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Electronically
FILED

by Superior Court of California, County of San Mateo
ON

By /s/ Jennifer Torres
Deputy Clerk

12/28/2022

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

YOVANI FRANKO RIVERA,

Plaintiff,

vs.

TOLUCO MEXICAN KITCHEN;
MIGUEL CANSECO; SERGIO
CANSECO; and DOES 1 to 25, inclusive,

Defendants.

) CASE NO.: 22-CIV-05490

) **COMPLAINT FOR DAMAGES FOR:**

-) 1) **FAILURE TO COMPENSATE FOR**
) **ALL HOURS WORKED;**
) 2) **FAILURE TO PAY MINIMUM**
) **WAGES;**
) 3) **FAILURE TO PAY OVERTIME;**
) 4) **FAILURE TO PROVIDE ACCURATE**
) **ITEMIZED WAGE STATEMENTS;**
) 5) **FAILURE TO PAY WAGES OWED**
) **EVERY PAY PERIOD;**
) 6) **FAILURE TO PAY WAGES WHEN**
) **EMPLOYMENT ENDS;**
) 7) **FAILURE TO GIVE REST BREAKS;**
) 8) **FAILURE TO GIVE MEAL BREAKS;**
) 9) **FAILURE TO REIMBURSE**
) **BUSINESS EXPENSES;**
) 10) **UNLAWFUL TIP COLLECTION;**
) 11) **PRIVATE ATTORNEYS GENERAL**
) **ACT ("PAGA");**
) 12) **FAILURE TO PROVIDE**
) **PERSONNEL RECORDS;**
) 13) **FAILURE TO PROVIDE PAY**
) **RECORDS;**
) 14) **SEXUAL HARASSMENT IN**
) **VIOLATION OF THE FAIR**
) **EMPLOYMENT AND HOUSING**
) **ACT ("FEHA")**
) 15) **HARASSMENT BASED ON SEXUAL**

) **ORIENTATION IN VIOLATION OF**
) **THE FEHA;**
) **16) FAILURE TO PREVENT**
) **HARASSMENT IN VIOLATION OF**
) **THE FEHA;**
) **17) NEGLIGENT RETENTION AND**
) **SUPERVISION;**
) **18) WRONGFUL CONSTRUCTIVE**
) **DISCHARGE IN VIOLATION OF**
) **PUBLIC POLICY;**
) **19) VIOLATION OF CALIFORNIA**
) **BUSINESS AND PROFESSIONS**
) **CODE SECTION 17200.**
)
)
) **DEMAND FOR JURY TRIAL**

COMES NOW Plaintiff, YOVANI FRANKO RIVERA (hereinafter "Plaintiff"), and alleges:

PARTIES, JURISDICTION, VENUE

1. Jurisdiction and Venue are proper in this Court and this action is properly filed in the County of San Mateo in this judicial district because Defendants TOLUCO MEXICAN KITCHEN, MIGUEL CANSECO, SERGIO CANSECO, and DOES 1 to 25, inclusive, (collectively "Defendant(s)" or "TOLUCO") do business in the County of San Mateo, and because Defendants' obligations and liabilities arise therein. Moreover, Plaintiff's damages sought herein exceed \$25,000.

2. Plaintiff is a male resident of the County of San Mateo, State of California.

3. Plaintiff is informed and believes that at all times herein mentioned, Defendant TOLUCO MEXICAN KITCHEN was and is a business operating in the County of San Mateo, State of California, and which employed Plaintiff.

4. Plaintiff is informed and believes that all times herein mentioned, Defendant MIGUEL CANSECO is and was a resident of the County of San Mateo, State of California and was an owner, director, and/or managing agent of TOLUCO MEXICAN KITCHEN, who was personally involved in the day-to-day activities of the business and hence controlled the wages, hours, and working conditions of Plaintiff and other aggrieved employees.

5. Plaintiff is informed and believes that all times herein mentioned, Defendant SERGIO CANSECO is and was a resident of the County of San Mateo, State of California and was an

1 owner, director, and/or managing agent of TOLUCO MEXICAN KITCHEN, who was
2 personally involved in the day-to-day activities of the business and hence controlled the wages,
3 hours, and working conditions of Plaintiff and other aggrieved employees.

4 6. Plaintiff is ignorant of the true names and capacities, whether individual, corporate, or
5 associate of those defendants fictitiously sued as DOES 1 to 25, inclusive, and so Plaintiff sues
6 them by these fictitious names. Plaintiff is informed and believes that each of the DOE
7 defendants, numbers 1 to 25, reside in the State of California and are in some manner responsible
8 for the conduct alleged herein. Upon discovering the true names and capacities of these
9 fictitiously named defendants, Plaintiff will amend this complaint to show the true names and
10 capacities of these fictitiously named defendants. Unless otherwise alleged in this complaint,
11 Plaintiff is informed, and on the basis of that information and belief, alleges that at all times
12 herein mentioned, each of the remaining codefendants, in doing the things hereinafter alleged,
13 were acting within the course, scope, and under the authority of their agency, employment, or
14 representative capacity, with the consent of his/her codefendants.

14 **GENERAL ALLEGATIONS**

15 7. Plaintiff started working for TOLUCO on or around April 2022 with his employment
16 ending in or around July 2022. During his employment tenure, Plaintiff earned \$16.00 per hour
17 and his job titles were dishwasher, preparer, and waiter.

18 8. It is Plaintiff's position that TOLUCO has committed numerous labor code violations
19 against Plaintiff and other hourly, non-exempt employees who worked for TOLUCO at any of
20 their California locations during the relevant PAGA period.

21 9. TOLUCO violated Labor Code section 226.8. Pursuant to Labor Code section 226.8(a)
22 (1), it is unlawful for any person or employer to willfully misclassify an individual as an
23 independent contractor. "Willful misclassification means avoiding employee status for an
24 individual by voluntarily and knowingly misclassifying that individual as an independent
25 contractor." Cal. Lab. Code Section 226.8(i)(4). This is so because TOLUCO treated Plaintiff
26 and others as employees with a set schedule of work from Monday through Friday. Moreover,
27 TOLUCO would not be able to get past the ABC Test set forth in *Dynamex Operations v.*
28 *Superior Court* (2018) 4 Cal. 5th 903 since Plaintiff and others were unequivocally doing work

1 (preparer, dishwasher, waiter) related to TOLUCO's core business of being a restaurant. As such,
2 TOLUCO willfully misclassified Plaintiff and other aggrieved employees as independent
3 contractors. Moreover, there was plenty of control by TOLUCO as it related to Plaintiff's and
4 other aggrieved employees' schedules and working conditions. Moreover, the tools and
5 instrumentalities used to carry out the job duties was provided by TOLUCO.

6 10. In addition, TOLUCO did not provide Plaintiff and other similarly situated aggrieved
7 employees with the minimum wages to which they were entitled for all work performed and did
8 not compensate him and others for all hours worked pursuant to California Labor Code sections
9 1194, 1197 and 1197.1. Plaintiff and others were not paid for all hours worked and consistently
10 worked "off the clock". This is so because Plaintiff and others would consistently be required to
11 perform work duties after clocking out for work. For instance, management would instruct
12 Plaintiff to take out the trash AFTER he had clocked out and on his way out. Moreover, Plaintiff
13 would report to work 15-20 minutes early and would engage in "off the clock" work for which
14 he was never compensated. Management/ownership was unequivocally aware of the "off the
15 clock" work. Moreover, there would be issues with rounding down the number of hours worked,
16 which led to time shaving and Plaintiff and others not being paid for all hours worked. This is
17 especially true since there was no formal, digital clock-in/clock-out system. Work hours were
18 tracked via handwritten notes. Moreover, to the extent employees such as Plaintiff and others
19 worked through their meal periods, they were not compensated for that time, which would be
20 akin to a minimum wage violation. Additionally, during his employment tenure, Plaintiff noticed
21 that his pay was off and that he was being paid for less hours than he actually worked. In fact,
22 Plaintiff texted his manager, Dora Zaragoza, letting her know of the pay discrepancies.

