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Attorneys for Plaintiff GABRIELA RIVERA DE CRUZ
 on behalf of herself and all other aggrieved employees.

Additional Counsel on Following Page

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

GABRIELA RIVERA DE CRUZ, and
 MARLENY MEJIA IRIAS, individually, on
 behalf of themselves, other aggrieved
 employees, and as a private attorney general on
 behalf of the State of California,

Plaintiffs,

v.

CARDENAS MARKETS LLC, a Delaware
 Limited Liability Company, MI PUEBLO
 NEWCO, LLC, a Delaware Limited Liability
 Company, and DOES 1 thru 50, inclusive,

Defendants.

ELECTRONICALLY FILED

Superior Court of California
 County of Alameda

10/19/2023

Chad Finke, Executive Officer / Clerk of the Court

By: D. Drew Deputy

Case No. 22CV005906

[Assigned to Hon. Judge James Reilly, Dept. 25]

**SECOND AMENDED REPRESENTATIVE
 ACTION COMPLAINT FOR:**

**1. Civil Penalties Pursuant to PAGA
 Labor Code §§ 2698, et seq.**

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on behalf of herself and all other aggrieved employees

1 Plaintiffs, GABRIELA RIVERA DE CRUZ (“Plaintiff De Cruz”) and MARLENY MEJIA
2 IRIAS (“Plaintiff Irias”) (collectively, hereinafter “Plaintiffs”) by and through their undersigned
3 attorneys, hereby bring this civil law enforcement action under the California Private Attorneys
4 General Act (“PAGA”) against Defendants CARDENAS MARKETS, LLC, a Delaware limited
5 liability company, MI PUEBLO NEWCO, LLC, a Delaware limited liability company; and DOES 1
6 to 10 (hereinafter referred to as “Defendants”). Plaintiffs are informed and believe, and on the basis
7 of that information allege, as follows:

8 **NATURE OF THE CASE**

9 1. This is a law enforcement and representative action under the Private Attorneys
10 General Act of the California Labor Code, arising from Defendants’ failure to provide aggrieved
11 employees with all wages, meal and rest periods in compliance with the applicable wage order and/or
12 the California Labor Code, by failing to provide suitable seating, by failing to reimburse business
13 expenses, by failing to pay accrued vacation wages, failing to provide COVID-19 supplemental sick
14 leave, and by failing to comply with the applicable wage order and/or the Labor Code in regards to
15 the payment of wages.

16 2. MI PUEBLO NEWCO, LLC was a California grocery chain based in San Jose,
17 California, that operated approximately 22 locations in Northern California. In 2017, CARDENAS
18 MARKETS LLC merged with MI PUEBLO NEWCO, LLC. CARDENAS MARKETS LLC is based
19 in Ontario California and operates approximately 56 stores across California. On January 1, 2021,
20 CARDENAS MARKETS LLC acquired MI PUEBLO NEWCO LLC. At all relevant times,
21 Defendants issued and maintained uniform, standardized scheduling and timekeeping practices and
22 procedures for all non-exempt, hourly paid employees in California, including Plaintiffs and others
23 similarly situated, regardless of their location or position.

24 3. Defendants have maintained practices across its locations which have failed and
25 continue to fail to pay Plaintiffs and aggrieved employees all wages. Specifically, Defendants have a
26 company-wide policy of discouraging Plaintiffs and aggrieved employees from recording hours
27 worked and assigning very heavy workloads. This has resulted in Defendants’ failure to pay overtime
28 wages to Plaintiffs and aggrieved employees

1 4. Further, as a result of Defendants limiting the amount of overtime employees could
2 accrue, coupled with understaffing and heavy workloads, Plaintiffs and aggrieved employees were
3 forced to work off-the-clock.

4 5. Defendants' failure to properly staff its facilities and practice of assigning heavy
5 workloads has also resulted in a lack of meal period and rest period coverage and prevented Plaintiffs
6 and aggrieved employees from taking compliant meal and rest periods.

7 6. In light of the foregoing, Defendants failed to provide Plaintiffs and aggrieved
8 employees with compliant wage statements and failed to timely pay final wages upon termination or
9 separation from employment.

10 7. Defendants also had a practice of failing to pay all accrued vacation and provide
11 supplemental COVID-19 paid sick leave pay.

12 8. Further, Defendants failed to provide Plaintiffs and aggrieved employees suitable
13 seating, although the nature of the work could reasonably be accomplished from a seated position.

14 9. Defendants also failed to reimburse Plaintiffs and aggrieved employees for business
15 related expenses, including but not limited to face masks which were required for the job.

16 10. Plaintiffs, on behalf of themselves and all other aggrieved employees, seek civil
17 penalties under PAGA based on Defendants' Labor Code violations.

18 11. Labor Code §§ 2698 et seq. grants California employees the right to bring a civil action
19 for violation of any provision of the Labor Code on behalf of themselves and other current and former
20 employees to recover civil penalties. In passing PAGA, the California Legislature "declared that
21 adequate financing of labor law enforcement was necessary to achieve maximum compliance with
22 state labor law, that staffing levels for labor law enforcement agencies had declined and were unlikely
23 to keep pace with future growth of the labor market, and that it was therefore in the public interest to
24 allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor
25 Code violations." *Arias v. Super Ct.* (2009) 46 Cal. 4th 969, 980.

26 12. PAGA permits aggrieved employees to collect the civil penalties authorized by law
27 and normally collected by the Labor and Workforce Development Agency ("LWDA") or any of its
28 departments or division. *See* Lab. Code § 2699(a). However, because the action is brought on behalf

1 of the state, 75% of the fees collected are distributed to the LWDA for the enforcement of labor laws
2 and for the education of employers and employees. The remaining 25% is shared between aggrieved
3 employees. See Lab. Code § 2699(i).

4 13. PAGA provides that any civil penalty assessed and collected by the LWDA for
5 violation of applicable provisions of the California Labor Code may, as an alternative, be recovered
6 through a civil action brought by an aggrieved employee on behalf of herself or himself and other
7 current or former employees pursuant to procedure outlined in California Labor Code § 2699.3.

8 14. Pursuant to Labor Code § 2699.3(a)(1)(A), before commencing a civil action, an
9 aggrieved employee must first give notice by online filing with the LWDA and by certified mail to
10 the employer of the alleged violations, including facts and theories to support the allegations. If the
11 LWDA fails to investigate the alleged violations within 65 calendar days of the date of the notice, the
12 aggrieved employee may then file a civil action to seek penalties.

13 15. On January 24, 2022, Plaintiff De Cruz provided written notice of the violations alleged
14 in this Complaint, including the facts and theories supporting her allegations, to the LWDA via online
15 submission, with a certified copy mailed to Defendants. Accordingly, Plaintiff De Cruz has satisfied
16 the administrative prerequisites under California Labor Code section 2699.3(a) to recover civil
17 penalties against Defendants for violations of California Labor Code identified in this Complaint.

18 16. On May 6, 2022, Plaintiff Irias provided written notice of the violations alleged in this
19 Complaint, including the facts and theories supporting her allegations, to the LWDA via online
20 submission, with a certified copy mailed to Defendants. Accordingly, Plaintiff Irias has satisfied the
21 administrative prerequisites under California Labor Code section 2699.3(a) to recover civil penalties
22 against Defendants for violations of California Labor Code identified in this Complaint. Attached
23 hereto as Exhibit 1 and incorporated by reference is Plaintiff Irias' May 6, 2022 PAGA Notice.

24 17. Plaintiffs on behalf of themselves and all others similarly situated, also request
25 reasonable attorneys' fees and costs pursuant to, inter alia, California Labor Code § 2699 (g).

26 **PARTIES**

27 18. Plaintiff, Gabriela Rivera de Cruz is an individual over the age of eighteen (18) and is
28 now, and/or at all relevant times mentioned in this Complaint was, a resident and domiciliary of the

1 State of California. During the relevant time period, Plaintiff De Cruz worked for Defendants in
2 Hayward, California from approximately October 3, 2014 through approximately October 13, 2021.
3 Most recently, Plaintiff worked as a baker and earned approximately \$18.25 per hour.

4 19. Plaintiff, Marleny Mejia Irias is an individual over the age of eighteen (18) and is now,
5 and/or at all relevant times mentioned in this Complaint was, a resident and domiciliary of the State
6 of California. During the relevant time period, Plaintiff Irias worked for Defendants in Alameda
7 County, California.

8 20. Plaintiffs are informed and believe, and based thereon allege, that Defendants Mi
9 Pueblo Newco LLC and Cardenas Markets LLC are Delaware limited liability companies. Plaintiffs
10 are further informed and believe that at all times relevant hereto, Defendants have transacted, and
11 continue to transact, business throughout the State of California.

