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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **IN AND FOR THE COUNTY OF SAN DIEGO**

14 ASHLEY MALAXECHEVARRIA, on behalf
15 of the State of California, as a private attorney
16 general,

17 Plaintiff,

18 vs.

19 D.C. CURIEL INC., a California Corporation;
20 and DOES 1 through 50, inclusive,

21 Defendants.

Case No. 37-2023-00005657-CU-OE-CTL

REPRESENTATIVE ACTION
COMPLAINT FOR:

1. Civil Penalties Pursuant to Labor Code
§ 2699, *et seq.* for violations of Labor
Code §§ 201, 202, 203, 204 *et seq.*, 210,
218, 221, 226(a), 226.7, 227.3, 510, 512,
558(a)(1)(2), 1194, 1197, 1197.1, 1198,
2802, California Code of Regulations,
Title 8, Section 11040, Subdivision 5(A)-
(B), and the applicable Wage Order(s).

1 Plaintiff Ashley Malaxechevarria (“PLAINTIFF”), on behalf of the people of the
2 State of California and as an “aggrieved employee” acting as a private attorney general
3 under the Labor Code Private Attorney General Act of 2004, § 2699, *et seq.* (“PAGA”) only,
4 alleges on information and belief, except for her own acts and knowledge which are based
5 on personal knowledge, the following:

6 INTRODUCTION

7 1. PLAINTIFF brings this action against Defendant D.C. Curiel Inc. (referred to
8 as “DEFENDANT”) seeking only to recover PAGA civil penalties for herself, and on behalf
9 of all current and former aggrieved employees that worked for DEFENDANT. PLAINTIFF
10 does **not seek to recover anything other than penalties as permitted by California Labor**
11 **Code § 2699**. To the extent that statutory violations are mentioned for wage violations,
12 PLAINTIFF does not seek underlying general and/or special damages for those violations, but
13 simply the civil penalties permitted by California Labor Code § 2699.

14 2. California has enacted the PAGA to permit an individual to bring an action on
15 behalf of herself and on behalf of others for PAGA penalties *only*, which is the precise and sole
16 nature of this action.

17 3. Accordingly, PLAINTIFF seeks to obtain all applicable relief for
18 DEFENDANT’s violations under PAGA and solely for the relief as permitted by PAGA – that
19 is, penalties and any other relief the Court deems proper pursuant to the PAGA. Nothing in this
20 complaint should be construed as attempting to obtain any relief that would not be available in
21 a PAGA-only action.

22 THE PARTIES

23 4. Defendant D.C. Curiel Inc. (“DEFENDANT”) is a California Corporation that at
24 all relevant times mentioned herein conducted and continues to conduct substantial business in
25 the state of California.

26 5. DEFENDANT owns and operates restaurants in California.

27 6. PLAINTIFF was employed by DEFENDANT in California from August of 2020
28

1 to March of 2022 and was at all times classified by DEFENDANT as a non-exempt employee
2 entitled to the legally required meal and rest periods and payment of minimum and overtime
3 wages due for all time worked.

4 7. PLAINTIFF, and such persons that may be added from time to time who satisfy
5 the requirements and exhaust the administrative procedures under the Private Attorney General
6 Act, brings this Representative Action on behalf of the State of California with respect to herself
7 and all individuals who are or previously were employed by DEFENDANT in California,
8 including any employees staffed with DEFENDANT by a third party, and classified as non-
9 exempt employees ("AGGRIEVED EMPLOYEES") during the time period of August 4, 2021
10 until a date as determined by the Court (the "PAGA PERIOD").