23 11. Additionally, TOLUCO violated Labor Code Section 351 and 353 by taking some of the
24 tips meant for employees and also deducting the tips from Plaintiff's and others' earned wages.
25 TOLUCO also deducted the credit card fee from Plaintiff's and others' tips and did not timely
26 provide the credit card and even cash tips to Plaintiff and other similarly situated aggrieved
27 employees. As such, Plaintiff and the other similarly situated employees were not given accurate
28 tips to which they were entitled.

12. Due to the above "off the clock" violations and as a matter of company policy, TOLUCO

1 violated Labor Code §510 because it failed to pay Plaintiff and other similarly situated aggrieved
2 employees overtime, even though they worked more than 8 hours per day, 12 hours per day,
3 and/or 40 hours per week throughout their employment. On Saturdays and Sundays, Plaintiff
4 would work over 12.5 hours per work shift. Plaintiff's and others' actual work hours, which
5 included the "off the clock" work as described above, entitled them to overtime and doubletime,
6 however, it was not company policy to keep accurate track of all hours worked and to pay
7 employees all due overtime and doubletime. In addition, TOLUCO did not include bonuses
8 and/or incentive payments in calculating employees' true regular rate of pay for purposes of
9 deciphering their correct overtime rate of pay.

10 13. TOLUCO violated Labor Code § 226.7 along with Industrial Welfare Commission
11 Wage Order no. 5 because it failed to provide Plaintiff and other similarly situated aggrieved
12 employees 10-minute rest periods for every four hours of work, or majority portion thereof,
13 throughout their employment. TOLUCO did not completely relieve Plaintiff of all duty during
14 said rest periods. TOLUCO did not pay to Plaintiff one additional hour of pay at Plaintiff's
15 regular rate of compensation for each workday that one or more statutory rest periods was not
16 provided. Rest breaks were not authorized or enforced at the restaurant. In fact, it was not part
17 of TOLUCO's culture for employees such as Plaintiff and others to take at least one 10-minute
18 rest break every day wherein they are relieved of all work duties. The latter was due to
19 understaffing of employees and employees being too busy to be able to take rest breaks. There
20 was no set schedule for employees to be able to take meal and rest breaks. As such, employees
21 were at the mercy of orders slowing down or not being placed. The latter meant that statutory
22 rest breaks took a back seat as did timely, uninterrupted meal breaks before the 5th hour worked.
23 In fact, Plaintiff did not receive a single rest break during his entire employment tenure at
24 TOLUCO as it was simply not part of the company policy and practice.

25 14. TOLUCO also violated Labor Code §§ 512 and 226.7 along with Industrial Welfare
26 Commission Wage Order No. 5 because it failed to provide Plaintiff and other similarly situated
27 aggrieved employees the requisite 30-minute, uninterrupted meal periods for every five (5) hours
28 of work throughout their employment, and Plaintiff did not validly waive said meal periods.
TOLUCO did not completely relieve Plaintiff of all duties during said meal periods. TOLUCO

1 did not pay to Plaintiff one additional hour of pay at Plaintiff's regular rate of compensation for
2 each workday that one or more statutory meal periods was not provided. If TOLUCO had
3 Plaintiff sign a meal period waiver, it would not be valid and enforceable since Plaintiff and
4 others generally worked more than a 6-hour shift. If TOLUCO had Plaintiff sign an on-duty meal
5 period agreement wherein Plaintiff agreed to work through his meal period, it would also be
6 invalid and unenforceable because the nature of Plaintiff's job does not prevent him from taking
7 a meal period. As was the case with rest periods, meal breaks were definitively not part of
8 TOLUCO's culture. Timely, uninterrupted, and complete (at least 30 minutes) meal periods were
9 not consistently authorized and were not consistently enforced. Due to understaffing and no
10 coverage, meal periods were not always taken BEFORE the 5th hour worked and were not for a
11 period of 30 minutes wherein employees were relieved of all job duties.

12 15. Furthermore, during the relevant time period and due to the above-mentioned labor code
13 violations, TOLUCO failed to pay Plaintiff and other similarly situated aggrieved employees all
14 wages due to them within any time period specified by California Labor Code section 204,
15 including the minimum wages and overtime as described above as well as meal/rest break
16 premiums. TOLUCO was also in violation of California Labor Code section 226(a) by not
17 providing access to paystubs and failing to include pertinent information on the wage statements,
18 including but not limited to, all hours worked, tips earned, gross wages earned, net wages earned,
19 all deductions, premium payments for meal and rest breaks, the correct legal name and address
20 of the employer, the correct beginning and end of the pay period, all applicable hourly rates, and
21 all identifying employee information, among other items. Furthermore, Plaintiff and others did
22 not receive access to pay stubs. As such, TOLUCO did not provide Plaintiff and other similarly
23 situated aggrieved employees with complete, accurate itemized wage statements.

24 16. TOLUCO violated Labor Code § 203 because it willfully failed to pay Plaintiff and
25 other similarly situated aggrieved employees earned and due wages upon separation of
26 employment, either immediately upon involuntary termination, or within 72 hours of resignation.
27 These earned but unpaid wages include compensation for all hours worked including minimum
28 wages and overtime compensation, tips, and premiums for the missed meal and rest breaks.

17. During the relevant time period, TOLUCO also failed to keep accurate and complete

1 payroll records showing the actual hours worked per day (including the time for meal periods)
2 and the wages paid to Plaintiff and other aggrieved employees pursuant to California Labor Code
3 sections 1174(d).

4 18. Additionally, during the relevant time period, Plaintiff and others incurred necessary,
5 business-related expenses and costs that were not reimbursed by TOLUCO. These costs include,
6 but are not limited to uniforms and use of personal cell phones to communicate with
7 management/ownership about work related matters and scheduling. Accordingly, TOLUCO was
8 in violation of California Labor Code sections 2800 and 2802.

9 19. Moreover, TOLUCO failed to provide sick pay pursuant to Labor Code section 246 and
10 also failed to provide Worker's Compensation coverage for Plaintiff and other aggrieved
11 employees in violation of Labor Code Section 3700.5.

12 20. In addition, during his employment tenure, Plaintiff was sexually harassed by his
13 manager, Dora Zaragoza, based on his sexual orientation in violation of the Fair Employment
14 and Housing Act ("FEHA"). Plaintiff is a homosexual male, and Dora Zaragoza would
15 consistently harass Plaintiff during his employment tenure by calling him "Puto" in person
16 (meaning gay, man-whore, bitch). Moreover, Dora Zaragoza would text Plaintiff and would refer
17 to him as "Putito." Due to the labor code violations as mentioned above and the hostile work
18 environment, Plaintiff was forced to quit his employment and did so on or around July 24, 2022.

19 21. Pursuant to California Government Code section 12960, Plaintiff has exhausted his
20 administrative remedies. Plaintiff filed a complaint with the Department of Fair Employment
21 and Housing ("DFEH"), alleging claims in this complaint. The DFEH immediately issued to
22 Plaintiff a right to sue letter.