12 21. Plaintiffs are informed and believe, and based upon such information and belief allege,
13 that Defendants are, now and/or at all times mentioned in this Complaint were in some manner legally
14 responsible for the events, happenings and circumstances alleged in this Complaint.

15 22. Plaintiffs are further informed and believe, and based upon such information and belief
16 allege, that at all times herein mentioned, Defendants proximately caused Plaintiffs, all other
17 aggrieved employees and the general public to be subjected to the unlawful practices, wrongs,
18 complaints, injuries and/or damages alleged in this Complaint.

19 23. Plaintiffs are informed and believe and based thereon allege that at all times herein
20 mentioned Defendants and DOES 1 through 10, are and were corporations, business entities,
21 individuals, and partnerships, licensed to do business and actually doing business in the State of
22 California.

23 24. Plaintiffs do not know the true names or capacities, whether individual, partner or
24 corporate, of the Defendants sued herein as DOES 1 through 10, inclusive, and for that reason, said
25 Defendants are sued under such fictitious names, and Plaintiffs pray for leave to amend this complaint
26 when the true names and capacities are known. Plaintiffs are informed and believe and based thereon
27 allege that each of said fictitious Defendants were responsible in some way for the matters alleged
28 herein and proximately caused Plaintiffs and members of the general public and aggrieved employees

1 to be subject to the illegal employment practices, wrongs and injuries complained of herein.

2 25. At all times herein mentioned, each of said Defendants participated in the doing of the
3 acts hereinafter alleged to have been done by the named Defendants; and furthermore, the Defendants,
4 and each of them, were the agents, servants and employees of each of the other Defendants, as well as
5 the agents of all Defendants, and at all times herein mentioned, were acting within the course and
6 scope of said agency and employment.

7 26. Plaintiffs are informed and believe and based thereon allege that at all times material
8 hereto, each of the Defendants named herein were the agent, employee, alter ego and/or joint venturer
9 of, or working in concert with each of the other co-Defendants and were acting within the course and
10 scope of such agency, employment, joint venture, or concerted activity. To the extent said acts,
11 conduct, and omissions were perpetrated by certain Defendants, each of the remaining Defendants
12 confirmed and ratified said acts, conduct, and omissions of the acting Defendants.

13 27. At all times herein mentioned, Defendants, and each of them, were members of, and
14 engaged in, a joint venture, partnership and common enterprise, and acting within the course and scope
15 of, and in pursuance of, said joint venture, partnership and common enterprise.

16 28. At all times herein mentioned, the acts and omissions of various Defendants, and each
17 of them, concurred and contributed to the various acts and omissions of each and all of the other
18 Defendants in proximately causing the injuries and damages as herein alleged. At all times herein
19 mentioned, Defendants, and each of them, ratified each and every act or omission complained of
20 herein. At all times herein mentioned, the Defendants, and each of them, aided and abetted the acts
21 and omissions of each and all of the other Defendants in proximately causing the damages as herein
22 alleged.

23 **JURISDICTION AND VENUE**

24 29. The Court has jurisdiction over this representative action pursuant to article 6, section
25 10 of the California Constitution and Code of Civil Procedure section 410.10.

26 30. The Court also has jurisdiction over Plaintiffs' and aggrieved employees' claims for
27 penalties pursuant to the Private Attorneys General Act of 2004, Labor Code sections 2698-99, as well
28 as pursuant to the applicable provisions.

31. The Court has jurisdiction over Defendants because they are authorized to do business in the State of California and are registered with the California Secretary of State. Defendants do sufficient business with sufficient minimum contacts in California, and/or otherwise intentionally avails itself of the California market through the advertising, marketing and sale of goods and services, to render the exercise of jurisdiction over Defendants by the California court consistent with traditional notions of fair play and substantial justice.

32. Venue is proper in Alameda County because the acts which give rise to this litigation occurred in this county and because Defendants have employed aggrieved employees in this county and transacts business in this county.

FACTUAL ALLEGATIONS

33. Plaintiffs incorporate all preceding paragraphs as though fully set forth herein.

Defendants' Failure to Pay Overtime Wages

34. During the Relevant Time Period, upon information and belief, Defendants had, and continue to have, a company-wide policy of discouraging and impeding Plaintiffs and aggrieved employees from recording hours worked that were outside of their scheduled shifts in order to limit the amount of overtime employees could accrue. On information and belief, this policy of limiting overtime, coupled with Defendants' policy and/or practice of understaffing and assignment of heavy workloads, led Plaintiffs and aggrieved employees to work off-the-clock before and after their scheduled shift times. For example, prior to almost every shift, Plaintiffs were required to arrive early and spend 2-3 minutes walking to break room to clock in.

35. Moreover, Defendants' company-wide policy and/or practice of understaffing its locations while assigning heavy workloads, resulted in a failure to provide Plaintiffs and aggrieved employees with adequate meal period coverage. Defendants also failed to adhere to a schedule of meal periods, which further caused Plaintiffs and aggrieved employees to not be relieved of their duties for compliant meal periods. As a result, Plaintiffs and aggrieved employees missed or had meal periods interrupted in order to complete their assigned tasks. Consequently, Plaintiffs and aggrieved employees performed work during meal periods for which they were not paid. Further, on information and belief, because Defendants frowned upon employees accruing meal period penalties, employees

1 were required to continue working after clocking out for their meal periods. Thus, Plaintiffs and
2 aggrieved employees performed work during meal periods for which they were not paid. Defendants
3 knew or should have known that as a result of these company-wide practices and/or policies, Plaintiffs
4 and aggrieved employees were performing assigned duties off-the-clock during meal periods, and
5 were suffered or permitted to perform work for which they were not paid. Because Plaintiffs and
6 aggrieved employees worked shifts of eight (8) hours a day or more or forty (40) hours a week or
7 more, some of this off-the-clock work qualified for overtime premium pay.

8 36. Therefore, Plaintiffs and aggrieved employees were not paid overtime wages for all of
9 the overtime hours they actually worked.

10 ***Defendants' Failure to Pay all Wages and Minimum Wages***

11 37. As stated above, during the relevant time period, as a result of Defendants' policy of
12 limiting the amount of overtime employees could accrue, coupled with understaffing and heavy
13 workloads, Plaintiffs and aggrieved employees were forced to work off-the-clock to complete their
14 work-related tasks. Moreover, due to Defendants' policies and/or practices of understaffing while
15 assigning of heavy workloads, and failing to adhere to a schedule of meal periods, Plaintiff and
16 aggrieved employees were forced to forego meal periods, have their meal periods interrupted, and/or
17 were otherwise not relieved of all duties during meal periods.

18 38. Further, as stated, in order to prevent employees from accruing meal period penalties,
19 upon information and belief, Plaintiffs and/or aggrieved employees would clock out before the fifth
20 hour worked and continue working to reflect compliant meal periods, regardless of whether they had
21 received a compliant meal period. Thus, Defendants did not pay at least minimum wages for all hours
22 worked by Plaintiffs and aggrieved employees. To the extent that these off-the-clock hours did not
23 qualify for overtime premium payment, Defendants did not pay at least minimum wages for those
24 hours worked off-the-clock.

25 ***Failure to Provide Compliant Meal Periods***

26 39. As stated above, Defendants had, and continue to have, a company-wide policy and/or
27 practice of understaffing, which, combined with the assignment of heavy workloads and failing to
28 adhere to a schedule of meal periods, has resulted in a lack of meal period coverage and prevented

1 Plaintiffs and aggrieved employees from taking all timely, uninterrupted meal periods to which they
2 were entitled. As a result, Plaintiffs and aggrieved employees were forced to work in excess of five
3 (5) hours before taking a meal period and, at times, had their meal periods interrupted, and/or had to
4 forgo their meal periods altogether.

5 40. For example, on several occasions, Plaintiffs were unable to take their meal period until
6 after their sixth hour after the start of their scheduled shift. Moreover, upon information and belief,
7 because Defendants frowned upon employees accruing meal period penalties, Defendants would
8 require Plaintiffs and aggrieved employees to clock out but continue to work to reflect compliant meal
9 periods, regardless of whether they had received a compliant meal period, in order to strictly limit
10 meal penalties that would need to be paid by Defendants.

11 41. Additionally, Defendants did not provide Plaintiffs and aggrieved employees with all
12 second 30-minute meal periods on days that they worked in excess of ten (10) hours in one day.
13 Plaintiffs and aggrieved employees did not sign valid meal period waivers on days that they were
14 entitled to meal periods and were not relieved of all duties.

15 ***Defendants' Failure to Provide Compliant Rest Breaks***

16 42. During the relevant time period, Defendants regularly failed to authorize and permit
17 Plaintiffs and aggrieved employees to take a ten (10) minute rest period per each four (4) hour period
18 worked or major fraction thereof.

