGA payment.

20 2. Non-Participating Class Members. After each instalment payment by Defendants
21 toward the Gross Settlement Amount, the Administrator will send, by U.S. mail, a single pro rata
22 Individual PAGA payment check to every Aggrieved Employee who opts out of the Class
Settlement (i.e., every Non-Participating Class Member).

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

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

26 Submit a written and signed letter with your name, present address, telephone number,
27 and a simple statement that you do not want to participate in the Settlement. The Administrator

will exclude you based on any writing communicating your request be excluded. Be sure to personally sign your request, identify the Action as *Maria Elena Diaz Hernandez vs. Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine*, Case No. 34-2021-00306648, and include your identifying information (full name, address, telephone number, approximate dates of employment, and social security number for verification purposes). You must make the request yourself. If someone else makes the request for you, it will not be valid. **The Administrator must be sent your request to be excluded by [redacted], or it will be invalid.** Section 9 of the Notice has the Administrator's contact information.

7. HOW DO I OBJECT TO THE SETTLEMENT?

Only Participating Class Members have the right to object to the Settlement. Before deciding whether to object, you may wish to see what Plaintiff and Defendants are asking the Court to approve. At least [redacted] days before the [redacted] Final Approval Hearing, Class Counsel and/or Plaintiff will file in Court (1) a Motion for Final Approval that includes, among other things, the reasons why the proposed Settlement is fair, and (2) a Motion for Fees, Litigation Expenses and Service Award stating (i) the amount Class Counsel is requesting for attorneys' fees and litigation expenses; and (ii) the amount Plaintiff is requesting as a Class Representative Service Award. Upon reasonable request, Class Counsel (whose contact information is in Section 9 of this Notice) will send you copies of these documents at no cost to you. You can also view them on the Administrator's Website ([url](#)) or the Court's website ([url](#)).

A Participating Class Member who disagrees with any aspect of the Agreement, the Motion for Final Approval and/or Motion for Fees, Litigation Expenses and Service Award may wish to object, for example, that the proposed Settlement is unfair, or that the amounts requested by Class Counsel or Plaintiff are too high or too low. **The deadline for sending written objections to the Administrator is [redacted].** Be sure to tell the Administrator what you object to, why you object, and any facts that support your objection. Make sure you identify the Action, *Maria Elena Diaz Hernandez, et al. vs. Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine*, case no. 34-2021-00306648, and include your name, current address, telephone number, and approximate dates of employment for Defendants and sign the objection. Section 9 of this Notice has the Administrator's contact information.

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

8. CAN I ATTEND THE FINAL APPROVAL HEARING?

You can, but don't have to, attend the Final Approval Hearing on [redacted] at (time) in Department 28 of the Sacramento Superior Court, located at 720 Ninth Street, Sacramento, CA 95814. 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, Plaintiff, and the Administrator. The Court will invite comment from objectors, Class Counsel and Defense Counsel before making a

1 decision. You can attend (or hire a lawyer to attend) either personally or virtually via [REDACTED]
2 ([https://www.\[REDACTED\]](https://www.[REDACTED])). Check the Court's website for the most current information.

3 It's possible the Court will reschedule the Final Approval Hearing. You should check the
4 Administrator's website [REDACTED] beforehand or contact Class Counsel to verify the date and time of
the Final Approval Hearing.

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

6 The Agreement sets forth everything Defendants and Plaintiff has promised to do under the
7 proposed Settlement. The easiest way to read the Agreement, the Judgment or any other
8 Settlement documents is to go to (specify entity)'s website at (url). You can also telephone or send
an email to Class Counsel or the Administrator using the contact information listed below, or
9 consult the Superior Court website by going to ([http://www.\[REDACTED\].aspx](http://www.[REDACTED].aspx)) and entering the Case
Number for the Action, Case No. 34-2021-00306648. You can also make an appointment to
10 personally review court documents in the Clerk's Office at the 720 Ninth Street by calling [REDACTED].

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

13 Class Counsel:

14 DAVID G. SPIVAK
15 david@spivaklaw.com
16 THE SPIVAK LAW FIRM
17 8605 Santa Monica Bl
18 PMB 42554
West Hollywood, CA 90069
Telephone: (213) 725-9094
Facsimile: (213) 634-2485

19 WALTER L. HAINES
20 walter@uelglaw.com
21 UNITED EMPLOYEES LAW GROUP, PC
22 8605 Santa Monica Blvd., PMB 63354
West Hollywood, CA 90069
Telephone: (562) 256-1047
Facsimile: (562) 256-1006

23 Administrator:

24 Name of Company: CPT Group, Inc.
25 Email Address: _____
26 Mailing Address: _____
27 Telephone: _____
Fax Number: _____

1
2 **10. WHAT IF I LOSE MY SETTLEMENT CHECK?**

3 If you lose or misplace your settlement check before cashing it, the Administrator will replace it
4 as long as you request a replacement before the void date on the face of the original check. If
5 your check is already void, you should consult the Unclaimed Property Fund for instructions on
6 how to retrieve the funds.

7 **11. WHAT IF I CHANGE MY ADDRESS?**

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

walter@uelglaw.com

8605 Santa Monica Blvd., PMB 63354

Teléfono: (562) 256-1047

Abogados de los Demandantes,

MARIA ELENA DIAZ HERNANDEZ, y todos los demás en situación similar

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

laura@dugganmchugh.com

641 Fulton Ave

Sacramento CA 95825

Facsimil: (916) 404-5900

GUITRON ALCAZAR ALCAZAR INC. DBA EL TAPATIO MEXICAN CUISINE, GUITRON

ALCAZAR III INC., Y GUTTRON ALCAZAR IV, LLC

Esta Acción de Grupo y Acuerdo de Liquidación de PAGA (“Acuerdo”) se realiza entre la demandante Maria Elena Diaz Hernandez (“Demandante”) y los demandados Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine, Guitron Alcazar III Inc. y Guitron Alcazar IV , LLC (colectivamente los “Demandados”). El Acuerdo se refiere a la Demandante y a los Demandados colectivamente como “Partes” o individualmente como “Parte”.

1. DEFINICIONES.

1.1. “Acción” significa la demanda de la Demandante que alega violaciones de salarios y horas contra Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine, Guitron Alcazar III Inc. y Guitron Alcazar IV, LLC titulada “Maria Elena Diaz Hernandez, en nombre de ella misma, y de todos los demás en situación similar, y como una ‘empleada agraviada’ en nombre de otros ‘empleados agraviados’ bajo la Ley de Abogados Generales Privados del Código Laboral de 2004, *Demandantes*, contra los Demandados Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine, Guitron Alcazar III Inc. y Guitron Alcazar IV, LLC; y DOES 1 a 50, inclusive, *Demandados*”, Caso No. 34-2021-00306648 iniciado el 23 de agosto de 2021 y pendiente en el Tribunal Superior del Estado de California, Condado de Sacramento.

1.2. “Administrador” significa CPT Group, Inc., la entidad neutral que las Partes han acordado designar para administrar el Acuerdo.

1.3. “Pago de Gastos Administrativos” significa el monto que se le pagará al Administrador del Monto Bruto del Acuerdo para reembolsar sus honorarios y gastos razonables de conformidad con la oferta “sin exceder” del Administrador presentada al Tribunal en relación con la Aprobación Preliminar del Acuerdo.

1.4. “Empleado Agraviado” significa una persona empleada por los Demandados en California y clasificada como empleado por hora no exento que trabajó para los Demandados durante el Período PAGA.

1.5. “Grupo” se refiere a todas las personas empleadas por los Demandados en California y clasificadas como empleados por hora no exentos que trabajaron para los Demandados durante el Período del Grupo.

1.6. “Abogado del Grupo” significa David G. Spivak de The Spivak Law Firm, y Walter L. Haines de United Employees Law Group, PC.

1.7. “Pago de Honorarios de Abogados del Grupo” y “Pago de Gastos de Litigio de

los Abogados del Grupo” se refieren a los montos asignados a los Abogados del Grupo para el reembolso de los honorarios y gastos razonables de los abogados, respectivamente, incurridos para procesar la Acción.

1.8. “Datos del Grupo” se refiere a la información de identificación del Miembro del Grupo en posesión de los Demandados, incluido el nombre del Miembro del Grupo, la última dirección postal conocida, el número de Seguro Social y el número de Semanas Laborales del Período del Grupo y Períodos de Pago de PAGA.

1.9. “Miembro del Grupo” o “Miembro del Grupo del Acuerdo” significa un miembro del Grupo, ya sea como Miembro del Grupo Participante o Miembro del Grupo No Participante (incluyendo un Miembro del Grupo No Participante que califica como un Empleado Agraviado).

1.10. “Búsqueda de las Direcciones de los Miembros del Grupo” se refiere a la investigación del Administrador y la búsqueda de las direcciones postales actuales de los Miembros del Grupo utilizando todas las fuentes, métodos y medios razonablemente disponibles, incluyendo, entre otros, la base de datos Nacional de Cambios de Dirección, omisión de seguimientos y contacto directo por parte del Administrador con los Miembros del Grupo.

1.11. “Aviso del Grupo” se refiere el AVISO DEL GRUPO DEL ACUERDO DE LA ACCIÓN DE GRUPO APROBADO POR EL TRIBUNAL Y FECHA DE AUDIENCIA PARA LA APROBACIÓN DEFINITIVA DEL TRIBUNAL, que se enviará por correo a los Miembros del Grupo en inglés con una traducción al español en el formulario, sin variación material, adjunta como Anexo A e incorporada por referencia en este Acuerdo.

1.12. “Período del Grupo” significa el período desde el 23 de agosto de 2017 hasta la fecha de la orden que aprueba preliminarmente el Acuerdo.

1.13. “Representante del Grupo” significa la Demandante nombrada en la demanda operativa en la Acción que solicita la aprobación del Tribunal para actuar como Representante del Grupo.

1.14. “Pago de Servicios del Representante del Grupo” se refiere a los pagos al Representante del Grupo por iniciar la Acción y proporcionar servicios en apoyo de la Acción.

1.15. "Tribunal" significa el Tribunal Superior de California, Condado de Sacramento.

1.16. "Demandados" significa los Demandados nombrados Guitron Alcazar Alcazar

Inc. dba El Tapatio Mexican Cuisine, Guitron Alcazar III Inc. y Guitron Alcazar IV, LLC.

1.17. “Abogado de la Defensa” significa Laura C. McHugh de Dugan McHugh Law Corporation.

1.18. “Fecha de Entrada en Vigor” significa la fecha en la que han ocurrido las dos cosas siguientes: (a) el Tribunal dicta Sentencia en su Orden que otorga la Aprobación Definitiva del Acuerdo; y (b) la Sentencia es definitiva. La Sentencia será definitiva en el último de los siguientes casos: (a) si ningún Miembro del Grupo Participante se opone al Acuerdo, el día en que el Tribunal dicte la Sentencia; (b) si uno o más Miembros del Grupo Participantes se oponen al Acuerdo, el día siguiente a la fecha límite para presentar una notificación de apelación de la Sentencia; o si se presenta una apelación oportuna de la Sentencia, el séptimo día calendario después de que se haya desestimado definitivamente cualquier procedimiento de apelación que se opusiera al acuerdo sin cambios sustanciales en los términos de este acuerdo y no haya derecho a presentar recursos adicionales.

1.19. “Aprobación Definitiva” significa la orden del Tribunal que otorga la aprobación definitiva del Acuerdo.

1.20. “Audiencia de Aprobación Definitiva” significa la audiencia del Tribunal sobre la Moción de Aprobación Definitiva del Acuerdo.

1.21. “Sentencia Definitiva” significa la Sentencia dictada por el Tribunal al Otorgar la Aprobación Definitiva del Acuerdo.

1.22. “Monto Bruto del Acuerdo” significa \$685,000.00, que es el monto total que los Demandados aceptan pagar en virtud del Acuerdo, excepto lo dispuesto en el Párrafo 9 a continuación. El Monto Bruto del Acuerdo se utilizará para pagar los Pagos Individuales del Grupo, los Pagos Individuales de PAGA, el Pago de PAGA a la LWDA, los Honorarios de los Abogados del Grupo, los Gastos de los Abogados del Grupo, el Pago de Servicios del Representante del Grupo y los Gastos del Administrador. Los Demandados pagarán el Monto Bruto del Acuerdo en dos (2) pagos parciales iguales de \$342,500.00, que se describen más adelante.

1.23. “Pago Individual del Grupo” significa la participación prorrateada del Miembro del Grupo Participante del Monto Neto del Acuerdo calculado según el número de Semanas Laborales trabajadas durante el Período del Grupo.

1.24. “Pago Individual de PAGA” significa la parte prorrateada del Empleado Agraviado del 25 % de las Sanciones de PAGA calculadas según el número de Períodos de Pago

trabajados durante el Período de PAGA.

1.25. “Sentencia” significa la sentencia dictada por el Tribunal con base en la Aprobación Definitiva.

1.26. “LWDA” se refiere a la Agencia de Desarrollo Laboral y de la Fuerza Laboral de California, la agencia autorizada, de conformidad con la Sección 2699, subd. (i) del Código Laboral.

1.27. “Pago de PAGA a la LWDA” significa el 75% de las sanciones PAGA pagadas a la LWDA de conformidad con la Sección 2699, subd. (i) del Código Laboral.

1.28. “Monto Neto del Acuerdo” significa el Monto Bruto del Acuerdo, menos los siguientes pagos en los montos aprobados por el Tribunal: Pagos Individuales de PAGA, el Pago de PAGA a la LWDA, el Pago de Servicios del Representante del Grupo, el Pago de Honorarios de los Abogados del Grupo, el Pago de Gastos de Litigio de los Abogados del Grupo y el Pago de Gastos Administrativos. El resto se pagará a los Miembros del Grupo Participantes como Pagos de Individuales del Grupo.

1.29. “Miembro del Grupo No Participante” significa cualquier Miembro del Grupo que opte por excluirse del Acuerdo enviando al Administrador una Solicitud de Exclusión válida y oportuna.

1.30. “Período de Pago PAGA” significa cualquier Período de Pago durante el cual un Empleado Agraviado trabajó para los Demandados por lo menos un día durante el Período PAGA.

1.31. “Período PAGA” significa el período comprendido entre el 26 de agosto de 2020 y la fecha de la orden de la Aprobación Preliminar del Acuerdo.

1.32. "PAGA" significa la Ley General de Abogados Privados (Código Laboral §§ 2698. et seq.).

1.33. “Aviso de PAGA” significa la carta del Demandante del 26 de agosto de 2021 a los Demandados y a la LWDA que proporciona un aviso de conformidad con la Sección 2699.3, subd. (a) del Código Laboral.

1.34. “Sanciones de PAGA” se refiere al monto total de las sanciones civiles de PAGA que se pagarán del Monto Bruto del Acuerdo, asignado el 25% a los Empleados Agraviados (\$1,000.00) y el 75% a LWDA (\$3,000.00) como liquidación de las reclamaciones de PAGA.

1.35. “Miembro del Grupo Participante” significa un Miembro del Grupo que no presenta una Solicitud de Exclusión del Acuerdo válida y oportuna.

1.36. “Demandante” significa María Elena Díaz Hernández, la Demandante nombrada en la Acción.

1.37. “Aprobación Preliminar” significa la Orden del Tribunal que Otorga la Aprobación Preliminar del Acuerdo.

1.38. “Orden de Aprobación Preliminar” significa la Orden propuesta que Otorga la Aprobación Preliminar y la Aprobación del Acuerdo PAGA.

1.39. “Reclamaciones Exoneradas del Grupo” significa las reclamaciones que se exoneran como se describe en el Párrafo 6.2 a continuación.

1.40. “Reclamaciones Exoneradas de PAGA” significa las reclamaciones que se liberan según lo descrito en el Párrafo 6.2 a continuación.

1.41. “Partes Exoneradas” significa: Los Demandados y cada uno de sus directores, funcionarios, accionistas, propietarios, agentes, empleados, miembros, abogados, aseguradores, predecesores, sucesores, cesionarios, subsidiarias y afiliados anteriores y actuales.

1.42. “Solicitud de Exclusión” significa la presentación por escrito de un Miembro del Grupo para ser excluido del Acuerdo del Grupo firmada por el Miembro del Grupo.

1.43. “Plazo de Respuesta” significa 60 días después de que el Administrador envíe por correo el Aviso a los Miembros del Grupo y a los Empleados Agraviados, y será la última fecha en la que los Miembros del Grupo podrán: (a) enviar por fax, correo electrónico o correo postal Solicitudes de Exclusión del Acuerdo, o podrán (b) enviar por fax, correo electrónico o correo postal su Objeción al Acuerdo. Los Miembros del Grupo a los que se les reenvían los Paquetes de Aviso después de haber sido devueltos sin poder ser entregados al Administrador tendrán 14 días calendarios adicionales después de que venza el Plazo de Respuesta.

1.44. “Acuerdo” significa la resolución de la Acción efectuada por el presente Acuerdo y la Sentencia.

1.45. “Semana Laboral” significa cualquier semana durante la cual un Miembro del Grupo trabajó para los Demandados por lo menos un día, durante el Período del Grupo.

2. CONSIDERACIONES.

2.1. El 23 de agosto de 2021, la Demandante inició esta Acción al presentar una Demanda alegando causas de acción para no proporcionar períodos para comer, no autorizar ni permitir períodos de descanso, no emitir declaraciones de salarios adecuadas, no pagar los salarios

a tiempo, no mantener los registros de nómina requeridos y otras alegaciones relacionadas. En 10 de diciembre de 2021, la Demandante presentó una Primera Demanda Enmendada alegando causas de acción por no proporcionar períodos para comer, no autorizar ni permitir períodos de descanso, no emitir declaraciones de salarios adecuadas, no pagar los salarios a tiempo, no mantener los registros de nómina requeridos y otras alegaciones relacionadas. La Primera Demanda Enmendada es la demanda operativa en la Acción (la “Denuncia Operativa”). El 26 de julio de 2022, la Demandante agregó Demandados en lugar de los Demandados Doe 1 y 2, respectivamente. Los Demandados niegan las alegaciones en la Demanda Operativa, niegan cualquier incumplimiento de las leyes identificadas en la Demanda Operativa y niegan toda responsabilidad por las causas de acción alegadas.

2.2. De conformidad con la Sección 2699.3, subd. (a) del Código Laboral, la Demandante notificó oportunamente por escrito a los Demandados y a la LWDA mediante el envío del Aviso de PAGA.

2.3. El 25 de mayo de 2022, las Partes participaron en una mediación de todo el día presidida por el Sr. David L. Perrault Esq. que condujo a este Acuerdo para resolver la Acción (describe los medios alternativos de negociación).

2.4. Antes de negociar el Acuerdo, la Demandante obtuvo, a través de una presentación de prueba informal, el número de empleados comparables, el número de Semanas Laborales, el número de períodos de pago, las tasas promedio de pago, los registros de tiempo de muestra, registros de nómina de muestra, políticas escritas, registros financieros e información relacionada. La investigación de la demandante fue suficiente para satisfacer los criterios de la aprobación del tribunal establecidos en *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*”)

2.5. El Tribunal no ha concedido la certificación de grupo.

2.6. Las Partes, los Abogados del Grupo y los Abogados de la Defensa declaran que no tienen conocimiento de ningún otro asunto o acción pendiente que haga valer reclamaciones que se extinguirán o se verán afectadas por el Acuerdo.

3. TÉRMINOS MONETARIOS.

3.1. Monto Bruto del Acuerdo. Salvo que se disponga lo contrario en el Párrafo 9 a

continuación, los Demandados prometen pagar \$685,000.00 y no más como el Monto Bruto del Acuerdo y pagar por separado todos y cada uno de los impuestos sobre la nómina del empleador adeudados a las Porciones de Salario de los Pagos Individuales del Grupo. Los Demandados no tienen la obligación de pagar el Monto Bruto del Acuerdo (ni ningún impuesto sobre la nómina) antes de la fecha límite establecida en el Párrafo 6.1 de este Acuerdo. El Administrador desembolsará la totalidad del Monto Bruto del Acuerdo sin pedir ni exigir a los Miembros del Grupo Participantes ni a los Empleados Agraviados que presenten una reclamación como condición para el pago. Nada del Monto Bruto del Acuerdo se revertirá al Demandado.

3.2. Pagos del Monto Bruto del Acuerdo. El Administrador realizará y deducirá los siguientes pagos del Monto Bruto del Acuerdo, en las cantidades especificadas por el Tribunal en la Aprobación Definitiva:

3.2.1. A la Demandante: El Pago de Servicio de Representante del Grupo no más de \$ 15,000.00 (además de cualquier Pago Individual del Grupo y cualquier Pago Individual de PAGA que la Representante del Grupo tiene derecho a recibir como Miembro del Grupo Participante). Los Demandados no se opondrán a la solicitud de la Demandante de un Pago de Servicios del Representante del Grupo que no supere estos montos. Como parte de la moción para el Pago de los Honorarios de los Abogados del Grupo y el Pago de los Gastos de Litigio del Grupo, la Demandante solicitará la aprobación del Tribunal para cualquier Pago de Servicios del Representante del Grupo a más tardar 16 días hábiles antes de la Audiencia de Aprobación Definitiva. Si el Tribunal aprueba un Pago de Servicios del Representante del Grupo menor que el monto solicitado, el Administrador retendrá el resto en el Monto Neto del Acuerdo. El Administrador pagará el Pago de Servicios del Representante del Grupo utilizando el Formulario 1099 del IRS. La Demandante asume toda la responsabilidad por los impuestos adeudados a los empleados en el Pago de Servicios del Representante del Grupo.