23 **FIRST CAUSE OF ACTION**

24 **FAILURE TO COMPENSATE FOR ALL HOURS WORKED**

25 **(California Industrial Welfare Commission Order 5-2001, California Code of
26 Regulations Title 8 Section 11050, and California Labor Code Section 1198)**

27 **(Plaintiff against all named defendants and all DOE defendants)**

28 22. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs
1 through 21, inclusive, of this Complaint as though fully set forth herein.

1 23. At all times relevant herein, Defendants were required to compensate its employees for
2 all hours worked upon reporting for work at the appointed time stated by the employer pursuant
3 to Industrial Welfare Commission Order 5-2001, California Code of Regulations, Title 8,
4 Section 11050.

5 24. For the three (3) years preceding filing of this action, Defendants failed to compensate
6 Plaintiff for all hours worked.

7 25. Under the aforementioned wage order and regulations, Plaintiff is to recover
8 compensation for all hours worked but not paid by Defendants for the three (3) years preceding
9 the filing of this Complaint.

10 26. As a proximate result of the aforementioned violations, Plaintiff has been damaged in an
11 amount according to proof at time of trial, but in an amount in excess of the jurisdiction of this
12 Court.

13 27. Defendants' conduct described herein violates Labor Code Section 512, 558, 1194, and
14 1198. Therefore, pursuant to Labor Code Sections 218.5, 512, 558, and 1194, Plaintiff is entitled
15 to recover damages for the nonpayment of wages for all hours worked, penalties, plus reasonable
16 attorney's fees and costs of suit.

17 28. Under this cause of action, Plaintiff prays for penalties due under the statutes alleged
18 along with any allowable interest, penalties, attorney's fees, and costs which will equal an
19 amount known to Plaintiff once he has obtained all of his payroll records from Defendants.

20 **SECOND CAUSE OF ACTION**

21 **FAILURE TO PAY MINIMUM WAGES**

22 **(California Labor Code Sections 1194, 1194.2, 1197)**

23 **(Plaintiff against all named Defendants and all DOE defendants)**

24 29. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs
25 1 through 28, inclusive, of this Complaint as though fully set forth herein.

26 30. Pursuant to Labor Code Sections 1194, 1194.2 and 1197, it is unlawful for an employer
27 to suffer or permit a California employee to work without paying wages at the minimum wage
28 rate for all hours worked as required by the applicable Industrial Welfare Commission
(hereinafter "IWC") Wage Order No. 5-2001, codified at California Code of Regulations, Title

1 8, Section 11050, subdivision 4.

2 31. Pursuant to IWC Wage Order no. 5-2001, subdivision 2(K), at all relevant times, “hours
3 worked” included “the time during which an employee is subject to the control of an employer,
4 and includes all the time the employee is suffered or permitted to work, whether or not required
5 to do so...”

6 32. During his employment, Plaintiff was regularly required as a matter of uniform policy
7 and practice to work, and in fact worked, as an employee of Defendants and Plaintiff was paid
8 less than the minimum wage rate by Defendants for hours worked in violation of California
9 Labor Code Section 1197 and the applicable California IWC wage order(s).

10 33. Plaintiff was, at all relevant times, under the control of Defendants and suffered or
11 permitted to work by Defendants. Defendants’ acts or omissions in failing to adequately
12 compensate Plaintiff were not in good faith nor were there reasonable grounds for Defendants to
13 believe that their acts or omissions were not contrary to California law.

14 34. For all hours worked by Plaintiff for which he was paid less than the minimum wage rate
15 by Defendants, Plaintiff is entitled to not less than the applicable California minimum wage rate
16 and, pursuant to Labor Code Section 1194.2(a), liquidated damages in an amount equal to unpaid
17 minimum wages and interests thereon. Pursuant to Labor Code Section 1194, Plaintiff is also
18 entitled to attorney’s fees, costs and interests according to proof.

19 35. Under this cause of action, Plaintiff prays for penalties due under the statutes alleged
20 along with any allowable interest, penalties, attorney’s fees, and costs according to proof at
21 trial.

22 **THIRD CAUSE OF ACTION**

23 **FAILURE TO PAY OVERTIME**

24 **(California Industrial Welfare Commission Order 5-2001, California Code of
25 Regulations Title 8 Section 11050)**

26 **(Plaintiff against all named Defendants and all DOE defendants)**

27 36. Plaintiff re-alleges and incorporates by reference each and every allegation in
28 paragraphs 1 through 35, inclusive, of this Complaint as though fully set forth herein.

37. Pursuant to Industrial Welfare Commission Order No. 5-2001, California Code of

1 Regulations, Title 8, Section 11050, for the period of Plaintiff's employment, Defendants were
2 required to compensate Plaintiff for all overtime, which is calculated at one and one-half (1.5)
3 times the regular rate of pay for hours worked in excess of eight (8) in a day or forty (40) hours
4 in a week, and two (2) times the regular rate of pay for hours worked in excess of twelve (12)
5 hours in a day or hours worked in excess of eight (8) on the seventh consecutive work day in a
6 week.

7 38. Plaintiff was a non-exempt employee entitled to the protections of the California
8 Industrial Welfare Commission Order No. 5-2001, California Code of Regulations, Title 8,
9 Section 11050.

10 39. Plaintiff worked more than eight (8) hours in a single workday, more than twelve (12)
11 hours in a single day, or forty (40) hours in a single workweek on numerous occasions.

12 40. Plaintiff was entitled to the above overtime premiums.

13 41. Defendants did not pay Plaintiff premium wages of at least one and one-half times
14 Plaintiff's regular rate of pay for hours worked past eight (8) in a day or two times Plaintiff's
15 regular rate of pay for hours worked past twelve (12) in a day.

16 42. Defendants did not pay Plaintiff premium wages of at least one and one-half times
17 Plaintiff's regular rate of pay for hours worked past forty (40) in a week.

18 43. Plaintiff worked at least one pay period in which he was not properly paid overtime
19 within the three (3) years prior to the initiation of this lawsuit.

20 44. Defendants know or should know the actual dates of overtime worked, the amount of
21 overtime worked, and the amount of unpaid overtime due.

22 45. As a proximate result of Defendants' violations, Plaintiff has been damaged in an amount
23 according to proof at time of trial, but in an amount in excess of the jurisdiction of this Court.

24 46. Pursuant to California Labor Code Sections 218.6, 510, 1194, and California Code of
25 Regulations, Title 8, Sections 11050, Plaintiff is entitled to recover damages for the nonpayment
26 of overtime premiums for all overtime hours worked, penalties, interest, plus reasonable
27 attorney's fees and costs of suit.

28 47. Under this cause of action, Plaintiff prays for penalties due under the statutes alleged
along with any allowable interest, penalties, attorney's fees, and costs according to proof at

1 trial.

2 **FOURTH CAUSE OF ACTION**

3 **FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS**

4 **(California Labor Code Section 226)**

5 **(Plaintiff against all named Defendants and all DOE defendants)**

6 48. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs
7 1 through 47, inclusive, of this Complaint as though fully set forth herein.

8 49. Pursuant to California Labor Code Section 226, every employer must furnish each
9 employee an itemized statement of wages and deductions at the time of payment of wages.

10 50. Defendants knowingly and intentionally did not furnish Plaintiff with any pay stubs that
11 accurately reflected all information required by Labor Code Section 226, including but not
12 limited to, gross wages earned, including overtime, net wages earned, total hours worked by the
13 employee, all deductions, and premium pay for missed meal breaks and rest breaks. Therefore,
14 Defendants failed to maintain and provide accurate itemized wage statements to Plaintiff in
15 accordance with California Labor Code Section 226(a).