19 43. Specifically, Plaintiffs allege that Defendants never provided rest periods.

20 ***Defendants' Failure to Provide Compliant Wage Statements***

21 44. During the relevant time period, Defendants have knowingly and intentionally
22 provided Plaintiffs and aggrieved employees with uniform, incomplete, and inaccurate wage
23 statements. For example, Defendants issued uniform wage statements to Plaintiffs and aggrieved
24 employees that fail to correctly list: gross wages earned; total hours worked; net wages earned; and
25 all applicable hourly rates in effect during the pay period, including rates of pay for overtime wages
26 and/or meal and rest period premiums, and the corresponding number of hours worked at each hourly
27 rate.

28 ///

1 45. Because Defendants did not record the time Plaintiffs and aggrieved employees spent
2 working off-the-clock and deducted time from their meal periods that were missed and/or interrupted
3 (and therefore time for which they should have been paid), Defendants did not list the correct amount
4 of gross wages and net wages earned by Plaintiffs and aggrieved employees in compliance with Labor
5 Code sections 226(a)(1) and 226(a)(5), respectively.

6 46. For the same reason, Defendants failed to accurately list the total number of hours
7 worked by Plaintiffs and aggrieved employees, and failed to list the applicable hourly rates of pay in
8 effect during the pay period and the corresponding accurate number of hours worked at each hourly
9 rate.

10 47. Because Defendants failed to provide the correct net and gross wages earned,
11 applicable rates of pay, and number of total hours worked on wage statements, Plaintiffs and aggrieved
12 employees have been prevented from verifying, solely from information on the wage statements
13 themselves, that they were paid correctly and in full. Instead, Plaintiffs and aggrieved employees have
14 had to look to sources outside of the wage statements themselves and reconstruct time records to
15 determine whether in fact they were paid correctly and the extent of underpayment, thereby causing
16 them injury.

17 ***Defendants' Failure to Timely Pay Final Wage Upon Termination***

18 48. On information and belief, Defendants have a company-wide practice or policy of
19 paying departing employees their final wages on the next regular pay cycle, instead of adhering to the
20 time requirements set forth in Labor Code sections 201 and 202.

21 49. In addition, Defendants willfully failed to pay Plaintiffs and aggrieved employees who
22 are no longer employed by Defendants the earned and unpaid wages set forth above, including but not
23 limited to, overtime wages, minimum wages, and/or meal rest period premiums, either at the time of
24 discharge, or within seventy-two (72) hours of their leaving Defendants' employ.

25 50. Specifically, Plaintiff De Cruz alleges that she did not receive a final pay check,
26 although a statement dated 10/15/21 was created indicating that she was owed at least \$826.64, plus
27 missed wages, and accrued vacation wages. Moreover, Defendants failed to pay Plaintiff De Cruz for
28 the seven hours she worked on the day she quit on 10/12/21.

1 ***Defendants' Failure to Provide Suitable Seating***

2 51. Defendants' California stores' areas are generally similar in their layout and design and
3 there was, and continues to be, space behind the counters to allow for the presence and use of a seat
4 or stool by Plaintiffs and aggrieved employees (with reasonable or no modification to these work
5 areas) during the performance of their work duties. Defendants could provide Plaintiffs and aggrieved
6 employees with a seat or stool at the counters, but instead denies them seating and forces aggrieved
7 employees to stand throughout the day. Plaintiffs and aggrieved employees spent a substantial portion
8 of their day behind the counters, regardless of their actual job title or description. The nature of the
9 work of an employee performing their job duties can reasonably be accomplished from a seated
10 position. However, Defendants systematically, and on a company-wide basis, did not provide seats or
11 stools at or near counters, forcing Plaintiffs and aggrieved employees to stand throughout their work
12 shifts.

13 52. Defendants did not provide Plaintiffs and aggrieved employees with seats or stools in
14 reasonable proximity to their work areas to allow them to use seats when it would not interfere with
15 the performance of their duties for times when they were not engaged in active duties that require
16 standing. In other words, to the extent Plaintiffs and aggrieved employees engaged in duties in which
17 the nature of the work required standing, Defendants denied them the use of seats nearby during lulls
18 in their work duties. Moreover, Defendants did not inform Plaintiffs and aggrieved employees of their
19 rights to a seat or stool under California law.

20 ***Defendants' Failure to Reimburse Business Expenses***

21 53. During the relevant time period, Defendants had a company-wide policy of requiring
22 Plaintiff and aggrieved employees to purchase their own masks and gloves which were necessary for
23 their jobs, but Defendants failed to reimburse them for these costs.

24 54. Although Defendants required Plaintiffs and aggrieved employees to utilize masks and
25 gloves to carry out their work-related duties, Defendants failed to reimburse them for this cost.
26 Defendants could have provided Plaintiffs and aggrieved employees with the actual tools for use on
27 the job, such as supplied masks and gloves. Or, Defendants could have reimbursed employees for the
28 costs of their masks and gloves or provided a PPE allowance. Instead, Defendants passed these

operating costs off onto Plaintiffs and aggrieved employees.

Defendants' Failure to Pay Accrued Vacation Wages

55. Plaintiffs allege that Defendants failed to pay all accrued vacation compensation for the last pay period.

56. By way of example, at the time Plaintiff De Cruz separated from Defendants' employ she had accrued 45.59 hours of vacation pay, which was never paid out to her.

57. Labor Code section 227.3, prohibits employers from forfeiting payment of the vested vacation wages of their employees.

58. As a matter of uniform corporate policy, procedure and practice Defendants violated Labor Code section 227.3 by failing to pay Plaintiffs and aggrieved employees all vested vacation wages at the end of their employment. The uniform policy of not paying Plaintiffs and aggrieved employees vested vacation wages at the end of their employment resulted in a forfeiture of vested vacation wages in violation of Labor Code section 227.3.

Defendants' Failure to Provide Supplemental COVID-19 Pay

59. Defendants also breached the state mandate for COVID-19, as it did not provide pay for COVID-19 related time off, but rather required Plaintiffs and aggrieved employees to use sick pay or vacation pay to take a day off for the COVID-19 vaccine or illness.

Facts Regarding Willfulness

60. Plaintiffs are informed and believes, and based thereon alleges, that Defendants are and were advised by skilled lawyers, other professionals, employees with human resources background and advisors with knowledge of the requirements of California wage and hour laws and that at all relevant times, Defendants knew or should have known, that aggrieved employees, including Plaintiffs, were entitled to receive one hour of pay at the employee's regular rate of compensation for each day that a meal and/or rest period was not provided and were and are entitled to received pay for all hours worked, accurate itemized wage statements, and final pay in a timely manner.

Plaintiffs' Exhaustion of Administrative Remedies

61. Plaintiffs have complied with the procedures for bringing suit specified in Labor Code section 2699.3.

62. By letters dated January 24, 2022, and May 6, 2022, required notice was provided to Labor and Workforce Development Agency (“LWDA”) and Defendants, of the specific provisions of the Labor Code alleged to have been violated, including the facts and theories to support the alleged violations.

63. More than sixty-five (65) days have passed since the date the notice was mailed to Defendant and the LWDA, and the LWDA has not responded.

64. Plaintiffs incorporate by reference all the allegations contained in the May 6, 2022, Notice sent by Plaintiff Irias to the LWDA and Defendants.

FIRST CAUSE OF ACTION

Civil Penalties Pursuant to PAGA (Labor Code §§ 2698, et seq.)

(On Behalf of All Aggrieved Employees Against All Defendants)

65. Plaintiffs hereby re-allege, and incorporate by reference as though set fully forth herein, the allegations contained above.

66. Plaintiffs assert claims for civil penalties as representatives of the State of California, as authorized by the Private Attorneys General Act (“PAGA”), Labor Code section 2698, *et seq.*, and to the extent permitted by law, on behalf of herself and other aggrieved employees who work or worked for Defendants in California at any time beginning January 24, 2021, through the resolution of this action and who are classified by Defendants as non-exempt from the wage and hour provisions of the California Labor Code.

67. Plaintiffs allege that Defendants violated Labor Code §§ 200, 201, 202, 203, 204, 210, 226, 226.3, 226.7, 227.3, 248, 510, 512, 558, 1174, 1174.5, 1194, 1197, 1197.1, 1198, 1198.5, 1199, 2802 and IWC Wage Order No. 7-2001 for the reasons set forth herein and in the attached exhibit.

68. Plaintiffs are “aggrieved employee” within the meaning of Labor Code section 2699(c) and are proper representatives to bring a civil action on behalf of themselves and other current and former employees of Defendants pursuant to the procedures specified in Labor Code section 2699.3(a) because Plaintiffs were employed by Defendants and one or more Labor Code violations alleged herein was against them.