3.2.2. A los Abogados del Grupo: Un Pago de Honorarios de Abogados del Grupo de no más del 33.33%, que actualmente se estima en \$228,333.30 y un Pago de Gastos de Litigio de los Abogados del Grupo de no más de \$20,000.00. Los Demandados no se opondrán a las solicitudes de estos pagos siempre que no excedan estas cantidades. La Demandante y/o los Abogados del Grupo presentarán una moción para el Pago de los Honorarios de los Abogados del Grupo y el Pago de los Gastos de Litigio del Grupo a más tardar 16 días hábiles antes de la Audiencia de Aprobación Definitiva. Si el Tribunal aprueba un Pago de Honorarios de los

Abogados del Grupo y/o un Pago de Gastos de Litigio de los Abogados del Grupo menores a los montos solicitados, el Administrador asignará el resto al Monto Neto del Acuerdo. Las Partes Exoneradas no tendrán ninguna responsabilidad ante los Abogados del Grupo o ante cualquier otro Abogado de la Demandante que surja de cualquier reclamación de cualquier parte del Pago de los Honorarios de los Abogados del Grupo y/o Pago de Gastos de Litigio de los Abogados del Grupo. El Administrador pagará el Pago de los Honorarios de los Abogados del Grupo y el Pago de los Gastos de los Abogados del Grupo utilizando uno o más Formularios 1099 del IRS. Los Abogados del Grupo asumen toda la responsabilidad por los impuestos adeudados sobre el Pago de los Honorarios de los Abogados del Grupo y el Pago de los Gastos de Litigio de los Abogados del Grupo y exime a los Demandados de toda responsabilidad e indemniza a los Demandados por cualquier disputa o controversia relativa a cualquier división o reparto de cualquiera de estos Pagos.

3.2.3. Al Administrador: Un Pago de Gastos del Administrador que no exceda los \$25,000.00 excepto que se demuestre una causa justificada y el Tribunal lo apruebe. En la medida en que los Gastos de Administración sean menores o el Tribunal apruebe un pago inferior a \$25,000.00, el Administrador retendrá el resto en el Monto Neto del Acuerdo.

3.2.4. A cada Miembro del Grupo Participante: Un Pago Individual del Grupo calculado (a) dividiendo el Monto Neto del Acuerdo por el número total de Semanas Laborales trabajadas por todos los Miembros del Grupo Participantes durante el Período del Grupo y (b) multiplicando el resultado por las Semanas Laborales de cada Miembro del Grupo Participante.

3.2.4.1. Asignación de Impuestos de Pagos Individuales del Grupo. El 20.00% del Pago Individual del Grupo de cada Miembro del Grupo Participante se asignará a la liquidación de reclamaciones de salarios (la “Porción de Salarios”). Las Porciones de Salarios están sujetas a retención de impuestos y se declararán en un formulario W-2 del IRS. El 80.00% del Pago Individual del Grupo de cada Miembro del Grupo Participante se asignará a la liquidación de reclamaciones por intereses y sanciones (la “Porción No Salarial”). Las Porciones no salariales no están sujetas a retenciones salariales y se declararán en los formularios 1099 del IRS. Los Miembros del Grupo Participantes asumen toda la responsabilidad y obligación de pagar los impuestos adeudados en su Pago Individual del Grupo.

3.2.4.2. Efecto de los Miembros del Grupo No Participantes en el Cálculo de los Pagos Individuales del Grupo. Los Miembros del Grupo No Participantes no

recibirán ningún Pago Individual del Grupo. El Administrador retendrá cantidades iguales a sus Pagos Individuales del Grupo en el Monto Neto del Acuerdo para su distribución a los Miembros del Grupo Participantes en forma prorrateada.

3.2.5. A la LWDA y a los Empleados Agraviados: Las Sanciones de PAGA por un monto de \$4,000.00 a pagar del Monto Bruto del Acuerdo, con el 75% (\$3,000.00) asignado al pago de PAGA a la LWDA y el 25% (\$1,000.00) asignado a los Pagos Individuales de PAGA.

3.2.5.1. El Administrador calculará cada Pago Individual de PAGA (a) dividiendo el monto de la participación del 25% de las sanciones de PAGA de \$1,000.00 de los Empleados Agraviados entre el número total de Períodos de Pago del Período de PAGA trabajados por todos los Empleados Agraviados durante el Período de PAGA y (b) multiplicando el resultado por los Períodos de Pago del Período PAGA de cada Empleado Agraviado. Los Empleados Agraviados asumen toda la responsabilidad y obligación de pagar los impuestos adeudados en su Pago Individual de PAGA.

3.2.5.2. Si el Tribunal aprueba Sanciones PAGA menores al monto solicitado, el Administrador asignará el resto al Monto Neto del Acuerdo. El Administrador informará de los Pagos Individuales de PAGA en los Formularios 1099 del IRS.

4. FINANCIAMIENTO Y PAGOS DEL ACUERDO.

4.1. Semanas Laborales del Grupo y Períodos de Pago de los Empleados Agraviados.
Con base en una revisión de sus registros hasta la fecha, los Demandados estiman que hay 611 Miembros del Grupo que trabajaron colectivamente un total de 23,061 Semanas Laborales y 305 Empleados Agraviados que trabajaron un total de 8,474 Períodos de Pago PAGA.

4.2. Datos del Grupo. A más tardar 15 días después de que el Tribunal otorgue la Aprobación Preliminar del Acuerdo, los Demandados entregarán simultáneamente los Datos del Grupo al Administrador, en forma de una hoja de cálculo de Microsoft Excel. Para proteger los derechos de privacidad de los Miembros del Grupo, el Administrador debe mantener la confidencialidad de los Datos del Grupo, usar los Datos del Grupo únicamente para los fines de este Acuerdo y para ningún otro propósito, y restringir el acceso a los Datos del Grupo a los empleados del Administrador que necesiten acceder a los Datos del Grupo para llevar a cabo y cumplir con este Acuerdo. Los Demandados tienen la obligación permanente de notificar

inmediatamente a los Abogados del Grupo si descubren que los Datos del Grupo omitieron información de identificación de los Miembros del Grupo y de proporcionar Datos del Grupo corregidos o actualizados tan pronto como sea razonablemente posible. Sin ninguna extensión de la fecha límite en la que los Demandados deben enviar los Datos del Grupo al Administrador, las Partes y sus abogados harán todo lo posible, de buena fe, para reconstruir o resolver cualquier problema relacionado con los Datos del Grupo faltantes u omitidos.

4.3. Financiamiento del Monto Bruto del Acuerdo. Los Demandados financiarán en su totalidad el Monto Bruto del Acuerdo y también financiarán los montos necesarios para pagar en su totalidad la parte de los impuestos sobre la nómina de los Demandados mediante la transmisión de los fondos al Administrador de la siguiente manera:

4.3.1. En el plazo de treinta (30) días calendario a partir de la Fecha de Entrada en Vigor, los Demandados deberán pagar el primero de dos (2) pagos a plazos iguales de \$342,500.00 del Monto Bruto del Acuerdo en la Cuenta del Acuerdo y deberán pagar el pago restante de \$342,500.00 en un plazo de 180 días posteriores al primer pago a plazos.

4.4. Distribuciones de los Pagos a Plazos hacia el Monto Bruto del Acuerdo. Se realizarán múltiples distribuciones del Monto Bruto del Acuerdo de la siguiente manera:

4.4.1. Primera Distribución. Dentro de los catorce (14) días calendario a partir de la Fecha de Entrada en Vigor, o dentro de los diez (10) días calendario a partir de la fecha límite para el Primer Pago (lo que ocurra posteriormente), el Administrador del Acuerdo distribuirá, *a prorrata*, la porción del Monto Bruto del Acuerdo que los Demandados pagaron hasta esa fecha, incluyendo las porciones *a prorrata* de los Pagos Individuales del Grupo, los Pagos Individuales de PAGA, el Pago de PAGA a la LWDA, el Pago de Servicios del Representante del Grupo, el Pago de Honorarios de los Abogados del Grupo, el Pago de Gastos de Litigio de los Abogados del Grupo y los gastos del Administrador.

4.4.2. Segunda Distribución. En un plazo de diez (10) días calendario a partir del Segundo Pago a Plazos, el Administrador del Acuerdo distribuirá, *a prorrata*, la porción del Monto Bruto del Acuerdo que los Demandados pagaron desde la primera distribución, incluyendo las porciones *a prorrata* de los Pagos Individuales del Grupo, los Pagos Individuales de PAGA, el Pago de PAGA a la LWDA, el Pago de Servicios del Representante del Grupo, el Pago de los Honorarios de los Abogados del Grupo, el Pago de los Gastos de Litigio de los Abogados del Grupo y los gastos del Administrador.

Los desembolsos de las porciones prorrateadas del Pago de los Honorarios de los Abogados del Grupo, el Pago de los Gastos de Litigio de los Abogados del Grupo y el Pago de Servicios del Representante del Grupo no precederán al desembolso de las porciones prorrateadas de los Pagos Individuales del Grupo y los Pagos Individuales de PAGA.

4.4.3. El Administrador emitirá cheques para los Pagos Individuales del Grupo y/o los Pagos Individuales de PAGA y los enviará a los Miembros del Grupo por correo de primera clase del Servicio Postal de los Estados Unidos, con franqueo prepago. En el anverso de cada cheque se indicará de forma destacada la fecha (no menos de 180 días después de la fecha de envío) en la que se anulará el cheque. El Administrador cancelará todos los cheques no cobrados en la fecha de anulación. El Administrador enviará los cheques para los Pagos Individuales del Acuerdo a todos los Miembros del Grupo Participantes (incluyendo aquellos cuyo Aviso del Grupo se devolvió sin entregar). El Administrador enviará los cheques correspondientes a los Pagos Individuales de PAGA a todos los Empleados Agraviados, incluyendo a los Miembros del Grupo No Participantes que califiquen como Empleados Agraviados (incluyendo aquellos cuyo Aviso del Grupo se devolvió sin entregar). El Administrador podrá enviar a los Miembros del Grupo Participantes un único cheque que combine el Pago Individual del Grupo y el Pago Individual de PAGA. Antes de enviar cualquier cheque, el Administrador debe actualizar las direcciones postales de los destinatarios utilizando la Base Nacional de Cambios de Dirección.

4.4.4. El Administrador debe realizar una búsqueda de direcciones de los Miembros del Grupo para todos los demás Miembros del Grupo cuyos cheques se devuelvan sin entregar y sin la dirección de reenvío de USPS. En un plazo de 7 días posteriores a la recepción de un cheque devuelto, el Administrador deberá volver a enviar los cheques a la dirección de reenvío de USPS proporcionada o a una dirección determinada a través de la Búsqueda de Direcciones de los Miembros del Grupo. El Administrador no necesitará tomar más medidas para entregar los cheques a los Miembros del Grupo cuyos cheques reenviados por correo se devuelven como no entregados. El Administrador enviará sin demora un cheque de sustitución a cualquier Miembro del Grupo cuyo cheque original se haya perdido o extraviado, previa solicitud del Miembro del Grupo antes de la fecha de anulación.

4.4.5. Para cualquier Miembro del Grupo cuyo cheque de Pago Individual del Grupo o cheque de Pago Individual de PAGA no se haya cobrado y se haya cancelado después

de la fecha de anulación, el Administrador transmitirá los fondos representados por dichos cheques al Fondo de Propiedad No Reclamada del Contralor de California a nombre del Miembro del Grupo, con lo cual no quedará ningún “residuo no pagado” sujeto a los requisitos de la Sección 384, subd. (b) del Código de Procedimiento Civil de California.

4.4.6. El pago de los Pagos Individuales del Grupo y los Pagos Individuales de PAGA no obligará a los Demandados a conferir ningún beneficio adicional ni a realizar ningún pago adicional a los Miembros del Grupo (como contribuciones o bonificaciones 401(k)) más allá de los especificados en este Acuerdo.

5. [OMITIDO]

6. EXONERACIÓN DE RECLAMACIONES. A partir de la fecha en que los Demandados financien en su totalidad el Monto Bruto del Acuerdo y financien todos los impuestos sobre la nómina del empleador adeudados en la Porción Salarial de los Pagos Individuales del Grupo, la Demandante, los Miembros del Grupo y los Abogados del Grupo exonerarán las reclamaciones contra todas las Partes Exoneradas de la siguiente manera:

6.1 Exoneración de la Demandante. La Demandante y su respectivo cónyuge, representantes, agentes, abogados, herederos, administradores, sucesores y cesionarios anteriores y actuales, en general, exoneran y eximen a las Partes Exoneradas de todas las reclamaciones, transacciones o sucesos que ocurrieron durante el Período del Grupo, incluyendo, entre otros: (a) todas las reclamaciones que fueron, o razonablemente podrían haber sido, alegadas, con base en los hechos contenidos en la Demanda Operativa y (b) todas las reclamaciones de PAGA que fueron, o razonablemente podrían haber sido, alegadas con base en los hechos contenidos en la Demanda Operativa, el Aviso de PAGA de la Demandante, o determinadas durante la Acción y exoneradas de conformidad con el Párrafo 6.2, a continuación (“Exoneración de la Demandante”). Las Exoneraciones de la Demandante no se extienden a ninguna reclamación o acción para hacer cumplir este Acuerdo, ni a ninguna reclamación por los beneficios adquiridos, beneficios de desempleo, beneficios por discapacidad, beneficios del seguro social, beneficios de compensación para trabajadores que surgieron en cualquier momento o en base a sucesos fuera del Período del Grupo. La Demandante reconoce que puede presentar pruebas en forma extrajudicial de hechos o leyes diferentes de, o además de, los hechos o leyes que la Demandante ahora conoce o cree que son ciertos, pero acepta, no obstante, que la Exoneración de la Demandante será y seguirá siendo efectiva en todos los aspectos, a pesar de tales diferencias o hechos adicionales o

presentación de pruebas en forma extrajudicial de los mismos.

6.1.1 Renuncia de la Demandante a los Derechos de conformidad con la Sección 1542 del Código Civil de California. A los efectos de la Exoneración de la Demandante, la Demandante renuncia y cede expresamente a las disposiciones, derechos y beneficios, si los hubiere, de conformidad con la Sección 1542 del Código Civil de California, que dice:

Una exoneración general no se extiende a reclamaciones que el acreedor o la parte exonerante no conoce o sospeche que existan a su favor en el momento de hacer la exoneración y que, de haberlas conocido, habrían afectado materialmente su Acuerdo con el deudor o la Parte Exonerada.

6.2 Exoneración por parte de los Miembros del Grupo Participantes que no son Empleados Agraviados: Todos los Miembros del Grupo Participantes, en nombre propio y en el de sus respectivos representantes, agentes, abogados, herederos, administradores, sucesores y cesionarios anteriores y actuales, liberan a las Partes Exoneradas de (i) todas las reclamaciones que se alegaron, o que razonablemente se podrían haber alegado, en base a los hechos del Período del Grupo establecidas en la Demanda Operativa y comprobadas en el curso de la Acción incluyendo, no proporcionar períodos para comer, no autorizar ni permitir períodos de descanso, no emitir declaraciones de salarios apropiadas, no pagar los salarios a tiempo, no mantener los registros de nómina requeridos y otras alegaciones relacionadas. Excepto por lo establecido en el Párrafo 6.3 de este Acuerdo, los Miembros del Grupo Participantes no renuncian a ninguna otra reclamación, incluyendo las reclamaciones por beneficios adquiridos, despido injustificado, violación de la Ley de Vivienda y Empleo Justos, seguro de desempleo, discapacidad, seguro social, compensación de trabajadores, o reclamaciones basadas en hechos ocurridos fuera del Período del Grupo.

6.3 Exoneración por parte de los Miembros del Grupo No Participantes que son Empleados Agraviados: Se considera que todos los Miembros del Grupo No Participantes que son Empleados Agraviados exoneran, en nombre de ellos mismos y de sus respectivos representantes, agentes, abogados, herederos, administradores, sucesores y cesionarios anteriores y actuales, a las Partes Exoneradas de todas las reclamaciones por sanciones de PAGA que se alegaron, o que razonablemente podrían haber sido alegadas, con base en los hechos del Período

PAGA expuestos en la Demanda Operativa y en el Aviso PAGA y constatados en el transcurso de la Acción incluyendo, no proporcionar períodos para comer, no autorizar ni permitir períodos de descanso, no emitir declaraciones de salarios adecuadas, no pagar los salarios a tiempo, no mantener los registros de nómina requeridos y otras alegaciones relacionados.

7. MOCIÓN PARA LA APROBACIÓN PRELIMINAR. Las Partes acuerdan preparar y presentar conjuntamente una Moción para la Aprobación Preliminar (“Moción para la Aprobación Preliminar”) que cumpla con la lista de verificación actual del Tribunal para las Aprobaciones Preliminares.

7.1 Responsabilidades de la Demandante. La Demandante preparará y entregará a los Abogado de la Defensa todos los documentos necesarios para obtener la Aprobación Preliminar, incluyendo: (i) un borrador del aviso y el memorando en apoyo de la Moción para la Aprobación Preliminar que incluya un análisis del Acuerdo conforme a *Dunk/Kullar* y una solicitud de aprobación del Acuerdo PAGA de conformidad con la Sección 2699, subd. (f)(2) del Código Laboral; (ii) un borrador de propuesta de Orden que otorga la Aprobación Preliminar y la Aprobación del Acuerdo PAGA; (iii) un borrador de propuesta de Aviso del Grupo; (iv) una declaración firmada del Administrador que adjunte su oferta “sin exceder” para administrar el Acuerdo y dando fe de su voluntad de prestar sus servicios; competencia; procedimientos operativos para proteger la seguridad de los Datos del Grupo; montos de cobertura de seguro para cualquier violación de datos, desfallo de fondos u otra mala conducta; todos los hechos relevantes para cualquier violación de interés real o potencial con los Miembros del Grupo; y la naturaleza y el alcance de cualquier relación financiera con la Demandante, los Abogados del Grupo o los Abogados de la Defensa; (v) una declaración firmada de la Demandante que confirme la voluntad y competencia para actuar y revelar todos los hechos relevantes a cualquier conflicto de interés real o potencial con los Miembros del Grupo y/o el Administrador; (v) una declaración firmada de cada bufete de Abogados del Grupo que certifique su competencia para representar a los Miembros del Grupo; su transmisión oportuna a la LWDA de todos los documentos PAGA necesarios (aviso inicial de violaciones (de conformidad con la Sección 2699.3, subd. (a)) del Código Laboral, Denuncia Operativa (de conformidad con la Sección 2699, subd. (l)(1)) del Código Laboral, este Acuerdo (de conformidad con la Sección 2699, subd. (l)(2)) del Código Laboral; (vi) una versión redactada del Acuerdo de las partes que muestre todas las

modificaciones hechas al Acuerdo Modelo listas para ser presentada ante el Tribunal; y (vii) todos los hechos relevantes a cualquier conflicto de interés real o potencial con los Miembros del Grupo y/o el Administrador. En sus Declaraciones, la Demandante y los Abogados del Grupo deberán declarar que no tienen conocimiento de ningún otro asunto o acción pendiente en el que se hagan valer las reclamaciones que se extinguirán o se verán afectados negativamente por el Acuerdo.

7.2 Responsabilidades de los Abogados. Los Abogados del Grupo y los Abogados de la Defensa son conjuntamente responsables de finalizar y presentar de manera expedita la Moción para la Aprobación Preliminar a más tardar 30 días después de la plena ejecución de este Acuerdo; obtener una fecha de audiencia inmediata para la Moción para la Aprobación Preliminar; y comparecer ante el Tribunal para abogar a favor de la Moción para la Aprobación Preliminar. Los Abogados del Grupo son responsables de entregar la Aprobación Preliminar del Tribunal al Administrador.

7.3 Deber de Cooperación. Si las Partes no están de acuerdo con cualquier aspecto de la propuesta de la Moción para la Aprobación Preliminar y/o las declaraciones y documentos de apoyo, los Abogados del Grupo y los Abogados de la Defensa trabajarán juntos de manera expeditiva en nombre de las Partes reuniéndose en persona o por teléfono, y de buena fe, para resolver el desacuerdo. Si el Tribunal no otorga la Aprobación Preliminar o condiciona la Aprobación Preliminar a cualquier cambio sustancial de este Acuerdo, los Abogados del Grupo y los Abogados de la Defensa trabajarán juntos de manera expedita en nombre de las Partes reuniéndose en persona o por teléfono, y de buena fe, para modificar el Acuerdo y satisfacer las preocupaciones del Tribunal.

8. ADMINISTRACIÓN DEL ACUERDO.

8.1 **Selección del Administrador.** Las Partes han seleccionado conjuntamente a CPT Group, Inc. para actuar como Administrador y han verificado que, como condición para su nombramiento, CPT Group, Inc. acepta quedar vinculado por el presente Acuerdo y desempeñar, en calidad de fiduciario, todas las funciones especificadas en el presente Acuerdo a cambio del Pago de Gastos de Administración. Las Partes y sus Abogados declaran que no tienen ningún interés o relación, financiera o de otro tipo, con el Administrador que no sea una relación profesional que surja de experiencias previas en la administración de acuerdos.

8.2 Número de Identificación Patronal. El Administrador deberá tener y utilizar su

propio Número de Identificación Patronal para efectos de calcular las retenciones de los impuestos sobre nómina y proporcionar informes a las autoridades fiscales estatales y federales.

8.3 Fondo de Liquidación Calificado. El Administrador establecerá un fondo de liquidación que cumpla con los requisitos de un Fondo de Liquidación Calificado ("QSF", por sus siglas en inglés) de conformidad con la Sección 468B-1 del Reglamento del Tesoro de los Estados Unidos.

8.4 Aviso a los Miembros del Grupo.

8.4.1 A más tardar tres (3) días hábiles después de recibir los Datos del Grupo, el Administrador notificará a los Abogados del Grupo que se ha recibido la lista e indicará el número de Miembros del Grupo, Miembros de PAGA, Semanas Laborales y Periodos de Pago en los Datos del Grupo.

8.4.2 Haciendo todo lo posible para actuar lo antes posible, y en ningún caso más de 14 días después de recibir los Datos del Grupo, el Administrador enviará a todos los Miembros del Grupo identificados en los Datos del Grupo, por correo de primera clase del Servicio Postal de los Estados Unidos (“USPS”), el Aviso del Grupo con traducción al español sustancialmente en el formulario adjunto a este Acuerdo como **Anexo A**. La primera página del Aviso del Grupo deberá estimar de manera prominente los montos en dólares de cualquier Pago Individual del Grupo y/o Pago Individual de PAGA pagadero al Miembro del Grupo, y el número de Semanas Laborales y Períodos de Pago de PAGA (si corresponde) utilizados para calcular estos montos. Antes de enviar por correo el Aviso del Grupo, el Administrador actualizará las direcciones de los Miembros del Grupo usando la base de datos Nacional de Cambios de Dirección.

