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21 Attorneys for Plaintiff,
22 CARMEN MORENO, and all others similarly situated
23

24 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
25
26 **FOR THE COUNTY OF SAN DIEGO**
27 **(UNLIMITED JURISDICTION)**
28

CARMEN MORENO, as an “aggrieved
employee” on behalf of herself and other similarly
situated “aggrieved employees” under the Labor
Code Private Attorneys General Act of 2004,

Plaintiff,

vs.

BLUEMERCURY, INC., a Delaware
corporation; and DOES 1–50, inclusive,

Defendants.

Case No. 37-2021-00048801-CU-OE-CTL

**COMPLAINT FOR VIOLATIONS OF
THE LABOR CODE AND CIVIL
PENALTIES UNDER THE LABOR
CODE PRIVATE ATTORNEYS
GENERAL ACT OF 2004, LABOR
CODE §§ 2698, ET SEQ.**

JURY TRIAL DEMANDED

Plaintiff, Carmen Moreno (hereafter “Plaintiff” or “Moreno”), on behalf of herself, the
State of California, and the other Aggrieved Employees, complains and alleges as follows:



I. INTRODUCTION

1. Plaintiff brings this representative action based on alleged violations of the California Labor Code and Industrial Welfare Commission Order No. 7-2001 (hereafter “the Wage Order”), against Defendants BlueMercury, Inc., a Delaware corporation, and DOES 1-50, inclusive (collectively “Defendants”).

2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to her, the State of California, and the Aggrieved Employees (defined below), for civil penalties and other related relief. These claims are based on Defendants’ failures to:

(A) Pay all wages, including minimum, regular, overtime and doubletime wages, earned for all hours worked at the correct rates of pay;

(B) Provide all meal periods;

(C) Authorize and permit all rest breaks;

(D) Pay premium wages for unprovided meal periods;

(E) Pay premium wages for unprovided rest breaks;

(F) Indemnify for necessary work-related expenditures;

(G) Only deduct wages lawfully;

(H) Issue only accurate and complete itemized wage statements;

(I) Timely pay wages during employment;

(J) Timely pay wages upon termination of employment; and

(K) Maintain accurate employment records.

Accordingly, Plaintiff now seeks to recover civil penalties and related relief through this representative action.

II. THE PARTIES

3. Plaintiff Carmen Moreno is resident of California.

4. Defendant BlueMercury, Inc. is organized and existing under the laws of Delaware and also a citizen of California based on Plaintiff’s information and belief.

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



when ascertained.

6. The “Aggrieved Employees” are all individuals the Defendants have employed or otherwise contracted with in California as hourly, nonexempt employees, including sales associates, individuals performing work comparable to the aforementioned, and individuals in similar positions during the period beginning one year before the Plaintiff’s notice of August 11, 2021 to the California Labor and Workforce Development Agency and ending on the date judgment is entered.

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

8. At all relevant times, in perpetrating the acts and omissions alleged herein, Defendants, and each of them, acted pursuant to and in furtherance of a policy, practice, or a lack of a practice which resulted in Defendants not paying Plaintiff and the other Aggrieved Employees in accordance with applicable California labor laws as alleged herein.

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

III. FACTUAL ALLEGATIONS

10. IWC Wage Order 7-2001 (“the Wage Order”) applies to “all persons employed in the mercantile industry whether paid on a time, piece rate, commission, or other basis” Wage Order, § 1. The Wage Order defines “Mercantile Industry” to mean “any industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods are commodities at wholesale or retail; or for the purpose of renting goods or commodities.” Wage Order, § 2(H). At all relevant times during the applicable limitations period, the Bluemercury “Employers, Moreno, and all of the Aggrieved Employees were covered by the Wage Order because the Defendants operated, and Moreno, and all of the Aggrieved Employees worked for, one or more establishments operated as retail cosmetics sales. Accordingly, Moreno and all of the



1 other Aggrieved Employees are entitled to the protections the Wage Order provides.

2 11. On approximately November 30, 2019, the Defendants began to employ Moreno
3 in La Jolla, San Diego County in the position of sales associate. The Defendants continuously
4 employed her in that capacity until on or about November 19, 2020 when her employment ended.

5 12. At all relevant times, the Defendants issued wages to Moreno and all of the other
6 Aggrieved Employees on an hourly basis and paid them by the hour. At all relevant times, the
7 Defendants classified Moreno and all of the other Aggrieved Employees as non-exempt
8 employees entitled to the protections of the Labor Code and the Wage Order.

9 13. At all relevant times, the Defendants failed to compensate Moreno and all of the
10 other Aggrieved Employees for all hours worked at the applicable minimum or regular rates of
11 pay. The Defendants deleted 1.5 or more hours per week from the time records of Moreno and
12 the Aggrieved Employees to avoid paying them wages for time worked in excess of eight hours
13 in a day and in excess of 40 hours in a week.

14 14. At all relevant times, the Defendants failed to compensate Moreno and all of the
15 other Aggrieved Employees at the correct rates of pay for all hours worked over eight in a day,
16 over 40 in a week, and for the first eight hours of the seventh day of the workweek. As a result of
17 the time deletions discussed above, the Defendants did not pay Moreno and the Aggrieved
18 Employees for all overtime and doubletime hours worked at the correct rates of pay.

19 15. At all relevant times, the Defendants failed to compensate Moreno and all of the
20 other Aggrieved Employees at the correct rates of pay for all hours worked over 12 in a day, and
21 all over the first eight of the seventh day of the workweek.