11 8. PLAINTIFF, on behalf of herself and all AGGRIEVED EMPLOYEES presently
12 or formerly employed by DEFENDANT during the PAGA PERIOD, brings this representative
13 action pursuant to Labor Code § 2699, *et seq.* seeking fixed civil penalties for DEFENDANT's
14 violation of California Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 218, 221, 226(a), 226.7,
15 227.3, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations,
16 Title 8, Section 11040, Subdivision 5(A)-(B), and the applicable Wage Order(s). Based upon
17 the foregoing, PLAINTIFF and all AGGRIEVED EMPLOYEES are aggrieved employees
18 within the meaning of Labor Code § 2699, *et seq.*

19 9. The true names and capacities, whether individual, corporate, subsidiary,
20 partnership, associate or otherwise of defendants DOES 1 through 50, inclusive, are presently
21 unknown to PLAINTIFF who therefore sues these Defendants by such fictitious names pursuant
22 to Cal. Civ. Proc. Code § 474. PLAINTIFF will seek leave to amend this Complaint to allege
23 the true names and capacities of Does 1 through 50, inclusive, when they are ascertained.
24 PLAINTIFF is informed and believes, and based upon that information and belief alleges, that
25 the Defendants named in this Complaint, including DOES 1 through 50, inclusive, are
26 responsible in some manner for one or more of the events and happenings that proximately
27 caused the injuries and damages hereinafter alleged.

28 10. The agents, servants and/or employees of the Defendants and each of them acting

1 on behalf of the Defendants acted within the course and scope of his, her or its authority as the
2 agent, servant and/or employee of the Defendants, and personally participated in the conduct
3 alleged herein on behalf of the Defendants with respect to the conduct alleged herein.
4 Consequently, the acts of each Defendant are legally attributable to the other Defendants and
5 all Defendants are jointly and severally liable to PLAINTIFF and the other members of the
6 CALIFORNIA CLASS, for the loss sustained as a proximate result of the conduct of the
7 Defendants' agents, servants and/or employees.

8 9 **THE CONDUCT**

10 11. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT was
11 required to pay PLAINTIFF and the AGGRIEVED EMPLOYEES for all their time worked,
12 meaning the time during which an employee is subject to the control of an employer, including
13 all the time the employee is suffered or permitted to work. DEFENDANT requires PLAINTIFF
14 and the AGGRIEVED EMPLOYEES to work without paying them for all the time they are
15 under DEFENDANT's control. Among other things, DEFENDANT requires PLAINTIFF to
16 work while clocked out during what is supposed to be PLAINTIFF's off-duty meal break.
17 PLAINTIFF was from time to time interrupted by work assignments while clocked out for what
18 should have been PLAINTIFF's off-duty meal break. DEFENDANT, as a matter of established
19 company policy and procedure, administers a uniform practice of rounding the actual time
20 worked and recorded by PLAINTIFF and the AGGRIEVED EMPLOYEES, always to the
21 benefit of DEFENDANT, so that during the course of their employment, PLAINTIFF and the
22 AGGRIEVED EMPLOYEES are paid less than they would have been paid had they been paid
23 for actual recorded time rather than "rounded" time. Additionally, DEFENDANT engages in
24 the practice of requiring PLAINTIFF and the AGGRIEVED EMPLOYEES to perform work
25 off the clock in that DEFENDANT, as a condition of employment, required these employees
26 to submit to mandatory temperature checks and symptom questionnaires for COVID-19
27 screening prior to clocking into DEFENDANT's timekeeping system for the workday. As a
28 result, PLAINTIFF and the AGGRIEVED EMPLOYEES forfeit minimum wage, overtime

1 wage compensation, and off-duty meal breaks by working without their time being correctly
2 recorded and without compensation at the applicable rates. DEFENDANT's policy and practice
3 not to pay PLAINTIFF and the AGGRIEVED EMPLOYEES for all time worked, is evidenced
4 by DEFENDANT's business records.

5 19. State law provides that employees must be paid overtime and meal and rest break
6 premiums at one-and-one-half times their "regular rate of pay." PLAINTIFF and the
7 AGGRIEVED EMPLOYEES are compensated at an hourly rate plus incentive pay that is tied
8 to specific elements of an employee's performance.