8.4.3 A más tardar 3 días hábiles después de que el Administrador reciba cualquier Aviso del Grupo devuelto por USPS como no entregado, el Administrador volverá a enviar por correo el Aviso del Grupo utilizando cualquier dirección de reenvío proporcionada por USPS. Si el USPS no proporciona una dirección de reenvío, el Administrador realizará una Búsqueda de Direcciones de los Miembros del Grupo y volverá a enviar por correo el Aviso del Grupo a la dirección más reciente obtenida. El Administrador no tiene la obligación alguna de hacer más intentos para localizar o enviar el Aviso del Grupo a los Miembros del Grupo cuyo Aviso del Grupo sea devuelto por USPS por segunda vez.

8.4.4 Los plazos para las objeciones por escrito de los Miembros del Grupo, las

Impugnaciones de las Semanas Laborales y/o los Períodos de Pago y las Solicitudes de Exclusión se extenderán 14 días adicionales más allá de los 60 días previstos en el Aviso del Grupo para todos los Miembros del Grupo cuyo Aviso se vuelva a enviar por correo. El Administrador informará a los Miembros del Grupo de la fecha límite extendida con el Aviso del Grupo reenviado.

8.4.5 Si el Administrador, alguno de los Demandados o los Abogados del Grupo son contactados o descubren de otra manera que alguna persona que crea que debería haber sido incluida en los Datos del Grupo y debería haber recibido el Aviso del Grupo, las Partes se reunirán y consultarán de inmediato en persona o por teléfono, y de buena fe, en un esfuerzo por acordar si se le incluye como Miembros del Grupo. Si las Partes están de acuerdo, estas personas serán Miembros del Grupo con los mismos derechos que los otros Miembros del Grupo, y el Administrador enviará, por correo electrónico o entrega al día siguiente, un Aviso del Grupo requiriendo que ejerzan opciones de conformidad con el presente Acuerdo a más tardar 14 días después de recibir el Aviso del Grupo, o de las fechas límite indicadas en el Aviso del Grupo, lo que sea posterior.

8.5 Solicitudes de Exclusión (Opt-Outs).

8.5.1 Los Miembros del Grupo que deseen excluirse (optar por no participar) del Acuerdo del Grupo deben enviar al Administrador, por fax, correo electrónico o correo postal, una Solicitud de Exclusión por escrito firmada a más tardar 60 días después de que el Administrador envíe por correo el Aviso del Grupo (más 14 días adicionales para los Miembros del Grupo cuyo Aviso del Grupo se vuelve a enviar por correo postal). Una Solicitud de Exclusión es una carta de un Miembro del Grupo o su representante que comunica razonablemente la elección del Miembro del Grupo de ser excluido del Acuerdo e incluye el nombre, la dirección y la dirección de correo electrónico o el número de teléfono del Miembro del Grupo. Para que sea válida, la Solicitud de Exclusión debe enviarse oportunamente por fax, correo electrónico o con la fecha de franqueo marcado antes de la Fecha Límite de Respuesta.

8.5.2 El Administrador no puede rechazar una Solicitud de Exclusión como no válida porque no contiene toda la información especificada en el Aviso del Grupo. El Administrador aceptará todas las Solicitudes de Exclusión como válidas si el Administrador puede determinar razonablemente la identidad de la persona como Miembro del Grupo y el deseo del Miembro del Grupo de ser excluido. La determinación del Administrador será definitiva e y

no apelable ni susceptible de impugnación. Si el Administrador tiene motivos para cuestionar la autenticidad de una Solicitud de Exclusión, el Administrador podrá exigir pruebas adicionales de la identidad del Miembro del Grupo. La determinación de autenticidad del Administrador será definitiva y no apelable ni susceptible de impugnación.

8.5.3 Todo Miembro del Grupo que no presente una Solicitud de Exclusión válida y oportuna se considerará Miembro del Grupo Participante de conformidad con este Acuerdo, con derecho a todos los beneficios y obligado a todos los términos y condiciones del Acuerdo, incluyendo las Exenciones de los Miembros del Grupo Participantes de conformidad con los Párrafos 6.2 y 6.3 del presente Acuerdo, independientemente de si el Miembro del Grupo Participante recibe realmente el Aviso del Grupo o se opone al Acuerdo.

8.5.4 Todo Miembro del Grupo que presente una Solicitud de Exclusión válida y oportuna es un Miembro del Grupo No Participante y no recibirá un Pago Individual del Grupo ni tendrá derecho a objetar los componentes de la Acción de Grupo del Acuerdo. Debido a que las reclamaciones futuras de PAGA están sujetas a la Exclusión de las reclamaciones al momento de la entrada en vigor de la Sentencia, se considera que los Miembros del Grupo No Participantes que son Empleados Agraviados exoneran las reclamaciones identificadas en el Párrafo 6.4 de este Acuerdo y son elegibles para un Pago Individual de PAGA.

8.6 Impugnación del Cálculo de las Semanas Laborales. Cada Miembro del Grupo tendrá 60 días después de que el Administrador envíe por correo el Aviso del Grupo (más 14 días adicionales para los Miembros del Grupo cuyo Aviso del Grupo se vuelva a enviar por correo) para impugnar el número de Semanas Laborales del Grupo y Períodos de Pago PAGA (si corresponde) asignados a los Miembros del Grupo en el Aviso del Grupo. El Miembro del Grupo puede impugnar la asignación comunicándose con el Administrador por fax, correo electrónico o correo postal. El Administrador debe alentar al Miembro del Grupo que impugna a que presente la documentación de apoyo. En ausencia de documentación contraria, el Administrador tiene derecho a suponer que las Semanas Laborales contenidas en el Aviso del Grupo son correctas siempre que sean consistentes con los Datos del Grupo. La determinación del Administrador de la asignación de las Semanas Laborales y/o Períodos de Pago de cada Miembro del Grupo será definitiva e inapelable o susceptible de impugnación. El Administrador proporcionará de inmediato copias de todas las impugnaciones al cálculo de las Semanas Laborales y/o Períodos de Pago a los Abogados de la Defensa y a los Abogados del Grupo, así como la determinación

del Administrador sobre las impugnaciones.

8.7 Objeciones al Acuerdo.

8.7.1 Sólo los Miembros del Grupo Participantes pueden objetar los componentes de la Acción de Grupo del Acuerdo y/o este Acuerdo, incluyendo la impugnación de la imparcialidad del Acuerdo y/o los montos solicitados para el Pago de los Honorarios de los Abogados del Grupo, el Pago de los Gastos de Litigio de los Abogados del Grupo y/o el Pago de Servicios del Representante del Grupo.

8.7.2 Los Miembros del Grupo Participantes pueden enviar objeciones por escrito al Administrador, por fax, correo electrónico o correo postal. Como alternativa, los Miembros del Grupo Participantes pueden comparecer ante el Tribunal (o contratar a un abogado para que comparezca ante el Tribunal) para presentar objeciones verbales en la Audiencia de la Apelación Definitiva. Los Miembros del Grupo Participantes que opten por enviar una objeción por escrito al Administrador deberán hacerlo a más tardar 60 días después de que el Administrador envíe por correo el Aviso del Grupo (más 14 días adicionales para los Miembros del Grupo cuyo Aviso del Grupo se haya vuelto a enviar por correo).

8.7.3 Los Miembros del Grupo No Participantes no tienen derecho a objetar a ninguno de los componentes de la Acción de Grupo del Acuerdo.

8.8 Deberes del Administrador. El Administrador tiene el deber de realizar u observar todas las tareas que deben ser realizadas u observadas por el Administrador contenidas en este Acuerdo o de alguna otra manera.

8.8.1 Sitio web, dirección de correo electrónico y número de teléfono de llamadas gratuitas. El Administrador establecerá, mantendrá y usará un sitio web de Internet para publicar información de interés para los Miembros del Grupo, incluyendo la fecha, la hora y el lugar de la Audiencia de Aprobación Definitiva y copias del Acuerdo, la Moción para la Aprobación Preliminar, el Aviso del Grupo, la Moción para la Aprobación Definitiva, la Moción para el Pago de Honorarios de Abogados del Grupo, Pago de los Gastos de Litigio de los Abogados del Grupo y Pago de Servicios del Representante del Grupo, la Aprobación Definitiva y la Sentencia. El Administrador también mantendrá y supervisará la dirección de correo electrónico y el número de teléfono gratuito para recibir llamadas, faxes y correos electrónicos de los Miembros del Grupo.

8.8.2 Solicitudes de Exclusión (Opt-outs) y Lista de Exclusión. El

Administrador revisará de inmediato y de forma continua las Solicitudes de Exclusión para determinar su validez. A más tardar 5 días después de la expiración del plazo para presentar las Solicitudes de Exclusión, el Administrador enviará por correo electrónico a los Abogados del Grupo y a los Abogados de la Defensa una lista que contenga (a) los nombres y otra información de identificación de los Miembros del Grupo que hayan presentado oportunamente Solicitudes de Exclusión válidas. (“Lista de Exclusión”); (b) los nombres y otra información de identificación de los Miembros del Grupo que hayan presentado Solicitudes de Exclusión no válidas; (c) copias de todas las Solicitudes de Exclusión del Acuerdo presentadas (ya sean válidas o no válidas).

8.8.3 Informes Semanales. El Administrador debe, semanalmente, proporcionar informes escritos a los Abogados del Grupo y los Abogados de la Defensa que, entre otras cosas, cuenten el número de: Avisos del Grupo enviados o reenviados por correo, Avisos del Grupo devueltos sin entregar, Solicitudes de Exclusión (ya sean válidas o no válidas) recibidas, objeciones recibidas, impugnaciones a las Semanas Laborales y/o Períodos de Pago recibidas y/o resueltas, y cheques enviados por correo para Pagos Individuales del Grupo y Pagos Individuales de PAGA (“Informe Semanal”). Los Informes Semanales deben incluir la evaluación del Administrador sobre la validez de las Solicitudes de Exclusión y adjuntar copias de todas las Solicitudes de Exclusión y objeciones recibidas.

8.8.4 Impugnaciones de Semanas Laborales y/o Período de Pago. El Administrador está facultado para abordar y tomar decisiones definitivas, de conformidad con los términos de este Acuerdo sobre todas las impugnaciones de los Miembros del Grupo relativas al cálculo de las Semanas Laborales y/o los Períodos de Pago. La decisión del Administrador será definitiva y no apelable ni susceptible de impugnación.

8.8.5 Declaración del Administrador. A más tardar 14 días antes de la fecha en que la Demandante debe presentar la Moción para la Aprobación Definitiva del Acuerdo, el Administrador proporcionará a los Abogados del Grupo y a los Abogados de la Defensa una declaración firmada apta para presentar ante el Tribunal que certifique su debida diligencia y cumplimiento de todas sus obligaciones de conformidad con el presente Acuerdo, incluyendo, entre otros, el envío por correo del Aviso del Grupo, los Avisos del Grupo devueltos como no entregados, el reenvío de los Avisos del Grupo, los intentos de localizar a los Miembros del Grupo, el número total de Solicitudes de Exclusión del Acuerdo que recibió (tanto válidas como no válidas), el número de objeciones por escrito y adjuntar la Lista de Exclusión. El

Administrador complementará su declaración según sea necesario o solicitado por las Partes y/o el Tribunal. Los Abogados del Grupo son responsables de presentar la(s) declaración(es) del Administrador ante el Tribunal.

8.8.6 Informe Final del Administrador. Dentro de los 10 días posteriores a que el Administrador desembolse todos los fondos en el Monto Bruto del Acuerdo, el Administrador proporcionará a los Abogados del Grupo y a los Abogados de la Defensa un informe final que detalle sus desembolsos por número de identificación de empleado únicamente de todos los pagos realizados de conformidad con el presente Acuerdo. Al menos 15 días antes de cualquier fecha límite establecida por el Tribunal, el Administrador preparará y enviará a los Abogados del Grupo y a los Abogados de la Defensa, una declaración firmada apta para presentar ante el Tribunal que dé fe del desembolso de todos los pagos requeridos de conformidad con el presente Acuerdo. Los Abogados del Grupo son responsables de presentar la declaración del Administrador en el Tribunal.

9. ESTIMACIONES DEL TAMAÑO DEL GRUPO y CLÁUSULA ESCALADORA.

Con base en sus registros, los Demandados estiman que, a la fecha del presente Acuerdo, (1) hay 611 Miembros del Grupo y 23,061 Semanas Laborales Totales durante el Período del Grupo y (2) hubo 305 Empleados Agraviados que trabajaron 8,474 Períodos de Pago durante el Período PAGA. Si las Semanas Laborales y/o los Miembros del Grupo a la fecha en que el Tribunal apruebe el Acuerdo exceden las 23.061 Semanas Laborales y/o los 611 Miembros del Grupo mencionados en más del 10.00%, el Monto Bruto del Acuerdo, incluyendo el Pago de los Honorarios de los Abogados del Grupo, el Pago de Servicios del Representante del Grupo y el Pago de LWDA, aumentará proporcionalmente según el número de Semanas Laborales adicionales o Miembros del Grupo, lo que resulte en un aumento mayor en el Monto Bruto del Acuerdo. Como alternativa, en el caso de que se active esta disposición de escalador, los Demandados tienen la opción de elegir finalizar el Período del Grupo para que tenga una fecha de finalización anterior a discreción de los Demandados para limitar las Semanas Laborales cubiertas a 25,368 en lugar de de pagar un aumento al Monto del Acuerdo. El Administrador del Acuerdo calculará las Semanas Laborales trabajadas por los Miembros del Grupo durante el Período del Grupo, el monto a pagar prorrateado y los pagos individuales del acuerdo a los Miembros del Grupo elegibles. Se presumirá que los datos de los Demandados son correctos, a

menos que un Miembro del Grupo en particular demuestre lo contrario al Administrador del Acuerdo mediante pruebas fehacientes. Todas las disputas sobre las Semanas Laborales trabajadas serán resueltas y decididas por el Administrador del Acuerdo, y la decisión del Administrador del Acuerdo sobre todas las disputas sobre las Semanas Laborales trabajadas será definitiva y no apelable.

10. DERECHO DE LOS DEMANDADOS A RETIRARSE. Si el número de Solicitudes de Exclusión válidas identificadas en la Lista de Exclusión supera el 10,00% del total de todos los Miembros del Grupo, los Demandados pueden, pero no están obligados a hacerlo, optar por retirarse del Acuerdo. Las Partes acuerdan que, si los Demandados se retiran, el Acuerdo será nulo ab initio, no tendrá fuerza ni efecto alguno, y que ninguna de las Partes tendrá ninguna otra obligación de cumplir de conformidad con este Acuerdo; siempre que, no obstante, los Demandados sigan siendo responsables de pagar todos los Gastos de Administración del Acuerdo incurridos hasta ese momento. Los Demandados deben notificar a los Abogados del Grupo y al Tribunal de su elección de retirarse a más tardar 7 días hábiles después de que el Administrador envíe la Lista de Exclusión Definitiva a los Abogados de la Defensa; las elecciones tardías no tendrán efecto alguno.

11. CLÁUSULA DE NO PUBLICIDAD. La Demandante acuerda abstenerse de cualquier publicidad o cualquier tipo de comunicación, oral o escrita, de naturaleza despectiva relativa a los Demandados o sus propietarios, funcionarios, agentes, directores, supervisores, empleados o representantes, incluyendo, entre otros, a Amparo Estela Alcazar, Amador (Hector) Alcazar, e Ivan Alcazar. La Demandante también acuerda y pacta que las mismas restricciones se aplicarán con respecto a los representantes de los medios de comunicación y a cualquiera de las cuentas de redes sociales de las Partes, incluyendo, entre otros, Facebook, Twitter, Instagram, Snapchat, LinkedIn, Glassdoor, o cualquier otra plataforma de redes sociales. Sin embargo, nada en este Acuerdo impedirá a la Demandante discutir o divulgar información sobre actos ilícitos en el lugar de trabajo, como las violaciones del Código Laboral en cuestión en esta demanda, acoso o discriminación o cualquier otra conducta que tenga razones para creer que es ilegal. Además, nada en este acuerdo prohíbe a la Demandante y/o a los Demandados proporcionar información veraz según lo exige la ley en un procedimiento legal o una investigación gubernamental. Cualquier

testimonio o comentario requerido en dichos procedimientos legales o investigaciones gubernamentales no se considerará un incumplimiento de la confidencialidad en violación de este párrafo.

12. MOCIÓN PARA LA APROBACIÓN DEFINITIVA. A más tardar 16 días hábiles antes de la Audiencia de la Aprobación Definitiva programada, la Demandante presentará ante el Tribunal una Moción para la Aprobación Definitiva del Acuerdo que incluye una solicitud de aprobación del acuerdo PAGA de conformidad con la Sección 2699, subd. (l) del Código Laboral, una Propuesta de Orden de Aprobación Definitiva y una Propuesta de Sentencia (colectivamente, “Moción para la Aprobación Definitiva”). La Demandante deberá proporcionar borradores de estos documentos a los Abogado de la Defensa a más tardar 7 días antes de presentar la Moción para la Aprobación Definitiva. Los Abogados del Grupo y los Abogados de la Defensa se reunirán y consultarán rápidamente en persona o por teléfono, y de buena fe, para resolver cualquier desacuerdo relacionado con la Moción para la Aprobación Definitiva.

12.1 Respuesta a las Objeciones. Cada Parte se reserva el derecho de responder a cualquier objeción planteada por un Miembro del Grupo Participante, incluido el derecho a presentar documentos de respuesta ante el Tribunal a más tardar 5 días hábiles antes de la Audiencia de Aprobación Definitiva, o según lo ordene o acepte el Tribunal.

12.2 Deber de Cooperación. Si el Tribunal no otorga la Aprobación Definitiva o condiciona la Aprobación Definitiva a cualquier cambio sustancial del Acuerdo (incluido, entre otros, el alcance de la exoneración que otorgarán los Miembros del Grupo), las Partes colaborarán rápidamente y de buena fe para abordar las preocupaciones del Tribunal revisando el Acuerdo según sea necesario para obtener la Aprobación Definitiva. La decisión del Tribunal de otorgar montos menores a las solicitadas para el Pago de Servicios del Representante del Grupo, el Pago de los Honorarios de los Abogados del Grupo, Pago de los Gastos de Litigio de los Abogados del Grupo y/o Pago de los Gastos del Administrador no constituirá una modificación sustancial del Acuerdo en el sentido de este párrafo.

12.3 Continuación de la Jurisdicción del Tribunal. Las Partes acuerdan que, después de dictarse la Sentencia, el Tribunal conservará la jurisdicción sobre las Partes, la Acción y el Acuerdo únicamente con el fin de (i) hacer cumplir este Acuerdo y/o Sentencia, (ii) abordar los asuntos de administración del acuerdo, y (iii)) abordar los asuntos posteriores a la Sentencia

según lo permita la ley.

12.4 Renuncia al Derecho de Apelación. Siempre que la Sentencia sea consistente con los términos y condiciones del presente Acuerdo, incluyendo específicamente el Pago de los Honorarios de los Abogados del Grupo y el Pago de los Gastos de Litigio de los Abogados del Grupo reflejados en el presente Acuerdo, las Partes, sus respectivos abogados y todos los Miembros del Grupo Participantes que no se opusieron al Acuerdo según lo dispuesto en este Acuerdo, renuncia a todos los derechos de apelar la Sentencia, incluyendo todos los derechos a los procedimientos posteriores a la Sentencia y de apelación, el derecho a presentar mociones para anular la Sentencia, mociones para un nuevo juicio, mandatos judiciales extraordinarios y apelaciones. La renuncia a la apelación no incluye la renuncia al derecho de oponerse a estas mociones, escritos o apelaciones. Si un objetor apela la Sentencia, las obligaciones de las Partes de cumplir de conformidad con el presente Acuerdo quedarán suspendidas hasta el momento en que la apelación se resuelva definitivamente y la Sentencia sea definitiva, excepto en los asuntos que no afecten la cantidad del Monto Neto del Acuerdo.

12.5 Órdenes del Tribunal de las Apelaciones para Anular, Revocar o Modificar Sustancialmente la Sentencia. Si el Tribunal de Apelación anula, revoca o modifica la Sentencia de manera que requiera una modificación sustancial del presente Acuerdo (incluido, entre otros, el alcance de la exoneración que otorgarán los Miembros del Grupo), este Acuerdo será nulo y sin efecto alguno. No obstante, las Partes colaborarán juntas de buena fe y de manera expedita para resolver las preocupaciones planteadas por el Tribunal de Apelaciones y obtener la Aprobación Definitiva y el dictado de la Sentencia, compartiendo, en una base de 50-50, los Gastos Administrativos adicionales en los que razonablemente se incurra después de la remisión. Una decisión de apelación que anule, revoque o modifique la adjudicación del Tribunal del Pago de Servicios del Representante del Grupo o cualquier Pago de los Abogados del Grupo no constituirá una modificación sustancial de la Sentencia en el sentido de este párrafo, siempre que el Monto Bruto del Acuerdo permanezca sin cambios.

13. SENTENCIA MODIFICADA. Si se requiere una sentencia enmendada de conformidad con la Sección 384 del Código de Procedimiento Civil, las Partes colaborarán juntas de buena fe para presentar conjuntamente una propuesta de sentencia enmendada.

14. DISPOSICIONES ADICIONALES.

14.1 No Admisión de Responsabilidad, Certificación del Grupo o Manejabilidad del Representante para Otros Fines. Este Acuerdo representa un compromiso y una solución de las reclamaciones muy controvertidas. Nada de lo contenido en el presente Acuerdo pretende ni debe interpretarse como una admisión por parte de los Demandados de que alguna de las alegaciones en la Demanda Operativa tiene fundamento o de que los Demandados son responsables de alguna de las reclamaciones planteadas; tampoco tiene la intención ni debe interpretarse como una admisión por parte de la Demandante de que las defensas de los Demandados en la Acción tienen fundamento. Las Partes acuerdan que la certificación del grupo y el tratamiento representativo son únicamente para los fines del presente Acuerdo. Si, por algún motivo, el Tribunal otorga la Aprobación Preliminar, la Aprobación Definitiva o dicta Sentencia, los Demandados se reservan el derecho de impugnar la certificación de alguna Acción de Grupo por cualquier motivo, y los Demandados se reservan todas las defensas disponibles para las reclamaciones de la Acción, y la Demandante se reserva el derecho a solicitar la certificación de la Acción de Grupo por cualquier motivo disponible y a impugnar las defensas de los Demandados. La Liquidación, el presente Acuerdo y la voluntad de las Partes de resolver la Acción no influirán en ningún litigio ni serán admisibles en relación con el mismo (excepto en los procedimientos para hacer cumplir o efectuar la Liquidación y el presente Acuerdo).