22 16. At all relevant times, the Defendants failed to provide Moreno and all of the other
23 Aggrieved Employees with all timely 30-minute, off-duty meal periods. The Defendants
24 prohibited Moreno and the Aggrieved Employees from leaving their work area for a duty-free
25 meal period unless another employee was available to cover. Generally, no such employee was
26 available. The Defendants also failed to pay premium wages for days on which it failed to provide
27 Moreno and all of the other Aggrieved Employees with meal periods as required by law.

28 17. At all relevant times, the Defendants failed to authorize and permit Moreno 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 Defendants prohibited Moreno and the Aggrieved
Employees from leaving their work area for a duty-free rest period unless another employee was

1 available to cover. Generally, no such employee was available. The Defendants also failed to pay
2 premium wages for days on which it failed to authorize and permit Moreno and all of the other
3 Aggrieved Employees to take rest breaks as required by law.

4 18. At all relevant times, the Defendants required Moreno and all of the other
5 Aggrieved Employees to incur certain business expenses in the course of performing their duties.
6 The Defendants required Moreno and all of the other Aggrieved Employees to supply
7 transportation between work sites to perform their job duties. However, the Defendants did not
8 provide these items and did not reimburse Moreno and the other Aggrieved Employees for these
9 items.

10 19. At all relevant times, the Defendants unlawfully deducted wages belonging to
11 Moreno and all of the other Aggrieved Employees. As explained above, the Defendants deleted
12 1.5 or more hours per week from the time records of Moreno and the Aggrieved Employees to
13 avoid paying them wages for time worked in excess of eight hours in a day and in excess of 40
14 hours in a week.

15 20. At all relevant times, the Defendants failed to issue to Moreno and all of the other
16 Aggrieved Employees complete and accurate wage statements that state all hours worked at the
17 correct rates of pay, and all wages earned. The Defendants knowingly and intentionally failed to
18 state on the wage statements they issued to Moreno and all of the other Aggrieved Employees the
19 unpaid wages discussed above. The wage statements fail to state all hours worked at the correct
20 rates of pay, all minimum wages earned, all regular wages earned, all overtime wages earned, all
21 doubletime wages earned, all meal period premium wages earned, all rest break premium wages
22 earned, all unlawfully deducted wages, and related information.

23 21. At all relevant times, the Defendants also failed to timely pay Moreno and all of
24 the other Aggrieved Employees all earned wages as described above during and at the conclusion
25 of employment.

26 22. At all relevant times, the Defendants failed to maintain accurate employee records
27 of Moreno and all of the other Aggrieved Employees.

28 23. For the reasons stated herein, Plaintiff alleges that as a result of Defendants'
unlawful practices and policies, Plaintiff and the Aggrieved Employees were:

A. Not paid all wages earned, including, but not limited to, minimum, regular,
overtime, and doubletime wages at the correct rates for all wages earned and work performed;



- 1 B. Not provided with all off duty meal periods;
- 2 C. Not authorized and permitted to take all rest break periods;
- 3 D. Not paid one hour's pay for each workday in which Defendants failed to
- 4 authorize and permit them to take one or more timely rest periods;
- 5 E. Not paid one hour's pay for each workday in which Defendants failed to
- 6 provide them with one or more timely meal periods;
- 7 F. Not indemnified for all necessary business expenditures incurred during
- 8 the discharge of their duties;
- 9 G. Not provided with accurate and complete wage statements; and
- 10 H. Not timely paid all earned and unpaid wages during their employment with
- 11 Defendants and at the time such employment ended.

12 **IV. FIRST (AND ONLY) CAUSE OF ACTION**

13 **CIVIL PENALTIES**

14 **(Lab. Code §§ 2698, et seq.)**

15 **(By Plaintiff, on behalf of herself and the other Aggrieved Employees, against all**

16 **Defendants)**

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

18 25. At all relevant times, Plaintiff and the Aggrieved Employees have been non-

19 exempt employees entitled to the protections of both the Labor Code and the Wage Order.

20 **A. FAILURE TO PAY ALL WAGES EARNED FOR ALL HOURS WORKED AT**

21 **THE CORRECT RATES OF PAY**

22 26. Section 2 of the Wage Order defines "hours worked" as "the time during which an

23 employee is subject to the control of an employer, and includes all the time the employee is

24 suffered or permitted to work, whether or not required to do so."

25 27. Section 3 of the Wage Order states:

26 The following overtime provisions are applicable to employees 18 years of age or

27 over and to employees 16 or 17 years of age who are not required by law to attend

28 school and are not otherwise prohibited by law from engaging in the subject work.

Such employees shall not be employed more than eight (8) hours in any workday

or more than 40 in a workweek unless the employee receives one and one half

(1½) times such employee's regular rate of pay for all hours worked over 40 hours



1 in the workweek. Eight (8) hours of labor constitutes a day's work. Employment
2 beyond eight (8) hours in any workday or more than six (6) days in any workweek
3 is permissible provided the employee is compensated for such overtime at not less
4 than:

5 (a) One and one-half (1½) times the employee's regular rate of pay for all
6 hours worked in excess of eight (8) hours up to and including twelve (12)
7 hours in any workday, and for the first eight (8) hours worked on the
8 seventh (7th) consecutive day of work in a workweek;

9 (b) Double the employee's regular rate of pay for all hours worked in excess
10 of 12 hours in any workday and for all hours worked in excess of eight (8)
11 hours on the seventh (7th) consecutive day of work in a workweek. The
12 overtime rate of compensation required to be paid to a nonexempt full-
13 time salaried employee shall be computed by using the employee's regular
14 hourly salary as one fortieth (1/40) of the employee's weekly salary.