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1 69. Pursuant to Labor Code §§ 118.12, 1194, 1197 and 1198, Defendants are and were
2 required to compensate Plaintiffs and aggrieved employees for all hours worked upon reporting for
3 work at the appointed time stated by the employer. By failing to pay Plaintiffs and aggrieved
4 employees all minimum wages, Defendant has failed to comply with the Labor Code.

5 70. Pursuant to Labor Code § 510 and 1198 and the applicable Wage Order, Defendants
6 were required to pay Plaintiffs and aggrieved employees for all overtime worked at the correct rate,
7 however failed to do so as a result of requiring Plaintiffs and aggrieved employees to work off-the-
8 clock and by failing to provide compliant meal and rest periods.

9 71. Pursuant to Labor Code §§ 200, 226.7, 512 and the applicable Wage Order, Defendants
10 are required to provide Plaintiffs and aggrieved employees with a meal period of not less than 30
11 minutes after working five hours, and if an employer fails to provide a meal period, the employer shall
12 pay the employee one (1) hour of pay at the employee's regular rate of pay. Defendants have failed to
13 provide mandated meal periods and have not provided pay in lieu of such meal breaks.

14 72. Pursuant to Labor Code §§ 200, 226.7, 512 and the applicable Wage Order, Defendants
15 are required to provide Plaintiffs and aggrieved employees with a ten-minute rest break per each four
16 hours worked. As rest breaks were not provided, Defendants have failed to comply with the Labor
17 Code and applicable Wage Order.

18 73. Labor Code § 226 requires employers to make, keep and provide true, accurate and
19 complete employment records. Defendants have failed to comply with the Labor Code as it
20 intentionally provided Plaintiffs and aggrieved employees with uniform, incomplete, inaccurate wage
21 statements.

22 74. Labor Code § 2802 requires that employers reimburse employees for business related
23 expenses. Defendants failed to comply with section 2802 as it failed to reimburse Plaintiffs and
24 aggrieved employees for personal protective equipment expenses.

25 75. Defendants have failed to comply with Labor Code § 1198 by failing to provide
26 suitable seating to Plaintiffs and aggrieved employees.

27 76. Pursuant to California Labor Code §227.3, an employee who is terminated without
28 having taken off her vested vacation time, all vested vacation shall be paid to her as wages at his final

1 rate. Plaintiffs were not paid their accrued vacation hours at the time his employment was terminated,
2 and Defendants are thus in violation of California Labor Code §227.3.

3 77. California Labor Code § 248.2 require provide supplemental Covid-19 sick pay for
4 Covid-19-related time off. Defendants failed to comply Labor Code section 248 because it required
5 Plaintiffs and aggrieved employees to take their personal sick days and/or vacation days for COVID-
6 19 related time off and failed to provide state mandated COVID-19 supplemental sick pay.
7 Specifically, Plaintiff De Cruz contracted COVID-19 in March of 2021 and rather than complying
8 with the provisions set forth above, Defendants used 70.55 hours of Plaintiff's vacation hours and 48
9 hours of sick pay to cover her mandatory time away from work.

10 78. Defendants willfully and knowingly failed to pay Plaintiffs and aggrieved employees
11 all accrued compensation within 72 of separation of employ in violation of California Labor Code §
12 203.

13 79. Pursuant to Labor Code § 2699.3(a)(1)(A), before commencing a civil action, an
14 aggrieved employee must first give notice by online filing with the LWDA and by certified mail to
15 the employer of the alleged violations, including facts and theories to support the allegations. If the
16 LWDA fails to investigate the alleged violations within 65 calendar days of the date of the notice, the
17 aggrieved employee may then file a civil action to seek penalties.

18 80. On January 24, 2022, and May 6, 2022, Plaintiffs provided written notice of the
19 violations alleged in this Complaint, including the facts and theories supporting her allegations, to the
20 LWDA via online submission, with a certified copy mailed to Defendants. Accordingly, Plaintiffs
21 have satisfied the administrative prerequisites under California Labor Code Section 2699.3(a) to
22 recover civil penalties against Defendants for violations of California Labor Code identified in this
23 Complaint.

24 81. Plaintiffs and other aggrieved employees hereby seek civil penalties for the Labor Code
25 violations during the applicable limitations period described herein, in the following amounts:

- 26 a. For violations of California Labor Code sections 200, 203, 227.3, 510, 512,
27 516, 1197, 1194, 1198, 2802, 248, \$100 for each aggrieved employee per pay period
28 for the initial violation and \$200 for each aggrieved employee per pay period for

each subsequent violation. Cal. Labor Code § 2699(f);

- b. For violation of California Labor Code Section 226, \$250 per employee for an initial violation and one thousand per employee for each subsequent violation. Cal. Labor Code § 226.3.

82. Pursuant to California Labor Code Section 2699(g), Plaintiffs, on behalf of themselves and other aggrieved employees, are entitled to an award of reasonable attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and aggrieved employees pray for judgment as follows:

1. That the Court find that Defendants has been in violation of Labor Code §§ 200, 201, 202, 203, 204, 210, 226, 226.3, 226.7, 227.3, 248, 510, 512, 558, 1174, 1174.5, 1194, 1197, 1197.1, 1198, 1198.5, 1199, 2802 and IWC Wage Order No. 7-2001.
2. Prejudgment interest under Cal. Civ. C. § 3287, and other applicable law;
3. That the Court award to Plaintiffs and the Aggrieved Employees civil penalties as provided herein, including but not limited to Labor Code §§ 2699(a) and 2699(f);
4. That Plaintiffs and other Aggrieved Employees be awarded reasonable attorneys' fees and costs pursuant to Labor Code § 2699(g)(1), Code of Civil Procedure § 1021.5, and/or other applicable law;
5. Any and all applicable civil penalties, as provided by law; and
6. For such other and further relief as this Court deems just and proper.

DATED: October 19, 2023

BRADLEY/GROMBACHER, LLP
MAJARIAN LAW GROUP APC

By: 

Marcus Bradley, Esq.
Kiley Grombacher, Esq.
Lirit King, Esq.
Sahag Majarian, Esq.
Garen Majarian, Esq.
Attorneys for Plaintiff Gabriela Rivera de Cruz
and the aggrieved employees

1 DATED: October 19, 2023

WINSTON LAW GROUP, P.C.

2 By: David Winston
3 DAVID S. WINSTON
4 Attorneys for Plaintiff Marleny Mejia Irias
5 and the aggrieved employees
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Exhibit 1

WINSTON LAW GROUP, P.C.

1880 CENTURY PARK EAST SUITE 511 ♦ LOS ANGELES, CA 90067 ♦ (424) 288-4568

Attorneys

David Winston

*Indicates Of Counsel

Lior Barkodar*

May 6, 2022

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

Cardenas Markets LLC
2501 E. Guasti Road
Ontario, CA 91761

Mi Pueblo Newco, LLC
2501 E. Guasti Road
Ontario, CA 91761

*Re: Marleny Mejia Irias vs. Cardenas Markets LLC and Mi Pueblo Newco, LLC
and/or other dbas of the above identified entities and/or other names by which these
entities and/or businesses are known as Cardenas Markets LLC and Mi Pueblo
Newco, LLC - California Labor Code §2699 Penalties*

Gentlepersons:

This firm represents Marleny Mejia Irias (“Plaintiff” or “Ms. Mejia”) and a proposed group of current and former employees working for Defendants Cardenas Markets LLC and Mi Pueblo Newco, LLC and/or other dbas of the above identified entities and/or other names by which these entities and/or businesses are known as Cardenas Markets LLC and Mi Pueblo Newco, LLC (“Defendants”) in California for violations of California Labor Code §§ 200, 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1194, 1197, 1197.1, 1198, 1198.5, 1199, 2802 and IWC Wage Order No. 7-2001 and/or other applicable wage order.

- (1) all non-exempt, hourly employees who were employed by Cardenas Markets LLC or its predecessor, merged or related entities in California at any point from January 24, 2021 and continuing into the present. (“Cardenas Non-Exempt Aggrieved Employees”);
- (2) all non-exempt, hourly employees who were employed by Mi Pueblo Newco, LLC or its predecessor, merged or related entities in California at any point from January 24, 2021 and continuing into the present. (“Mi Pueblo Non-Exempt Aggrieved Employees”);

Collectively, aggrieved employee groups one (1) and (2) may be referred to as the “Non-Exempt Aggrieved Employees.”

