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**ELECTRONICALLY FILED**  
Superior Court of California,  
County of San Diego

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Clerk of the Superior Court  
By Nora Lopez, Deputy Clerk

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN DIEGO**

KATHERINE WISHNICK, individually and on  
behalf of all others similarly situated,

Plaintiff,

vs.

BIG DADDY'S OIL 22, INC.; BIG DADDY'S  
OIL 23, INC.; BIG DADDY'S OIL 24, INC.;  
BIG DADDY'S OIL 26, INC.; BIG DADDY'S  
OIL, LLC; and BIG DADDY DOES 1 through  
50; ROES 1 through 10, inclusive,

Defendants.

Case No. 37-2023-00001414-CU-OE-CTL

**CLASS ACTION**

**FIRST AMENDED CLASS AND  
REPRESENTATIVE ACTION  
COMPLAINT**

1. Minimum Wage Violations
2. Failure to Pay All Overtime Wages
3. Meal Period Violations
4. Rest Period Violations
5. Failure to Pay All Sick Leave Wages
6. Untimely Payment of Wages
7. Wage Statement Violations
8. Waiting Time Penalties
9. Unfair Competition
10. Civil Penalties Under the Private Attorneys  
General Act

1 Plaintiff KATHERINE WISHNICK (“Plaintiff”), individually and on behalf of all others  
2 similarly situated and the State of California under the Private Attorneys General Act brings this  
3 FIRST AMENDED CLASS AND REPRESENTATIVE ACTION COMPLAINT against Defendants  
4 BIG DADDY'S OIL 22, INC.; BIG DADDY'S OIL 23, INC.; BIG DADDY'S OIL 24, INC.; BIG  
5 DADDY'S OIL 26, INC.; BIG DADDY’S OIL, LLC; and BIG DADDY DOES 1 through 50; ROES  
6 1 through 10, inclusive, (collectively “Defendants”), alleging as follows:

### 7 **INTRODUCTION**

8 1. This is a class and representative action filed for wage and hour violations of California  
9 Labor Code against Big Daddy’s Oil, which owns and operates a series of AM/PM ARCO gas stations.

10 2. Defendants employed Plaintiff and class members at multiple gas stations San Diego  
11 County and California and failed to pay for all hours worked, to include all forms of remuneration in  
12 the regular rate of pay/compensation (such as bonuses and other payments), and therefore underpaid  
13 Plaintiff and the class members are liable for the underlying wages and premiums.

### 14 **JURISDICTION & VENUE**

15 3. Jurisdiction of this action is proper in this Court under Article VI, Section 10 of the  
16 California Constitution as the causes of action are premised upon violations of California law.

17 4. The monetary damages and restitution sought by Plaintiff exceed the minimal  
18 jurisdiction limits of the Superior Court.

19 5. This Court has jurisdiction over Defendants because, upon information and belief,  
20 Defendants are citizens of California, have sufficient minimum contacts in California, or otherwise  
21 intentionally avail themselves to the California economy so as to render the exercise of jurisdiction  
22 over them by the California courts consistent with traditional notions of fair play and substantial  
23 justice.

24 6. Venue is proper in this Court under Code of Civil Procedure sections 393(a), 395,  
25 and/or 395.5 because, upon information and belief, Defendants conduct business and committed some  
26 of the alleged violations in this county.

**PARTIES**

**A. Plaintiff Katherine Wishnick**

7. Plaintiff Wishnick is an individual over 18 years of age who worked for Defendants in California as a non-exempt employee from about December 2020 to October 2022. Plaintiff worked as a Cashier.

8. The State of California, via the Labor and Workforce Development Agency (“LWDA”), is the real party in interest in this action. (*Kim v. Reins Int’l California, Inc.* (2020) 9 Cal. 5th 73, 81 [The “government entity on whose behalf the plaintiff files suit is always the real party in interest.”])

**B. Defendants**

9. Defendants do business in California as AM/PM Arco.

10. Defendant Big Daddy's Oil 22, Inc. is a California corporation that maintains operations and conducts business throughout the State of California, including in this county.

11. Defendant Big Daddy's Oil 23, Inc. is a California corporation that maintains operations and conducts business throughout the State of California, including in this county.

12. Defendant Big Daddy's Oil 24, Inc. is a California corporation that maintains operations and conducts business throughout the State of California, including in this county.

13. Defendant Big Daddy's Oil 26, Inc. is a California corporation that maintains operations and conducts business throughout the State of California, including in this county.

14. Defendant Big Daddy's Oil, LLC is a Nevada limited liability company that maintains operations and conducts business throughout the State of California, including in this county.