15 28. Section 4 of the Wage Order requires an employer to pay non-exempt employees
16 at least the minimum wage set forth therein for all hours worked, which consists of all hours that
17 an employer has actual or constructive knowledge that employees are working.

18 29. Labor Code section 510 states:

19 Eight hours of labor constitutes a day's work. Any work in excess of eight hours
20 in one workday and any work in excess of 40 hours in any one workweek and the
21 first eight hours worked on the seventh day of work in any one workweek shall be
22 compensated at the rate of no less than one and one-half times the regular rate of
23 pay for an employee. Any work in excess of 12 hours in one day shall be
24 compensated at the rate of no less than twice the regular rate of pay for an
25 employee. In addition, any work in excess of eight hours on any seventh day of a
26 workweek shall be compensated at the rate of no less than twice the regular rate of
27 pay of an employee. Nothing in this section requires an employer to combine more
28 than one rate of overtime compensation in order to calculate the amount to be paid
to an employee for any hour of overtime work.

30. Labor Code section 1194 invalidates any agreement between an employer and an
employee to work for less than the minimum wage required under the applicable Wage Order.

31. Labor Code section 1197 makes it unlawful for an employer to pay an employee
less than the minimum wage required under the applicable Wage Order for all hours worked
during a payroll period.

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



1 33. In conjunction, these provisions of the Labor Code require employers to pay non-
2 exempt employees no less than their agreed-upon or statutorily mandated wage rates for all hours
3 worked, including unrecorded hours when the employer knew or reasonably should have known
4 that employees were working during those hours. (See *Morillion v. Royal Packing Co.* (2000) 22
Cal.4th 575, 585.)

5 34. At all relevant times during the applicable limitations period, Defendants failed to
6 compensate Plaintiff and the Aggrieved Employees for all hours worked, including, but not
7 limited to overtime wages for all overtime hours they worked at the correct rates of pay.

8 35. Plaintiff is informed and believes and thereon alleges that, at all relevant times,
9 Defendants maintained a policy and/or practice, or lack thereof, which resulted in Defendants'
10 failure to compensate Plaintiff and the other Aggrieved Employees for all hours worked as
11 required by California law.

12 **B. FAILURE TO PROVIDE MEAL PERIODS**

13 36. In relevant part, California Labor Code § 1198 states:

14
15 The maximum hours of work and the standard conditions of labor fixed by the
16 commission shall be the maximum hours of work and the standard conditions of
17 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.

18 37. In relevant part, In relevant part, California Labor Code § 512 states:

19
20 An employer shall not employ an employee for a work period of
21 more than five hours per day without providing the employee with
22 a meal period of not less than 30 minutes, except that if the total
23 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.

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

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



Meal Periods:

- (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.
- (B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
- (C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
- (D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.
- (E) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

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

- (b) An employer shall not require an employee to work during a meal or rest period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.
- (c) If an employer fails to provide an employee a meal period or rest period in accordance with a state law, including, but



not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

40. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff and the Aggrieved Employees were entitled to uninterrupted meal periods of at least 30 minutes for each day they worked five or more hours. Pursuant to California Labor Code § 512, they were also entitled to a second 30-minute meal period when they worked more than 10 hours in a workday.

41. Pursuant to the Wage Order, Plaintiff and the Aggrieved Employees were entitled to be provided with net rest breaks of at least ten minutes for each four-hour period of work, or major fraction thereof.

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

43. At all relevant times, Defendants failed to provide Plaintiff and the Aggrieved Employees with all timely rest and meal periods. The Defendants prohibited Moreno and the Aggrieved Employees from leaving their work area for a duty-free meal period unless another employee was available to cover. Generally, no such employee was available. Furthermore, Defendants failed to pay premium wages for days on which they failed to provide Plaintiff and the other Aggrieved Employees with timely meal periods.

44. At all relevant times, Defendants failed to authorize and permit Plaintiff and the Aggrieved Employees to take ten-minute, paid, duty-free rest breaks every four hours worked or major fraction thereof. The Defendants prohibited Moreno and the Aggrieved Employees from leaving their work area for a duty-free rest period unless another employee was available to cover. Generally, no such employee was available. Defendants did not seek an exemption from the rest period protections of the Wage Order from the California Divisions of Labor Standards Enforcement. Moreover, Defendants failed to pay Plaintiff and the Aggrieved Employees premium wages on workdays they failed to provide them with 10-minute rest periods every four hours worked or major fraction thereof.



1 45. Plaintiff is informed and believes and thereon alleges that, at all relevant times
2 within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy
3 which resulted in Defendants not providing the and the Aggrieved Employees with all off-duty
4 meal periods and rest breaks required by California law.

5 **C. FAILURE TO AUTHORIZE AND PERMIT REST BREAKS**

6 46. In relevant part, California Labor Code § 1198 states:

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

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

13 Rest Periods:

14 (A) Every employer shall authorize and permit all employees to take
15 rest periods, which insofar as practicable shall be in the middle of
16 each work period. The authorized rest period time shall be based
17 on the total hours worked daily at the rate of ten (10) minutes net
18 rest time per four (4) hours or major fraction thereof. However, a
19 rest period need not be authorized for employees whose total daily
20 work time is less than three and one-half (3 ½) hours. Authorized
21 rest period time shall be counted as hours worked for which there
22 shall be no deduction from wages.