- (3) all individuals who were employed by Cardenas Markets LLC or its predecessor, merged or related entities in California as a non-exempt, hourly employee or other similar position and who worked a shift of more than eight (8) hours in a day and/or forty (40) hours in a week during a pay period from January 24, 2021 and continuing into the present. (“Cardenas Overtime Aggrieved Employees”);
- (4) all individuals who were employed by Mi Pueblo Newco, LLC or its predecessor, merged or related entities in California as a non-exempt, hourly employee or other similar position and who worked a shift of more than eight (8) hours in a day and/or forty (40) hours in a week during a pay period from January 24, 2021 and continuing into the present. (“Mi Pueblo Overtime Aggrieved Employees”);
- (5) all individuals who were employed by Cardenas Markets LLC or its predecessor, merged or related entities for one or more pay periods in California as a non-exempt, hourly employee and who worked a shift of more than eight (8) hours in a day and/or forty (40) hours in a week during a period where they also received a non-discretionary bonus, incentive payment/pay, shift differential, hazard pay, and/or a payment under the pay codes “Special Pay,” “HP Earns,” “HPRRO,” “Premium Pay” pay codes from January 24, 2021 and continuing into the present; (“Cardenas Incentive Pay Overtime Aggrieved Employees”);
- (6) all individuals who were employed by Mi Pueblo Newco, LLC or its predecessor, merged or related entities for one or more pay periods in California as a non-exempt, hourly employee and who worked a shift of more than eight (8) hours in a day and/or forty (40) hours in a week during a period where they also received a non-discretionary bonus, incentive payment/pay, shift differential, hazard pay, and/or a payment under the pay codes “Special Pay,” “HP Earns,” “HPRRO,” “Premium Pay” pay codes from January 24, 2021 and continuing into the present; (“Mi Pueblo Incentive Pay Overtime Aggrieved Employees”);

Collectively, aggrieved employee groups three (3), four (4), five (5), and six (6) may be referred to as the “Overtime Aggrieved Employees.”

- (7) all individuals who were employed by Cardenas Markets LLC or its predecessor, merged or related entities. in California who worked one or more shifts of more than six (6) hours as a non-exempt, hourly employee or other similar position from January 24, 2021 and continuing into the present. (“Cardenas Meal Period Aggrieved Employees”);
- (8) all individuals who were employed by Mi Pueblo Newco, LLC or its predecessor, merged or related entities. in California who worked one or more shifts of more than six

(6) hours as a non-exempt, hourly employee or other similar position from January 24, 2021 and continuing into the present. (“Mi Pueblo Meal Period Aggrieved Employees”);

(9) All individuals who were employed by Cardenas Markets LLC or its predecessor, merged or related entities in California who were paid a meal and/or rest period premium within the same week that they also received a non-discretionary bonus, incentive payment/pay, and/or a payment under the “Special Pay,” “HP Earns,” “HPRRO,” “Premium Pay” pay codes from January 24, 2021 and continuing into the present. (“Cardenas Meal/Rest Period Premium Aggrieved Employees”);

(10) All individuals who were employed by Mi Pueblo Newco, LLC or its predecessor, merged or related entities in California who were paid a meal and/or rest period premium within the same week that they also received a non-discretionary bonus, incentive payment/pay, and/or a payment under the “Special Pay,” “HP Earns,” “HPRRO,” “Premium Pay” pay codes from January 24, 2021 and continuing into the present. (“Mi Pueblo Meal/Rest Period Premium Aggrieved Employees”);

Collectively, aggrieved employee groups seven (7), eight (8), nine (9), and ten (10) may be referred to as the “Meal Period Aggrieved Employees.”

(11) all individuals who were employed by Cardenas Markets LLC or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from January 24, 2021 and continuing into the present. (“Cardenas Rest Period Aggrieved Employee”);

(12) all individuals who were employed by Mi Pueblo Newco, LLC or its predecessor, merged or related entities in California as a non-exempt hourly employee, or other similar position, who worked one or more shifts of more than four (4) hours in length or major fraction thereof from January 24, 2021 and continuing into the present. (“Mi Pueblo Rest Period Aggrieved Employee”);

Collectively, aggrieved employee groups nine (9), ten (10), eleven (11), and twelve (12) may be referred to as the “Rest Period Aggrieved Employees.”

(13) all individuals who were employed by Cardenas Markets LLC or its predecessor, merged or related entities for one or more pay periods in California as a non-exempt, hourly employee and whose employment concluded at any time between January 24, 2021 and continuing into the present. (“Cardenas General Late Payment Aggrieved

Employees”);

(14) all individuals who were employed by Mi Pueblo Newco, LLC or its predecessor, merged or related entities for one or more pay periods in California as a non-exempt, hourly employee and whose employment concluded at any time between January 24, 2021 and continuing into the present. (“Mi Pueblo General Late Payment Aggrieved Employees”);

(15) all individuals who were employed by Cardenas Markets LLC or its predecessor, merged or related entities for one or more pay periods in California, who received sick pay, and whose employment concluded at any time between January 24, 2021 and continuing into the present; (“Cardenas Sick Pay Late Payment Aggrieved Employee”);

(16) all individuals who were employed by Mi Pueblo Newco, LLC or its predecessor, merged or related entities for one or more pay periods in California, who received sick pay, and whose employment concluded at any time between January 24, 2021 and continuing into the present; (“Mi Pueblo Sick Pay Late Payment Aggrieved Employee”);

Collectively, aggrieved employee groups thirteen (13), fourteen (14), fifteen (15), and sixteen (16) may be referred to as the “Late Payment Aggrieved Employees.”

These groups may all collectively be referred to herein as aggrieved employees and/or all aggrieved employees where appropriate. The purpose of this letter is to comply with the Private Attorneys General Act of 2004, pursuant to California Labor Code § 2698 *et seq.* We herein set forth some of the facts and theories of California Labor Code violations which we allege Defendant engaged in with respect to our client and all aggrieved employees.¹ Specifically, Plaintiff contends that Defendant required and/or suffered and permitted Plaintiff and the other aggrieved employees to perform work off-the-clock without compensation including, but not limited to, the time associated with temperature check/health screenings, failed to pay overtime wages, including, but not limited to, the time associated with temperature checks/screenings and by omitting non-discretionary bonuses/incentive payments and hazard pay (including, but not limited to Oakland’s local grocery store employee hazard pay ordinance) when calculating and paying overtime wages, misclassifying overtime hours as regular hours due to the temperature checks/health screenings, failed to provide timely first meal periods within the first five (5) hours of an employees’ shift and failing to authorize and permit aggrieved employees who worked more than five (5) hours, but less than six (6) hours a meal period, incorrectly paid meal period premiums at an

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

employee's hourly base rate instead of at their regular rate of compensation, failed to authorize and permit lawful rest periods, incorrectly paid rest period premiums at an employee's hourly base rate instead of at their regular rate of compensation, failed to provide accurate and/or lawful itemized wage statements that complied with Labor Code section 226 (including by including non-time related entries related to various pay codes (to the extent it is not based on time) in the total hours worked and/or including the wrong amount of hours on wage statements and derivative violations, paid sick pay at the incorrect rate by failing to include non-hourly base rate compensation, failed to timely pay all wages owed during employment, and failed to timely pay all wages owed upon separation.

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE §§ 1194, 1197, 1197.1, 1198 AND IWC WAGE ORDER NO. 7-2001 OR OTHER APPLICABLE WAGE ORDERS

Labor Code § 1197 states the California requirement that employees must be paid at least the minimum wage fixed by the Commission or by any applicable state or local law, and any payment of less than the minimum wage is unlawful. Similarly, Labor Code § 1194 entitles "any employee receiving less than the legal minimum wage...to recover in a civil action the unpaid balance of the full amount of this minimum wage." IWC Wage Order 7-2001 and other applicable wage orders obligate employers to pay each employee minimum wages for all hours worked.

These minimum wage standards apply to each hour employees worked for which they were not paid. Therefore, an employer's failure to pay for any particular hour of time worked by an employee is unlawful, even if averaging an employee's total pay over all hours worked, paid or not, results in an average hourly wage above minimum wage. *Armenta*, 135 Cal.App.4th at 324.

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

Defendants engaged in a common policy and practice for at least part of the time since the onset of the COVID-19 pandemic of requiring Plaintiff and the aggrieved employees to undergo temperature checks and/or other medical screenings prior to the start of their shift while off-the-clock for which they did not receive compensation in violation of Labor Code §§ 1194 and 510. This includes, but is not limited, to requiring Plaintiff and the aggrieved employees to fill out a questionnaire prior to clocking-in for the day. Defendants also required Plaintiff and the other aggrieved employees to undergo security checks whenever they purchased an item from Defendants and provide a proof of receipt while on meal/rest periods. *Barrett Business Services, Inc.*, 29 Cal. App. 5th 778, 808 (2018) (affirming the award of PAGA penalties for violations of Labor Code § 512 where employees meal periods were interrupted and remanding to the trial court the amount of

PAGA penalties that should be awarded based upon the minimum wage violations associated with the same interrupted meal periods under Labor Code section 1194.).