14.2 Certificación para Fines de Liquidación: La Demandante y los Demandados acuerdan que, únicamente para fines de liquidación, la certificación del Grupo tal como se define en el presente es apropiada y cumple con las normas establecidos en la Regla Federal de Procedimiento Civil 23 y/o de conformidad con la Sección 382 del Código de Procedimiento Civil de California.

14.3 Confidencialidad antes de la Aprobación Preliminar. La Demandante, los Abogados del Grupo, los Demandados y los Abogados de la Defensa acuerdan por separado que, hasta que se presente la Moción para la Aprobación Preliminar del Acuerdo, ellos y cada uno de ellos no divulgarán, difundirán y/o darán publicidad, ni causarán ni permitirán que otra persona divulgue, disemine o dé publicidad, a ninguno de los términos del Acuerdo directa o indirectamente, de manera específica o general, a ninguna persona, corporación, asociación, agencia gubernamental u otra entidad, excepto: (1) a los Abogados, contadores o cónyuges de las Partes, a quienes se les indique mantener la confidencialidad del presente Acuerdo; (2) a los

Abogados en un asunto relacionado; (3) en la medida necesaria para informar los ingresos a las autoridades fiscales correspondientes; (4) en respuesta a una orden o citación judicial; o (5) en respuesta a una investigación o citación emitida por una agencia gubernamental estatal o federal.

Cada Parte acuerda notificar inmediatamente a la otra Parte de cualquier orden, investigación o citación judicial o de una agencia que solicite esta información. La Demandante, los Abogados del Grupo, los Demandados y los Abogados de la Defensa acuerdan por separado no iniciar, directa o indirectamente, ninguna conversación u otra comunicación, antes de la presentación de la Moción para la Aprobación Preliminar, con ningún tercero en relación con este Acuerdo o los asuntos que dieron lugar a este Acuerdo, excepto para responder únicamente que “el asunto se resolvió”, o palabras en ese sentido. Este párrafo no restringe las comunicaciones de los Abogados del Grupo con los Miembros del Grupo de conformidad con las obligaciones éticas de los Abogados del Grupo con los Miembros del Grupo.

14.4 Sin Solicitación. Las Partes acuerdan por separado que ellos y sus respectivos abogados y empleados no solicitarán a ningún Miembro del Grupo que opte por no participar en el presente Acuerdo o que se oponga al mismo, ni apelar la Sentencia. Nada de lo dispuesto en este párrafo se interpretará en el sentido de restringir la capacidad de los Abogados del Grupo para comunicarse con los Miembros del Grupo de conformidad con las obligaciones éticas de los Abogados del Grupo con los Miembros del Grupo.

14.5 Acuerdo Integrado. Una vez ejecutado por todas las Partes y sus abogados, el presente Acuerdo, junto con sus anexos, constituirá el Acuerdo Completo entre las Partes en relación con el Acuerdo, sustituyendo todas y cada una de las declaraciones, garantías, pactos o incentivos verbales hechos a o por cualquiera de las Partes.

14.6 Autorización de los Abogados. Los Abogados del Grupo y los Abogados de la Defensa garantizan y declaran por separado que están autorizados por la Demandante y los Demandados, respectivamente, para tomar todas las medidas apropiadas requeridas o permitidas para ser tomadas por dichas Partes de conformidad con el presente Acuerdo para hacer efectivos sus términos, y para ejecutar cualquier otro documento razonablemente necesario para hacer efectivos los términos del presente Acuerdo, incluyendo las enmiendas a este Acuerdo.

14.7 Cooperación. Las Partes y sus abogados cooperarán entre sí y harán todo lo posible, de buena fe, para implementar el Acuerdo mediante, entre otras cosas, la modificación del Acuerdo, la presentación de pruebas suplementarias y complementarias de puntos y

1 autoridades según lo solicite el Tribunal. En caso de que las Partes no puedan ponerse de acuerdo
2 sobre la forma o el contenido de cualquier documento necesario para implementar el Acuerdo, o
3 sobre alguna modificación del Acuerdo que pueda ser necesaria para implementar el Acuerdo, las
4 Partes solicitarán la asistencia de un mediador y/o del Tribunal para su resolución.

5 14.8 Cumplimiento. Las partes acuerdan que el Tribunal Superior del Condado de
6 Sacramento tendrá jurisdicción para hacer cumplir los términos del presente Acuerdo de
7 conformidad con la Sección 661.6 del Código de Procedimiento Civil de California. En caso de
8 que se requiera presentación de una moción para hacer cumplir este Acuerdo debido al
9 incumplimiento de una de las Partes de los términos del mismo, se otorgará a la parte vencedora
10 los honorarios y costos razonables de los abogados, que se sumarán a los montos que deben
11 pagarse de conformidad con Acuerdo.

12 14.9 Sin Asignaciones Previas. Las Partes declaran y garantizan por separado que no
13 han cedido, transferido, gravado o pretendido ceder, transferir o gravar directa o indirectamente
14 a ninguna persona o entidad y parte de ninguna responsabilidad, reclamación, demanda, acción,
15 causa de acción o derecho liberado y descargado por la Parte en este Acuerdo.

16 14.10 Sin Asesoramiento Fiscal. Ni la Demandante, ni los Abogados del Grupo, ni los
17 Demandados, ni los Abogados de la Defensa están proporcionando ningún tipo de asesoramiento
18 en relación con los impuestos o la tributación, ni nada de lo contenido en este Acuerdo se
19 considerará como tal en el sentido de la Circular 230 del Departamento del Tesoro de los Estados
20 Unidos (31 CFR Parte 10, en su versión enmendada) o de otro modo.

21 14.11 Modificación del Acuerdo. Este Acuerdo, y todas sus partes, podrán ser
22 enmendados, modificados, cambiados o renunciados únicamente mediante un instrumento
23 expreso por escrito firmado por todas las Partes o sus representantes, y aprobado por el Tribunal.

24 14.12 Acuerdo Vinculante para los Sucesores. El presente Acuerdo será vinculante y
25 redundará en beneficio de los sucesores de cada una de las Partes.

26 14.13 Ley Aplicable. Todos los términos y condiciones de este Acuerdo y sus anexos
27 se regirán e interpretarán de conformidad con las leyes internas del estado de California, sin tener
28 en cuenta los principios de conflicto de leyes.

14.14 Cooperación en la Redacción. Las Partes han cooperado en la redacción y
preparación del presente Acuerdo. El presente Acuerdo no se interpretará en contra de ninguna
de las Parte sobre la base de que las Partes fueron las que redactaron o participaron en la redacción.

14.15 Confidencialidad. En la medida en que lo permita la ley, todos los acuerdos firmados y las órdenes dictadas durante la Acción y en el presente Acuerdo en relación con la confidencialidad de la información mantendrán su vigencia después de haber firmado el presente Acuerdo.

14.16 Uso y Devolución de los Datos del Grupo. Información proporcionada a los Abogados del Grupo de conformidad con el Código de Pruebas de California §1152, y todas las copias y resúmenes de los Datos del Grupo proporcionados a los Abogados del Grupo por los Demandados en relación con la mediación, otras negociaciones del Acuerdo o en relación con el Acuerdo, únicamente podrán con respecto al presente Acuerdo, y con ningún otro propósito, y no podrán usarse de ninguna manera que viole ningún acuerdo contractual, estatuto o norma judicial existente. A más tardar 90 días después de la fecha en que el Tribunal cumpla con la obligación del Administrador de proporcionar una Declaración que confirme el pago final de todos los fondos del Acuerdo, la Demandante destruirá todas las versiones impresas y electrónicas de los Datos del Grupo recibidos de los Demandados, a menos que, antes de que el Tribunal cumpla la obligación del Administrador, los Demandados soliciten por escrito a los Abogados del Grupo la devolución, en lugar de la destrucción, de los Datos del Grupo.

14.17 **Encabezados.** El encabezado descriptivo de cualquier sección o párrafo de este Acuerdo se inserta únicamente para facilitar la referencia y no constituye parte de este Acuerdo.

14.18 Días Calendario. A menos que se indique lo contrario, toda referencia a “días” en el presente Acuerdo se entenderá a días calendario. En caso de que cualquier fecha o fecha límite establecida en el presente Acuerdo caiga en fin de semana o en día festivo legal federal, dicha fecha o fecha límite será el primer día hábil siguiente.

14.19 Aviso. Todos los avisos, demandas u otras comunicaciones entre las Partes en relación con el presente Acuerdo se harán por escrito y se considerarán debidamente entregados a partir del tercer día hábil posterior al envío por correo postal de los Estados Unidos, o el día del envío por correo electrónico o mensajero, dirigido como sigue:

Al demandante:
DAVID G. SPIVAK
david@spivaklaw.com
THE SPIVAK LAW FIRM
8605 Santa Monica Bl
PMB 42554

- 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

3
4
5
6
7

8
9
10
11
12

13
14
15
16
17

18
19
20
21
22

24
25

2

25

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

Con fecha de: _____

Por: _____

Amador Alcazar
Presidente
Guitron Alcazar Alcazar Inc. dba El
Tapatio Mexican Cuisine, Guitron
Alcazar III Inc., and Guitron Alcazar
IV, LLC

Con fecha de: 08 / 29 / 2023

THE SPIVAK LAW FIRM

Por:  _____

DAVID G. SPIVAK, Abogados de la
Demandante, MARIA ELENA DIAZ
HERNANDEZ, y todos los demás en
situación similar

Con fecha de: _____

UNITED EMPLOYEES LAW GROUP

Por: _____

WALTER L. HAINES, Abogados de la
Demandante, MARIA ELENA DIAZ
HERNANDEZ, y todos los demás en
situación similar

Con fecha de: _____

DUGAN MCHUGH LAW CORPORATION

Por: _____

LAURA C. MCHUGH, Abogados de
los Demandados, Guitron Alcazar
Alcazar Inc. dba El Tapatio Mexican
Cuisine, Guitron Alcazar III Inc., and
Guitron Alcazar IV, LLC

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

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

(case name: *Maria Elena Diaz Hernandez, et al. v. Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine, et al.* and number 34-2021-00306648)

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

You may be eligible to receive money from an employee class action lawsuit ("Action") against Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine, Guitron Alcazar III Inc., and Guitron Alcazar IV, LLC (collectively "Defendants") for alleged wage and hour violations. The Action was filed by one of Defendants' employees, Maria Elena Diaz Hernandez ("Plaintiff") and seek payment of (1) wages and other relief for a class of non-exempt, hourly employees ("Class Members") who worked for Defendants during the Class Period (August 23, 2017 to the date of the order preliminarily approving the Settlement); and (2) penalties under the California Private Attorney General Act ("PAGA") for all non-exempt, hourly employees who worked for Defendants during the PAGA Period (August 26, 2020 to the date of the order preliminarily approving the Settlement) ("Aggrieved Employees").

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").

Based on Defendants' records, and the Parties' current assumptions, **your Individual Class Payment is estimated to be \$ [REDACTED] (less withholding) and your Individual PAGA payment is estimated to be \$ [REDACTED]**. 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 above estimates are based on Defendants' records showing that **you worked [REDACTED] Work Weeks** during the Class Period and **you worked [REDACTED] Pay Periods** during the PAGA Period. If you believe that you worked more Work Weeks during either period, 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. 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 Plaintiff and her 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 the 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 wage claims 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 wage claims against Defendants that are covered by this Settlement (Released Claims).
You Can Opt-out of the Class Settlement but not the PAGA Settlement	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. Once excluded, you will be a Non-Participating Class Member and no longer eligible for an Individual Class Payment. Non-Participating Class Members cannot object to any portion of the proposed Settlement. See Section 6 of this Notice.
The Opt-out Deadline is	You cannot opt-out of the PAGA portion of the proposed Settlement. Defendants must pay Individual PAGA payments to all Aggrieved Employees and the Aggrieved Employees must give up their rights to pursue Released Claims (defined below).
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. The Court's decision whether to finally approve the Settlement will include a determination of how much will be paid to Class Counsel and Plaintiff who pursued the Action on behalf of the Class. You are not personally responsible for any payments to Class Counsel or Plaintiff, but every dollar paid to Class Counsel and Plaintiff reduces the overall amount paid to Participating Class Members. You can object to the amounts requested by Class Counsel or Plaintiff if you think they are unreasonable. See Section 7 of this Notice.
Written Objections Must be Submitted by	

(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.

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

1. Defendants Will Pay \$685,000.00 as the Gross Settlement Amount (Gross Settlement). Defendants have agreed to deposit the Gross Settlement into an account controlled by the Administrator of the Settlement. The Administrator will use the Gross Settlement to pay the Individual Class Payments, Individual PAGA payments, Class Representative Service Payment, Class Counsel's attorney's fees and expenses, the 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 begin to fund the Gross Settlement as follows: Within thirty (30) calendar days of the Effective Date, Defendants shall pay the first of two (2) equal \$342,500.00 installment payments on the Gross Settlement Amount into the Settlement Account and shall pay the remaining \$342,500.00 installment payment within 180 days of the first installment payment. The Administrator will make a distribution after each installment payment as follows:

First Distribution. Within fourteen (14) calendar days of the Effective Date, or within ten (10) calendar days of the deadline for the First payment (whichever is later), the Settlement Administrator shall distribute, *pro rata*, the portion of the Gross Settlement Amount Defendants paid by that date, including *pro rata* portions of the Individual Class Payments, Individual PAGA Payments, LWDA PAGA payment, Class Representative Service Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Administrator's expenses.

Second Distribution. Within ten (10) calendar days of the Second Installment Payment, the Settlement Administrator shall distribute, *pro rata*, the portion of the Gross Settlement Amount Defendants paid since the first distribution, including *pro rata* portions of the Individual Class Payments, Individual PAGA Payments, LWDA PAGA payment, Class Representative Service Payment, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment, and the Administrator's expenses.

2. Disbursements of the pro rata portions of the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payment and the Class Representative Service Payment shall not precede disbursement of pro rata portions of the Individual Class Payments and Individual PAGA payments.

3. 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.

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

A. Up to \$228,333.30 (33.33% of the Gross Settlement to Class Counsel for

attorneys' fees and up to \$20,000.00 for their litigation expenses. To date, Class Counsel have worked and incurred expenses on the Action without payment.

B. Up to \$15,000.00 as a Class Representative Award to Plaintiff for filing the Action, working with Class Counsel and representing the Class. A Class Representative Award will be the only monies Plaintiff will receive other than her Individual Class Payment and any Individual PAGA payment.

C. Up to \$25,000.00 to the Administrator for services administering the Settlement.

D. Up to \$4,000.00 for PAGA Penalties, allocated 75% to the LWDA PAGA payment and 25% in Individual PAGA payments to the Aggrieved Employees based on their PAGA Period Pay Periods.

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

If the Work Weeks and/or Class Members as of the date the Court approves the settlement exceeds the referenced 23,061 Work Weeks and/or 611 Class Members by more than 10.00%, the Gross Settlement Amount, including the Class Counsel Fees Payment, the Class Representative Service Payment, and the LWDA payment, will increase proportionally according to the number of additional Work Weeks or Class Members, whichever results in a higher increase in the Gross Settlement Amount.

5. Net Settlement Distributed to Class Members. After making the above deductions in amounts approved by the Court, the Administrator will distribute the rest of the Gross Settlement (the “Net Settlement”) by making Individual Class Payments to Participating Class Members based on their Class Period Work Weeks.

6. Taxes Owed on Payments to Class Members. Plaintiff and Defendants are asking 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 owes 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 Plaintiff 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 Payments received from the proposed Settlement. You should consult a tax advisor if you have any questions about the tax consequences of the proposed Settlement.

7. Need to Promptly Cash Payment Checks. The front of every check issued for

Individual Class Payments and Individual PAGA payments will show the date when the check expires (the void date). If you don't cash it by the void date, your check will be automatically cancelled, and the monies

■ will be deposited with the California Controller's Unclaimed Property Fund in your name.

☐ will irrevocably lost to you because they will be paid to a non-profit organization or foundation ("Cy Pres").

If the monies represented by your check is sent to the Controller's Unclaimed Property, you should consult the rules of the Fund for instructions on how to retrieve your money.

8. **Requests for Exclusion from the Class Settlement (Opt-Outs).** You will be treated as a Participating Class Member, participating fully in the Class Settlement, unless you notify the Administrator in writing, not later than [REDACTED], that you wish to opt-out. The easiest way to notify the Administrator is to send a written and signed Request for Exclusion by the [REDACTED] Response Deadline. The Request for Exclusion should be a letter from a Class Member or her representative setting forth a Class Member's name, present address, telephone number, and a simple statement electing to be excluded from the Settlement. Excluded Class Members (i.e., Non-Participating Class Members) will not receive Individual Class Payments, but will preserve their rights to personally pursue wage and hour claims against Defendants.

You cannot opt-out of the PAGA portion of the Settlement. Class Members who exclude themselves from the Class Settlement (Non-Participating Class Members) remain eligible for Individual PAGA payments and are required to give up their right to assert PAGA claims against Defendants based on the PAGA Period facts alleged in the Action.

9. The Proposed Settlement Will be Void if the Court Denies Final Approval. It is possible the Court will decline to grant Final Approval of the Settlement or decline enter a Judgment. It is also possible the Court will enter a Judgment that is reversed on appeal. Plaintiff 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.

10. Administrator. The Court has appointed a neutral company, CPT Group, 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.

11. **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 the Settlement. This means that unless you opted out by validly excluding yourself from the Class Settlement, you cannot sue, continue to sue, or be part of any other lawsuit against Defendants or related entities 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.

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

All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from (i) all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint and ascertained in the course of the Action including failure to provide meal periods, failure to authorize and permit rest periods, failure to issue proper wage statements, failure to timely pay wages, failure to maintain required payroll records, and related allegations. Except as set forth in Section 6.3 of the Settlement Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period.

12. Aggrieved Employees' PAGA Release. After the Court's judgment is final, and Defendants have paid the Gross Settlement (and separately paid the employer-side payroll taxes), all Aggrieved Employees will be barred from asserting PAGA claims against Defendants, whether or not they exclude themselves from the Settlement. This means that all Aggrieved Employees, including those who are Participating Class Members and those who opt-out of the Class Settlement, cannot sue, continue to sue, or participate in any other PAGA claim against Defendants or their related entities based on the PAGA Period facts alleged in the Action and resolved by this Settlement.

The Aggrieved Employees' Releases for Participating and Non-Participating Class Members are as follows:

All Participating and Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties, from all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Notice and ascertained in the course of the Action including failure to provide meal periods, failure to authorize and permit rest periods, failure to issue proper wage statements, failure to timely pay wages, failure to maintain required payroll records, and related allegations.

4. HOW WILL THE ADMINISTRATOR CALCULATE MY PAYMENT?

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

2. Individual PAGA payments. The Administrator will calculate Individual PAGA

will exclude you based on any writing communicating your request be excluded. Be sure to personally sign your request, identify the Action as *Maria Elena Diaz Hernandez vs. Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine*, Case No. 34-2021-00306648, and include your identifying information (full name, address, telephone number, approximate dates of employment, and social security number for verification purposes). You must make the request yourself. If someone else makes the request for you, it will not be valid. **The Administrator must be sent your request to be excluded by [redacted], or it will be invalid.** Section 9 of the Notice has the Administrator's contact information.

7. HOW DO I OBJECT TO THE SETTLEMENT?

Only Participating Class Members have the right to object to the Settlement. Before deciding whether to object, you may wish to see what Plaintiff and Defendants are asking the Court to approve. At least [redacted] days before the [redacted] Final Approval Hearing, Class Counsel and/or Plaintiff will file in Court (1) a Motion for Final Approval that includes, among other things, the reasons why the proposed Settlement is fair, and (2) a Motion for Fees, Litigation Expenses and Service Award stating (i) the amount Class Counsel is requesting for attorneys' fees and litigation expenses; and (ii) the amount Plaintiff is requesting as a Class Representative Service Award. Upon reasonable request, Class Counsel (whose contact information is in Section 9 of this Notice) will send you copies of these documents at no cost to you. You can also view them on the Administrator's Website ([url](#)) or the Court's website ([url](#)).

A Participating Class Member who disagrees with any aspect of the Agreement, the Motion for Final Approval and/or Motion for Fees, Litigation Expenses and Service Award may wish to object, for example, that the proposed Settlement is unfair, or that the amounts requested by Class Counsel or Plaintiff are too high or too low. **The deadline for sending written objections to the Administrator is [redacted].** Be sure to tell the Administrator what you object to, why you object, and any facts that support your objection. Make sure you identify the Action, *Maria Elena Diaz Hernandez, et al. vs. Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine*, case no. 34-2021-00306648, and include your name, current address, telephone number, and approximate dates of employment for Defendants and sign the objection. Section 9 of this Notice has the Administrator's contact information.

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

8. CAN I ATTEND THE FINAL APPROVAL HEARING?

You can, but don't have to, attend the Final Approval Hearing on [redacted] at (time) in Department 28 of the Sacramento Superior Court, located at 720 Ninth Street, Sacramento, CA 95814. 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, Plaintiff, and the Administrator. The Court will invite comment from objectors, Class Counsel and Defense Counsel before making a

1 decision. You can attend (or hire a lawyer to attend) either personally or virtually via [REDACTED]
2 ([https://www.\[REDACTED\]](https://www.[REDACTED])). Check the Court's website for the most current information.

3 It's possible the Court will reschedule the Final Approval Hearing. You should check the
4 Administrator's website [REDACTED] beforehand or contact Class Counsel to verify the date and time of
the Final Approval Hearing.