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

28 48. In relevant part, California Labor Code § 226.7 states:

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



1 (c) If an employer fails to provide an employee a meal period
2 or rest period in accordance with a state law, including, but
3 not limited to, an applicable statute or applicable
4 regulation, standard, or order of the Industrial Welfare
5 Commission, the Occupational Safety and Health
6 Standards Board, or the Division of Occupational Safety
7 and Health, the employer shall pay the employee one
8 additional hour of pay at the employee's regular rate of
9 compensation for each work day that the meal or rest
10 period is not provided.

11 49. Pursuant to the Wage Order, Plaintiff and the Aggrieved Employees were entitled
12 to be authorized and permitted to take net rest breaks of at least ten minutes for each four-hour
13 period of work, or major fraction thereof.

14 50. Defendants intentionally failed to authorize and permit Plaintiff and the Aggrieved
15 Employees to take all 10-minute rest periods free from any work duties in accordance with the
16 Wage Order.

17 51. At all relevant times, Defendants failed to authorize and permit Plaintiff and the
18 Aggrieved Employees to take all timely rest periods. Furthermore, Defendants failed to pay
19 premium wages to Plaintiff and the Aggrieved Employees for days on which they failed to
20 authorize and permit Plaintiff and the other Aggrieved Employees to take timely rest periods.

21 52. At all relevant times, due to high workload and low staffing levels, Defendants
22 failed to authorize and permit Plaintiff and the Aggrieved Employees to take ten-minute, paid,
23 duty-free rest breaks every four hours worked or major fraction thereof. Defendants did not seek
24 an exemption from the rest period protections of the Wage Order from the California Division of
25 Labor Standards Enforcement. Moreover, Defendants failed to pay Plaintiff and the Aggrieved
26 Employees premium wages on workdays they failed to authorize and permit them to take 10-
27 minute rest periods every four hours worked or major fraction thereof.

28 53. Plaintiff is informed and believes and thereon alleges that, at all relevant times
within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy
which resulted in Defendants not authorizing and permitting Plaintiff and the Aggrieved
Employees to take all rest breaks required by California law.

D. FAILURE TO INDEMNIFY

54. In pertinent part, California Labor Code § 2802(a) states: "An employer shall



1 indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct
2 consequence of the discharge of his or her duties.” Additionally, the Wage Order states,

3 (A) When uniforms are required by the employer to be worn by the
4 employee as a condition of employment, such uniforms shall be provided
5 and maintained by the employer.

6 ...

7 (B) When tools or equipment are required by the employer or are necessary to
8 the performance of a job, such tools and equipment shall be provided and
9 maintained by the employer, except that an employee whose wages are at
10 least two (2) times the minimum wage provided herein may be required to
11 provide and maintain hand tools and equipment customarily required by
12 the trade or craft.

13 Wage Order, § 9(A) and (B).

14 55. California Labor Code § 1198 prohibits employers from employing their
15 employees under conditions prohibited by the Wage Order.

16 56. At all relevant times, Defendants required Plaintiff and the Aggrieved Employees
17 to incur certain business expenses in the course of performing their duties. As described above,
18 the Defendants required Moreno and all of the other Aggrieved Employees to incur certain
19 business expenses in the course of performing their duties. The Defendants required Moreno and
20 all of the other Aggrieved Employees to supply transportation between work sites to perform their
21 job duties. However, the Defendants did not provide these items and did not reimburse Moreno
22 and the other Aggrieved Employees for mileage.

23 57. Plaintiff is informed and believes and thereon alleges that, at all relevant times,
24 Defendants maintained a policy and/or practice, or lack thereof, which resulted in Defendants’
25 failure to indemnify Plaintiff and the Aggrieved Employees for the reasonable expenses they
26 incurred during the course of performing their duties.

27 **E. UNLAWFUL DEDUCTIONS**

28 58. Under Labor Code § 221, “It shall be unlawful for any employer to collect or
receive from an employee any part of wages theretofore paid by said employer to said employee.”
The Defendants deducted wages from the wages earned by Moreno and all of the other Aggrieved
Employees for in violation of Labor Code § 221. Accordingly, Moreno seeks an award of civil



1 penalties against the Defendants on behalf of herself and all of the other Aggrieved Employees as
2 follows: \$100 for each aggrieved employee for each initial violation of Labor Code § 221, and
3 \$200 for each aggrieved employee for each subsequent violation, or any willful or intentional
4 violation of Labor Code § 221, plus 25% of the amount unlawfully withheld from each aggrieved
employee (penalties set by Labor Code § 225.5).

5 **F. FAILURE TO PROVIDE ACCURATE AND COMPLETE WRITTEN WAGE**
6 **STATEMENTS**

7 59. Pursuant to California Labor Code § 226(a), Plaintiff and the Aggrieved
8 Employees were entitled to receive, bi-weekly or at the time of each payment of wages, an
9 accurate itemized statement showing: a) gross wages earned; b) net wages earned; c) all applicable
10 hourly rates in effect during the pay period; and d) the corresponding number of hours worked at
11 each hourly rate by the employee.

12 60. Pursuant to California Labor Code § 226, an employee is deemed to suffer injury
13 if the employer fails to provide a wage statement. Also, an employee is deemed to suffer injury if
14 the employer fails to provide accurate and complete information as required by California Labor
15 Code § 226(a) and the employee cannot “promptly and easily determine” from the wage statement
alone one or more of the following:

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

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

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

24 D. The name of the employee and only the last four digits of his or his social
25 security number or an employee identification number other than a social security number; and

26 E. The number of piece-rate units earned and the piece rate.

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



1 62. As alleged herein, at all relevant times during the applicable limitations period,
2 Defendants violated California Labor Code section 226 because they did not properly and
3 accurately itemize each employee's gross wages earned, net wages earned, the total hours worked,
4 the corresponding number of hours worked at each rate by the employee and other requirements
5 of California Labor Code section 226. Defendants failed to state in the wage statements they
6 issued to Plaintiff and the other Aggrieved Employees all their hours worked and wages earned,
7 including, but not limited to, regular and overtime wages for work they performed off-the-clock
after clocking-out (as described above).