9 20. The second component of PLAINTIFF's and the AGGRIEVED EMPLOYEES'
10 compensation is DEFENDANT's non-discretionary incentive program that paid PLAINTIFF
11 and the AGGRIEVED EMPLOYEES incentive wages based on their performance for
12 DEFENDANT. The non-discretionary incentive program provided all employees paid on an
13 hourly basis with incentive compensation when the employees met the various performance
14 goals set by DEFENDANT. However, when calculating the regular rate of pay in order to pay
15 overtime and meal and rest break premiums to PLAINTIFF and the AGGRIEVED
16 EMPLOYEES, DEFENDANT failed to include the incentive compensation as part of the
17 employees' "regular rate of pay" for purposes of calculating overtime pay and meal and rest
18 break premium pay. Management and supervisors described the incentive program to potential
19 and new employees as part of the compensation package. As a matter of law, the incentive
20 compensation received by PLAINTIFF and the AGGRIEVED EMPLOYEES must be included
21 in the "regular rate of pay." The failure to do so has resulted in a underpayment of overtime
22 compensation and meal and rest break premiums to PLAINTIFF and the AGGRIEVED
23 EMPLOYEES by DEFENDANT.

24 21. As a result of their rigorous work schedules, PLAINTIFF and the AGGRIEVED
25 EMPLOYEES were from time to time unable to take thirty (30) minute off duty meal breaks
26 and were not fully relieved of duty for their meal periods. PLAINTIFF and the AGGRIEVED
27 EMPLOYEES were required from time to time to perform work as ordered by DEFENDANT
28 for more than five (5) hours during some shifts without receiving a meal break. Further,

1 DEFENDANT from time to time failed to provide PLAINTIFF and AGGRIEVED
2 EMPLOYEES with a second off-duty meal period for some workdays in which these employees
3 were required by DEFENDANT to work ten (10) hours of work. DEFENDANT also engaged
4 in the practice of rounding the meal period times to avoid paying penalties to PLAINTIFF and
5 the AGGRIEVED EMPLOYEES. PLAINTIFF and the AGGRIEVED EMPLOYEES therefore
6 forfeit meal breaks without additional compensation and in accordance with DEFENDANT's
7 corporate policy and practice.

8 22. During the PAGA PERIOD, PLAINTIFF and the AGGRIEVED EMPLOYEES
9 were also required from time to time to work in excess of four (4) hours without being provided
10 ten (10) minute rest periods. Further, these employees were denied their first rest periods of at
11 least ten (10) minutes for some shifts worked of at least two (2) to four (4) hours from time to
12 time, a first and second rest period of at least ten (10) minutes for some shifts worked of
13 between six (6) and eight (8) hours from time to time, and a first, second and third rest period
14 of at least ten (10) minutes for some shifts worked of ten (10) hours or more from time to time.
15 PLAINTIFF and the AGGRIEVED EMPLOYEES were also not provided with one hour wages
16 in lieu thereof. Additionally, the applicable California Wage Order requires employers to
17 provide employees with off-duty rest periods, which the California Supreme Court defined as
18 time during which an employee is relieved from all work related duties and free from employer
19 control. In so doing, the Court held that the requirement under California law that employers
20 authorize and permit all employees to take rest period means that employers must relieve
21 employees of all duties and relinquish control over how employees spend their time which
22 includes control over the locations where employees may take their rest period. Employers
23 cannot impose controls that prohibit an employee from taking a brief walk - five minutes out,
24 five minutes back. Here, DEFENDANT's policy restricted PLAINTIFF and the AGGRIEVED
25 EMPLOYEES from unconstrained walks and is unlawful based on DEFENDANT's rule which
26 states PLAINTIFF and the AGGRIEVED EMPLOYEES cannot leave the work premises during
27 their rest period.