16 51. Pursuant to California Labor Code Section 226(e), Plaintiff is entitled to recover the
17 greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation
18 occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay
19 period, not exceeding an aggregate amount of four thousand dollars (\$4,000), plus costs and
20 reasonable attorney's fees. Plaintiff only claims damages under this cause of action pursuant to
21 the 1-year period immediately preceding the date this lawsuit was filed.

22 52. As a direct and proximate result of Defendants' unlawful conduct, Plaintiff has sustained
23 damages, including loss of earnings, in an amount to be established at trial. As a further direct
24 and proximate result of Defendants' unlawful conduct, as set forth herein, Plaintiff is entitled to
25 recover penalties, in an amount to be established at trial, as well as costs and attorney's fees
26 pursuant to statute.

27 53. Under this cause of action, Plaintiff prays for penalties due under the statutes alleged
28 along with any allowable interest, penalties, attorney's fees, and costs according to proof at trial.

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1 **FIFTH CAUSE OF ACTION**

2 **FAILURE TO PAY WAGES OWED EVERY PAY PERIOD**

3 **(California Labor Code Section 204)**

4 **(Plaintiff against all named Defendants and all DOE defendants)**

5 54. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs
6 1 through 53, inclusive, of this Complaint as though fully set forth herein.

7 55. California Labor Code Section 204 establishes the fundamental right of all employees
8 in the State of California to be paid wages in a timely fashion for their work.

9 56. At all times relevant during the liability period, Defendants failed to pay Plaintiff the
10 full amount of all owed wages when due as required by California Labor Code Section 204.

11 57. Defendants failed to pay Plaintiff all wages earned each pay period. Plaintiff is
12 informed, believes, and thereon alleges, that all times relevant during the liability period,
13 Defendants maintained a policy or practice of not paying Plaintiff wages for all hours worked,
14 including overtime hours and the minimum wage along with premiums for missed meal breaks
15 and rest breaks.

16 58. As a result of Defendants' unlawful conduct, Plaintiff has suffered damages in an
17 amount, subject to proof, to the extent he was not paid all wages each pay period. The precise
18 amount of unpaid wages is not presently known to Plaintiff but can be determined directly from
19 Defendants' records or indirectly based on information from Defendants' records.

20 59. Under this cause of action, Plaintiff prays for penalties due under the statutes alleged
21 along with any allowable interest, penalties, attorney's fees, and costs according to proof at trial.

22 **SIXTH CAUSE OF ACTION**

23 **FAILURE TO PAY WAGES WHEN EMPLOYMENT ENDS**

24 **(California Labor Code Sections 201, 203)**

25 **(Plaintiff against all named Defendants and all DOE defendants)**

26 60. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs
27 1 through 59, inclusive, of this Complaint as though fully set forth herein.

28 61. Pursuant to California Labor Code Section 201(a), an employer who discharges an
employee must immediately pay for all compensation due and owing.

1 62. Pursuant to California Labor Code Section 202, when an employee resigns, the employer
2 must pay all compensation due and owing within 72 hours of resignation, or on the employee's
3 last day of work, if the employee gives more than 72 hours notice of resignation.

4 63. Pursuant to California Labor Code Section 203, if an employer willfully fails to pay,
5 without abatement or reduction, any wages of an employee whose employment ends, the wages
6 of the employee shall continue as a penalty from the due date at the same rate until paid or until
7 an action is commenced; however, the wages shall not continue for more than 30 days for failure
8 to pay an employee owed wages.

9 64. After Plaintiff's employment with Defendants ended, Defendants willfully refused and
10 continue to refuse to pay their unpaid wages as required by Labor Code Section 203.

11 65. Under this cause of action, Plaintiff prays for penalties due under the statutes alleged
12 along with any allowable interest, penalties, attorney's fees, and costs according to proof at trial.
13 Moreover, Plaintiff prays for the above-mentioned money from 3 years immediately preceding
14 the filing of this lawsuit.

15 66. Under this cause of action, Plaintiff also prays for attorney's fees and costs under
16 California Labor Code Section 218.5 for time spent pursuing the non-payment of wages as set
17 forth herein. Plaintiff also prays for interest under California Labor Code Section 218.6.

18 67. Under this cause of action, Plaintiff prays for penalties due under the statutes alleged
19 along with any allowable interest, penalties, attorney's fees, and costs according to proof at trial.

20 **SEVENTH CAUSE OF ACTION**

21 **FAILURE TO GIVE REST BREAKS**

22 **(Plaintiff against all named Defendants and all DOE defendants)**

23 68. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs
24 1 through 67, inclusive, of this Complaint as though fully set forth herein.

25 69. Plaintiff brings this cause of action under the following laws, for the following reasons:

- 26 a. Title 8 of the California Code of Regulations Sections 11050(12)(A), which provides
27 that every employer shall authorize and permit all employees to take rest periods,
28 which insofar as practicable shall be in the middle of each work period. The
authorized rest period time shall be based on the total hours worked daily at the rate

of ten (10) minutes net rest time per four (4) hours or major fraction thereof;

- b. Title 8 of the California Code of Regulations Sections 11050(12)(B), which provides that if an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at employee's regular rate of compensation for each workday that the rest period is not provided;
- c. Title 8 of the California Code of Regulations sections 11050(20)(A), which penalizes the employer \$50.00 for each initial violation, per employee, of any provision of the Wage Order, and \$100.00 for each additional violation thereafter per employee; and
- d. California Labor Code section 226.7, which states that (a) no employer shall require any employee to work during any rest period mandated by an applicable order of the Industrial Welfare Commission, and (b) if an employer fails to provide an employee a rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one (1) additional hour of pay at employee's regular rate of compensation for each work day that the rest period is not provided.

70. Plaintiff alleges that he was not authorized and permitted to take a ten (10) minute rest break after every four (4) hours of work or major fraction thereof, as required by California law.

71. Under this cause of action, Plaintiff prays for wages due to him under the statutes, regulations, and wage orders alleged in this cause of action along with any allowable interest, penalties, attorney's fees and costs according to proof at trial. Specifically, Plaintiff prays for the foregoing moneys calculated from 3 years immediately preceding the filing of this lawsuit.

72. Plaintiff also prays for Labor Code section 218.5 recovery of costs and attorney's fees as well as interest under Labor Code section 218.6.

73. Under this cause of action, Plaintiff prays for penalties due under the statutes alleged along with any allowable interest, penalties, attorney's fees, and costs according to proof at trial.

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1 **EIGHTH CAUSE OF ACTION**

2 **FAILURE TO GIVE MEAL BREAKS**

3 **(Plaintiff against all named Defendants and all DOE defendants)**

4 74. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs
5 1 through 73, inclusive, of this Complaint as though fully set forth herein.