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

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

22 **G. UNTIMELY WAGES DURING EMPLOYMENT**

23 65. Labor Code § 204 states:

- 24
- 25 (a) All wages, other than those mentioned in Section 201,
26 201.3, 202, 204.1, or 204.2, earned by any person in any
27 employment are due and payable twice during each
28 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.

66. Defendants failed to compensate Plaintiff and the Aggrieved Employees for all hours worked at the correct rates of pay, including overtime. Defendants failed to provide Plaintiff and the Aggrieved Employees with all meal and rest periods in compliance with California laws. Defendants also failed to provide Plaintiff and the Aggrieved Employees with all premium wages on workdays they failed to provide them with one or more meal or rest periods in compliance with California laws. As a result, Defendants failed to timely pay all earned minimum, overtime, and premium wages due during employment within the time periods set by California Labor Code section 204.

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1 **H. UNTIMELY FINAL WAGES**

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

4 68. Labor Code § 202 provides that all earned and unpaid wages of an employee who
5 quits after providing at least 72-hours notice before quitting are due and payable at the time of
6 quitting and that all earned and unpaid wages of an employee who quits without providing at least
7 72-hours notice before quitting are due and payable within 72 hours.

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

11 70. Plaintiff is informed and believes that Defendants' failures to timely pay Plaintiff
12 and the Aggrieved Employees all of their earned and unpaid wages (described above) have been
13 willful in that, at all relevant times, Defendants have deliberately maintained policies and
14 practices that violate the requirements of the Labor Code and the Wage Order, even though at all
15 relevant times, they have had the ability to comply with those legal requirements.

16 **I. FAILURE TO PROVIDE SIGNED AND COMPLETE COMMISSION**
17 **AGREEMENTS**

18 71. Labor Code § 2751 states:

19 (a) Whenever an employer enters into a contract of employment with an
20 employee for services to be rendered within this state and the
21 contemplated method of payment of the employee involves commissions,
22 the contract shall be in writing and shall set forth the method by which the
23 commissions shall be computed and paid.

24 (b) The employer shall give a signed copy of the contract to every employee
25 who is a party thereto and shall obtain a signed receipt for the contract
26 from each employee. In the case of a contract that expires and where the
27 parties nevertheless continue to work under the terms of the expired
28 contract, the contract terms are presumed to remain in full force and effect
until the contract is superseded or employment is terminated by either
party.

(c) As used in this section, "commissions" has the meaning set forth in
Section 204.1. For purposes of this section only, "commission" does not
include any of the following:



- (1) Short-term productivity bonuses such as are paid to retail clerks.
- (2) (Temporary, variable incentive payments that increase, but do not decrease, payment under the written contract.
- (3) Bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed.

72. At all relevant times, the Defendants have failed to provide Moreno and all of the other Aggrieved Employees with signed commission agreements. As a result, the Defendants have violated Labor Code § 2751. Accordingly, Moreno seeks an award of civil penalties against the Defendants on behalf of herself and all of the other Aggrieved Employees for the violations of Labor Code § 2751 at \$100 per aggrieved employee for each of the pay periods in which initial violations of § 2751 occurred, and \$200 per aggrieved employee per pay period in which subsequent violations of § 2751 occurred (penalties set by Labor Code § 2699(f)(2)).

J. FAILURE TO MAINTAIN ACCURATE EMPLOYMENT RECORDS

73. Labor Code § 1174 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.

74. Labor Code § 1174.5 states:



Any person employing labor who willfully fails to maintain the records required by subdivision (c) 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).

75. Section 7 of the Wage Order states:

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

- (1) Full name, home address, occupation and social security number.
- (2) Birth date, if under 18 years, and designation as a minor.
- (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
- (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the Employee.
- (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
- (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

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

77. On information and belief, Defendants have willfully failed to maintain the records required by § 1174 and Wage Order, including, but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Plaintiff and the Aggrieved Employees.

78. Accordingly, Moreno seeks an award of civil penalties against the Defendants on behalf of herself and all of the other Aggrieved Employees as follows: (1) \$500 for each aggrieved



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

5 **K. CIVIL PENALTIES SOUGHT**

6 79. Defendants paid wages to employees on regular intervals. Defendants failed to pay
7 Plaintiff on such intervals for all wages earned and all hours worked. On information and belief,
8 Plaintiff alleges that Defendants also failed to pay the Aggrieved Employees on such intervals for
9 all wages earned and all hours worked.

10 80. During the applicable time period, Defendants violated California Labor Code
11 §§ 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, 2802, and related
12 Labor Code statutes.

13 81. California Labor Code §§ 2699(a) and (g) authorize an aggrieved employee, on
14 behalf of themselves and other current or former employees, to bring a civil action to recover civil
15 penalties pursuant to the procedures specified in California Labor Code § 2699.3.

16 82. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff and the Aggrieved
17 Employees are entitled to recover civil penalties for each of the Defendants' violations of
18 California Labor Code §§ 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198,
19 2802, and related Labor Code statutes during the applicable limitations period in the following
20 amounts:

21 A. For violations of California Labor Code § 204, one hundred dollars
22 (\$100.00) for each aggrieved employee for each initial violation and two hundred dollars
23 (\$200.00) for each aggrieved employee for each subsequent, willful or intentional violation
(penalty amounts established by California Labor Code § 210).