15. The true names and capacities, whether individual, corporate, or otherwise, of the parties sued as BIG DADDY DOES 1 through 50; ROES 1 through 10, inclusive, are presently unknown, unascertainable, or uncertain to Plaintiff, who sues them by such fictitious names under Code of Civil Procedure section 474. Plaintiff is informed, believes, and alleges that each of BIG DADDY DOES 1 through 50 employed Plaintiff and is responsible in some manner for the acts and omissions alleged herein. Plaintiff may seek leave to amend this Complaint to reflect their true names and capacities once ascertained.

16. BIG DADDY DOES are individuals and/or corporate or other legal entities that together comprise the employer of Plaintiff and class members.

17. Plaintiff is informed, believes, and alleges that all Defendants in this action are employers, co-employers, joint employers, and/or part of an integrated employer enterprise, as each of the Defendants exercised control over the wages, hours, and working conditions of Plaintiff and other aggrieved employees, suffered and permitted them to work, and otherwise engaged them as employees under California law.

18. Plaintiff is informed, believes, and alleges that at least some of the Defendants have common ownership, common management, interrelationship of operations, and centralized control over labor relations and are therefore part of an integrated enterprise and thus jointly and severally responsible for the acts and omissions alleged herein, including pursuant to Labor Code sections 558, 558.1, and 1197.1

19. Plaintiff is informed, believes, and alleges that each defendant acted in all respects pertinent to this action as an alter-ego, agent, servant, joint employer, joint venturer, co-conspirator, partner, in an integrated enterprise, or in some other capacity on behalf of all other co-defendants, such that the acts and omissions of each defendant may be legally attributable to all others. Specifically, Defendants constitute a single employer organized through various different Big Daddy's Oil entities. Employees work on many occasions interchangeably among the stores, are subject to the same policies and practices, and employment decisions are made by the same decisionmakers.

## CLASS ALLEGATIONS

20. Plaintiff brings this action individually and on behalf of the following class pursuant to Code of Civil Procedure section 382:

a. All current and former non-exempt employees who worked for Defendants in California at any time from four years (plus the additional 178-day statutory tolling period under Emergency Rule 9) prior to the filing of this action through date of class certification.

21. Plaintiff reserves the right to establish various subclass definitions as appropriate at the class certification stage, according to proof.

22. The class is ascertainable and shares a well-defined community of interest in this litigation:

- a. Numerosity: Although the precise membership of the entire class is unknown to Plaintiff at this time, Plaintiff estimates the class to exceed 50 individuals. The class members are so numerous that joinder of all class members is impracticable. The identity of class members is readily ascertainable by inspection of Defendants' employment records.
- b. Typicality: Plaintiff's claims are typical of the claims of the other class members. Plaintiff and class members were subject to the same policies and practices of Defendants, which resulted in losses to Plaintiff and Class Members. Proof of common unlawful business practices, which Plaintiff experienced and is representative of, will establish the right of the class to recover on the causes of action alleged herein.
- c. Adequacy: Plaintiff is an adequate class representative. Plaintiff will take all necessary steps to adequately and fairly represent and protect the interests of the class. Plaintiff has no interest antagonistic to other class members. Plaintiff is represented by attorneys who have substantial experience prosecuting, defending, resolving, and litigating wage and hour class, collective, and representative actions in California state and federal courts.
- d. Superiority: A class action is superior to other means for adjudicating this dispute. Individual joinder is impractical. Class treatment will allow for common issues to be resolved in a single forum, simultaneously, and without duplication of effort and expense.
- e. Public Policy Considerations: Certification of this lawsuit as a class action advances the State of California's strong public interest in ensuring its approximately millions of employed residents are properly paid the wages they earned for the hours they worked. Class actions provide a mechanism for

1 enforcement of labor laws and allow for vindication of employee rights by  
2 unnamed class members.

3 23. Common questions of law and fact as to the class members predominate over questions  
4 affecting only individual members. The common questions of law and fact exist as to whether the  
5 employment policies and practices formulated by Defendants and applied to the class members  
6 constitute violate California law.

7 **GENERAL ALLEGATIONS**

8 24. Defendants failed to pay overtime and double time at the lawful rate of pay by failing  
9 to calculate Plaintiff's and other class members' additional remuneration into the "regular rate of pay"  
10 as required by California law.

11 25. Plaintiff's records show Defendants had a policy and practice of paying overtime at  
12 1.5x Plaintiff's base rate, rather than 1.5x Plaintiff's regular rate of pay, which should have factored in  
13 all remuneration, including bonuses.

14 26. Defendants paid Plaintiff and class members bonuses, "maintenance" payments, and  
15 other forms of remuneration that Defendants failed to include in the overtime and double time rates in  
16 the pay periods when employees worked overtime hours.

17 27. Plaintiff's wage statement with the pay date of 03/18/2022 provides an illustrative  
18 example of the regular rate underpayment.