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

6 The Agreement sets forth everything Defendants and Plaintiff has promised to do under the
7 proposed Settlement. The easiest way to read the Agreement, the Judgment or any other
8 Settlement documents is to go to (specify entity)'s website at (url). You can also telephone or send
9 an email to Class Counsel or the Administrator using the contact information listed below, or
10 consult the Superior Court website by going to ([http://www.\[REDACTED\].aspx](http://www.[REDACTED].aspx)) and entering the Case
Number for the Action, Case No. 34-2021-00306648. You can also make an appointment to
11 personally review court documents in the Clerk's Office at the 720 Ninth Street by calling [REDACTED].

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

14 Class Counsel:

15 DAVID G. SPIVAK
16 david@spivaklaw.com
17 THE SPIVAK LAW FIRM
18 8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069
Telephone: (213) 725-9094
Facsimile: (213) 634-2485

19 WALTER L. HAINES
20 walter@uelglaw.com
21 UNITED EMPLOYEES LAW GROUP, PC
22 8605 Santa Monica Blvd., PMB 63354
West Hollywood, CA 90069
Telephone: (562) 256-1047
Facsimile: (562) 256-1006

23 Administrator:

24 Name of Company: CPT Group, Inc.
25 Email Address: _____
26 Mailing Address: _____
27 Telephone: _____
28 Fax Number: _____

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

11. WHAT IF I CHANGE MY ADDRESS?

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

EXHIBIT 2



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

EXHIBIT 3

FILED
Superior Court Of California,
Sacramento
08/23/2021
mvalledor
By _____, Deputy
Case Number:
34-2021-00305646

1 DAVID G. SPIVAK (SBN 179684)
2 david@spivaklaw.com
3 GREGORY WILBUR (SBN 295945)
4 greg@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 MARIA ELENA DIAZ HERNANDEZ, and all others similarly situated
14 (Additional Attorney for Plaintiff on Following Page)

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 SACRAMENTO
(UNLIMITED JURISDICTION)

MARIA ELENA DIAZ HERNANDEZ, on
behalf of herself, all others similarly situated,
and the general public,

Plaintiff,

vs.

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

Defendants.

Case No.:

CLASS ACTION

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); and
4. Unfair Competition (Bus. & Prof. Code §§ 17200, et seq.).

JURY TRIAL DEMANDED

3/1/21



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

8. Defendant GUITRON ALCAZAR ALCAZAR INC. doing business as El Tapatio
Mexican Cuisine is a corporation organized and existing under the laws of California and also a



SPIVAK LAW

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

1 citizen of California based on Plaintiff's information and belief.

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

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

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

15 12. Plaintiff is informed and believes and thereon alleges that each and every one of
16 the acts and omissions alleged herein was 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 CLASS ALLEGATIONS

21 13. This action has been brought and may be maintained as a class action pursuant to
22 California Code of Civil Procedure § 382 because there is a well-defined community of interest
23 among the persons who comprise the readily ascertainable class defined below and because
24 Plaintiff is unaware of any difficulties likely to be encountered in managing this case as a class
action.

25 14. **Class Definition:** The Class is defined as follows: All individuals currently and
26 formerly employed in California as non-exempt, hourly employees by Defendants, including but
27 not limited to cooks, runners, servers, wait staff, bussers, bartenders, cocktail servers, hosts,
28 dishwashers, and persons in similar positions at any time during the period beginning four years



SPIVAK LAW

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

1 prior to the filing of this action and ending on the date that final judgment is entered in this action
2 (“Class” or “Class Members”).

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

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

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

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

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

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

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

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

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

25 18. **Typicality:** Plaintiff’s claims are typical of the other Class Members’ claims.
26 Plaintiff is informed and believes and thereon alleges that Defendants have a policy and/or
27 practice, or lack thereof, which resulted in Defendants failing to comply with the California Labor
28 Code, the Wage Order, and the Business and Professions Code.

19. **Adequacy of Class Representative:** Plaintiff is an adequate class representative
in that she has no interests that are adverse to, or otherwise in conflict with, the interests of absent
Class Members. Plaintiff is dedicated to vigorously prosecuting this action on behalf of Class



SPIVAK LAW

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

Members. Plaintiff will fairly and adequately represent and protect the interests of Class Members.

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

21. **Superiority:** A class action is vastly superior to other available means for fair and efficient adjudication of Class Members' claims and would be beneficial to the parties and the 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 would thus make it difficult, if not impossible, for individual Class Members to both seek and obtain relief. Moreover, a class action will serve an important public interest by permitting Class Members to effectively pursue the recovery of monies owed to them. Further, a class action will prevent the potential for inconsistent or contradictory judgments inherent in individual litigation.

STATEMENT OF FACTS

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

23. At all relevant times, Defendants issued wages to Plaintiff and all of the other Class 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.

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

25. At all relevant times, Defendants failed to authorize and permit Plaintiff and all of the other Class Members to take ten-minute, off-duty, paid rest breaks every four hours worked



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 major portion thereof. Defendants denied Plaintiff and the Class Members all duty-free, ten-
2 minute rest breaks. Defendants also failed to pay premium wages for days on which they failed
3 to authorize and permit Plaintiff and all of the other Class Members to take rest breaks as required
4 by law.

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

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

16 28. Defendants failed to maintain accurate employee records of Plaintiff and all of the
17 other Class Members.

18 **FIRST CAUSE OF ACTION**

19 **FAILURE TO PROVIDE REST BREAKS AND MEAL PERIODS**

20 **(Lab. Code §§ 226.7, 512, and 1198)**

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

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

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

26 31. In relevant part, California Labor Code § 1198 states:

27 The maximum hours of work and the standard conditions of labor
28 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.

32. In relevant part, California Labor Code § 512 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 An employer shall not employ an employee for a work period of
2 more than five hours per day without providing the employee with
3 a meal period of not less than 30 minutes, except that if the total
4 work period per day of the employee is no more than six hours, the
5 meal period may be waived by mutual consent of both the
6 employer and employee.

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

13 33. In relevant part, § 12 of the Wage Order states:

14 **Rest Periods**

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

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

34. 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 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



SPIVAK LAW

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

1 be permitted only when the nature of the work prevents an
2 employee from being relieved of all duty and when by written
3 agreement between the parties an on-the-job paid meal period is
4 agreed to. The written agreement shall state that the employee
5 may, in writing, revoke the agreement at any time.”

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

11 35. In relevant part, California Labor Code § 226.7 states:

12 (b) An employer shall not require an employee to work during
13 a meal or rest period mandated pursuant to an applicable statute,
14 or applicable regulation, standard, or order of the Industrial
15 Welfare Commission, the Occupational Safety and Health
16 Standards Board, or the Division of Occupational Safety and
17 Health.

18 (c) If an employer fails to provide an employee a meal period
19 or rest period in accordance with a state law, including, but not
20 limited to, an applicable statute or applicable regulation, standard,
21 or order of the Industrial Welfare Commission, the Occupational
22 Safety and Health Standards Board, or the Division of
23 Occupational Safety and Health, the employer shall pay the
24 employee one additional hour of pay at the employee’s regular rate
25 of compensation for each work day that the meal or rest period is
26 not provided.

27 36. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff and the
28 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.

37. Pursuant to the Wage Order, Plaintiff 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.

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

39. 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 meal periods. Defendants denied Plaintiff and all of the other
2 Class Members their 30-minute off-duty meal period within the first five hours of work.
3 Defendants required the Plaintiff and the Class Members to take their meal periods more than
4 five hours into their work shifts. Furthermore, Defendants failed to pay premium wages for days
5 on which they failed to provide Plaintiff and all of the other Class Members with timely meal
6 periods.

7 40. At all relevant times, Defendants failed to authorize and permit Plaintiff and all
8 of the other Class Members to take ten-minute, paid, duty-free rest breaks every four hours
9 worked or major fraction thereof. Defendants did not seek an exemption from the rest period
10 protections of the Wage Order from the California Division of Labor Standards Enforcement.
11 Defendants denied Plaintiff and the Class Members all duty-free, ten-minute rest breaks.
12 Moreover, Defendants failed to pay Plaintiff and all of the other Class Members premium wages
13 on workdays Defendants failed to provide Plaintiff and all of the other Class Members with 10-
14 minute rest periods every four hours worked or major fraction thereof.

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

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

22 43. By reason of the above, pursuant to California Labor Code § 226.7, Plaintiff and
23 the Class Members are entitled to premium wages for workdays in which one or more off-duty
24 meal periods were not provided to them, and for workdays in which one or more rest breaks were
25 not provided to them.

26 **SECOND CAUSE OF ACTION**

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

28 **(Lab. Code § 226)**

(By Plaintiff and the Class against all Defendants)

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

45. 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 other Class Members have been employees of Defendants and entitled to the benefits and
2 protections of California Labor Code § 226.

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

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

23 47. Pursuant to California Labor Code § 226(e), an employee suffering injury as a
24 result of a knowing and intentional failure by an employer to comply with subdivision (a) is
25 entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period
26 in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a
27 subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and
28 is entitled to an award of costs and reasonable attorneys' fees.

48. Pursuant to California Labor Code § 226(e), an employee is deemed to suffer
injury if the employer fails to provide a wage statement. Also, an employee is deemed to suffer
injury if the employer fails to provide accurate and complete information as required by California



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 § 226(a) and the employee cannot “promptly and easily determine” from the wage
2 statement alone one or more of the following:

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

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

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

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

13 49. “Promptly and easily determine,” as stated in California Labor Code § 226(e),
14 means a reasonable person would be able to readily ascertain the information without reference
15 to other documents or information.

16 50. As alleged herein, at all relevant times during the applicable limitations
17 period,**[FIX THE JUSTIFICATION ON RIGHT SIDE.]** Defendants violated Labor Code
18 § 226 because they did not properly and accurately itemize each Aggrieved Employee’s gross
19 wages earned, net wages earned, the total hours worked, the corresponding number of hours
20 worked at each rate by the Aggrieved Employee and other requirements of Labor Code § 226.
21 Defendants failed to state in the wage statements they issued to Plaintiff and all of the other Class
22 Members all their hours worked and wages earned, including, but not limited to, regular and
23 overtime wages for work they performed off-the-clock after clocking-out. Defendants knowingly
24 and intentionally failed to state on the wage statements they issued to Plaintiff and all of the other
25 Class Members the earned but unpaid wages described above. The wage statements do not state
26 all meal period premium wages earned, all rest break premium wages earned, the employer’s
27 name and address, all hours worked at the correct rates of pay, all minimum wages earned, all
28 regular wages earned, all overtime wages earned, and all doubletime wages earned. Defendants
issued wage statements to Plaintiff and the Class Members that do not state the correct name and
address of the employer. As a result, Defendants have violated California Labor Code § 226.

51. Defendants’ failure to provide Plaintiff and the other Class Members with accurate



SPIVAK LAW

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

1 wage statements was knowing and intentional. Defendants had the ability to provide Plaintiff and
2 the other Class Members with accurate wage statements but intentionally provided wage
3 statements that Defendants knew were not accurate.

4 52. As a result of being provided with inaccurate wage statements by Defendants,
5 Plaintiff 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, Plaintiff
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 53. Pursuant to California Labor Code § 226(e), Plaintiff and the other Class Members
15 are entitled to recover the greater of actual damages, or penalties of fifty dollars (\$50) for the
16 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 54. Accordingly, with respect to this cause of action, on behalf of herself and the other
21 Class Members, Plaintiff prays for the herein stated relief and for an award of all reasonable costs
22 and attorneys' fees, including interest thereon, as permitted by law, all in amounts subject to
23 proof.

24 **THIRD CAUSE OF ACTION**

25 **WAITING TIME PENALTIES**

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

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

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

56. At all relevant times during the applicable limitations period, Plaintiff and the
Class have been non-exempt employees of Defendants and entitled to the benefits and
protections of California Labor Code §§ 201–203, 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 57. Labor Code § 201 provides that all earned and unpaid wages of an employee who
2 is discharged are due and payable immediately at the time of discharge.

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

7 59. By failing to pay earned minimum and premium wages to Plaintiff and the Class,
8 Defendants failed to timely pay them all earned and unpaid wages in violation of Labor Code
9 § 201 or § 202.

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

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

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

24 63. Plaintiff is informed and believes that Defendants' failures to weekly and timely
25 pay Plaintiff and the Class all of their earned and unpaid wages have been willful in that, at all
26 relevant times, Defendants have deliberately maintained policies and practices that violate the
27 requirements of the Labor Code and the Wage Order, even though at all relevant times, they have
28 had the ability to comply with those legal requirements.

 64. 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.



SPIVAK LAW

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

1 **FOURTH CAUSE OF ACTION**

2 **UNFAIR COMPETITION**

3 **(Bus. & Prof. Code §§ 17200, et seq.)**

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

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

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

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

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

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

24 70. Plaintiff and the other Class Members are entitled to reasonable attorneys' fees in
25 connection with their unfair competition claims pursuant to California Code of Civil Procedure
26 § 1021.5, the substantial benefit doctrine and/or the common fund doctrine.

27 ///

28 ///

///

///

///



SPIVAK LAW

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

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. Restitution;
- I. Declaratory and injunctive relief;
- J. Equitable relief;
- K. Pre-judgment interest;
- L. Statutory penalties;
- M. Costs of suit;
- N. Interest;
- O. Reasonable attorneys' fees; and
- P. 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: August 20, 2021

By



DAVID SPIVAK,
GREGORY WILBUR
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 4

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
10 by law.

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

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

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

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

26 **FIRST CAUSE OF ACTION**

27 **FAILURE TO PROVIDE REST BREAKS AND MEAL PERIODS**

28 **(Lab. Code §§ 226.7, 512, and 1198)**

(By Plaintiff and the Class against all Defendants)

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

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

THIRD CAUSE OF ACTION
WAITING TIME PENALTIES
(Lab. Code §§ 201, 202, and 203)

(By Plaintiff and the Class against all Defendants)

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

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

59. 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.

60. 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.

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

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

63. Labor Code § 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 § 201, or § 202.

64. Defendants failed to pay Plaintiff and all of the other Class Members whose employment ended all of the earned but unpaid wages described above by the conclusion of their employment with Plaintiff, including unprovided meal period premium wages, unprovided rest 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

1 2699(f)(2)).

2 80. Plaintiff has complied with the procedures for bringing suit specified in
3 California Labor Code § 2699.3. By letter dated August 26, 2021, Plaintiff filed written notice
4 online with the Labor and Workforce Development Agency (“LWDA”) and gave written notice
5 by certified mail to Defendants of the specific provisions of the California Labor Code alleged
6 to have been violated, including the facts and theories to support the alleged violations. A true
7 and correct copy of the notice to the LWDA dated August 26, 2021 is attached as Exhibit A.
8 Plaintiff accompanied her LWDA notice with a fee in the amount of \$75.00. The LWDA has
9 failed to take action in response within 65 calendar days of the date of Plaintiff’s notice, but
10 Plaintiff anticipates that the LWDA will provide written notice to Plaintiff informing her that it
11 does not intend to investigate these allegations.

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

15 **PRAYER FOR RELIEF**

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

- 18 A. An order that the action be certified as a class action;
- 19 B. An order that Plaintiff be appointed class representative;
- 20 C. An order that counsel for Plaintiff be appointed class counsel;
- 21 D. Unpaid Wages;
- 22 E. Actual Damages;
- 23 F. Statutory Damages;
- 24 G. Liquidated Damages;
- 25 H. Civil Penalties;
- 26 I. Restitution;
- 27 J. Declaratory and injunctive relief;
- 28 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.

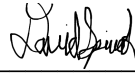
DEMAND FOR JURY TRIAL

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

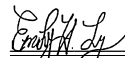
____ (BY MAIL) I caused such an envelope to be mailed by placing it for collection and mailing, in the course of ordinary business practice, with other correspondence of The Spivak Law Firm, 16530 Ventura Blvd., Suite 203, Encino, California 91436.

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

EXHIBIT 5



Sample size calculator

What margin of error can you accept?

5% is a common choice

32 %

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%

95 %

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

126

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%

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	4.47%	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 6

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title: Maria Elena Diaz Hernandez v. Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine
Case no.: 34-2021-00306648
Court: Sacramento
Judge: Hon. Steven M Gevercer, Dept. 28
Page subject: **Data**

Important Dates

Unfair Competition, Bus.&Prof. § 17200 ("UCL") period begins:	Thursday, August 24, 2017
Lab.Code § 203 (waiting time penalties) period begins:	Friday, August 24, 2018
Lab.Code § 2699 (civil penalties) period begins:	Wednesday, August 26, 2020
Lab.Code § 226 (pay stub penalties) period begins:	Sunday, August 23, 2020
LWDA Notice:	Thursday, August 26, 2021
Lawsuit:	Monday, August 23, 2021
Sample begin:	Thursday, September 10, 2020
Sample end:	Tuesday, May 10, 2022
Sample calendar days:	607
Mediation:	Wednesday, May 25, 2022
Anticipated Settlement Period end date:	Thursday, September 22, 2022
Settlement Period to Sample Period:	305.60%

Classes / Groups sizes

UCL Class Members:	126
UCL Workweeks:	4,243
UCL Wage Statements:	2,158
UCL Workdays:	17,396
UCL Calendar days:	1,735
UCL Months:	57.04

Waiting Time Penalties Class Members: 81

PAGA Aggrieved Employees: 126
PAGA Wage Statements: 2,158

Wage Statement Class Members: 126
Wage Statement Class Wage Statements: 2,158

Averages

Average Hourly Rate:	\$	14.48
Average Overtime Rate:	\$	21.72
Average Doubletime Rate:	\$	28.96
Average Work Hours Per Day:		6.04
Average Work Hours Per Week:		24.77
Average Workdays Per Week:		4.10
Workdays to Calendar Days (%):		58.57%
Paycycle:		Biweekly (26 / year)
Paychecks Per Year:		

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Maria Elena Diaz Hernandez v. Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine
Case no.:	34-2021-00306648
Court:	Sacramento
Judge:	Hon. Steven M Gevercer, Dept. 28
Page subject:	Unpaid wages
Authority:	Lab.Code §§ 510, 1194, 1194.2, and 1198

Average Hourly Rate:	\$	14.48
Unpaid hours per pay week:		-
Actionable workweeks:		2,158
Interest:		10%

Unpaid wages:	\$	-
Liquidated damages:	\$	-

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Maria Elena Diaz Hernandez v. Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine
Case no.:	34-2021-00306648
Court:	Sacramento
Judge:	Hon. Steven M Gevercer, Dept. 28
Page subject:	Unprovided Meal Periods
Authority:	Lab.Code §§ 226.7, 512, and 1198

Average Hourly Rate:	\$	14.48
Actionable workdays:		17,396
>>Percentage qualifying for meal periods:		82%
Violation rate (%)		71%
Meal period premium wages:	\$	145,884.20

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Maria Elena Diaz Hernandez v. Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine
Case no.:	34-2021-00306648
Court:	Sacramento
Judge:	Hon. Steven M Gevercer, Dept. 28
Page subject:	Unprovided Rest Periods
Authority:	Lab.Code §§ 226.7 and 1198

Average Hourly Rate:	\$	14.48
Actionable workdays:		17,396
>>Percentage qualifying for rest periods:		98%
Violation rate (%)		100%
Rest period premium wages:	\$	245,878.05

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Maria Elena Diaz Hernandez v. Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine
Case no.:	34-2021-00306648
Court:	Sacramento
Judge:	Hon. Steven M Gevercer, Dept. 28
Page subject:	Itemized Wage Statements
Authority:	Lab.Code § 226

Wage Statement Class Members:		126
Wage Statement Class Wage Statements:		2,158
Initial penalty:	\$	50.00
Subsequent penalty:	\$	100.00
Statutory wage statement penalties:	\$	209,500.00

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Maria Elena Diaz Hernandez v. Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine
Case no.:	34-2021-00306648
Court:	Sacramento
Judge:	Hon. Steven M Gevercer, Dept. 28
Page subject:	Waiting Time / Final Wages
Authority:	Lab.Code § 203

Waiting Time Penalties Class Members:		81
Days waiting:		30
Average Hourly Rate:	\$	14.48
Average Overtime Rate:	\$	21.72
Average Doubletime Rate:	\$	28.96
Average Work Hours Per Day:		6.04
Regular Hours Per Day:		6.04
Overtime Hours Per Day:		-
Doubletime Hours Per Day:		-
Waiting time penalties:	\$	212,525.86

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title: Maria Elena Diaz Hernandez v. Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine
Case no.: 34-2021-00306648
Court: Sacramento
Judge: Hon. Steven M Gevercer, Dept. 28
Page subject: **PAGA Civil Penalties**
Authority: Lab.Code §§ 2698, *et seq.*

Labor Code violation	Labor Code Civil		Subsequent		Pay periods		Total
	Penalty Statute	Initial penalty	penalty				
Meal periods Lab.Code § 512):	Lab.Code § 558	\$ 50.00	\$ 100.00		2,158	\$	215,750.00
Rest periods (Lab.Code § 1198):	Lab.Code § 2699	\$ 100.00	\$ 200.00		2,158	\$	431,500.00
Improper pay stubs (Lab.Code § 226):	Lab.Code § 226.3	\$ 250.00	\$ 1,000.00		2,158	\$	2,157,250.00
Untimely wages (Lab.Code §§ 201-204):	Lab.Code § 2699	\$ 100.00	\$ 200.00		2,158	\$	431,500.00
Total:						\$	3,236,000.00

By continuing to review this documents, recipient agrees not to use this document for purposes other than settlement discussions

Case title:	Maria Elena Diaz Hernandez v. Guitron Alcazar Alcazar Inc. dba El Tapatio Mexican Cuisine
Case no.:	34-2021-00306648
Court:	Sacramento
Judge:	Hon. Steven M Gevercer, Dept. 28
Page subject:	Totals
Authority:	Various

Restitution	Reduction		Demand
Meal period premium wages:	\$ 145,884.20	1% \$	144,425.36
Rest period premium wages:	\$ 245,878.05	1% \$	243,419.27
Restitution subtotal:	\$ 391,762.25	\$	387,844.63
Penalties			
Statutory wage statement penalties:	\$ 209,500.00	1% \$	207,405.00
Waiting time penalties:	\$ 212,525.86	1% \$	210,400.60
Meal periods (Lab.Code § 512):civil penalties:	\$ 215,750.00	1% \$	213,592.50
Rest periods (Lab.Code § 1198):civil penalties:	\$ 431,500.00	1% \$	427,185.00
Improper pay stubs (Lab.Code § 226):civil penalties:	\$ 2,157,250.00	1% \$	2,135,677.50
Untimely wages (Lab.Code §§ 201-204):civil penalties:	\$ 431,500.00	1% \$	427,185.00
Penalties subtotal:	\$ 3,658,025.86	\$	3,621,445.60
Grand total:	\$ 4,049,788.11	\$	4,009,290.23

EXHIBIT 7

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

9 Attorney for Plaintiffs,

10 ALINA GHRDILYAN, EVGENIA SULTANIAN, and all others similarly situated

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

13 **(UNLIMITED JURISDICTION)**

14 ALINA GHRDILYAN; EVGENIA
15 SULTANIAN; and all others similarly situated,

16 *Plaintiffs,*

17 vs.