24 B. For violations of California Labor Code § 221, one hundred dollars
25 (\$100.00) for each Aggrieved Employee for each initial and intentional violation (if found to be
26 neither willful nor intentional) and \$200 for each aggrieved employee for each initial violation of
27 California Labor Code § 221 (if found to be either willful or intentional) and for each subsequent
28 violation of California Labor Code § 221 (regardless of whether they are found to be either willful
or intentional) (penalties set by California Labor Code § 225.5).



1 C. For violations of California Labor Code § 226, two hundred fifty dollars
2 (\$250.00) per employee for initial violation and one thousand dollars (\$1,000.00) per employee
3 for each subsequent violation (penalty amounts established by California Labor Code § 226.3).

4 D. For violations of California Labor Code §§ 510 and 512, fifty dollars
5 (\$50.00) for each aggrieved employee for each initial violation for pay period for which the
6 employee was underpaid and one hundred dollars (\$100.00) for each underpaid employee for
7 each pay period for which the employee was underpaid (penalty amounts established by
8 California Labor Code § 558).

9 E. For violations of California Labor Code § 1174, five hundred dollars
10 (\$500.00) for each Aggrieved Employee for each initial violation (penalty amounts established
11 by Labor Code § 1174.5).

12 F. For violations of California Labor Code § 1197, one hundred dollars
13 (\$100.00) for each Aggrieved Employee for each initial and intentional violation and two hundred
14 fifty dollars (\$250.00) for each Aggrieved Employee for each subsequent violation, per pay period
15 (regardless of whether the initial violations were intentionally committed) (penalty amounts
16 established by California Labor Code § 1197.1).

17 G. For violations of California Labor Code §§ 201, 202, 203, 226.7, 1194,
18 1198, and 2802, one hundred dollars (\$100.00) for each aggrieved employee per pay period for
19 each initial violation and two hundred dollars (\$200.00) for each aggrieved employee per pay
20 period for each subsequent violation (penalty amounts established by California Labor Code
21 § 2699(f)(2)).

22 **L. NOTICE TO THE STATE OF CALIFORNIA AND DEFENDANTS**

23 83. Plaintiff has complied with the procedures for bringing suit specified in California
24 Labor Code § 2699.3. By letter dated August 11, 2021, Plaintiff gave written notice by certified
25 mail to the Labor and Workforce Development Agency (“LWDA”) and Defendants of the specific
26 provisions of the California Labor Code alleged to have been violated, including the facts and
27 theories to support the alleged violations. A true and correct copy of Plaintiff’s letter to the LWDA
28 dated August 11, 2021 is attached hereto as **Exhibit A**. The LWDA has not responded to
Plaintiff’s letter.

84. Pursuant to California Labor Code § 2699(g), Plaintiff and the Aggrieved
Employees are entitled to an award of civil penalties, reasonable attorneys’ fees, and costs in

connection with their claims for civil penalties.

V. PRAYER FOR RELIEF

85. WHEREFORE, Plaintiff, on behalf of herself and the Aggrieved Employees, prays for relief and judgment against Defendants as follows:

- A. Civil penalties;
- B. Costs of suit;
- C. Reasonable attorneys' fees; and
- D. Such other relief as the Court deems just and proper.

VI. DEMAND FOR JURY TRIAL

Plaintiff, on behalf of herself and all other Aggrieved Employees, hereby demands a jury trial on all issues so triable.

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: November 16, 2021

By:



DAVID G. SPIVAK,
CAROLINE TAHMASSIAN,
Attorneys for Plaintiff, CARMEN
MORENO, and all others similarly
situated



EXHIBIT A



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION, CERTIFIED MAIL, AND EMAIL

August 11, 2021

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

Re: Carmen Moreno / Bluemercury

To Whom It May Concern:

Pursuant to the Labor Code Private Attorneys General Act of 2004, Labor Code sections 2698, *et seq.*, Carmen Moreno (hereafter “Moreno” or “Complainant”) provides notice that BlueMercury, Inc., a Delaware corporation, and related entities (collectively “the Bluemercury Employers” or “the Employers”) violated her rights and those of all other individuals the Bluemercury Employers have employed or otherwise contracted with in California as hourly, nonexempt employees, including sales associates, individuals performing work comparable to the aforementioned, and individuals in similar positions (hereafter the “Aggrieved Employees”) under Labor Code sections 201, 202, 204, 203, 221, 226, 226.7, 510, 512, 1174, 1194, 1197, and 1198. On behalf of herself and all other Aggrieved Employees, Moreno hereby provides this notice to the Labor & Workforce Development Agency and the Bluemercury Employers and their agents and representatives.

At all relevant times, the Bluemercury Employers have employed persons, conducted business, and engaged in illegal payroll practices and policies, throughout California. Moreno and all of the other Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission Order No. 7-2001 (hereafter “the Wage Order”) section 2, subdivision (E) and “Aggrieved Employees” within the meaning of Labor Code section 2699(c).

Statement of Facts

On approximately November 30, 2019, the Bluemercury Employers began to employ Moreno in La Jolla, San Diego County in the position of sales associate. The Bluemercury Employers continuously employed her in that capacity, with the exception of a health-related leave of absence, until on or about November 19, 2020 when her employment ended.

At all relevant times, the Bluemercury Employers issued wages to Moreno and all of the other Aggrieved Employees on a basis and paid them by the hour. At all relevant times, the Bluemercury Employers classified Moreno and all of the other Aggrieved Employees as non-exempt employees entitled to the protections of the Labor Code and the Wage Order.