6 75. Plaintiff brings this cause of action under the following laws, for the following
7 reasons:

- 8 a. California Labor Code section 512(a), which requires that employees be given a 30-
9 minute uninterrupted meal break after five (5) hours of work, and a second
10 uninterrupted meal break after ten (10) hours of work;
- 11 b. California Labor Code section 226.7, which states that (a) no employer shall require
12 any employee to work during any meal period mandated by an applicable order of
13 the Industrial Welfare Commission, and (b) if any employer fails to provide an
14 employee a meal period in accordance with an applicable order of the Industrial
15 Welfare Commission, the employer shall pay the employee one (1) additional hour
16 of pay at the employee's regular rate of compensation for each workday that the meal
17 period is not provided;
- 18 c. California Industrial Welfare Commission Order No. 5 section 11(B), as codified
19 under Title 8 of the California Code of Regulations Section 11050, which states that
20 if an employer fails to provide an employee a meal period in accordance with the
21 applicable provisions of the Wage Order, the employer shall pay the employee one
22 (1) hour of pay at the employee's regular rate of compensation for each workday that
23 the meal period is not provided;
- 24 d. California Industrial Welfare Commission Wage Order No. 5 Section 7(A)(3), as
25 codified under Title 8 of the California Code of Regulations Section 11050, which
26 requires an employer to maintain records documenting its employees' meal periods;
- 27 e. California Industrial Welfare Commission wage order No. 5 Section 20(A), as
28 codified under California Code of Regulations Section 11050, which penalizes the
employer \$50.00 for each initial violation, per employee, of any provision of the

1 Wage Order, and \$100.00 for each additional violation thereafter per employee; and
2 f. California Labor Code section 1171 and 1173, which have given the California
3 Labor Commission jurisdiction to enact Wage Orders (such as Wage Order no. 5)
4 as enforceable law.

5 76. Plaintiff alleges that he was not authorized and permitted to take relieved meal breaks
6 after five (5) hours of work. Plaintiff further alleges that he was not authorized and permitted to
7 take a second relieved meal break after ten (10) hours of work, as required by California law.
8 California Labor Code section 512(a) and California Industrial Welfare Commission Order No.
9 5, as codified under California Code of Regulations Sections 11050 et. seq. requires that
10 employees receive uninterrupted meal periods every five (5) hours of consecutive work, and that
11 the meal period be at least 30 minutes in length, wherein employee is relieved of all work duty.
12 California Labor Code section 226.7 provides that employers may not require their employees
13 to work through their meal periods. California Labor Code section 226.7 and California Code of
14 Regulations section 11050 requires that if the employer fails to provide the employee with an
15 uninterrupted meal period, the employer must pay the employee one (1) hour of pay for each
16 work day that the meal period is not given.

17 77. Under this cause of action, Plaintiff prays for wages due to him under the statutes,
18 regulations, and wage orders alleged in this cause of action along with any allowable interest,
19 penalties, attorney's fees and costs according to proof at trial. Specifically, Plaintiff prays for the
20 foregoing moneys calculated from 3 years immediately preceding the filing of this lawsuit.

21 78. Plaintiff also prays for Labor Code section 218.5 recovery of costs and attorney's
22 fees as well as interest under Labor Code section 218.6.

23 79. Under this cause of action, Plaintiff prays for penalties due under the statutes alleged
24 along with any allowable interest, penalties, attorney's fees, and costs according to proof at trial.

25 **NINTH CAUSE OF ACTION**

26 **FAILURE TO REIMBURSE FOR BUSINESS EXPENSES**

27 **(Plaintiff against all named Defendants and DOE Defendants)**

28 80. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs
1 through 79, inclusive, of this Complaint as though fully set forth herein.

1 81. Labor Code section 2802 provides that “[a]n employer shall indemnify his or her
2 employee for all necessary expenditures or losses incurred by the employee in direct
3 consequence of the discharge of his or her duties.”

4 82. Beginning at least 3 years prior to the filing of this complaint, in order to discharge
5 his duties for Defendant, Plaintiff incurred reasonable and necessary expenses in the course of
6 completing his job duties, which were not reimbursed by Defendants. These costs include, but
7 are not limited to, uniforms, as well as personal cell phone for work purposes. Plaintiff is entitled
8 to reimbursement for these necessary expenditures, plus interest and attorney’s fees and costs,
9 under Labor Code section 2802.

10 **TENTH CAUSE OF ACTION**

11 **UNLAWFUL TIP COLLECTION**

12 **(Lab. Code §§ 351 and 353)**

13 **(Plaintiff against all named Defendants and DOE Defendants)**

14 83. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs
15 1 through 82, inclusive, of this Complaint as though fully set forth herein.

16 84. During all times relevant herein, Defendants unlawfully collected tips meant for
17 employees and also deducting the tips from Plaintiff’s and others’ earned wages. TOLUCO also
18 deducted the credit card fee from Plaintiff’s and others’ tips and did not timely provide the credit
19 card and even cash tips to Plaintiff and other similarly situated aggrieved employees.
20 Furthermore, the owner and management would take the tips that were meant for the employees
21 in contravention of California law.

22 85. Labor Code section 351 makes it illegal for an employer to collect tips paid or left for the
23 employee and mandates that such tips are the employees' property.

24 86. Labor Code section 353 requires every employer to keep accurate records of all gratuities
25 received, whether received directly from the employee or indirectly by means of deductions from
26 the wages of the employee or otherwise.

27 87. By Defendants unlawfully collecting tips from Plaintiff, Defendants violated California
28 Labor Code Section 351 and 353. Therefore, Plaintiff demands return of all tips unlawfully
collected from them within three years of the filing of this complaint.

1 **ELEVENTH CAUSE OF ACTION**

2 **PRIVATE ATTORNEYS GENERAL ACT**

3 **Individual and Representative Claim for PAGA penalties under California Labor Code**
4 **sections 201, 202, 203, 204 and/or 204b, 210, 226, 226.3, 226.7, 226.8, 233, 246, 351, 353,**
5 **510, 512, 558, 558.1, 1174, 1174.5, 1194, 1197, 1198, 2802, 3700.5)**

6 **(Plaintiff against all named Defendants and all DOE defendants)**

7 88. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs
8 1 through 87, inclusive, of this Complaint as though fully set forth herein.

9 89. Pursuant to law, Plaintiff provided the required written notice to the LWDA and
10 Defendants of the specific violations of the California Labor Code that Defendants and DOE
11 defendants have violated and continue to violate.

12 90. Pursuant to California Labor code section 2699.3, no response was received from the
13 LWDA within 65 days of the postmark date of the above-alleged letter.

14 91. Plaintiff therefore has exhausted all administrative remedies required of him under
15 California Labor Code sections 2698, 2699, and 2699.3, and, as a result, may prosecute this
16 cause of action and pursue penalties in a representative action for Defendants' violations of the
17 Labor Code.

18 92. Pursuant to California Labor Code section 2699, any provisions of the Labor Code
19 that provides for a civil penalty to be assessed and collected by the LWDA or any of its
20 departments, divisions, commissions, boards, agencies, or employees for violation of the code
21 may, as an alternative, be recovered through a civil action brought by an aggrieved employee
22 on behalf of himself or herself and other current or former employees pursuant to the procedures
23 specified in California Labor Code section 2699.3.

24 93. Plaintiff is an "aggrieved employee" because Plaintiff was employed by the alleged
25 violator and had one or more of the alleged violations committed against him, and therefore is
26 properly suited to represent the interests of other current and former hourly, non-exempt
27 employees who worked for TOLUCO at any of their California locations during the relevant
28 PAGA Period.

94. Based on the acts alleged above, Plaintiff, on behalf of himself and others, seeks penalties

1 under California Labor Code sections 2698 and 2699 because of Defendants' violations of
2 numerous provisions of the California Labor Code as alleged in this Complaint.

3 95. Plaintiff therefore has exhausted all administrative remedies required of him under
4 California Labor Code sections 2698, 2699, and 2699.3, and, as a result, may prosecute this
5 cause of action and pursue penalties in a representative action for Defendants' violations of the
6 Labor Code.

7 96. California Labor Code section 2699 et seq. imposes penalties upon culpable
8 Defendants for violating the Labor Code.