18 RJ FINANCIAL, INC., a California
19 corporation; RAMIL ABALKHAD, an
20 individual; and DOES 1 through 50, inclusive,

21 *Defendants.*

Case No.: BC430633

CLASS ACTION

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

Action filed: 01/28/2010
CMC: 05/10/2010, 8:30 a.m.
FSC: Not set
Trial: Not set
Dept: 36, Hon. Gregory Alarcon

22 On behalf of both himself and all other persons similarly situated, plaintiff ALINA
23 GHRDILYAN and EVGENIA SULTANIAN ("Plaintiffs") bring this action against defendants
24 RJ FINANCIAL, INC., RAMIL ABALKHAD, and the other defendants, (collectively

25
26
27
THE
SPIVAK
LAW FIRM

CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court
FEB 24 2010

John A. Clarke, Executive Officer/Clerk
BY MARY GARCIA, Deputy

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.

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 8

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

(THE FOLLOWING PROCEEDINGS WERE HELD AT 1:47 P.M.)

THE COURT: NOW, WE WILL GO BACK TO THE GHRDILYAN
AGAINST RJ CASE.

OKAY. WHEN WE LEFT, I HAD, I THINK, TALKED
ABOUT SOME GENERAL POINTS OF LAW HAVING TO DO WITH PAGA
ACTIONS, AND I WILL JUST OVERLAP SLIGHTLY.

I WAS SAYING THAT PAGA ACTIONS DO NOT HAVE TO
BE HAVE MAINTAINED AS CLASS ACTIONS. THEY CAN BE, BUT ARE
NOT REQUIRED TO BE. AND ONE OF AUTHORITIES ON THAT IS ARIAS,
A-R-I-A-S, VERSUS SUPERIOR COURT, (2009) 46 CALIFORNIA 4TH
969 FROM PAGES 981 TO 982. PAGA IS NOT THE EMPLOYEE'S
EXCLUSIVE REMEDY. THEY MAY SEPARATELY OR CONCURRENTLY SEEK
OTHER REMEDIES. LABOR CODE 2699(G) AND CALIBER BODY WORKS
VERSUS SUPERIOR COURT, (2005) 134 CALIFORNIA APPELLATE 4TH
365 AT 375.

THE KINDS OF PENALTIES THAT PAGA PLAINTIFFS
CAN SEEK TO RECOVER, ASSUMING THAT THE FACTS SUPPORT IT, ARE
THOSE FOR FAILURE TO PAY STATUTORILY PRESCRIBED WAGES --
THAT'S LABOR CODE 210 -- UNLAWFULLY WITHHELD WAGES -- THAT'S
LABOR CODE 225.5 -- OR FOR VIOLATING, FOR EXAMPLE, AN
INDUSTRIAL WELFARE COMMISSION ORDER -- THAT'S LABOR CODE 558.
AN AGGRIEVED EMPLOYEE -- THAT WOULD MEAN ANYONE EMPLOYED BY
THE ALLEGED VIOLATOR AND AGAINST WHOM ONE OR MORE VIOLATIONS
WAS COMMITTED -- AND I PICKED UP THAT DEFINITION FROM LABOR
CODE 2699(C) AND FROM THE COMMENTS IN AMALGAMATED TRANSIT
UNION VERSUS SUPERIOR COURT, (2009) 46 CALIFORNIA 4TH 993 AT
1004 TO 1005 -- AN AGGRIEVED EMPLOYEE CAN SUE TO RECOVER
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 WRANGLLED 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 AWARDED 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 9



SPIVAK LAW

ATTORNEY CONSULTATION AND FEE CONTRACT FOR CONTINGENCY CASES

THIS FEE CONTRACT FOR CONTINGENCY CASES ("Contract") is made on February 23, 2021, in Encino, between **Maria Diaz** hereinafter referred to as "Client," and The Spivak Law Firm of Los Angeles County, CA and United Employees Law Group, PC of Orange County, CA hereinafter referred to as "Attorney."

In consideration of the mutual promises herein contained, the parties hereto agree as follows:

I. PURPOSE OF REPRESENTATION

1.01 Client hereby retains and employs Attorney to sue for and recover all damages and compensation to which Client may be entitled as well as to compromise and settle all claims described below:

Class action and Private Attorneys General Act lawsuits against El Tapatio Restaurant and related entities for unprovided meal and rest periods

1.02 This agreement will not become binding on either party, and Attorney will not begin providing legal services, until Client has paid the initial deposit, if any, as described in Paragraph 2.03, and has signed this Agreement. This written agreement supersedes any and all previous agreements between the parties, if any.

1.03 Attorney will provide reasonably necessary legal services and will take steps to keep Client informed of the progress of the case. Attorney will respond within a reasonable time and manner to Client's inquiries. If court action becomes necessary, Attorney will represent Client through trial and post-trial motions. Separate arrangements must be made for any appeal or execution proceedings that client wishes to pursue after judgment, or any other matters for which Client wishes to employ Attorney other than the matter described above.

II. ATTORNEY'S FEE AND EXPENSES

2.01 In consideration of services rendered and to be rendered by Attorney, Client hereby agrees to pay to Attorney in the event of an individual settlement or judgment the following amounts on any settlements, monies, judgments or other consideration which have or may be paid on this legal matter:

- a. Before the filing of a lawsuit or arbitration demand: 33 and 1/3 percent of any recovery.

- b. After the filing of a lawsuit or arbitration demand: 40 percent of any recovery. In the event Client prevails at trial (or arbitration) of this matter, any fee awarded by the court, pursuant to statute or contract, in connection with the subject matter of this representation, shall be paid to Attorney and shall be applied against Client's fee obligation under this Agreement, but shall not limit or discharge Client's fee obligation. In the event there is a fee award by the court upon Client prevailing at trial, the Attorney shall receive either the fee award or 40% of the total award, whichever is greater.

If the total legal fees received in this case are \$250,000.00 or greater, it is agreed that the United Employees Law Group, PC will shall receive 33 and 1/3% of the total legal fees received and the Spivak Law Firm shall receive the remaining 66 and 2/3% of the total legal fees received. If the total legal fees received in this case are less than \$250,000.00, it is agreed that the United Employees Law Group, PC will shall receive 25% of the total legal fees received and the Spivak Law Firm shall receive the remaining 75% of the total legal fees received.

It is agreed and understood that if the amount of attorney's fees on this claim or cause of action are regulated or governed by law, and that law precludes any other fee arrangement other than the amount set by the law or regulation, then the amount payable hereunder to said Attorney shall be limited to the maximum so allowed by law. In the event of a class action settlement or judgment, Private Attorneys General Action settlement or judgment, or other representative settlement or judgment, a court's approval of an award of attorney fees is necessary. Normally with such settlements and judgments, a request for attorney fees will be for no more than one third (33 and 1/3%) of the total value of the settlement or judgment amount. Attorney will apply for an award of attorney fees from the court that may be more or less than the percentages stated above. Under such circumstances. Attorney will also ask the court to separately award Attorney the costs Attorney has advanced for this matter. In advance of such requests to a Court for attorney fees and costs, Attorney will seek Client's written consent to the attorney fees and costs sought.

2.01.1 This section concerns the possibility of settlement of individual claims, attorney fees, and costs in the event representative claims are no longer viable.

Under this Agreement, Attorney agrees to represent Client in Client's pursuit of the claims described in Section 1.01 of this Agreement, stated above. These claims are representative claims because Client agrees that Client will pursue the Claims for Client and all comparable employees and individuals. In this regard, Attorney advises Client of the following material information:

1. Attorney has chosen to represent Client primarily because the Client has claims that Client may be able to bring on behalf of numerous other comparable employees. As a result, Client's claims have the potential to support a class action lawsuit and/or a Private Attorneys General Act lawsuit.
2. Client's individual claims - and those of each of the other comparable employees that Attorney will file the lawsuit on behalf of - are generally worth very small amounts in

unpaid wages, unreimbursed work expenses, interest, and/or statutory monetary penalties. Attorney would not have agreed to represent Client if it were not for the strong likelihood that a Court will permit Client's lawsuit to proceed to trial on behalf of numerous other employees with comparable claims to Client's claims.

3. Only by combining the claims of numerous individuals can Attorney reasonably hope to recover the attorney fees and costs Attorney incurs as part of Attorney's contingency representation of Client.
4. For reasons that are unknown at the time of this Agreement and for reasons that are well outside of the control of the Attorney and the Client, Attorney may discover after Client executes this Agreement that numerous comparable employees with comparable claims to Client's claims do not exist. In this instance, the Attorney and the Client may not be able to pursue the class action or Private Attorneys General Act claims any longer.
5. Based on Attorney's prior experience, Defendants (the party or parties Client sues or intends to sue) in class actions and Private Attorneys General Actions often attempt to settle with the Plaintiff (the party suing or intending to sue) for the maximum value of the Plaintiff's individual claims. Such settlements prevent the Plaintiff from continuing to represent comparable individuals (sometimes known as "class members," "putative class members," "proposed class members," and/or "aggrieved employees") who Client brought the lawsuit on behalf of.
6. Based on Attorney's prior experience, the Defendant may offer to settle Client's individual claims for an amount of money that equals or exceeds the maximum value of Client's claims. In this event, the Attorney's fees and costs will likely exceed the maximum value of Client's individual claims. Often in Attorney's experience, the Attorney's fees and costs will far exceed the value of Client's individual claims.
7. Attorney may advise Client to accept an individual settlement of Client's claims if numerous individuals with claims that are comparable to Client's do not exist and an individual settlement is in Client's best interest. Alternatively, Client may choose to enter into a settlement for an amount that equals or exceeds the maximum value of Client's individual claims even if there are numerous individuals with claims that are comparable to Client's claims.
8. Based on evidence Attorney may obtain after entering into this Agreement with client, Attorney's estimate of maximum value of Client's claims may change over the course of the Attorney-Client relationship under this Agreement.

In the event the Defendant offers to settle with Client for an amount of money that equals or exceeds the maximum value of Client's individual claims, Client agrees that, if the Attorney's fees and costs exceed the maximum value of Client's claims, Attorney may elect, solely at Attorney's option, that Client

receive only the maximum value of Client's individual claims from the settlement funds and that the Attorney receives the remaining settlement funds to cover all or part of the Attorney's fees and costs and the risks that arise from Attorney's contingency representation of Client. In other words, Client agrees to accept as settlement the amount equal to the estimated maximum value of Client's claims. Attorney discloses that attorney's fees and costs incurred may substantially exceed the client's net recovery.

Within seven days of Client's written request to Attorney, Attorney will provide Client with Attorney's estimate of the maximum value of Client's claims. This estimate of maximum value may change over the course of litigation.

Attorney strongly recommends that Client consult with an independent lawyer about this provision, including whether this provision is in Client's best interests. By initialing below, Client agrees that Attorney has provided Client with a reasonable opportunity to consult with an independent lawyer about this provision and Client consents to this provision.

DEM

____ (Client initials here)

2.02 The rates set forth above are not set by law, but are negotiable between an attorney and client.

2.03 Client agrees to grant law firm a lien on any and all claims or causes of action that are the subject of this Agreement. The lien, to ensure payment of any sums owing to law firm at the conclusion of services performed, will attach to any recovery you may obtain. Law firm may compel payment of fees and costs from any such funds recovered on behalf of you, even if law firm has been discharged before the end of the case. You may seek the opinion of an independent lawyer of your choice before agreeing to this lien. By initialing below, Client agrees that Client has had reasonable opportunity to consult an independent law firm, regardless of whether you have actually consulted such law firm, and Client agrees that law firm will have a lien as specified above.

DEM

____ (Client initials here) DS (Attorney initials here)

III. APPROVAL NECESSARY FOR SETTLEMENT

3.01 Attorney is hereby authorized to enter into any and all settlement negotiations on behalf of those whom Attorney represents as Attorney deems appropriate. This includes, but is not limited to, Attorney's prerogative to pursue cash or structured payment settlement negotiations.

3.02 Client hereby grants unto Attorney a power of attorney to handle negotiations and settlement discussions regarding the obtaining of possession of any and all monies or other things of value subject of the matter due to Client under this claim as fully as Client could do so in person.

a. This expressly includes the right to sign Client's name on and to any insurance company drafts, money orders, cashier's checks, checks or other negotiable instruments made payable to Attorney and Client, Attorney, or to Client without the joinder of Attorney,

submitted to Attorney on behalf of Client in full or partial settlement of this case.

b. This limited power of attorney further authorizes Attorney to place these monies, referred to above, in Attorney's trust account and from that trust account, make distributions and payments to Attorney for the agreed to fee stated above, reimbursement to Attorney for any and all expenses incurred by Attorney in handling this case, payments to Client of Client's interest in the monies recovered as stated above, and payments to parties other than Client and Attorney for their services performed, fees charged or bills rendered in connection with representing Client, including but not limited to medical bills, court reporter fees, deposition fees, investigative services, costs of exhibits or other special expenses incurred by Attorney on behalf of Client.

3.03 No settlement of any nature shall be made for any of the aforesaid claims or profits of Client without the complete approval of Client, nor shall Client obtain any settlement on the aforesaid claims without the complete approval of attorney.

3.04 Attorney is granted a limited power of attorney so that Attorney may have full authority to prepare, sign and file all legal instruments, pleadings, drafts, authorizations and papers as shall be reasonably necessary to conclude this representation, including settlement and/or reduce to possession any and all monies or other things of value due to Client under this claim as fully as Client could do so in person.

IV. REPRESENTATIONS

4.01 It is expressly agreed and understood that no promises or guarantees as to the outcome of the case have been made to Client by Attorney. Attorney has not represented to Client that Client will recover all or any of the funds so desired. Client also acknowledges that obtaining a judgment does not guarantee that the opposing party will be able to satisfy the judgment. It is further expressly understood and agreed that no other representations have been made to Client, except for those set out in this Contract.

V. DEDUCTION OF EXPENSES

5.01 All reasonable expenses incurred by Attorney in the handling of this legal matter shall be deducted from the gross settlement proceeds at the time the case is settled or resolved, and before the contingent fee is calculated.

5.02 The expenses contemplated above, include but are not limited to any and all out-of-pocket expenses incurred in connection with this case, including but not limited to the following expenses: filing fees, court costs, certified copies of documents, pleadings, orders etc., transcripts, depositions, duplication costs, postage, office supplies, photographs, trial exhibits, long distance phone and fax calls, appraisal fees, consultants, expert witnesses and other fees associated with preparation and trial testimony, investigation fees, delivery charges, overnight mail/parcel services, parking, toll road and

mileage expenses, out of town expenses including travel expense, air fare, hotels, meals, and any other expense incurred in connection with the matter.

5.03 Except for the following, all expenses and costs will be charged to Client at Attorney's cost: mileage at \$0.50/mile and photocopying at \$0.25/page.

VI. COOPERATION OF CLIENT

6.01 Client shall keep Attorney advised of Client's whereabouts at all times, and provide Attorney with any changes of address, phone number or business affiliation during the time period which Attorney's services are required, and shall comply with all reasonable requests of Attorney in connection with the preparation and presentation of aforesaid representation.

6.02 Attorney may, at Attorney's option, withdraw from the case and cease to represent Client for any reason, including without limitation Client's failure to timely pay fees and expenses or deposits for same in accordance with this Contract, subject to the professional responsibility requirements to which attorneys are subject.

It is further understood and agreed between the parties that upon such termination of any services of Attorney, any of Client's deposits remaining in Attorney's Trust Account shall be applied to any balance remaining owing to Attorney for fees and/or expenses and any surplus then remaining shall be refunded to Client.

6.03 Duties As A Class Representative In A Class Action or Private Attorney General Action. Client has retained Attorney to prosecute a class action and/or private attorney general action on behalf of Client and comparable employees and other individuals. This section applies only to Client's responsibilities as a class representative or as a private attorney general. Client will have certain duties and responsibilities to the comparable individuals the lawsuit is on behalf of. Certain of these duties are explained in greater detail below.

6.03.01 Attorney may apply to the Court for a special award to compensate the Client as the class representative or private attorney general for Client's contribution to the action and/or Client's release of all individual claims Client may have. Client understands however that unless such an award is approved by the Court, Client will only be entitled to Client's pro rata share of funds available for distribution to all class members, aggrieved employees, and comparable individuals.

6.03.02 A class representative represents the interests of all members of his class in litigation to recover money unpaid wages, penalties, reimbursement, restitution and/or obtain injunctive relief for the class. Likewise, a private attorney general represents the interests of all comparable aggrieved employees in litigation to recover money civil penalties (monetary penalties that traditionally only the State can sue for) on behalf of the Client, aggrieved employees, and the State of California.

6.03.03 The class or group of aggrieved employees usually consists of all persons who are similarly

situated with respect to a common course of conduct or practice. In other words, all those persons who are affected by the challenged behavior.

6.03.04 A class representative or private attorney general has claims that are typical of those of the class or group of aggrieved employees, and thus involve common issues of law or fact. For example, as a class representative, Client's claims against the defendant are typical of the class and private attorney general claims against the defendant, simply because Client was injured by the same unlawful employment practices as the other class members and aggrieved employees.

6.03.05 A class representative and private attorney general always considers the interests of the class and/or aggrieved employees just as Client would consider Client's own interests and in some cases must put the interests of the class and other aggrieved employees before Client's own interests. This means that Client is a champion of the other individuals or a fiduciary litigant.

6.03.06 A class representative or private attorney general always actively participates in the lawsuit, as necessary, by among other things, answering interrogatories, producing documents to the defendants and giving deposition and trial testimony if requested. Client may be required to travel to give such testimony.

6.03.07 A class representative or private attorney general recognizes and accepts 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.

6.03.08 A class representative or private attorney general is not required to be particularly sophisticated or knowledgeable about the subject of the lawsuit. However, a class representative private attorney general should follow the progress of the lawsuit and should provide all relevant facts to the lawyers for the class or aggrieved employees.

6.03.09 A class representative or private attorney general volunteers to represent or champion many other people with similar claims and injuries because of the importance of the case and that necessity that all class members or aggrieved employees benefit from the lawsuit equally; the savings of time, money and effort should benefit all parties and the court. Class actions and private attorney general actions are an important tool to assure compliance with the law even where an individual's losses may be relatively small.

By initially below, Client has reviewed and acknowledges Client's duties as a class representative and/or private attorney general.

DEM

_____ (Client initials here)

VII. CALIFORNIA LAW TO APPLY

7.01 This Agreement shall be construed under the laws of California, and all obligations of the

parties created hereunder are performable in Los Angeles County, CA.

VIII. PARTIES BOUND

8.01 This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns where permitted by this Agreement.

IX. LEGAL CONSTRUCTION

9.01 In case any one or more of the provisions contained in this Agreement shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions thereof and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

X. PRIOR AGREEMENTS SUPERSEDED

10.01 This Agreement constitutes the sole and only agreement by and between the parties. It supersedes any prior understandings or written or oral agreements between the parties concerning the subject matter discussed herein.

XI. RESOLUTION OF DISPUTES BY ARBITRATION

11.01 You have the right to elect arbitration pursuant to the fee arbitration procedures of the State Bar of California, in any dispute subject to the jurisdiction of the State of California over attorneys' fees, charges, costs or expenses, as set forth in California Business and Professions Code Section 6200, et seq. If, after receiving a notice of this right to arbitrate, you do not elect to proceed under the State Bar fee arbitration procedures, and do not file a request for fee arbitration within 30 days, any dispute over fees, charges, costs or expenses, will be resolved by binding arbitration as described below.

11.02 Any controversy between the parties regarding the construction, application or performance of any services under this Agreement, and any claim arising out of or relating to this Agreement or its breach, shall be submitted to binding arbitration upon the written request of one party after the service of that request on the other party. The sole and exclusive venue for the arbitration and or any legal dispute shall be Los Angeles County, California.

11.03 By initialing below, Client and law firm confirm that they have read and understand the paragraphs above, and voluntarily agree to binding arbitration. In doing so, Client and law firm voluntarily give up important constitutional rights to trial by judge or jury, as well as rights to appeal. You are advised that you have the right to have an independent law firm of your choice review these arbitration provisions, and this entire agreement, prior to initialing this provision or signing this Agreement.

DEM _____ (Client initials here) DS (Attorney initials here)

TAX DISCLOSURE AND ACKNOWLEDGMENT:

CLIENT IS ADVISED TO OBTAIN INDEPENDENT AND COMPETENT TAX ADVICE REGARDING THESE LEGAL MATTERS SINCE LEGAL TRANSACTIONS CAN GIVE RISE TO TAX CONSEQUENCES.

THE UNDERSIGNED LAW FIRM AND ATTORNEY HAVE NOT AGREED TO RENDER ANY TAX ADVICE AND ARE NOT RESPONSIBLE FOR ANY ADVICE REGARDING TAX MATTERS OR PREPARATION OF TAX RETURNS, OR OTHER FILINGS, INCLUDING, BUT NOT LIMITED TO, STATE AND FEDERAL INCOME AND INHERITANCE TAX RETURNS.