The Bluemercury Employers failed to compensate Moreno and all of the other Aggrieved Employees for all hours worked at the applicable minimum or regular rates of pay. The Bluemercury Employers deleted 1.5 or more hours per week from the time records of Moreno and the Aggrieved Employees to avoid paying them wages for time worked in excess of eight hours in a day and in excess of 40 hours in a week.

The Bluemercury Employers failed to compensate Moreno and all of the other Aggrieved Employees at the correct rates of pay for all hours worked over eight in a day, over 40 in a week, and for the first eight hours of the seventh day of the workweek. As a result of the time deletions discussed above, the Bluemercury Employers did not pay Moreno and the Aggrieved Employees for all overtime and doubletime hours worked at the correct rates of pay.

At all relevant times, the Bluemercury Employers failed to provide Moreno and all of the other Aggrieved Employees with all timely 30-minute, off-duty meal periods. The Bluemercury Employers prohibited Moreno and the Aggrieved Employees from leaving their work area for a duty-free meal period unless another employee was available to cover. Generally, no such employee was available. The Bluemercury Employers also failed to pay premium wages for days

on which it failed to provide Moreno and all of the other Aggrieved Employees with meal periods as required by law.

At all relevant times, the Bluemercury Employers required Moreno and all of the other Aggrieved Employees to incur certain business expenses in the course of performing their duties. The Bluemercury Employers required Moreno and all of the other Aggrieved Employees to supply transportation between work sites to perform their job duties. However, the Bluemercury Employers did not provide these items and did not reimburse Moreno and the other Aggrieved Employees for these items.

The Bluemercury Employers unlawfully deducted wages belonging to Moreno and all of the other Aggrieved Employees. As explained above, the Bluemercury Employers deleted 1.5 or more hours per week from the time records of Moreno and the Aggrieved Employees to avoid paying them wages for time worked in excess of eight hours in a day and in excess of 40 hours in a week.

At all relevant times, the Bluemercury Employers failed to issue to Moreno 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 Bluemercury Employers knowingly and intentionally failed to state on the wage statements they issued to Moreno and all of the other Aggrieved Employees the unpaid wages discussed above. The wage statements fail to state all hours worked at the correct rates of pay, all minimum wages earned, all regular wages earned, all overtime wages earned, all doubletime wages earned, all meal period premium wages earned, all rest break premium wages earned, and all unlawfully deducted wages.

The Bluemercury Employers also failed to timely pay Moreno and all of the other Aggrieved Employees all earned wages as described above during and at the conclusion of employment.

The Bluemercury Employers failed to maintain accurate employee records of Moreno and all of the other Aggrieved Employees.

For the reasons stated herein, Moreno 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 Bluemercury Employers failed to pay Moreno and all of the other Aggrieved Employees all wages earned for all hours worked at the correct rates of pay, including minimum, regular, overtime, and doubletime wages;
- (b) The Bluemercury Employers failed to provide Moreno and all of the other Aggrieved Employees all meal periods in compliance with California law;
- (c) The Bluemercury Employers failed to authorize and permit Moreno and all of the other Aggrieved Employees to take rest breaks in compliance with California law;
- (d) The Bluemercury Employers failed to compensate Moreno and all of the other Aggrieved Employees at one hour's pay for each day in which the Bluemercury Employers failed to provide them with one or more meal periods as required by law;
- (e) The Bluemercury Employers failed to compensate Moreno and all of the other Aggrieved Employees at one hour's pay for each day in which the Bluemercury Employers failed to authorize and permit them to take one or more rest breaks as required by law;
- (f) The Bluemercury Employers unlawfully deducted wages belonging to Moreno and all of the other Aggrieved Employees;
- (g) The Bluemercury Employers knowingly and intentionally failed to provide Moreno and all of the other Aggrieved Employees with accurate wage statements;

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- (h) The Bluemercury Employers willfully failed to timely pay Moreno and all of the other Aggrieved Employees all earned and unpaid wages during their employment with the Bluemercury Employers and when their employment ended; and
- (i) The Bluemercury Employers failed to maintain accurate employment records pertaining to Moreno and all of the other Aggrieved Employees.

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

The Wage Order

The Wage Order applies to "all persons employed in the mercantile industry whether paid on a time, piece rate, commission, or other basis." Wage Order, § 1. The Wage Order defines "Mercantile Industry" to mean, "any industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail; or for the purpose of renting goods or commodities." Wage Order, § 2(H). At all relevant times during the applicable limitations period, the Bluemercury "Employers, Moreno, and all of the Aggrieved Employees were covered by the Wage Order because the Bluemercury Employers operated, and Moreno, and all of the Aggrieved Employees worked for, one or more establishments operated for retail cosmetics sales. Accordingly, Moreno and all of the other Aggrieved Employees are entitled to the protections the Wage Order provides.

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

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

In relevant part, section 2(G) 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 1194 states:

- (a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.

In relevant part, Labor Code section 510 states:

Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh

day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

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

The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 in a workweek unless the employee receives one and one half (1½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

- (a) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek;
- (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek. The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one fortieth (1/40) of the employee's weekly salary.

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

In conjunction, these provisions of the Labor Code require employers to pay employees no less than their agreed-upon or statutorily mandated wage rates for

all hours worked, including hours spent working “off-the-clock” (before punching in or after punching out on a time clock) when the employer knew or reasonably should have known that employees were working during those hours. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.