9 97. California Labor Code section 558 establishes a civil penalty as follows: Any employer
10 or other person action on behalf of an employer who violates, or causes to be violated, a section
11 of this chapter or any provision regulating hours and days of work in any order of the Industrial
12 Welfare Commission (including the "Hours and Days of Work" section of the Wage Order) shall
13 be subject to a civil penalty of (1) for any initial violation, fifty dollars (\$50) for each underpaid
14 employee for each pay period for which the employee was underpaid... (2) for each subsequent
15 violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which
16 the employee was underpaid...

17 98. Plaintiff seeks penalties for Defendants' misconduct as alleged herein as permitted by
18 law, but only those penalties that are required to be shared with the LWDA as Plaintiff is not
19 seeking individual/victim specific relief or underpaid wages for Plaintiff or other aggrieved
20 employees in this specific cause of action under the Private Attorneys General Act.

21 99. Specifically, Plaintiff seeks penalties under California Labor Code section 2699, for
22 the following:

23 Violations of California Labor Code sections 201, 202, 203, 204 and/or 204b, 210, 226,
24 226.3, 226.7, 226.8, 233, 246, 351, 353, 510, 512, 558, 558.1, 1174, 1174.5, 1194, 1197,
25 1198, 2802, 3700.5 via 2698 and 2699 and any other Labor Codes and Industrial Welfare
26 Commission Wage Order Provisions (no. 5) violated based on the facts alleged in this
27 Complaint.

28 100. Pursuant to Labor Code section 2698 et seq., Plaintiff seeks to recover attorney's fees,
costs, and civil penalties on behalf of Plaintiff and other current and former aggrieved employees

1 as alleged herein in an amount to be shown according to proof at trial and within the jurisdictional
2 limits of this Court.

3 **TWELFTH CAUSE OF ACTION**

4 **FAILURE TO PROVIDE PERSONNEL RECORDS**

5 **(Plaintiff against all named Defendants and all DOE Defendants)**

6 101. Plaintiff re-alleges and incorporates by reference each and every allegation in
7 paragraphs 1 through 100, inclusive, of this Complaint as though fully set forth herein.

8 102. Labor Code section 1198.5 dictates “every current and former employee, or his
9 or her representative, has the right to inspect and receive a copy of the personnel records that
10 the employer maintains relating to the employee’s performance or to any grievance concerning
11 the employee.”

12 103. Moreover, pursuant to sub-part (b)(1) of Labor Code section 1198.5, “the
13 employer shall make the contents of those personnel records available for inspection to the
14 current or former employee, or his or her representative, at reasonable intervals and at reasonable
15 times...” On information and belief, Defendants intentionally failed to provide Plaintiff with
16 personnel records when requested by Plaintiff via letters on August 29, 2022, as required by law.
17 Plaintiff requested his personnel records in accordance with California Labor Code section
1198.5(k) on August 29, 2022, via U.S. certified mail, return receipt requested.

18 104. Defendants failed to provide Plaintiff with an opportunity to inspect or copy his
19 records within 30 days. As a direct result of Defendants’ violations alleged herein, Plaintiff has
20 suffered and continues to suffer substantial losses related to Defendants' failure to provide
21 personnel records.

22 105. Plaintiff seeks all available remedies for Defendants’ violations including, but
23 not limited penalties, and costs to the extent permitted by law and according to proof at trial.
24 Pursuant to Labor Code section 1198.5, Plaintiff prays for judgment against Defendants in the
25 amount of \$750.00, along with costs and attorney’s fees.

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1 **THIRTEENTH CAUSE OF ACTION**

2 **FAILURE TO PROVIDE PAY RECORDS**

3 **(Plaintiff against all named Defendants and all DOE Defendants)**

4 106. Plaintiff re-alleges and incorporates by reference each and every allegation in
5 paragraphs 1 through 105, inclusive, of this Complaint as though fully set forth herein.

6 107. Labor Code section 226 sub-section (b) dictates “an employer...shall afford
7 current and former employees the right to inspect or copy records pertaining to their
8 employment, upon reasonable request to the employer...”

9 108. Moreover, pursuant to sub-section (c) of Labor Code section 226, “an
10 employer who receives a written or oral request to inspect or copy records pursuant to
11 subdivision (b) pertaining to a current or former employee shall comply with the request as soon
12 as practicable, but no later than 21 calendar days from the date of the request.” On information
13 and belief, Defendants intentionally failed to provide Plaintiff with pay records when requested
14 by Plaintiff via certified letter, return receipt requested, on August 29, 2022, and as required by
15 law. Plaintiff requested his pay records in accordance with California Labor Code section 226
16 on August 29, 2022, via certified mail. Defendants failed to provide Plaintiff with an
17 opportunity to inspect or copy his pay records within 21 days.

18 109. As a direct result of Defendants’ violations alleged herein, Plaintiff has
19 suffered and continues to suffer substantial losses related to Defendants' failure to provide pay
20 records.

21 110. Pursuant to Labor Code section 226, Plaintiff prays for judgment against
22 Defendants in the amount of \$750.00, along with costs and attorney’s fees. Plaintiff seeks all
23 available remedies for Defendants’ violations including, but not limited penalties, and costs to
24 the extent permitted by law and according to proof at trial.

25 **FOURTEENTH CAUSE OF ACTION**

26 **SEXUAL HARASSMENT IN VIOLATION OF FEHA**

27 **(Plaintiff against Defendant TOLUCO MEXICAN KITCHEN and all DOE defendants)**

28 111. Plaintiff re-alleges and incorporates by reference each and every allegation in
paragraphs 1 through 110, inclusive, of this Complaint as though fully set forth herein.

1 112. At all times herein mentioned, FEHA, Government Code section 12900, et seq.,
2 was in full force and effect and was binding on Defendants. Specifically, Government Code
3 section 12940(j) prohibits an employer from sexually harassing an employee on the basis of his
4 sex.

5 113. Plaintiff's manager, Dora Zaragoza, was and is at all times relevant hereto an
6 employee of TOLUCO and a "supervisor" as that term is fined in the Fair Employment and
7 Housing Act (FEHA, Government Code section 12926(t). The actions of Plaintiff's manager,
8 Dora Zaragoza, towards Plaintiff, while in the course and scope of his employment with
9 TOLUCO as described herein, created a hostile sexual environment which materially altered
10 Plaintiff's working conditions and which constitutes sexual harassment in violation of California
11 Government Code section 12940(j)(1).

12 114. In engaging in the aforementioned conduct, Defendants and DOES 1 to 25,
13 inclusive, and each of them, aided, abetted, incited, compelled, and/or coerced unlawful
14 employment practices in violation of the announced policy of this State against such practices.
15 Furthermore, they failed to take immediate and appropriate corrective action to prevent this
16 harassment.

17 115. As a proximate result of the conduct of the Defendants, Plaintiff has suffered and
18 will continue to suffer damages in terms of lost wages, lost bonuses, lost benefits, and other
19 pecuniary loss according to proof. Plaintiff has also suffered and will continue to suffer physical
20 and emotional injuries, including nervousness, humiliation, depression, anguish, embarrassment,
21 fright, shock, pain, discomfort, fatigue, and anxiety. The amount of Plaintiff's damages will be
22 ascertained at trial.

23 116. In committing the foregoing acts, Defendants have been guilty of oppression,
24 fraud, and/or malice under California Civil Code section 3294, thereby entitling Plaintiff to
25 punitive damages in a sum appropriate to punish and make an example out of the foregoing
26 Defendants.