FURTHERMORE, CLIENT SHOULD OBTAIN PROFESSIONAL HELP REGARDING THE VALUATION AND LOCATION OF ALL ASSETS WHICH MAY BE THE SUBJECT OF A LEGAL MATTER INCLUDING BUT NOT LIMITED TO PENSIONS, EMPLOYMENT BENEFIT AND PROFIT SHARING RIGHTS THAT MAY BE CONTROLLED BY ANY OTHER PARTY TO THE LEGAL MATTER.

XII. DISCLAIMER OF GUARANTEE

12.01 Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of the matter. Attorney makes no such promises or guarantees. There can be no assurance that Client will recover any sum or sums in this matter. Attorney's comments about the outcome of this matter are expressions of opinion only. Client acknowledges that Attorney has made no promises or guarantees about the outcome.

XIII. DISCHARGE AND WITHDRAWAL

13.01 Client may discharge Attorney at any time, with written notice. Attorney may withdraw with Client's consent, or for good cause, which includes Client's breach of this Agreement, refusal to cooperate or communicate with Attorney on this matter, or any fact or circumstance that would render Attorney's representation unlawful or unethical. Attorney will, upon Client's request, deliver Client's file and property in Attorney's possession, unless subject to lien as provided above, whether or not Client has completed payment for all services rendered.

XIV. EFFECTIVE DATE

14.01 This Agreement will govern all legal services beginning on the date that Attorney began

Maria Diaz
2/23/2021
Page 10 of 13

performing work for Client. That date of this document is to be used for reference only. Client will be required to pay Attorney the reasonable value of services performed by Attorney, even if this agreement never takes effect.

I further certify and acknowledge that I have read this Contract, and that I have voluntarily entered into this Contract fully aware of its terms and conditions as of the date Attorney first provided services. All clients signing below agree to be liable, jointly and severally, for all obligations under this agreement.

SIGNED on Feb 23, 2021



Maria Diaz

SIGNED on 03 / 08 / 2021

The Spivak Law Firm


BY: _____
David G. Spivak
16530 Ventura Blvd., Suite 203
Encino, CA 91436
(818) 582-3086
(818) 582-2561 (telefax)
California Bar No. 179684

United Employees Law Group, PC


BY: _____
Walter L. Haines
5500 Bolsa Ave., Suite 201
Huntington Beach, CA 92649
(562) 256-1047
(562) 256-1006 (telefax)
California Bar No. 71075

STATEMENT OF CLIENT'S RIGHTS FOR CONTINGENCY FEES

Before you, the prospective client, arrange a contingent fee agreement with a lawyer, you should understand this statement of your rights as a client. This statement is not a part of the actual contract between you and your lawyer, but, as a prospective client, you should be aware of these rights.

1. There is no legal requirement that a lawyer charge a client a set fee or a percentage of money recovered in a case. You, the client, have the right to talk with your lawyer about the proposed fee and to bargain about the rate or percentage as in any other contract. If you do not reach an agreement with one (1) lawyer you may talk with other lawyers.

2. Any contingent fee contract must be in writing and you have three (3) business days to reconsider the contract. You may cancel the contract without any reason if you notify your lawyer in writing within 3 business days of signing the contract. If you withdraw from the contract within the first three (3) business days, you do not owe the lawyer a fee although you may be responsible for the lawyer's actual costs during that time. If your lawyer begins to represent you, your lawyer may not withdraw from the case without giving you notice, delivering necessary papers to you, and allowing you time to employ another lawyer. Often, your lawyer must obtain court approval before withdrawing from a case. If you discharge your lawyer without good cause after the 3-day period, you have to pay a fee for work the lawyer has done.

3. Before hiring a lawyer, you, the client, have the right to know about the lawyer's education, training, and experience. If you ask, the lawyer should tell you specifically about the lawyer's actual experience dealing with cases similar to yours. If you ask, the lawyer should provide information about special training or knowledge and give you this information in writing if you request it.

4. Before signing a contingent fee contract with you, a lawyer must advise you whether the lawyer intends to handle your case alone or whether other lawyers will be helping with the case. If you lawyer intends to refer the case to other lawyers, the lawyer should tell you what kind of fee sharing arrangement will be made with the other lawyers. If lawyers from different law firms will represent you, at least one (1) lawyer from each law firm must sign the contingent fee contract.

5. If your lawyer intends to refer your case to another lawyer or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with other lawyers, you should sign a new contract that includes the new lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible to represent your interest and is legally responsible for the acts of the other lawyers involved in the case.

6. You, the client, have the right to know in advance how you will need to pay the expenses and the legal fees at the end of the case. If you pay a deposit in advance for costs, you may ask reasonable questions about how the money has or will be spent and how much of it remains unspent. Your lawyer should give a reasonable estimate about future necessary costs. If your lawyer agrees to

lend or advance you money to prepare or research the case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also have the right to decide, after consulting with your lawyer, how much money is to be spent to prepare a case. If you pay the expenses, you have the right to decide how much to spend. Your lawyer should also inform you whether the fee will be based on the gross amount recovered or on the amount recovered minus the costs.

7. You, the client, have the right to be told by your lawyer about the possible adverse consequences if you lose the case. Those adverse consequences might include money that you might have to pay to your lawyer for costs and liability you might have for attorney's fees, costs, and expenses to the other side.

8. You, the client, have the right to receive and approve a closing statement at the end of the case before you pay any money. The statement must list all of the financial details of the entire case, including the amount recovered, all expenses, and a precise statement of your lawyer's fee. Until you approve the closing statement your lawyer cannot pay any money to anyone, including you, without an appropriate order of the court. You also have the right to have every lawyer or law firm on your case sign this closing statement.

9. You, the client, have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of the lawyer's ability.

10. You, the client, have the right to make the final decision regarding settlement of a case. Your lawyer must notify you of all offers of settlement before and after the trial. Offers during the trial must be immediately communicated and you should consult with your lawyer regarding whether to accept a settlement. However, you must make the final decision to accept or reject a settlement.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

11. If at any time you, the client, believe that your lawyer has charged an excessive or illegal fee, you have the right to report the matter to The California Bar, the agency that oversees the practice and behavior of all lawyers in California. For information on how to reach The California Bar, contact the local bar association. Any disagreement between you and your lawyer about a fee can be taken to court and you may wish to hire another lawyer to help you resolve this disagreement. Usually fee disputes must be handled in a separate lawsuit, unless your fee contract provides for arbitration.

SIGNED on Feb 23, 2021



Maria Diaz

SIGNED on 03 / 08 / 2021

The Spivak Law Firm

BY: 

David G. Spivak
16530 Ventura Blvd., Suite 203
Encino, CA 91436
(818) 582-3086
(818) 582-2561 (telefax)
California Bar No. 179684

EXHIBIT 10

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.

*FACTS*²

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 11

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 12

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 13

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 ‘multipl[ication 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 14

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?

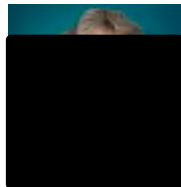
YOU ALMOST CERTAINLY DO. If you claim emotional distress (you don't have to, but you may not get as much money if you don't), most courts say you have put your own emotional condition at issue and the employer is entitled to find out how much of your (just as an example) bipolar disorder was caused by 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 15

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 16

CASE NAME: DIAZ v EL TAPATIO

Date: April 17, 2023
Requesting Paralegal: Emily Houg Ly
Plaintiff or Defense: Plaintiff
Firm Name: The Spivak Law Firm
Telephone: (818) 205-9033
Email: emily@spivaklaw.com

All-In Settlement

Class Size: 611
Opt-Out Rate: 1.5%
No. of Checks Issued: 602
Postage Total: \$1,161.81
Grand Total: \$17,954.40

DISCOUNTED FLAT FEE: \$12,250.00

The services and numbers reflected herein are an estimate provided by counsel. If the actual services and number are different, our cost estimate will change accordingly.

The attached Terms and Conditions are included as part of our cost proposal. By accepting our costs proposal for this matter, you are thereby agreeing to the Terms and Conditions.

CASE SETUP

Upon Intake of the Data, CPT will Scrub all Records to a Useable Format to Reduce Duplicates, Anomalies and Increase the Success Rate of Deliverability of the Class Notice. Class Members will be Assigned a Unique Mailing ID which will be Used Throughout Administration. All Pertinent Documents will be Posted on a Case Specific Website. The Notice Packet will be Translated into Spanish.

ADMINISTRATIVE TASKS	UNIT PRICE	PIECES/HOURS	COST ESTIMATE
Project Manager: Case Intake & Review	\$95.00	6	\$570.00
Programming: Data Base Setup	\$150.00	6	\$900.00
Static Website	\$500.00	1	\$500.00
Spanish Translation	\$1,200.00	1	\$1,200.00
TOTAL			\$3,170.00

DIRECT MAIL NOTICE

To Ensure Mailing to the Most Current Address Possible, CPT will Perform an Address Update via NCOA. CPT will Mail a Full-Length Notice, 1-Page Exclusion, Dispute & Objection Form in English & Spanish.

ADMINISTRATIVE TASKS	UNIT PRICE	PIECES/HOURS	COST ESTIMATE
Project Manager: Format Documents	\$95.00	2	\$190.00
National Change of Address Search (NCOA)	\$135.00	1	\$135.00
Print & Mail Notice Packets	\$1.50	611	\$916.50
First-Class Postage (up to 2 oz.)*	\$0.81	611	\$494.91
TOTAL			\$1,736.41

*Postage costs are subject to change at anytime. The final rate will be determined at the time of mailing.

PROCESS RETURNED UNDELIVERABLE MAIL

Based On CPT's Historical Data, 6% of the Notices will be Returned Undeliverable. Upon Receipt, CPT will Perform a Skip Trace in an Attempt to Obtain a Current Address; Thus, 91% of the Notice Packets are Remailled.

ADMINISTRATIVE TASKS	UNIT PRICE	PIECES/HOURS	COST ESTIMATE
Clerical Staff	\$60.00	1	\$60.00
Update Undeliverable Mail Database	\$0.50	37	\$18.50
Skip Trace for Best Address	\$1.00	32	\$32.00
Print & Remail Notice Packets	\$1.50	29	\$43.50
First-Class Postage (up to 2 oz.)	\$0.81	29	\$23.49
TOTAL			\$177.49

OPT-OUT PROCESSING

CPT will Process and Validate all Opt-Outs and Other Responses from Class Members. Deficient Opt-Outs will Receive a Deficiency Notice by Mail and Provide an Opportunity to Cure. CPT will Scrub the Filed Opt-Outs to Eliminate Duplicates, Fraudulent, and Otherwise Invalid.

ADMINISTRATIVE TASKS	UNIT PRICE	PIECES/HOURS	COST ESTIMATE
Programming: De-duplication/Scrubbing	\$150.00	1	\$150.00
Project Manager: Validate Opt-Out Requests	\$95.00	1	\$95.00
Clerical Staff	\$60.00	1	\$60.00
Opt-Out & Change of Address Processing	\$2.00	9	\$18.33
Print & Mail Deficiency/Dispute Notices	\$1.50	1	\$1.50
First-Class Postage (up to 1 oz.)	\$0.60	1	\$0.60
Review & Process Deficiency Responses	\$10.00	1	\$10.00
		TOTAL	\$335.43

TELEPHONE SUPPORT

CPT will Maintain a Toll-Free Phone Number with IVR Capabilities and Live Class Member Support Representatives During Normal Business Hours, Monday-Friday, 9:00 AM - 5:30 PM, PT. The Dedicated Case Phone Number will Remain Active Up to 120 Days After Disbursement.

ADMINISTRATIVE TASKS	UNIT PRICE	PIECES/HOURS	COST ESTIMATE
Toll-Free Number Establish/Setup	\$150.00	2	\$300.00
Live Call Center Support Reps.	\$3.00	123	\$369.00
		TOTAL	\$669.00

SSN VERIFICATION

Verify SSN for Validity with IRS / IRS Backup Withholdings

ADMINISTRATIVE TASKS	UNIT PRICE	PIECES/HOURS	COST ESTIMATE
Programming: SSN Selection	\$150.00	1	\$150.00
Department Manager: Analysis & Reporting	\$95.00	3	\$285.00
IRS SSN Verification	\$0.10	602	\$60.18
		TOTAL	\$495.18

DISTRIBUTION SERVICES

CPT will Establish and Manage the Qualified Settlement Fund (QSF) for up to One Year After Disbursement. Upon Approval, CPT will Perform all Necessary Calculations and Disburse Funds. CPT will Mail an 8.5"x11" MICR Check to Valid Class Members. CPT Uses a Payee Positive Pay System to Reconcile Checks Cashed and Conducts Monthly Account Reconciliations for the QSF.

ADMINISTRATIVE TASKS	UNIT PRICE	PIECES/HOURS	COST ESTIMATE
Programming: Calculation Totals	\$150.00	3	\$450.00
Project Supervisor: Review of Distribution	\$150.00	3	\$450.00
Project Manager: Correspondence w/Parties	\$95.00	2	\$190.00
Programming: Setup & Printing of Checks	\$150.00	3	\$450.00
Obtain EIN, Setup QSF/Bank Account	\$150.00	3	\$450.00
Print & Mail Notice, Checks & W2/1099	\$2.50	602	\$1,504.59
First-Class Postage (up to 1 oz.)*	\$0.60	602	\$361.10
Check Reminder Postcard	\$0.40	481	\$192.59
Postage for Postcard	\$0.44	481	\$211.85
		TOTAL	\$4,260.12

*Postage costs are subject to change at anytime. The final rate will be determined at the time of mailing.

POST-DISTRIBUTION & TAX REPORTING

Any Check Returned Undeliverable is Skip Traced to Locate a Current Address and Remailled Accordingly. CPT will Process Requests for Check Reissues Continuously. CPT Prepares Annual Tax Reporting on Behalf of the QSF and Federal and State Taxes in Accordance with Current State and Federal Regulations. Upon the Conclusion of the Settlement, a Final Report and Declaration will be Provided to all Parties.

ADMINISTRATIVE TASKS	UNIT PRICE	PIECES/HOURS	COST ESTIMATE
Project Supervisor: Account Reconciliation	\$150.00	10	\$1,500.00
Update Undeliverable Checks Database	\$0.50	48	\$24.00
Skip Trace for Best Address	\$1.00	48	\$48.00
Remail Undeliverable Checks	\$2.50	44	\$110.00
First-Class Postage (up to 1 oz.)	\$0.60	44	\$26.40
Re-Issue Checks as Required	\$5.00	31	\$155.00
First-Class Postage (up to 1 oz.)	\$0.60	31	\$18.60
Project Supervisor: Reconcile Uncashed Chk	\$150.00	1	\$150.00
Programming: Weekly & Final Reports	\$150.00	2	\$300.00
Project Supervisor: Final Declaration	\$150.00	2	\$300.00
Project Manager: Account Files Sent to Atty	\$95.00	2	\$190.00
CA Tax Preparation*	\$600.00	1	\$600.00
Annual Tax Reporting to IRS*	\$1,000.00	1	\$1,000.00
QSF Annual Tax Reporting	\$500.00	1	\$500.00
TOTAL			\$4,922.00

*CPT will file Federal and California taxes in accordance to current state and federal regulations. Additional charges will apply if the Settlement/Order/parties require(s) multiple state tax filings.

SCO ESCHEATMENT PROCESSING

Escheatment Processing to the State Controller Unclaimed Property Division / Uncashed Check Rate 21%			
ADMINISTRATIVE TASKS	UNIT PRICE	PIECES/HOURS	COST ESTIMATE
UPEnterprise Reporting Services	\$0.15	126	\$18.90
Project Manager: SCO Fall Reporting	\$95.00	2	\$190.00
Project Supervisor: Review of SCO Reports	\$150.00	1	\$150.00
Certified Mail Report to SCO	\$8.53	1	\$8.53
Check Reissues for Winter/Spring QTR	\$5.00	13	\$65.00
First-Class Postage (up to 1 oz.)	\$0.60	13	\$7.80
Project Supervisor: June Remittance	\$150.00	1	\$150.00
Project Manager: June Remittance	\$95.00	2	\$190.00
Certified Mail Report to SCO	\$8.53	1	\$8.53
Add'l Account Recons	\$150.00	6	\$900.00
Add'l QSF Annual Tax Reporting	\$500.00	1	\$500.00
TOTAL			\$2,188.76

GRAND TOTAL	\$17,954.40
-------------	-------------

TERMS AND CONDITIONS

These Terms and Conditions are made a part of, and incorporated by reference into, any cost proposal or Bid presented by CPT Group, Inc. to Client

1. Definitions.

- a) **"Affiliate"** means a party that partially (at least 50%) or fully controls, is partially or fully controlled by, or is under partial (at least 50%) or full common control with another party.
 - b) **"Approved Bank"** means a financial institution insured by the Federal Deposit Insurance Corporation with capital exceeding \$1 billion.
 - c) **"Case"** means the particular judicial matter identified by the name of plaintiff(s) and defendant(s) on the applicable Order.
 - d) **"Claims Administrator"** means CPT Group, Inc., a reputable third-party Claims Administrator selected by all the Parties (Plaintiff and Defense Counsel) to administer the Settlement or Notification Mailing.
 - e) **"Client"** means collectively Plaintiff Counsel and Defense Counsel.
 - f) **"Client Content"** means all Class Member written document communications relating to the Case, including claim forms, opt-out forms, and objections, which contain Client Data.
 - g) **"Client Data"** means proprietary or personal data regarding Client or any of its Class Members under this Agreement, as provided by Client.
 - h) **"Class Member"** means an individual who is eligible under the Settlement Agreement to receive a designated amount of the Settlement, including the named Plaintiff(s) in the Case and all other putative persons so designated or addressed therein.
 - i) **"Confidential Information"** means any non-public information of CPT or Client disclosed by either party to the other party, either directly or indirectly, in writing, orally or by inspection of tangible objects, or to which the other party may have access, which a reasonable person would consider confidential and/or which is marked "confidential" or "proprietary" or some similar designation by the disclosing party. Confidential Information shall also include the terms of this Agreement, except where this Agreement specifically provides for disclosure of certain items. Confidential Information shall not, however, include the existence of the Agreement or any information which the recipient can establish: (i) was or has become generally known or available or is part of the public domain without direct or indirect fault, action, or omission of the recipient; (ii) was known by the recipient prior to the time of disclosure, according to the recipient's prior written documentation; (iii) was received by the recipient from a source other than the discloser, rightfully having possession of and the right to disclose such information; or (iv) was independently developed by the recipient, where such independent development has been documented by the recipient.
 - j) **"Court Order"** means a legal command or direction issued by a court, judicial office, or applicable administrative body requiring one or more parties to the Case to carry out a legal obligation pursuant to the Case.
 - k) **"Defendant"** means the named party and/or parties in the Case against whom action is brought.
 - l) **"Defense Counsel"** means the attorney of record for the defendant(s) in the Case.
 - m) **"Intellectual Property Right"** means any patent, copyright, trade or service mark, trade dress, trade name, database right, goodwill, logo, trade secret right, or any other intellectual property right or proprietary information right, in each case whether registered or unregistered, and whether arising in any jurisdiction, including without limitation all rights of registrations, applications, and renewals thereof and causes of action for infringement or misappropriation related to any of the foregoing.
 - n) **"Order"** means a Product purchase in a schedule, statement of work, addendum, exhibit, or amendment signed by Client and CPT.
 - o) **"Parties"** shall mean collectively Defendants, Defense and Plaintiff as defined in the Settlement Agreement or Court Order.
 - p) **"Plaintiff"** means the named party and/or parties in the Case who are bringing the action.
 - q) **"Plaintiff Counsel"** means the attorney of record for plaintiff Class Members in the Case.
 - r) **"Products"** means any and all CPT Services, and work products resulting from Services.
 - s) **"Qualified Settlement Fund"** means the entity as defined by Treasury Regulation section 4686-1 under which a bank account is established to receive settlement funds from the Defendant in the Case, which such funds are then disbursed by CPT according to the Settlement Agreement and pursuant to Court Order.
 - t) **"Service"** means any service rendered by CPT specifically to Client, including, but not limited to: (i) notifications to Class Members; (ii) setting up a Qualified Settlement Fund with a financial institution; (iii) management of disbursement of funds from the Qualified Settlement Fund to applicable parties pursuant to the Settlement Agreement; (iv) provision of customer support relating to the Case; (v) management of Case claim forms and correspondence; and/or (vi) any administrative or consulting service.
 - u) **"Software"** means any and all of CPT's proprietary applications, including, without limitation, all updates, revisions, bug-fixes, upgrades, and enhancements thereto.
 - v) **"Settlement"** means the total dollar amount agreed to between parties to the Case, as negotiated by Plaintiff Counsel and Defense Counsel, to resolve the Case to mutual satisfaction.
 - w) **"Settlement Agreement"** means the contract between parties to the Case to resolve the same, which specifies amounts to be disbursed from the Qualified Settlement Fund to attorneys, CPT, and individual Class Members.
 - x) **"Term"** means the term of the Agreement, as set forth in the Order.
 - y) **"Transmission Methods"** means the secure authorized manner to send Client Data and/or Wire Information as specified on a schedule or Order hereto.
 - z) **"Wire Information"** means instructions for (i) Defense Counsel to transfer funds from Defendant to the Qualified Settlement Fund or (ii) CPT to transfer funds from the Qualified Settlement Fund to applicable parties pursuant to the Settlement Agreement.
2. Client Obligations. Client will ensure that it has obtained all necessary consents and approvals for CPT to access Client Data for the purposes permitted under this Agreement and shall only transmit Client Data and/or Wire Instructions to CPT via the Transmission Methods. Client shall use and maintain appropriate administrative, technical, and physical safeguards designed to protect Client Data provided under this Agreement. Client shall not send, or attempt to send, Client Data and/or Wire Instructions via email, facsimile, unprotected spreadsheet, USB flash drive or other external or removable storage device, cloud storage provider, or any other method not specified in the Transmission Methods. Notwithstanding the foregoing, Client acknowledges and understands that the electronic transmission of information cannot be guaranteed to be secure or error free, and such information could be intercepted, corrupted, lost, and/or destroyed. Client further warrants that any Client Data and/or Wire Instructions it transmits shall be free of viruses, worms, Trojan horses, or other harmful or disabling codes which could adversely affect the Client Data and/or CPT. If Client is in breach of this section, CPT may suspend Services, in addition to any other rights and remedies CPT may have at law or in equity.
3. Security. The Parties and CPT shall each use reasonable administrative, technical, and physical safeguards that are reasonably designed to: (a) protect the security and confidentiality of any personally identifiable information provided by Class Members and/or Client under this Agreement; (b) protect against any anticipated threats or hazards to the security or integrity of such personally identifiable information; (c) protect against unauthorized access to or use of such personally identifiable information that could result in substantial harm or inconvenience to any individual; and (d) protect against unauthorized access to or use of such personally identifiable information in connection with its disposal. Each Party will respond promptly to remedy any known security breach involving the personally identifiable information provided by you and/or Client under this Agreement and shall promptly inform the other Parties of such breaches.
4. CPT Obligations. Provided that Client complies with all provisions of Section "Client Obligations", CPT will (i) maintain appropriate safeguards for the protection of Client Data, including regular back-ups, security and incident response protocols, and (ii) not access or disclose Client Data except (A) as compelled by law, (B) to prevent or address service or technical issues, (C) in accordance with this Agreement or the provisions of the Settlement Agreement, or (D) if otherwise permitted by Client.
5. Mutual Obligations.
- a) Resources. Each party agrees to: (i) provide the resources reasonably necessary to enable the performance of the Services; (ii) manage its project staffing, milestones, and attendance at status meetings; and (iii) ensure completion of its project deliverables and active participation during all phases of a Service project. The parties acknowledge that failure to cooperate during a Service project may delay delivery of the Service.