The Bluemercury Employers deleted 1.5 or more hours per week from the time records of Moreno and the Aggrieved Employees to avoid paying them wages for time worked in excess of eight hours in a day and in excess of 40 hours in a week. As a result of the time deletions discussed above, the Bluemercury Employers did not pay Moreno and the Aggrieved Employees for all overtime and doubletime hours worked at the correct rates of pay.

At all relevant times during the applicable limitations period, the Bluemercury Employers failed to compensate Moreno and all of the other Aggrieved Employees for all hours worked, including, but not limited to minimum, regular, overtime, and doubletime wages for all hours they worked at the correct rates of pay. Accordingly, Moreno now seeks civil penalties on behalf of herself and all of the other Aggrieved Employees as follows:

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

underpaid wages, liquidated damages pursuant to Section 1194.2, and any applicable penalties imposed pursuant to Section 203 (penalties set by Labor Code § 1197.1) and

4. \$100 for each aggrieved employee for each initial violation of Labor Code § 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code § 2699(f)(2)).

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

In relevant part, section 2(G) 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.
- (B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
- (C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
- (D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the

employee's regular rate of compensation for each workday that the meal period is not provided.

- (E) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

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 Bluemercury Employers failed to provide Moreno and all of the other Aggrieved Employees with all timely meal periods. The Bluemercury Employers denied Moreno and all of the other Aggrieved Employees their 30-minute off-duty meal period within the first five hours of work. The Bluemercury Employers prohibited Moreno and the Aggrieved Employees from leaving their work area for a duty-free meal period unless another employee was available to cover. Generally, no such employee was available. Furthermore, the Bluemercury Employers failed to pay premium wages for days on which they failed to provide Moreno and all of the other Aggrieved

Employees with timely meal periods. Accordingly, Moreno now seeks civil penalties for these Labor Code violations that the Bluemercury 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(G) 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 Bluemercury Employers failed to authorize and permit Moreno 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 Bluemercury Employers did not seek an exemption from the rest period protections of the Wage Order from the California Division of Labor Standards Enforcement. The Bluemercury Employers prohibited Moreno and the Aggrieved Employees from leaving their work area for a duty-free rest period unless another employee was available to cover. Generally, no such employee was available. Moreover, the Bluemercury Employers failed to pay Moreno and all of the other Aggrieved Employees premium wages on workdays the Bluemercury Employers failed to provide Moreno and all of the other Aggrieved Employees with 10-minute rest periods every four hours worked or major fraction thereof. Accordingly, Moreno now seeks civil penalties for these Labor Code violations that the Bluemercury 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)).

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Unlawful Deductions
(Lab. Code § 221)

Under Labor Code § 221, “It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.” As explained above, the Bluemercury Employers deducted wages from the wages earned by Moreno and all of the other Aggrieved Employees for in violation of Labor Code § 221. Accordingly, Moreno seeks civil penalties on behalf of herself and all of the other Aggrieved Employees as follows: \$100 for each aggrieved employee for each initial violation of Labor Code § 221, and \$200 for each aggrieved employee for each subsequent violation, or any willful or intentional violation of Labor Code § 221, plus 25% of the amount unlawfully withheld from each aggrieved employee (penalties set by Labor Code § 225.5).

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 Employer 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 Bluemercury 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 Bluemercury Employers failed to state in the wage statements they issued to Moreno 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 Bluemercury Employers knowingly and intentionally failed to state on the wage statements they issued to Moreno and all of the other Aggrieved Employees the earned but unpaid wages described above. The wage statements do not state all hours worked at the correct rates of pay, all minimum wages earned, all regular wages earned, all overtime wages earned, all doubletime wages earned, all meal period premium wages earned, all rest break premium wages earned, and all unlawfully deducted wages. Accordingly, Moreno seeks civil penalties for the Labor Code violations that the Bluemercury 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 Bluemercury Employers failed to compensate Moreno and all of the other Aggrieved Employees for wages earned, including minimum wages, regular wages, overtime wages, doubletime wages, unprovided meal period premium wages, unprovided rest break premium wages, and deducted wages, at the intervals stated above. As a result, the Bluemercury Employers failed to timely pay all earned wages due during employment within the time periods set by Labor Code section 204. Accordingly, Moreno now seeks civil penalties for the Labor Code violations that the Bluemercury 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).

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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 Bluemercury Employers failed to pay Moreno 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 Moreno, including minimum wages, regular wages, overtime wages, doubletime wages, unprovided meal period premium wages, unprovided rest break premium wages, and deducted wages. By failing to pay Moreno and all of the other Aggrieved Employees as set forth above at the end of employment, the Bluemercury Employers are liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of herself and all of the other Aggrieved Employees, Moreno seeks civil penalties from the Bluemercury 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 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 Bluemercury Employers failed to compensate Moreno and all of the other Aggrieved Employees for all hours worked at the correct rates of pay, including all hours worked at the correct rates of pay, all minimum wages earned, all regular wages earned, all overtime wages earned, all doubletime wages earned, all meal period premium wages earned, all rest break premium wages earned, and all unlawfully deducted wages. As a result, the Bluemercury Employers have failed to accurately maintain all records required by section 1174 and the Wage Order, including but not limited to Moreno and all of the other Aggrieved Employees' total hours worked, total wages paid, and applicable hourly rates during each payroll period. Accordingly, Moreno 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)).

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Conclusion

As noted above, this letter constitutes the required notice under the Labor Code Private Attorneys General Act of 2004. Please be advised that Carmen Moreno 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.

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cc: Carmen Moreno
Walter L. Haines Esq.

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