28 23. During the PAGA PERIOD, DEFENDANT failed to accurately record and pay

1 PLAINTIFF and the AGGRIEVED EMPLOYEES for the actual amount of time these
2 employees worked. Pursuant to the Industrial Welfare Commission Wage Orders,
3 DEFENDANT was required to pay PLAINTIFF and the AGGRIEVED EMPLOYEES for all
4 time worked, meaning the time during which an employee was subject to the control of an
5 employer, including all the time the employee was permitted or suffered to permit this work.
6 DEFENDANT required these employees to work off the clock without paying them for all the
7 time they were under DEFENDANT's control. As such, DEFENDANT knew or should have
8 known that PLAINTIFF and the AGGRIEVED EMPLOYEES were under compensated for all
9 time worked. As a result, PLAINTIFF and the AGGRIEVED EMPLOYEES forfeited time
10 worked by working without their time being accurately recorded and without compensation at
11 the applicable minimum wage and overtime wage rates. To the extent that the time worked off
12 the clock does not qualify for overtime premium payment, DEFENDANT fails to pay minimum
13 wages for the time worked off-the-clock in violation of Cal. Lab. Code §§ 1194, 1197, and
14 1197.1.

15 24. From time to time, DEFENDANT also failed to provide PLAINTIFF and the
16 AGGRIEVED EMPLOYEES with complete and accurate wage statements which failed to
17 show, among other things, the correct gross and net wages earned. Cal. Lab. Code § 226
18 provides that every employer shall furnish each of his or her employees with an accurate
19 itemized wage statement in writing showing, among other things, gross wages earned and all
20 applicable hourly rates in effect during the pay period and the corresponding amount of time
21 worked at each hourly rate. PLAINTIFF and the AGGRIEVED EMPLOYEES were paid on
22 an hourly basis. As such, the wage statements should reflect all applicable hourly rates during
23 the pay period and the total hours worked, and the applicable pay period in which the wages
24 were earned pursuant to California Labor Code Section 226(a). The wage statements
25 DEFENDANT provided to PLAINTIFF and the AGGRIEVED EMPLOYEES failed to identify
26 such information. More specifically, the wage statements failed to identify the accurate total
27 hours worked each pay period. When the hours shown on the wage statements were added up,
28 they did not equal the actual total hours worked during the pay period in violation of Cal. Lab.

1 Code 226(a)(2). Aside, from the violations listed above in this paragraph, DEFENDANT failed
2 to issue to PLAINTIFF an itemized wage statement that lists all the requirements under
3 California Labor Code 226 *et seq.* As a result, DEFENDANT from time to time provided
4 PLAINTIFF and the AGGRIEVED EMPLOYEES with wage statements which violated Cal.
5 Lab. Code § 226.

6 25. Cal. Lab. Code § 204(d) provides, the requirements of this section shall be
7 deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the
8 wages are paid not more than seven (7) calendar days following the close of the payroll period.
9 Cal. Lab. Code § 210 provides:

10 [I]n addition to, and entirely independent and apart from, any other penalty provided in
11 this article, every person who fails to pay the wages of each employee as provided in
12 Sections. . . 204. . . shall be subject to a civil penalty as follows: (1) For any initial
13 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 percent of the amount unlawfully
withheld.

14 26. DEFENDANT from time to time failed to pay PLAINTIFF and the AGGRIEVED
15 EMPLOYEES within seven (7) days of the close of the payroll period in accordance with Cal.
16 Lab. Code § 204(d).

17 27. DEFENDANT underpaid sick pay wages to PLAINTIFF and the AGGRIEVED
18 EMPLOYEES by failing to pay such wages at the regular rate of pay in violation of Cal. Lab.
19 Code Section 246. Specifically, PLAINTIFF and other non-exempt employees earn non-
20 discretionary remuneration. Rather than pay sick pay at the regular rate of pay, DEFENDANT
21 underpaid sick pay to PLAINTIFF and the AGGRIEVED EMPLOYEES at their base rates of
22 pay.

23 28. Cal. Lab. Code Section 246(1)(2) requires that paid sick time for nonexempt
24 employees be calculated by dividing the employee's total wages, not including overtime
25 premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days
26 of employment.

27 29. DEFENDANT violated Cal. Lab. Code Section 246 by failing to pay sick pay at
28 the regular rate of pay. PLAINTIFF and the AGGRIEVED EMPLOYEES routinely earned non-

1 discretionary incentive wages which increased their regular rate of pay. However, when sick pay
2 was paid, it was paid at the base rate of pay for PLAINTIFF and the AGGRIEVED
3 EMPLOYEES, as opposed to the correct, higher regular rate of pay, as required under Cal. Lab.
4 Code Section 246.