Defendants' conduct in failing to pay Plaintiff and the aggrieved employees for such time was willful within the meaning of the California Labor Code. The Department of Industrial Relations issued guidance on July 28, 2020 advising that employers that they must compensate employees for the time associated with medical checks before shifts (including temperature checks):

Medical Checks

9. Q: Must my employer pay me for time spent at my employer's worksite completing certain medical checks (including temperature checks) before beginning a shift?

A: Yes. Employers must pay workers for all "hours worked," including time that a worker is under the control of the employer. Employers that require their workers to complete a medical check in order to begin a shift, even if it is recommended under public health orders, must compensate workers for that time worked.

The term "hours worked" means the time during which a worker is subject to the control of an employer, and includes all the time the worker is suffered or permitted to work, whether or not required to do so. Under this definition, one way to determine whether time a worker spends performing a task is compensable—that is, whether it is time "worked"—is whether the employer exercised control over the worker by requiring the worker to perform that task.

If an employer requires that all workers perform a medical check (such as a temperature check) onsite before beginning a shift, the time completing the medical check, including any time waiting in line, would constitute time worked. This requirement applies even if such tasks were performed pursuant to a state or local public health guideline, because the check is done at the request, and thus under the control, of the employer.

10. Q: Is my employer required to pay workers for required medical checks (including temperature checks) at the employer's worksite, even if the medical checks take very little time?

A: Yes, an employer is required to compensate for all hours worked in California even if a required task takes only a small amount of time. There is no "de minimis" rule under California law. Therefore, if an employer requires medical checks (such as a temperature check) at the employer's worksite, the employer must compensate a worker for that time worked, even if the temperature check takes only a small amount of time to complete and record.

Defendants' conduct in requiring Plaintiff and the other aggrieved employees to undergo temperature checks wellness screening prior to the start of their shifts as well as security checks (while on breaks or if they purchased an item from the store), violated Labor Code §§ 1194, 1197, 1197.1, and 1198.

Defendants are also legally responsible for ensuring the accuracy of its time records and cannot rely upon time records that it knew were false and/or statements by employees as the California Supreme Court explained. *Donohue v. Amn Servs.*, 11 Cal.5th 58, 81 (2021) (“It is the employer's duty to maintain accurate time records” and that the employer could not rely upon certifications from employees where the information provided to the employees was inaccurate and/or incomplete); *accord Feaver v. Kaiser Found. Health Plan, Inc.*, No. 15-cv-00890-EMC, 2016 U.S. Dist. LEXIS 9778, at *8 (N.D. Cal. Jan. 27, 2016) (conditionally certifying a class under the Fair Labor Standards Act where the employees could show that they received and/or sent emails off-the-clock despite the fact that the employer had a policy requiring all time to be recorded.); *Troester v. Starbucks Corp.*, 5 Cal.5th 829 (2018). As such Defendants were obligated to maintain accurate time records of the time spent waiting in line for temperature checks, the time associated with temperature checks, and their failure to do so resulted in the underpayment of Plaintiff and the aggrieved employees.

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

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE §§ 510, 558, 1197, 1197.1, and 1198 AS WELL AS WAGE ORDER NOS. 7-2001 AND OTHER APPLICABLE WAGE ORDERS

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

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

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

As discussed in detail above, Defendants engaged in a common policy and practice for at least part of the time since the onset of the COVID-19 pandemic of requiring Plaintiff and the aggrieved employees to undergo temperature checks and/or other medical screenings and answering questionnaires prior to the start of their shift while off-the-clock for which they did not receive compensation in violation of Labor Code §§ 1194 and 510. Defendants also required Plaintiff and the other aggrieved employees to undergo security checks and verify their receipts/purchases if they purchased food to consume during a break and/or before the start of their shift regardless of whether or not they received a discount. Due to the application of this policy, Plaintiff and the other aggrieved employees were never relieved of all duties during their meal/rest periods.

Since Plaintiff and many of the aggrieved employees later worked eight (8) hours aside from the off-the-clock time associated with temperature checks/medical screenings or security checks, many of the hours worked by Plaintiff and the aggrieved employees were misclassified as regular hours instead of overtime hours resulting in the underpayment of overtime wages in addition to the failure to pay for all hours worked. Such conduct violated Labor Code § 510.

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

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

3 *Cf. Alvarado v. Dart Container Corp. of California*, 4 Cal.5th 542, 568 (2018) (explaining that for the purposes of calculating the per hour value of an employer’s flat sum attendance bonuses that California, unlike the FLSA, uses the non-overtime hours worked during the pay period as the divisor instead of all hours worked during the pay

FLSA, the regular rate of pay includes all forms of remuneration. *See* 29 U.S.C. § 207(e); *Huntington Mem'l*, 131 Cal. App. 4th at 90 (holding that shift differential must be included in the regular rate when calculating and paying overtime).

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

Further, the U.S. Department of Labor has routinely taken the position that hazard pay must be included when calculating and paying overtime wages to employees:



Available at <https://www.dol.gov/general/topic/wages/hazardpay>

Here, Defendants paid Plaintiff and the other aggrieved employees with non-discretionary bonuses, incentive payments, hazard pay and other compensation that was required to be included within the regular rate (including but not limited to compensation under they pay codes “Special Pay,” “HP Earns,” “HPRRO,” “Premium Pay”), but failed to include such compensation when calculating and paying overtime wages. For instance for the pay period of May 24, 2021 to May 30, 2021, Plaintiff earned an additional \$5.00 per hour in Hazard Pay—believed to include, but not limited to, hazard pay under Oakland’s Grocery Worker Hazard Pay Emergency Ordinance—or other properly includable compensation under the pay code “HP Earns,” but Defendants failed to include such compensation entirely when calculating and paying her overtime wages:

Earnings	rate	hours	this period	year to date
Regular	15.5000	39.87	617.99	12,530.20
Overtime	23.2500	.07	1.63	45.52
HP Earns	5.0000	39.93	199.65	3,129.45
HPRRO			0.60	8.77
MealPremium				15.05
Sick Pay				248.00
Vacation				86.99
Gross Pay			\$819.87	16,063.98

In addition, for the pay period of November 22, 2021 to November 28, 2021, Plaintiff earned \$43.63 in undefined premium pay, but Defendants failed to include this undefined and necessarily includable “premium pay” when calculating and paying overtime wages in violation of Labor Code § 510:

Earnings	rate	hours	this period	year to date
Regular	15.5000	31.82	493.21	24,516.71
Overtime	23.2500	.02	0.47	159.95
Holiday-Work	23.2500	7.85	182.51	182.51
Premium Pay			43.63	43.63
HP Earns				3,327.90
HPRRO				9.29
MealPremium				61.55
PaidSickLeave				744.00
Sick Pay				596.75
Vacation				86.99
Gross Pay			\$719.82	29,729.28

Instead of including all required compensation when calculating and paying overtime wages, Defendants instead improperly paid overtime wages only at one and one-half times Plaintiff and the aggrieved employees' regular hourly base rate instead of at one and one-half time their regular rate of pay. In other words, Defendants improperly failed to include shift differentials, non-discretionary bonuses, incentive payments, hazard pay and pay under the pay codes "Special Pay," "HP Earns," "HPRRO," "Premium Pay" when calculating and paying overtime wages.

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

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

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE §§ 226.7, 512, 558, and 1198 AS WELL AS IWC WAGE ORDER NO. 7-2001 AND OTHER APPLICABLE WAGE ORDERS

Labor Code § 512 requires employers to provide employees with thirty (30) minute uninterrupted and duty-free meal period within the first five (5) hours of work. Moreover, an employee who works more than ten (10) hours per day is entitled to receive a second thirty (30) minute uninterrupted and duty-free meal period. Pursuant to Labor Code § 512, an employer may

not employ an employee for a work period of more than ten (10) hours, without providing the employee with a second meal period of not less than thirty (30) minutes. Moreover, the second meal period may not be waived if the total hours worked is more than twelve (12) hours.

Similarly, IWC Wage Order No. 7-2001 and other applicable wage orders prohibit an employer from “employ[ing] any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes. IWC Wage Order No. 7-2001 and other applicable wage orders further obligates employers to provide an employee to “pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each workday that the meal period is not provided. Labor Code section 1198 prohibits an employer from requiring an employee to work beyond the “standard conditions of labor fixed by the commission...or under conditions of labor prohibited by the order.”