27 117. The acts of oppression, fraud, and/or malice, were engaged in by employees of
28 Defendants. Each of the foregoing Defendants had advance knowledge of the unfitness of each
employee who acted with oppression, fraud, and/or malice, and/or authorized or ratified the

wrongful conduct for which an award of punitive damages is sought, and/or was personally guilty of oppression, fraud, and/or malice. The advance knowledge and conscious disregard, authorization, ratification, or act of oppression, fraud, and/or malice was committed by or on part of an officer, director, or managing agent of each of the Defendants, thereby entitling Plaintiff to punitive and exemplary damages against each of the Defendants in accordance with California Civil Code section 3294 in a sum appropriate to punish and make an example of each Defendant.

118. FEHA provides for an award of reasonable attorneys' fees and costs incurred by a prevailing Plaintiff in an action brought under its provisions. Plaintiff has employed and will continue to employ attorneys for the initiation and prosecution of this action. Plaintiff has incurred and will continue to incur attorneys' fees and costs herein. Plaintiff is entitled to an award of attorneys' fees and costs.

FIFTEENTH CAUSE OF ACTION

HARASSMENT BASED ON SEXUAL ORIENTATION IN VIOLATION OF FEHA

(Plaintiff against Defendant TOLUCO MEXICAN KITCHEN and all DOE defendants)

119. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs 1 through 118, inclusive, of this Complaint as though fully set forth herein.

120. At all times herein mentioned, FEHA, Government Code section 12900, et seq., was in full force and effect and was binding on Defendants. Specifically, Government Code section 12940(j) prohibits an employer from sexually harassing an employee on the basis of his sexual orientation. Plaintiff, a homosexual male qualified employee, was subjected to harassment based upon his sexual orientation.

121. Plaintiff's manager, Dora Zaragoza, was and is at all times relevant hereto an employee of TOLUCO and a "supervisor" as that term is fined in the Fair Employment and Housing Act (FEHA, Government Code section 12926(t). The actions of Plaintiff's manager, Dora Zaragoza, towards Plaintiff, while in the course and scope of his employment with TOLUCO as described herein, created a hostile sexual environment which materially altered Plaintiff's working conditions and which constitutes harassment based on sexual orientation in violation of California Government Code section 12940(j)(1).

122. In engaging in the aforementioned conduct, Defendants and DOES 1 to 25,

1 inclusive, and each of them, aided, abetted, incited, compelled, and/or coerced unlawful
2 employment practices in violation of the announced policy of this State against such practices.
3 Furthermore, they failed to take immediate and appropriate corrective action to prevent this
4 harassment.

5 123. As a proximate result of the conduct of the Defendants, Plaintiff has suffered and
6 will continue to suffer damages in terms of lost wages, lost bonuses, lost benefits, and other
7 pecuniary loss according to proof. Plaintiff has also suffered and will continue to suffer physical
8 and emotional injuries, including nervousness, humiliation, depression, anguish, embarrassment,
9 fright, shock, pain, discomfort, fatigue, and anxiety. The amount of Plaintiff's damages will be
10 ascertained at trial.

11 124. In committing the foregoing acts, Defendants have been guilty of oppression,
12 fraud, and/or malice under California Civil Code section 3294, thereby entitling Plaintiff to
13 punitive damages in a sum appropriate to punish and make an example out of the foregoing
14 Defendants.

15 125. The acts of oppression, fraud, and/or malice, were engaged in by employees of
16 Defendants. Each of the foregoing Defendants had advance knowledge of the unfitness of each
17 employee who acted with oppression, fraud, and/or malice, and/or authorized or ratified the
18 wrongful conduct for which an award of punitive damages is sought, and/or was personally
19 guilty of oppression, fraud, and/or malice. The advance knowledge and conscious disregard,
20 authorization, ratification, or act of oppression, fraud, and/or malice was committed by or on part
21 of an officer, director, or managing agent of each of the Defendants, thereby entitling Plaintiff
22 to punitive and exemplary damages against each of the Defendants in accordance with California
23 Civil Code section 3294 in a sum appropriate to punish and make an example of each Defendant.

24 126. FEHA provides for an award of reasonable attorneys' fees and costs incurred by
25 a prevailing Plaintiff in an action brought under its provisions. Plaintiff has employed and will
26 continue to employ attorneys for the initiation and prosecution of this action. Plaintiff has
27 incurred and will continue to incur attorneys' fees and costs herein. Plaintiff is entitled to an
28 award of attorneys' fees and costs.

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1 **SIXTEENTH CAUSE OF ACTION**

2 **FAILURE TO PREVENT HARASSMENT IN VIOLATION OF FEHA**

3 **(Plaintiff against Defendant TOLUCO MEXICAN KITCHEN and all DOE defendants)**

4 127. Plaintiff re-alleges and incorporates by reference each and every allegation in
5 paragraphs 1 through 126, inclusive, of this Complaint as though fully set forth herein.

6 128. At all times herein mentioned, FEHA, California Government Code section
7 12940(k), was in full force and effect and was binding on Defendants. This statute states that it
8 is an unlawful employment practice in California for an employer to “fail to take all reasonable
9 steps necessary to prevent discrimination and harassment from occurring.”

10 129. As alleged above, Plaintiff, a homosexual male qualified employee, was
11 subjected to harassment based on his sex and sexual orientation.

12 130. Defendants failed to take all reasonable steps necessary to prevent harassment. In
13 addition, TOLUCO failed to remedy such harassment. TOLUCO further failed to train,
14 supervise, and monitor its employees and agents.

15 131. The failure of Defendants to prevent harassment created and encouraged an
16 environment where such harassment was condoned, encouraged, tolerated, sanctioned, and/or
17 ratified.

18 132. As a direct and proximate result of the aforementioned acts and omissions of
19 Defendants, Plaintiff suffered general and compensatory damages, including but not limited to,
20 loss of income (past and future), loss of employment benefits (past and future), general and
21 compensatory damages (past and future), mental pain and anguish and emotional distress (past
22 and future), and will continue to suffer in the future, in an amount to be proved at trial.

23 133. The foregoing conduct engaged in by Defendants and DOES 1 to 25, inclusive,
24 and each of their directors, officers and/or managing agents, constitutes malice, fraud, and
25 oppression and was authorized, ratified, and carried on with a conscious and willful disregard of
26 their workers’ right to work in an environment free of harassment and retaliation, so as to justify
27 the imposition of punitive damages to punish and set an example of said Defendants.

28 134. As a proximate result of the foregoing conduct, which violated the provisions of
Government Code section 12940, et seq., Plaintiff has been forced to and will incur attorney’s

1 fees and costs in the prosecution of this claim, in an amount to be proven at trial.

2 **SEVENTEENTH CAUSE OF ACTION**

3 **NEGLIGENT RETENTION AND SUPERVISION**

4 **(Plaintiff against Defendant TOLUCO MEXICAN KITCHEN and all DOE defendants)**

5 135. Plaintiff re-alleges and incorporates by reference each and every allegation in
6 paragraphs 1 through 134, inclusive, of this Complaint as though fully set forth herein.

7 136. Upon information and belief, TOLUCO, by and through its agents and
8 employees, knew or reasonably should have known through reasonable investigation, of
9 manager Dora Zaragoza's propensity for sexually harassing behavior.

10 137. Defendants had a duty not to hire or retain its supervisors, provide proper training
11 to its supervisors and provide reasonable supervision of its supervisors, including Dora Zaragoza.

12 138. Defendants negligently hired, retained and/or failed to adequately train and
13 supervise its managers, including Dora Zaragoza, wherein she was able to commit the wrongful
14 acts complained of herein against Plaintiff. Defendants failed to provide reasonable supervision
15 of Dora Zaragoza despite knowing of her propensities for sexually harassing behavior.

16 139. As a result of the above-described conduct, Plaintiff has suffered and continues
17 to suffer a great amount of stress, anxiety, humiliation, embarrassment, loss of sleep, loss of
18 confidence, loss of self-esteem, and general discomfort.