5 30. As a pattern and practice, DEFENDANT regularly failed to pay PLAINTIFF and
6 the AGGRIEVED EMPLOYEES their correct wages and accordingly owe waiting time
7 penalties pursuant to Cal. Lab. Code Section 203. Further, PLAINTIFF is informed and believes
8 and based thereon alleges that such failure to pay sick pay at regular rate was willful, such that
9 PLAINTIFF and the AGGRIEVED EMPLOYEES whose employment has separated are
10 entitled to waiting time penalties pursuant to Cal. Lab. Code Sections 201-203.

11 31. Pursuant to Cal. Lab. Code Section 221, "It shall be unlawful for any employer
12 to collect or receive from an employee any part of wages theretofore paid by said employer to
13 said employee." DEFENDANT failed to pay all compensation due to PLAINTIFF and the
14 AGGRIEVED EMPLOYEES, made unlawful deductions from compensation payable to
15 PLAINTIFF and the AGGRIEVED EMPLOYEES, failed to disclose all aspects of the
16 deductions from compensation payable to PLAINTIFF and the AGGRIEVED EMPLOYEES,
17 and thereby failed to pay these employees all wages due at each applicable pay period and upon
18 termination.

19 32. DEFENDANT intentionally and knowingly failed to reimburse and indemnify
20 PLAINTIFF and the AGGRIEVED EMPLOYEES for required business expenses incurred by
21 the PLAINTIFF and the AGGRIEVED EMPLOYEES in direct consequence of discharging
22 their duties on behalf of DEFENDANT. Under California Labor Code Section 2802, employers
23 are required to indemnify employees for all expenses incurred in the course and scope of their
24 employment. Cal. Lab. Code § 2802 expressly states that "an employer shall indemnify his or
25 her employee for all necessary expenditures or losses incurred by the employee in direct
26 consequence of the discharge of his or her duties, or of his or her obedience to the directions of
27 the employer, even though unlawful, unless the employee, at the time of obeying the directions,
28 believed them to be unlawful."

33. In the course of their employment PLAINTIFF and the AGGRIEVED EMPLOYEES as a business expense, were required by DEFENDANT to use their own personal cellular phones as a result of and in furtherance of their job duties as employees for DEFENDANT but are not reimbursed or indemnified by DEFENDANT for the cost associated with the use of their personal cellular phones and personal home offices for DEFENDANT's benefit. Specifically, PLAINTIFF and the AGGRIEVED EMPLOYEES were required by DEFENDANT to use their personal cellular phones and personal home offices. As a result, in the course of their employment with DEFENDANT, PLAINTIFF and the AGGRIEVED EMPLOYEES incurred unreimbursed business expenses which included, but were not limited to, costs related to the use of their personal cellular phones all on behalf of and for the benefit of DEFENDANT.

34. All of the conduct and violations alleged herein occurred during the PAGA PERIOD. To the extent that any of the conduct and violations alleged herein did not affect PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those violations that affected the AGGRIEVED EMPLOYEES pursuant to *Carrington v. Starbucks Corp.* 2018 AJDAR 12157 (Certified for Publication 12/19/18).

JURISDICTION AND VENUE

35. This Court has jurisdiction over this Action pursuant to California Code of Civil Procedure, Section 410.10.

36. Venue is proper in this Court pursuant to California Code of Civil Procedure, Sections 395 and 395.5, because PLAINTIFF worked in this County for DEFENDANT and DEFENDANT (i) currently maintains and at all relevant times maintained offices and facilities in this County and/or conducts substantial business in this County, and (ii) committed the wrongful conduct herein alleged in this County against PLAINTIFF and other AGGRIEVED EMPLOYEES.

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1 **FIRST CAUSE OF ACTION**

2 **For Violation of the Private Attorneys General Act**

3 **[Cal. Lab. Code §§ 2698, *et seq.*]**

4 **(By PLAINTIFF and Against All Defendants)**

5 37. PLAINTIFF realleges and incorporates by this reference, as though fully set forth
6 herein, the prior paragraphs of this Complaint.