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

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

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

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

In *Alberts v. Aurora Behavioral Health Care*, 241 Cal. App. 4th 388, 410 (2015), the California Court of Appeal emphatically held that a meal period policy must specifically advise employees of the proper timing of meal periods. In *Alberts*, the meal break policy stated employees are entitled to “an unpaid thirty-minute break for a meal period, approximately half way between the beginning and ending of the employee’s shift.” *Id.* The court, in accordance with *Brinker*, found the defendant’s meal break policy violated California law because it did not specify “that a meal break be provided during the first five hours of an employee’s shift.” *Id.* (citing *Brinker, supra*, 53

Cal.4th at 1048–1049.⁴ The California Supreme Court recently held in *Donohue v. Amn Servs.*, No. S253677, 2021 Cal. LEXIS 1294, at *30 (Feb. 25, 2021) that “time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations.” In order to defeat this presumption, an employer must show not only that it advised employees “of his or her legal right to take a meal period and has knowingly and voluntarily decided not to take the meal period.” *Id.* at *33 This presumption applies not only to missed meal periods, but also “to records showing short and delayed meal periods as well.” *Id.* at *34.

Moreover, an employee who is not advised of their to receive proper meal periods cannot waive their meal period. *Brinker* 53 Cal. 4th at 1033 (“No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it.”); *Bradley*, 211 Cal.App.4th at 1151 (“an employer is obligated to provide the rest and meal breaks, and if an employer does not do so, the fact that an employee did not take the break cannot reasonably be considered a waiver.”). Similarly, recently in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 528 (2018), the California Court of Appeal affirmed a judgment in favor of employees who had signed first meal period waivers and did not take meal periods by the 5th hour when they were scheduled to work less than six (6) hours, but ultimately worked 6.01 hours or more. On these occasions, the employees did not know that they were entitled to take a timely meal period at the fifth hour and in fact were told that they were not. Accordingly, on such occasions the aggrieved employees were denied an opportunity to take a timely first meal period. *Carrington*, 30 Cal. App. 5th at 528.

Here, Defendants failed to authorize and permit Plaintiff and the other aggrieved employees to receive lawful meal periods, failed to advise them of their right to such meal periods, failed to authorize and permit them to take timely first meal periods, and failed to authorize and permit employees to take 30-minute meal periods on occasion. Defendants’ meal period policies and practices also disincentivized and discouraged Plaintiff and the other aggrieved employees from taking timely first meal periods within the first five (5) hours of their shift. Defendants’ understaffing policies and practices also pressured, coerced, and forced employees to take untimely first meal periods and/or forgo meal periods due to a lack of sufficient coverage. In addition, Defendants were aware of their obligation to provide timely first meal periods, but intentionally manipulated Plaintiff and the other aggrieved employees’ time entries—in violation of Labor Code sections 226.7, 512, 1174, and 1174.5—to show that they received a timely meal period even

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

though they did not receive a timely meal period. Defendants' and its supervisory employees referred to this policy and practice as correcting or fixing their time entries/hours. Specifically, Plaintiff was told not to punch out for these meal periods because it was already too late. Although this could happen at any point in time, this happened more frequently when Defendants had long lines of customers and did not want their customers to wait for lengthy periods of time. In other words, it resulted directly from a failure to provide adequate staffing to service Defendants clients.

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

Similarly, IWC Wage Order Nos. 7-2001 and other applicable wage orders prohibit an employer from "employ[ing] any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes. IWC Wage Order No. 7-2001 and other applicable wage orders further obligate employers to provide an employee to "pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided. Accordingly, for each day that Plaintiff and all aggrieved employees did not receive compliant meal periods, they are entitled to receive meal period premiums pursuant to Labor Code § 226.7 and IWC Wage Order No. 7-2001 and other applicable wage orders. Unfortunately, Plaintiff and the other aggrieved employees were not compensated with one (1) hours' worth of pay at their regular rate of compensation when they were not provided with a compliant meal period in violation of Labor Code § 226.7 and IWC Wage Order No. 7-2001 and other applicable wage orders.

Further, on the rare occasion if any that Defendants paid meal period premiums to the aggrieved employees, Defendants improperly paid the premium at the employee's hourly base rate instead of at their regular rate resulting in the underpayment of meal period premiums. Plaintiff contends that Defendants' policies and practices as alleged above violated Labor Code § 226.7 and seeks penalties pursuant to PAGA related thereto consistent with the California Supreme Court's decision in *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858, 878 (2021) ("we hold that the term 'regular rate of compensation' in section 226.7(c) has the same meaning of regular rate of pay' in section 510(a) and encompasses not only hourly wages, but all nondiscretionary payments for work performed by the employee.").

Based upon the foregoing, Defendants violated Labor Code §§ 226.7, 512, 558, 117, 1174.5, and 1198 as well as IWC Wage Order No. 7-2001 and other applicable wage orders with respect to Plaintiff and the aggrieved employees. As such, Plaintiff and the aggrieved employees are entitled to penalties under Labor Code § 558. Labor Code § 558 imposes a penalty upon

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

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE § 226.7 AND IWC WAGE ORDER NO. 7-2001 AND OTHER APPLICABLE WAGE ORDERS

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

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

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

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

Pursuant to Labor Code § 226.7 and IWC Wage Order No. 7-2001 and other applicable wage orders, Defendants failed to provide Rest Period Aggrieved Employees with rest periods of not less than ten (10) minutes for every major fraction of four (4) hours worked. Instead, Defendants regularly and consistently required Rest Period Aggrieved Employees to forgo rest periods and/or required them to remain on the premises and failed to relieve them of all duties.

Moreover, the aggrieved employees were denied rest periods as a result of Defendants’ understaffing practices and policies. Notably, although Defendants’ rest period policies and practices are not compliant, they also pressured and coerced employees to forgo rest periods and

made it difficult for employees to take lawful duty-free rest periods both due to their understaffing policies and practices and otherwise. At times during her employment, Plaintiff would ask her manager Patty if she could take a rest period and her Manager would instead direct Plaintiff to take care of her line. When Plaintiff advised Manager Patty that she had not been able to take her rest period and that her shift was ending, her Manager Patty would tell her to keep working and that overtime wasn't permitted by the Company thereby forcing Plaintiff to forgo her rest period due to the company's overtime, staffing budget, and staffing policies and practices. Plaintiff often did not receive rest period premiums on these occasions.

Further, on the rare occasion if any that Defendants paid rest period premiums, Defendants improperly paid the premium at the employee's hourly base rate instead of at their regular rate. Plaintiff contends that Defendants' policies and practices as alleged above violated Labor Code § 226.7 and seeks penalties pursuant to PAGA related thereto consistent with the California Supreme Court's decision in *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858, 878 (2021) ("we hold that the term 'regular rate of compensation' in section 226.7(c) has the same meaning of regular rate of pay' in section 510(a) and encompasses not only hourly wages, but all nondiscretionary payments for work performed by the employee.").

Based upon the foregoing, Defendants violated Labor Code § 226.7 and 1198 as well as IWC Wage Order No. 7-2001 and other applicable wage orders with respect to the aggrieved employees. Employees, including Plaintiff and the other aggrieved employees who experienced a violation of Labor Code § 226.7 may pursue PAGA penalties under Labor Code § 558. Labor Code § 558 imposes a penalty upon employers "who violates, or causes to be violated...any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected employee." For purposes of Labor Code § 558, Plaintiff and the aggrieved employees seek only the penalties assessed as civil penalties pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and not any underpaid wages.

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE §§ 226(a), 226(e) and 226.3

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

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

Similarly, Labor Code § 226(e) provides:

- (e) (1) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees.
- (2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.
- (B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:
- (i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).
 - (ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).
 - (iii) The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682,

Due to Defendants' failure to pay Plaintiff and all aggrieved employees all minimum wages, overtime wages, meal period premiums, and rest period premiums, the wage statements issued by Defendants do not indicate the correct amount of gross wages earned, the total hours worked, the net wages earned, all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate. Thus, Plaintiff is an aggrieved employee within the

meaning of PAGA and Defendants have violated Labor Code §226(a)(1), (2), (5), and (9) with respect to Plaintiff and all aggrieved employees.