19 140. Defendants engaged in these acts alleged herein and/or condoned, permitted,
20 authorized, and/or ratified the conduct of their employees and agents and are vicariously liable
21 for the wrongful conduct of their employees and agents for this cause of action.

22 **EIGHTEENTH CAUSE OF ACTION**

23 **WRONGFUL CONSTRUCTIVE DISCHARGE IN VIOLATION OF PUBLIC POLICY**

24 **(Plaintiff against Defendant TOLUCO MEXICAN KITCHEN and all DOE defendants)**

25 141. Plaintiff re-alleges and incorporates by reference each and every allegation in
26 paragraphs 1 through 140, inclusive, of this Complaint as though fully set forth herein.

27 142. At all times during his employment with Defendant TOLUCO, Plaintiff
28 performed his duties with the utmost diligence and competence.

143. Defendants intentionally created an illegal work environment and atmosphere

1 by harassing Plaintiff based on his sex and sexual orientation, not paying him overtime, and not
2 paying him the minimum wage, and violating numerous labor code sections as outlined in this
3 Complaint, thereby not giving Plaintiff an opportunity to work in an environment free of sexual
4 harassment and labor code violations. This situation became intolerable for Plaintiff and
5 Plaintiff had no alternative but to quit his job.

6 144. The employment of Plaintiff was constructively wrongfully terminated in or
7 around July 2022 in violation of the fundamental public policy of the State of California with
8 respect to sexually harassing an employee on account of his sexual orientation and violating
9 numerous labor code sections, including not compensating Plaintiff for all hours worked, not
10 compensating Plaintiff the minimum wage, not compensating Plaintiff overtime wages, not
11 reimbursing Plaintiff for business expenses incurred in the course of performing his duties, not
12 providing Plaintiff accurate, itemized wage statements, and not paying Plaintiff wages owed
13 every pay period and upon the separation of employment, among others. Moreover, Plaintiff was
14 forced to hire an attorney to assist him to end these illegal activities. Said conduct violated
15 statutory and constitutional expressions of public policy including, FEHA, the California Labor
Code and the California Constitution, Article 1 section 8.

16 145. As set forth above, said actions by Defendants were wrongful and in violation of
17 the fundamental principles of the public policy of the State of California as reflected in its laws,
18 objectives and policies. Said statutes and constitutional expressions of public policy include,
19 but are not limited to, FEHA, California Labor Code and the California Constitution, Article 1
20 section 8. These laws inure to the benefit of the public at large, and not just the private interests
21 of the employers and employees whom they govern or protect.

22 146. As a direct and proximate result of the aforementioned acts and omissions of
23 corporate Defendants, Plaintiff suffered general and compensatory damages, including but not
24 limited to, loss of income (past and future), loss of employment benefits (past and future), general
25 and compensatory damages (past and future), mental pain and anguish and emotional distress
26 (past and future), and will continue to suffer in the future, in an amount to be proved at trial.

27 147. The foregoing conduct engaged in by corporate Defendants and each of their
28 directors, officers and/or managing agents, constitutes malice, fraud, and oppression and was

1 authorized, ratified, and carried on with a conscious and willful disregard of their workers' right
2 to work in an environment free of retaliation due to whistleblowing, so as to justify the imposition
3 of punitive damages to punish and set an example of said Defendants.

4 **NINETEENTH CAUSE OF ACTION**

5 **VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17200**

6 **(California Business and Professions Code Section 17200)**

7 **(Plaintiff against TOLUCO MEXICAN KITCHEN and all DOE defendants)**

8 148. Plaintiff re-alleges and incorporates by reference each and every allegation in
9 paragraphs 1 through 147, inclusive, of this Complaint as though fully set forth herein.

10 149. By virtue of the foregoing statutes, regulations, and laws, the acts of Defendants
11 constitutes unfair and unlawful business practices under California Business and Professions
12 Code Section 17200, et seq.

13 150. Defendant's violations of the FEHA, California labor laws and the Labor Code
14 constitutes a business practice because it was done repeatedly over a significant period of time
15 in a systematic manner that was detrimental to Plaintiff and others.

16 151. For the four years preceding the filing of this action, Plaintiff has suffered
17 damages and request damages and/or restitution of all monies and profits to be disgorged from
18 corporate defendant TOLUCO MEXICAN KITCHEN in an amount according to proof at
19 time of trial, but in excess of the jurisdiction of this Court.

20 WHEREFORE, Plaintiff prays for Judgment against Defendants, and each of them, as
21 follows:

- 22 1. For compensatory damages including lost past and future wages, regular wages,
23 overtime, and all other sums of money, including employment benefits, together with
24 interest on said amounts, and any other economic injury to Plaintiff, according to proof;
- 25 2. For general damages according to proof;
- 26 3. For special and consequential damages to the extent allowed by law;
- 27 4. For damages for wages and overtime not paid to Plaintiff in an amount subject to proof
28 at trial;
5. For an award of punitive damages against Defendant TOLUCO MEXICAN KITCHEN

1 according to proof;

2 6. For damages and penalties under Labor Code Section 226 for Plaintiff in an amount
3 subject to proof at trial;

4 7. For damages and penalties pursuant to Labor Code Section 203 in an amount subject to
5 proof at trial;

6 8. For restitution and disgorgement for all unfair business practices by Defendant TOLUCO
7 MEXICAN KITCHEN against Plaintiff in an amount subject to proof at trial;

8 9. For an order enjoining Defendant TOLUCO MEXICAN KITCHEN from further unfair
9 and unlawful business practices in violation of Business and Professions Code Sections
10 17200, et seq.;

11 10. For one hour of wages due to Plaintiff for each work period of more than five (5) hours
12 when Plaintiff did not receive an uninterrupted thirty (30) minute meal period;

13 11. For one hour of wages due to Plaintiff for each work period of four (4) hours or major
14 fraction thereof when Plaintiff did not receive a ten (10) minute rest break;

15 12. For maximum civil penalties available under the Labor Code and applicable Wage
16 Order against Defendants as described more particularly in the Complaint and
17 representative PAGA claim;

18 13. For all remedies available to Plaintiff under the applicable Wage Order and the
19 Labor Code including an award of unpaid wages, attorney's fees, costs, interest,
20 liquidated damages, damages, penalties, and waiting time penalties according to proof
21 to the extent permitted by law via PAGA;

22 14. For the imposition of civil penalties and/or statutory penalties;

23 15. For all interest as allowed by law;

24 16. For all costs and disbursements incurred in this suit;

25 17. Reasonable attorney's fees where available by law, including but not limited to,
26 pursuant to Labor Code section 2698 et seq., Code of Civil Procedure section 1021.5,
27 Labor Code section 1102.5, the Labor Code, FEHA; and/or other applicable laws; and
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1 18. For such other and further relief as this Court may deem proper.

2 **DATED:** December 27, 2022

MESSRELIAN LAW INC.

3 By Maralle Messrelia
4 Harout Messrelia, Esq.
5 Maralle Messrelia, Esq., Of Counsel
6 Attorneys for Plaintiff Yovani Franko Rivera

7 **DEMAND FOR JURY TRIAL**

8 Plaintiff hereby demands, as a matter of right, a trial by jury in this case.

9 **DATED:** December 27, 2022

MESSRELIAN LAW INC.

10 By Maralle Messrelia
11 Harout Messrelia, Esq.
12 Maralle Messrelia, Esq., Of Counsel
13 Attorneys for Plaintiff Yovani Franko Rivera
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