19 28. Plaintiff and other employees experienced missed, late, short, and interrupted meal  
20 periods in order to keep up with high demands of the job. When Plaintiff and class members  
21 experienced non-compliant meal periods, Defendants failed to pay meal period premiums at the  
22 regular rate of compensation in violation of Labor Code section 226.7.

23 29. Defendants additionally had a policy and practice of not paying rest periods when they  
24 were due. To the extent Defendants ever paid rest period premiums, Defendants violated Labor Code  
25 section 226.7 because such premiums were not paid at the correct regular rate of compensation to  
26 aggrieved employees, which would have factored in bonuses and other forms of compensation based  
27 on their policy and practice of miscalculating underpaying the regular rate of pay applicable to  
28 overtime and other premiums.

1           30.     Additionally, Defendants failed to pay Plaintiff and aggrieved employees for all hours  
2 worked, due to their unlawful policy and practice of requiring Plaintiff and other aggrieved employees  
3 to clock out regardless of their ability to take a compliant meal break, depriving them of regular and  
4 overtime wages.

5           31.     In effect, requiring Plaintiff and class members to work-off-the clock without pay.  
6 When Plaintiff and aggrieved employees worked more than 8 hours, this practice resulted in unpaid  
7 overtime wages.

8           32.     Based on Defendants' noncompliance with the regular rate of pay requirements  
9 applicable to overtime and meal/rest period premiums, Plaintiff alleges on information and belief that  
10 the regular rate miscalculation equally applied to paid sick leave with respect to the class, resulting in  
11 underpayments of paid sick leave wages.

12           33.     Defendants' failure to pay regular and overtime, paid sick leave, and premium  
13 payments each pay period or upon separation of employment, rendered the payments untimely and  
14 subject to civil penalties for the violations committed against the aggrieved employees under Labor  
15 Code §§ 201 through 203.

16           34.     Defendants failed to provide accurate itemized wage statements to the aggrieved  
17 employees each pay period as a result of these policies and practices.

18           35.     Specifically, Defendants violated Labor Code section 226(a)(1) and (5) by not listing  
19 the correct "gross wages earned" or "net wages earned" on those statements because the amounts listed  
20 failed to include and account for the unpaid meal and rest period premiums Plaintiff and class members  
21 earned but were not paid.

22           36.     Likewise, in violation of Labor Code section 226(a)(9), Defendants failed to state on  
23 employee statements each pay period the applicable hourly rates and the number of hours worked at  
24 that rate, as Defendants failed to pay all wages and premiums owed to employees each pay period (i.e.,  
25 meal and rest period premiums). The amounts stated are instead depreciated and underpaid, resulting  
26 in an inaccurate reflection to the pay stub.

27           37.     These wage statement violations created significant confusion among Plaintiff and  
28 other aggrieved employees with respect to what amounts were owed and paid, at what rates, the

1 number of hours worked, and how those amounts were or should be calculated. The wage statements  
2 reflect a false statement of earnings and concealed the underlying problems of underpayments of  
3 employee wages.

4 38. Plaintiff is informed, believes, and alleges that Defendants' acts and omissions have  
5 knowingly and intentionally caused harm to Plaintiff and the Class. Plaintiff is informed, believes,  
6 and alleges that Defendants have engaged in systemic violations of the Labor Code and IWC Wage  
7 Order by maintaining practices, policies, and customs that are inconsistent with their obligations under  
8 California Law.

9 **FIRST CAUSE OF ACTION**

10 **MINIMUM WAGE VIOLATIONS**

11 **Violation of Labor Code §§ 1194, 1194.2 and 1197**

12 **(All Claims Alleged by Plaintiff and Class Members Against All Defendants)**

13 39. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

14 40. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code  
15 §§ 1182.12, 1194, 1194.2, 1197, 1197.1 and 1198 and the IWC Wage Orders (the "Hours and Days  
16 of Work" and "Minimum Wages" sections of the applicable orders), which require non-exempt  
17 employees be timely paid at least the state or local minimum wage (if higher) for each hour of work,  
18 and further provide a private right of action for an employer's failure to pay all minimum wages (plus  
19 liquidated damages).

20 41. Defendants willfully failed in their affirmative obligation to pay Plaintiff and Class  
21 Members at least the lawful minimum wage for each hour worked in violation of Labor Code sections  
22 1182.12, 1194, 1194.2, 1197, 1197.1 and 1198 and the IWC Wage Orders (the "Hours and Days of  
23 Work" and "Minimum Wages" sections of the applicable orders), including payment at the lawful  
24 local and county minimum wage ordinances in effect. As a result, Defendants are liable for all  
25 associated damages, including liquidated damages for the minimum wage violations pursuant to Labor  
26 Code § 1194.2.