7 38. PAGA is a mechanism by which the State of California itself can enforce state
8 labor laws through the employee suing under the PAGA who do so as the proxy or agent of the
9 state's labor law enforcement agencies. An action to recover civil penalties under PAGA is
10 fundamentally a law enforcement action designed to protect the public and not to benefit private
11 parties. The purpose of the PAGA is not to recover damages or restitution, but to create a
12 means of "deputizing" citizens as private attorneys general to enforce the Labor Code. In
13 enacting PAGA, the California Legislature specified that "it was ... in the public interest to
14 allow aggrieved employees, acting as private attorneys general to recover civil penalties for
15 Labor Code violations ..." Stats. 2003, ch. 906, § 1. Accordingly, PAGA claims cannot be
16 subject to arbitration.

17 39. PLAINTIFF, and such persons that may be added from time to time who satisfy
18 the requirements and exhaust the administrative procedures under the Private Attorney General
19 Act, brings this Representative Action on behalf of the State of California with respect to herself
20 and all individuals who are or previously were employed by DEFENDANT in California,
21 including any employees staffed with DEFENDANT by a third party, and classified as non-
22 exempt employees ("AGGRIEVED EMPLOYEES") during the time period of August 4, 2021
23 until a date as determined by the Court (the "PAGA PERIOD").

24 40. On August 4, 2022, PLAINTIFF gave written notice by electronic mail to the
25 Labor and Workforce Development Agency (the "Agency") and by certified mail to the
26 employer of the specific provisions of this code alleged to have been violated as required by
27 Labor Code § 2699.3. The statutory waiting period for PLAINTIFF to add these allegations to
28 the Complaint has expired. As a result, pursuant to Section 2699.3, PLAINTIFF may now

1 commence a representative civil action under PAGA pursuant to Section 2699 as the proxy of
2 the State of California with respect to all AGGRIEVED EMPLOYEES as herein defined.

3 41. The policies, acts and practices heretofore described were and are an unlawful
4 business act or practice because DEFENDANT (a) failed to provide PLAINTIFF and the
5 AGGRIEVED EMPLOYEES accurate itemized wage statements, (b) failed to properly record
6 and provide legally required meal and rest periods, (c) failed to pay minimum wages, (d) failed
7 to pay overtime wages and sick pay wages, (e) failed to reimburse employees for required
8 expenses, and (f) failed to provide wages when due, all in violation of the applicable Labor
9 Code sections listed in Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 218, 221, 226(a), 226.7,
10 227.3, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations,
11 Title 8, Section 11040, Subdivision 5(A)-(B), and the applicable Wage Order(s), and thereby
12 gives rise to civil penalties as a result of such conduct.¹ PLAINTIFF hereby seeks recovery of
13 only civil penalties as prescribed by the Labor Code Private Attorney General Act of 2004 as
14 the representative of the State of California for the illegal conduct perpetrated on PLAINTIFF
15 and the AGGRIEVED EMPLOYEES.

16
17 **PRAYER FOR RELIEF**

18 WHEREFORE, PLAINTIFF prays for judgment against each Defendant, jointly and
19 severally, as follows:

20 1. On behalf of the State of California and with respect to all AGGRIEVED
21 EMPLOYEES:

22 A) Recovery of civil penalties as prescribed by the Labor Code Private
23 Attorneys General Act of 2004; and,

24 B) An award of attorneys' fees and cost of suit, as allowable under the
25 law, including, but not limited to, pursuant to Labor Code §2699.

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27
28 ¹Plaintiff specifically excludes and/or does not allege any claims under California Labor
Code §558(a)(3).

1 Dated: February 8, 2023

BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW
LLP

2
3 By: /s/ Nicholas De Blouw
4 Norman B. Blumenthal
5 Kyle R. Nordrehaug
6 Nicholas J. De Blouw

Attorneys for Plaintiff