Separate and independent from the foregoing, to the extent that “Special Pay,” “HP Earns,” “HPRRO,” “Premium Pay” pay turns out not to be based upon hours worked, Plaintiff contends that Defendants failed to include the number of hours worked at these rates in violation of Labor Code § 226(a)(9):

Earnings	rate	hours	this period	year to date
Regular	15.5000	39.87	617.99	12,530.20
Overtime	23.2500	.07	1.63	45.52
HP Earns	5.0000	39.93	199.65	3,129.45
HPRRO			0.60	8.77
MealPremium				15.05
Sick Pay				248.00
Vacation				86.99
Gross Pay			\$819.87	16,063.98

Earnings	rate	hours	this period	year to date
Regular	15.5000	31.82	493.21	24,516.71
Overtime	23.2500	.02	0.47	159.95
Holiday-Work	23.2500	7.85	182.51	182.51
Premium Pay			43.63	43.63
HP Earns				3,327.90
HPRRO				9.29
MealPremium				61.55
PaidSickLeave				744.00
Sick Pay				596.75
Vacation				86.99
Gross Pay			\$719.82	29,729.28

In addition, the wage statements issued to Plaintiff and all aggrieved employees did not include the actual total hours worked by the employee in violation of Labor Code § 226(a)(2). As previously explained, in express violation of Section 7(A)(3) of IWC Wage Order No. 7-2001 which requires employers to record “when the employee begins and ends **each work period.**” Instead, Defendants failed to report the time that it knew that Plaintiff and the other aggrieved

employees were working while off-the-clock including the time associated with uncompensated temperature checks/medical screenings or the hours worked associated with interrupted meal periods. In other words, Defendants did not include the total hours worked by the employee during the pay period including hours that it knew they had worked regardless of whether or not compensation was provided for such time in violation of Labor Code § 226(a)(2).

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

There is currently a split of authority regarding which PAGA penalties apply to violations of Labor Code § 226(a). *Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334, 355 (2021) (holding that such violations give rise to a 2699.3 penalty) *cf.*; *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal.App.5th 667, 675 (2018) (holding that such violations give rise to a Labor Code § 226.3 penalty). Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the required in subdivision (a) of Section 226.” As explained in detail above, Defendants failed to provide Plaintiff and the other aggrieved employees with accurate itemized wage statements. Accordingly, to the extent it applies, Plaintiff and the other aggrieved employees may also recover Labor Code § 226.3 or 2699 penalties for Defendants’ violations of Labor Code § 226(a).

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE § 200-204, 210 and 1198 BY FAILING TO PROVIDE REPORTING TIME PAY

IWC Wage Order No. 7-2001, § 5 provides that “[e]ach workday that an employee is required to report to the work site and does report, but is not put to work or is furnished less than half of his/her usual or scheduled day’s work, the employer shall pay him/her for half the usual or scheduled day’s work, but in no event for less than two (2) hours nor more than four (4) hours at the employee’s regular rate of pay, which shall not be less than the minimum wage.”

Labor Code § 200 provides that “Wages” includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.” Moreover, Labor Code § 1198

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

On several occasions, Plaintiff and the other aggrieved employees were required to report to work and would stay for approximately two (2) hours and would be sent home for lack of work despite being scheduled to work eight (8) hours or more. On these occasions, Defendants failed to pay Plaintiff and the other aggrieved employees reporting time pay consistent with IWC Wage Order No. 7-2001 and Labor Code §§ 200 and 200-204, 210, and 1198. The text and information about Labor Code sections 201-204 and 210 can be found later in this letter and are hereby incorporated by reference for brevity purposes.

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE §§ 201-203, 204, and 210

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

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

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

Due to Defendants’ failure to pay Plaintiff and all aggrieved employees all minimum wages, all overtime wages, meal period premiums, rest period premiums, and reporting time pay for the reasons discussed above, Defendants failed to timely pay Plaintiff and all aggrieved employees all

wages owed within seven (7) days of the close of the payroll period in accordance with Labor Code § 204(d) on a regular and consistent basis or within the time constraints of Labor Code §§ 201-202 upon the conclusion of their employment.

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

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

Lab. Code § 246.

Throughout Plaintiff and the aggrieved employees' employment, Defendants failed to include the incentive pay, other non-discretionary bonuses hazard pay and compensation under the pay codes "Special Pay," "HP Earns," "HPRRO," "Premium Pay" when calculating and paying sick pay. As a result when Plaintiff and the Late Payment Aggrieved Employees employment ended, they left their employment without having received compensation for all of their sick pay that they were owed under Labor Code § 246 and resulting in a violation of Labor Code §§ 201-203. As a result of Defendant's underpayment of sick pay, Plaintiff and the other Late Payment Aggrieved Employees experienced a violation of Labor Code §§ 201-202 upon separation from Defendant. *See Powell v. Walmart Inc.*, No. 3:20-cv-2412-BEN-LL, 2021 U.S. Dist. LEXIS 20777, at *6 (S.D. Cal. Feb. 2, 2021) (denying a motion to dismiss claims under Labor Code section 203 based upon the employer's alleged failure to include incentive pay when calculating and paying sick pay); *accord Flores v. Dart Container Corp.*, No. 2:19-cv-00083 WBS EFB, 2020 U.S. Dist. LEXIS 93524, at *7 (E.D. Cal. May 27, 2020).

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE §§ 1174 and 1174.5

Labor Code § 1174 provides that each employer shall keep "payroll records showing the hours worked daily by and the wages paid to...employees employed at...establishments." An

employer who fails to maintain the records proscribed by Labor Code § 1174 is subject to a civil penalty of five hundred (\$500) dollars under Labor Code § 1174.5.

As previously explained, Defendant failed to maintain accurate records of the total hours worked by employees or of the time associated with temperature checks, medical screenings, security checks and the actual meal punches (it rounded meal punches) and failed to record time that employees were subject to Defendants control and required to work during their meal periods on a regular and consistent basis in express violation of Section 7(A)(3) of IWC Wage Order No. 7-2001 which requires employers to record “when the employee begins and ends **each work period**.”:

7. RECORDS

- (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.

Due to Defendants’ regular and consistent practice of not recording all hours worked, including the time associated with temperature checks, medical screenings, security checks, and time where they were not relieved of all duties during meal/rest periods or required to perform work during meal periods, the time records maintained by Defendant do not show the actual hours worked daily by Plaintiff and the aggrieved employees. This caused Plaintiff and the other aggrieved employees time records not to actually show the total hours worked daily by each of them throughout the PAGA period in violation of Labor Code §§ 1174 and 1174.5.

Plaintiff seeks both PAGA penalties under Labor Code § 1174.5 for willful violations of Labor Code § 1174 since Defendant was previously sued for engaging in the same conduct, but also separate PAGA penalties pursuant to section 2699.3 for non-willful violations since no default is proscribed for such violations. Labor Code § 2699.3 (identifying a violation of Labor Code section 1174 subdivisions (c) and (d) as non-curable PAGA claims).

DEFENDANTS VIOLATED AND CONTINUE TO VIOLATE LABOR CODE § 2802

Labor Code §2802 provides that “[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.”

Defendants failed to provide any masks and/or other safety equipment as required by California law during the COVID-19 pandemic and made employees provide their own masks. By

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failing to provide Plaintiff and the aggrieved employees with masks and other safety equipment during the COVID-19 pandemic, Defendant caused Plaintiff and the other aggrieved employees to make expenditures and incur losses in the direct consequence of the discharge of their job duties in violation of Labor Code § 2802.

CONCLUSION

Therefore, pursuant to Labor Code § 2699.3, we write to inform you and the Labor and Workforce Development Agency of Plaintiff's claims. Nevertheless, it is the policy of this firm to attempt to negotiate an early resolution of all matters where possible and beneficial to the aggrieved employees and all putative class members. If Defendant is interested in attempting to resolve this matter on a representative basis, please contact us or have any Counsel you choose to retain contact me so that we can discuss an informal discovery plan and the possibility of early mediation.

Very truly yours,

WINSTON LAW GROUP, P.C.

By: /s/ David S. Winston
DAVID S. WINSTON

Certified Mail #: 7020 1810 0000 4230 7463
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PROOF OF SERVICE

STATE OF CALIFORNIA COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action; my business address 31365 Oak Crest Drive Suite 240, Westlake Village, CA 91361.

On October 19, 2023, I served the foregoing documents described

1) SECOND AMENDED COMPLAINT

on all interested parties in this action as follows: **SEE ATTACHED SERVICE LIST**

[] **(VIA US MAIL)** I caused such envelope(s) to be deposited in the mail at Westlake Village, California with postage thereon fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[] **(BY ELECTRONIC SERVICE)** I served the aforementioned document(s) by electronic mail to the parties' email addresses as they are known to me. My email address is mvalle@bradleygrombacher.com. Said document(s) were served by email on October 19, 2023. The names and email addresses of the persons served are set forth in the service list. I did not receive, under a reasonable period of time, any indication that the email did not go through.

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed October 19, 2023, at Westlake Village, California.

Maria Valle

Maria Valle-Lomeli

Rivera De Cruz v. Cardenas Markets, LLC
Alameda Superior Court Case No. 22CV005906

Mailing List

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