If there is a delay, the party experiencing the delay will notify the other party as soon as reasonably practicable, and representatives of each party will meet to discuss the reason for the delay and applicable consequences. Changes beyond the scope of an Order and/or a party's delay in performing its obligations may require an amended Order.

- b) **Incident Notification.** Each party will promptly inform the other parties in the event of a breach of Client Data in their possession and shall utilize best efforts to assist the other parties to mitigate the effects of such incident.
6. **Qualified Settlement Fund Account.** At Client's request, CPT shall be authorized to establish one or more bank accounts at an Approved Bank. The amounts held at the Approved Bank under this Agreement are at the sole risk of Client. Without limiting the generality of the foregoing, CPT shall have no responsibility or liability for any diminution of the funds that may result from the deposit thereof at the Approved Bank, including deposit losses, credit losses, or other claims made against the Approved Bank. It is acknowledged and agreed that CPT has acted reasonably and prudently in depositing funds at an Approved Bank, and CPT is not required to conduct diligence or make any further inquiries regarding such Approved Bank.
7. **Fees and Payment.** Pricing stated within the proposal is good for 90 Days. 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 Client data and /or notice documents. Client will be invoiced for any remaining fees according to the applicable Order. Pricing stated within any proposal from CPT to Client is for illustrative purposes only and is only binding upon an Order executed by CPT and Client. Payment of fees will be due within 30 days after the date of the invoice, except where this Agreement expressly prescribes other payment dates. All fees set forth in an Order are in U.S. dollars, must be paid in U.S. dollars, and are exclusive of taxes and applicable transaction processing fees. Late payments hereunder will incur a late charge of 1.5% (or the highest rate allowable by law, whichever is lower) per month on the outstanding balance from the date due until the date of actual payment. In addition, Services are subject to suspension for failure to timely remit payment therefor. If travel is required to effect Services, Client shall reimburse CPT for pre-approved, reasonable expenses arising from and/or relating to such travel, including, but not limited to, airfare, lodging, meals, and ground transportation.
8. **Term and Termination.**
- a) **Term.** The Term is set forth in the Order. The Agreement may be renewed by mutual written agreement of the parties.
- b) **Termination for Cause.** Either party may immediately terminate this Agreement if the other party materially breaches its obligations hereunder, and, where capable of remedy, such breach has not been materially cured within forty-five (45) days of the breaching party's receipt of written notice describing the breach in reasonable detail.
- c) **Bankruptcy Events.** A party may immediately terminate this Agreement if the other party: (i) has a receiver appointed over it or over any part of its undertakings or assets; (ii) passes a resolution for winding up (other than for a bona fide scheme of solvent amalgamation or reconstruction), or a court of competent jurisdiction makes an order to that effect and such order is not discharged or stayed within ninety (90) days; or (iii) makes a general assignment for the benefit of its creditors.
- d) **Effect of Termination.** Immediately following termination of this Agreement, upon Client's written request, Client may retrieve Client Data via Client's secure FTP site in the same format in which the Client Data was originally inputted into the Software, at no additional charge. Alternatively, Client Data can be returned in a mutually agreed format at a scope and price to be agreed. CPT will maintain a copy of Client Data and Client Content for no more than four (4) years following the date of the final check cashing deadline for Class Members under the Settlement Agreement, after which time any Client Data and Client Content not retrieved will be destroyed.
- e) **Final Payment.** If Client terminates this Agreement due to Section "Termination", Client shall pay CPT all fees owed through the termination date. If CPT terminates the Agreement in accordance with Section "Termination," Client shall pay CPT all fees invoiced through the termination date, plus all fees remaining to be invoiced during the Term, less any costs CPT would have incurred had the Agreement not been terminated.

Confidentiality. Each of the parties agrees: (i) not to disclose any Confidential Information to any third parties except as mandated by law and except to those subcontractors of CPT providing Products hereunder who agree to be bound by confidentiality obligations no less stringent than those set forth in this Agreement; (ii) not to use any Confidential Information for any purposes except carrying out such party's rights and responsibilities under this Agreement; and (iii) to keep the Confidential Information confidential using the same degree of care such party uses to protect its own confidential information; **provided, however,** that such party shall use at least reasonable care. These obligations shall survive termination of this Agreement.

- a) **Compelled Disclosure.** If receiving party is compelled to disclose any Confidential Information by judicial or administrative process or by other requirements of law, such party shall (i) promptly notify the other party, (ii) reasonably cooperate with the other party in such party's efforts to prevent or limit such compelled disclosure and/or obtain confidential treatment of the items requested to be disclosed, and (iii) shall disclose only that portion of such information which each party is advised by its counsel in writing is legally required to be disclosed.
- b) **Remedies.** If either party breaches any of its obligations with respect to confidentiality or the unauthorized use of Confidential Information hereunder, the other party shall be entitled to seek equitable relief to protect its interest therein, including but not limited to, injunctive relief, as well as money damages.
10. **Intellectual Property.** As between the parties, CPT will and does retain all right, title and interest (including, without limitation, all Intellectual Property Rights) in and to the Products. Client retains all ownership rights to Client Data.
11. **Indemnification.** Client agrees to indemnify, defend, and hold harmless CPT, its Affiliates, and the respective officer, directors, consultants, employees, and agents of each (collectively, Covered CPT Parties") from and against any and all third party claims and causes of action, as well as related losses, liabilities, judgments, awards, settlements, damages, expenses and costs (including reasonable attorney's fees and related court costs and expenses) (collectively, "Damages") incurred or suffered by CPT which directly relate to or directly arise out of (i) Client's breach of this Agreement; (ii) CPT's performance of Services hereunder; (iii) the processing and/or handling of any payment by CPT; (iv) any content, instructions, information or Client Data provided by Client to CPT in connection with the Services provided by CPT hereunder. The foregoing provisions of this section shall not apply to the extent the Damages relate to or arise out of CPT's willful misconduct. To obtain indemnification, indemnitee shall: (i) give written notice of any claim promptly to indemnitor; (ii) give indemnitor, at indemnitor's option, sole control of the defense and settlement of such claim, provided that indemnitor may not, without the prior consent of indemnitee (not to be unreasonably withheld), settle any claim unless it unconditionally releases indemnitee of all liability; (iii) provide to indemnitor all available information and assistance; and (iv) not take any action that might compromise or settle such claim.
12. **Warranties.** Each party represents and warrants to the other party that, as of the date hereof: (i) it has full power and authority to execute and deliver the Agreement; (ii) the Agreement has been duly authorized and executed by an appropriate employee of such party; (iii) the Agreement is a legally valid and binding obligation of such party; and (iv) its execution, delivery and/or performance of the Agreement does not conflict with any agreement, understanding or document to which it is a party. CPT WARRANTS THAT ANY AND ALL SERVICES PROVIDED BY IT HEREUNDER SHALL BE PERFORMED IN A PROFESSIONAL MANNER CONSISTENT WITH PREVAILING INDUSTRY STANDARDS. TO THE EXTENT PERMITTED BY APPLICABLE LAW, CPT DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT AND ANY WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE OR TRADE PRACTICE.
13. **Liability.**
- a) **Liability Cap.** EXCEPT FOR A PARTY'S WILLFUL MISCONDUCT, EACH PARTY'S MAXIMUM AGGREGATE LIABILITY ARISING OUT OF OR RELATING TO THIS AGREEMENT, REGARDLESS OF THE THEORY OF LIABILITY, WILL BE LIMITED TO THE TOTAL CLAIMS ADMINISTRATOR FEES PAID OR PAYABLE BY CLIENT TO CPT HEREUNDER. THE EXISTENCE OF MORE THAN ONE CLAIM SHALL NOT EXPAND SUCH LIMIT. THE PARTIES ACKNOWLEDGE THAT THE FEES AGREED UPON BETWEEN CLIENT AND CPT ARE BASED IN PART ON THESE LIMITATIONS, AND THAT THESE LIMITATIONS WILL APPLY NOTWITHSTANDING ANY FAILURE OF ANY ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. THE FOREGOING LIMITATION SHALL NOT APPLY TO A PARTY'S PAYMENT OBLIGATIONS UNDER THE AGREEMENT.
- b) **Exclusion of Consequential Damages.** NEITHER PARTY WILL BE LIABLE FOR LOST PROFITS, LOST REVENUE, LOST BUSINESS OPPORTUNITIES, LOSS OF DATA, INTERRUPTION OF BUSINESS, OR ANY OTHER INDIRECT, SPECIAL, PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATING TO THIS AGREEMENT, REGARDLESS OF THE THEORY OF LIABILITY, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
14. **Communications.** CPT may list Client's name and logo alongside CPT's other clients on the CPT website and in marketing materials, unless and until Client revokes such permission. CPT may also list the Case name and/or number, and certain Qualified Settlement Fund information, on the CPT website and in marketing materials, unless stated otherwise in the Settlement Agreement.

15. Miscellaneous Provisions.

- a) Governing Law; Jurisdiction. This Agreement will be governed by and construed in accordance with the laws of the State of California and the federal laws of the United States of America, without regard to conflict of law principles. CPT and Client agree that any suit, action or proceeding arising out of, or with respect to, this Agreement or any judgment entered by any court in respect thereof shall be brought exclusively in the state or federal courts of the State of California located in the County of Orange, and each of CPT and Client hereby irrevocably accepts the exclusive personal jurisdiction and venue of those courts for the purpose of any suit, action or proceeding.
- b) Force Majeure. Neither party will be liable for any failure or delay in its performance under this Agreement due to any cause beyond its reasonable control, including without limitation acts of war, acts of God, earthquake, flood, weather conditions, embargo, riot, epidemic, acts of terrorism, acts or omissions of vendors or suppliers, equipment failures, sabotage, labor shortage or dispute, governmental act, failure of the Internet or other acts beyond such party's reasonable control, provided that the delayed party: (i) gives the other party prompt notice of such cause; and (ii) uses reasonable commercial efforts to correct promptly such failure or delay in performance.
- c) Counterparts. This Agreement may be executed in any number of counterparts and electronically, each of which shall be an original but all of which together shall constitute one and the same instrument.
- d) Entire Agreement. This Agreement contains the entire understanding of the parties in respect of its subject matter and supersedes all prior agreements and understandings (oral or written) between the parties with respect to such subject matter. The schedules and exhibits hereto constitute a part hereof as though set forth in full herein.
- e) Modifications. Any modification, amendment, or addendum to this Agreement must be in writing and signed by both parties.
- f) Assignment. Neither party may assign this Agreement or any of its rights, obligations, or benefits hereunder, by operation of law or otherwise, without the other party's prior written consent; provided, however, either party, without the consent of the other party, may assign this Agreement to an Affiliate or to a successor (whether direct or indirect, by operation of law, and/or by way of purchase, merger, consolidation or otherwise) to all or substantially all of the business or assets of such party, where the responsibilities or obligations of the other party are not increased by such assignment and the rights and remedies available to the other party are not adversely affected by such assignment. Subject to that restriction, this Agreement will be binding on, inure to the benefit of, and be enforceable against the parties and their respective successors and permitted assigns.
- g) No Third-Party Beneficiaries. The representations, warranties, and other terms contained herein are for the sole benefit of the parties hereto and their respective successors and permitted assigns and shall not be construed as conferring any rights on any other persons.
- h) Statistical Data. Without limiting the confidentiality rights and Intellectual Property Rights protections set forth in this Agreement, CPT has the perpetual right to use aggregated, anonymized, and statistical data ("Statistical Data") derived from the operation of the Software, and nothing herein shall be construed as prohibiting CPT from utilizing the Statistical Data for business and/or operating purposes, provided that CPT does not share with any third-party Statistical Data which reveals the identity of Client, Client's Class Members, or Client's Confidential Information.
- i) Export Controls. Client understands that the use of CPT's Products is subject to U.S. export controls and trade and economic sanctions laws and agrees to comply with all such applicable laws and regulations, including the Export Administration Regulations maintained by the U.S. Department of Commerce and the trade and economic sanctions maintained by the Treasury Department's Office of Foreign Assets Control.
- j) Severability. If any provision of this Agreement is held by a court or arbitrator of competent jurisdiction to be contrary to law, such provision shall be changed by the court or by the arbitrator and interpreted so as to best accomplish the objectives of the original provision to the fullest extent allowed by law, and the remaining provisions of this Agreement shall remain in full force and effect.
- k) Notices. Any notice or communication required or permitted to be given hereunder may be delivered by hand, deposited with an overnight courier, sent by electronic delivery, or mailed by registered or certified mail, return receipt requested and postage prepaid to the address for the other party first written above or at such other address as may hereafter be furnished in writing by either party hereto to the other party. Such notice will be deemed to have been given as of the date it is delivered, if by personal delivery; the next business day, if deposited with an overnight courier; upon receipt of confirmation of electronic delivery (if followed up by such registered or certified mail); and five days after being so mailed.
- l) Independent Contractors. Client and CPT are independent contractors, and nothing in this Agreement shall create any partnership, joint venture, agency, franchise, sales representative or employment relationship between Client and CPT. Each party understands that it does not have authority to make or accept any offers or make any representations on behalf of the other. Neither party may make any statement that would contradict anything in this section.
- m) Subcontractors. CPT shall notify Client of its use of any subcontractors to perform Client-specific Services. CPT shall be responsible for its subcontractors' performance of Services under this Agreement.
- n) Headings. The headings of the sections of this Agreement are for convenience only, do not form a part hereof, and in no way limit, define, describe, modify, interpret, or construe its meaning, scope or intent.
- o) Waiver. No failure or delay on the part of either party in exercising any right, power or remedy under this Agreement shall operate as a waiver, nor shall any single or partial exercise of any such right, power or remedy preclude any other or further exercise or the exercise of any other right, power, or remedy.
- p) Survival. Sections of the Agreement intended by their nature and content to survive termination of the Agreement shall so survive.

EXHIBIT 17

Case Name: DIAZ/EL TAPATIO

Tuesday, April 18, 2023

Requesting Law Firm
Contact
E-Mail
ILYM Contact
E-Mail
Contact Number

The Spivak Law Firm
Emily Hough Ly
emily@spivaklaw.com
ILYM Group
Lisa@ilymgroup.com
714.878.8836

ESTIMATE FOR ADMINISTRATION SOLUTIONS
Opt-Out

ASSUMPTIONS	
Total Number of Class Members	611
Estimated Percentage of Undeliverable Mail	20%
NCOA	Yes
Static Website	Yes
Certified Spanish Translations	Yes

Activity	Rate Type	Unit Cost	Volume	Amount
CASE STARTUP				
Initial Setup - Import and Formatting of Data*	Hourly	\$150.00	3	\$450.00
Programming of Class Database	Hourly	\$175.00	3	\$525.00

**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 \$975.00

PROJECT MANAGEMENT				
Project Manager (Case notification and maintenance)	Hourly	\$120.00	6	\$720.00
Staff Hours for Processing Opt-Outs, Disputes & Objections	Hourly	\$70.00	3	\$210.00
Staff Hours for Processing Returned Mailed	Hourly	\$70.00	3	\$210.00
Report Processing	Hourly	\$70.00	4	\$280.00
NCOA	Per Piece	\$100.00	1	Waived
Toll-Free Call Center	Flat Fee	\$200.00	1	\$200.00
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
Status Reports	Flat Fee	\$500.00	1	Waived

Subtotal \$3,620.00

ILYM | GROUP, Inc.

SETTLEMENT ADMINISTRATION EXPERTS

Activity	Rate Type	Unit Cost	Volume	Amount
----------	-----------	-----------	--------	--------

NOTIFICATION/MAILING				
Fulfillment Notice, English and Spanish	Per Piece	\$1.50	611	\$916.50
USPS First Class Postage	Per Piece	\$0.80	611	\$488.80
Remails (Forward/Skip Trace Undeliverables)	Per Piece	\$2.00	122	\$244.40
Storage, Photocopies, Deliveries	Flat Fee	\$310.47	1	\$310.47

Subtotal \$1,960.17

DISTRIBUTION (Includes EIN, Bank Acct * /QSF Setup)				
Distribution Setup & Management	Hourly	\$150.00	6	\$900.00
Account Reconciliation & Distribution Reporting	Hourly	\$125.00	6	\$750.00
Check, Print & Mail (Including W2/1099 Stub & Release)**	Per Check	\$1.00	611	\$611.00
USPS First Class 1oz Postage	Per Piece	\$0.60	611	\$366.60
2nd Check, Print & Mail (Including W2/1099 Stub & Release)**	Per Check	\$1.00	611	\$611.00
2nd USPS First Class 1oz Postage	Per Piece	\$0.60	611	\$366.60
Remails (Forward/Skip Trace Undeliverables)	Per Piece	\$1.50	92	\$137.48
Check Cashing Reminder Postcard, Includes Postage	Per Piece	\$1.00	397	\$397.15
Preparation of Taxes	Hourly	\$120.00	11	\$1,320.00
Annual Filing of Tax Return	Per Year	\$1,500.00	2	\$3,000.00

***Additional Bank fees may apply*

Subtotal \$8,459.83

CASE CONCLUSION				
Data Manager Final Reporting	Hourly	\$100.00	3	\$300.00
Project Manager Final Reporting	Hourly	\$120.00	3	\$360.00
Process Uncashed Funds	Flat Fee	\$500.00	1	\$500.00
Declaration	Hourly	\$125.00	3	\$375.00

Subtotal \$1,535.00

Total Case Estimate: \$16,550.00

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 18



April 18, 2023

Case: Diaz v. El Taptio, Opt-Out Administration

Phoenix Contact: Michael E. Moore
 Contact Number: 949.331.0131
 Email: mike@phoenixclassaction.com

CASE ASSUMPTIONS

Class Members	611
Opt Out Rate	1%
Opt Outs Received	6
Total Class Claimants	605
Subtotal Admin Only	\$13,614.61

Flat Fee Total \$13,000.00

For 611 Class Members

Pricing Good for Scope of Estimate Only

Two Disbursements & Uncashed Checks to State of CA
 Spanish Translation, Printing & Mailing Included

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 **611** 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	80		\$160.00
NCOA (USPS)	\$150.00	1		\$150.00
Total				\$860.00

* Up to 120 days after disbursement

Data Merger & Scrub / Notice Packet, Opt-Out Form & Postage / Spanish Translation / Website

Project Action	Rate	Hours/Units	Line Item	Estimate
Notice Packet Formatting	\$100.00	2		\$200.00
Spanish Translation	\$800.00	1		\$800.00
Data Merge & Duplication Scrub	\$0.10	611		\$61.10
Notice Packet & Opt-Out Form	\$1.30	611		\$794.30
Estimated Postage (up to 2 oz.)*	\$0.84	611		\$513.24
Static Website	\$100.00	1		\$100.00
Check Cashing Reminder Postcard Postage Included	\$0.60	127		\$76.23
Total				\$2,544.87

* 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	\$0.85	153		\$129.84
Remail Notice Packets	\$0.75	150		\$112.31
Estimated Postage	\$0.84	150		\$125.79
Programming Undeliverables	\$50.00	1		\$50.00
			Total	\$637.94

Database Programming / Processing Opt-Outs, Deficiencies or Disputes

Project Action:	Rate	Hours/Units	Line Item	Estimate
Programming Claims Database	\$150.00	2		\$300.00
Non Opt-Out Processing	\$200.00	1		\$200.00
Case Associate	\$55.00	6		\$330.00
Opt-Outs/Deficiency/Dispute Letters	\$10.00	12		\$120.00
Case Manager	\$85.00	5		\$425.00
			Total	\$1,375.00

Calculation & Disbursement Programming/ Create & Manage QSF/ Mail Checks

Project Action:	Rate	Hours/Units	Line Item	Estimate
Programming Calculations	\$135.00	2		\$270.00
Disbursement Review	\$135.00	2		\$270.00
Programming Manager	\$95.00	4		\$380.00
QSF Bank Account & EIN	\$135.00	1		\$135.00
Check Run Setup & Printing	\$135.00	12		\$1,620.00
Mail Class Checks * (x 2)	\$0.85	605		\$1,028.50
Estimated Postage (x 2)	\$0.61	605		\$738.10
			Total	\$4,441.60

* Checks are printed on 8.5 x 11 in. sheets with W2/1099 Tax Filing



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	3		\$345.00
Remail Checks & Tax Forms (Postage Included)	\$1.70	206		\$350.20
Case Associate	\$55.00	4		\$220.00
Reconcile Uncashed Checks	\$85.00	6		\$510.00
Conclusion Reports	\$115.00	3		\$345.00
Case Manager Conclusion	\$85.00	4		\$340.00
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	\$300.00	1		\$300.00
Estimated <u>59</u> Total Class Members				
Total				\$3,755.20

* All applicable California State & Federal taxes, which include SUI, ETT, and SDI, and FUTA filings. Additional taxes are Defendant's responsibility.

Estimate Total: \$13,614.61



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 19