27 42. Defendants' unlawful acts and omissions deprived Plaintiff and Class Members of  
28 minimum, regular and overtime wages in amounts to be determined at trial. Plaintiff and Class

Members are entitled to recover to the full amount of the unpaid wages, plus liquidated damages in an amount equal to the wages unlawfully unpaid (and interest thereon), in addition to interest, attorneys' fees, and costs to the extent permitted by law, including under Labor Code sections 1194 and 1194.2.

## **SECOND CAUSE OF ACTION**

### **FAILURE TO PAY ALL OVERTIME WAGES**

#### **Violation of Labor Code §§ 510 and 1194**

43. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

44. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code §§ 204, 510, 558, 1194, and 1198, which require non-exempt employees be timely paid overtime wages all overtime hours worked, and which further provide a private right of action for an employer's failure to pay all overtime compensation for overtime hours worked.

45. Defendants failed in their affirmative obligation to pay Plaintiff and Class Members no less than one and one-half times their respective "regular rate of pay" for all hours worked in excess of eight hours in one day, 40 hours in one week, or the first eight hours worked on the seventh day of work in any one workweek, and no less than twice their respective "regular rate of pay" for all hours over 12 hours in one day and any work in excess of eight hours on any seventh day of a workweek for such hours worked, in violation of Labor Code sections 204, 510, 558, 1194, and 1198 and the IWC Wage Orders (the "Hours and Days of Work" sections of the applicable orders).

46. Plaintiff and Class Members are entitled to recover to the full amount of the unpaid overtime, in addition to interest, statutory and civil penalties, and attorneys' fees, and costs to the extent permitted by law.

## **THIRD CAUSE OF ACTION**

### **MEAL PERIOD VIOLATIONS**

#### **Violation of Labor Code §§ 226.7 and 512**

47. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

48. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code §§ 226.7, 558 and 512, which require non-exempt employees be provided complaint meal periods (or meal period premiums in lieu thereof), and which further provide a private right of action for an

1 employer's failure to lawfully provide all meal periods and/or pay meal period premiums at the lawful  
2 regular rate of compensation.

3 49. Defendants willfully failed in their affirmative obligation to consistently provide  
4 Plaintiff and Class Members compliant, duty-free meal periods of not less than 30 minutes beginning  
5 before the fifth hour of hour for each work period of more than five hours per day and a second duty-  
6 free meal period of not less than 30 minutes beginning before the tenth hour of hour of work in  
7 violation of Labor Code sections 226.7, 512, 558, 1198 and the IWC Wage Orders (the "Meal Periods"  
8 sections of the applicable orders).

9 50. Further, Defendants willfully failed in their affirmative obligation to consistently pay  
10 Plaintiff and Class Members one additional hour of pay at the respective regular rate of compensation  
11 for each workday that a fully compliant meal period was not provided, in violation of Labor Code  
12 sections 226.7, 512, 558, and 1198 and the IWC Wage Orders (the "Meal Periods" sections of the  
13 applicable orders).

14 51. Plaintiff and Class Members are entitled to recover to the full amount of the meal period  
15 premiums owed, in addition to interest, statutory and civil penalties, and attorneys' fees, and costs to  
16 the extent permitted by law.

17 **FOURTH CAUSE OF ACTION**

18 **REST PERIOD VIOLATIONS**

19 **Violation of Labor Code §§ 226.7**

20 52. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

21 53. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code  
22 §§ 226.7 and 516, which require non-exempt employees be authorized to take complaint rest periods  
23 (or rest period premiums in lieu thereof), and which further provide a private right of action for an  
24 employer's failure to lawfully provide all rest periods and/or pay rest period premiums at the lawful  
25 regular rate of compensation.

26 54. Defendants willfully failed in their affirmative obligation to consistently authorize and  
27 permit Plaintiff and Class Members to receive compliant, duty-free rest periods of not less than ten  
28 (10) minutes for every four hours worked (or major fraction thereof) in violation of Labor Code

1 sections 226.7, 516, 558, and 1198 and the IWC Wage Orders (the “Rest Periods” sections of the  
2 applicable orders).

3 55. Further, Defendants willfully failed in their affirmative obligation to consistently pay  
4 Plaintiff and Class Members one additional hour of pay at the respective regular rate of compensation  
5 for each workday that a fully compliant rest period was not provided, in violation of Labor Code  
6 sections 226.7, 516, 558, and 1198 and the IWC Wage Orders.

7 **FIFTH CAUSE OF ACTION**

8 **FAILURE TO PAY ALL PAID SICK LEAVE WAGES**

9 **Violation of Labor Code §§ 200, 218, 246 *et seq.***

10 56. All outside paragraphs of this Complaint are incorporated into this section.

11 57. Defendants knowingly and intentionally failed in their affirmative obligation to pay  
12 sick leave wages to Plaintiff and the Paid Sick Leave Class in violation of Labor Code section 246  
13 *et seq.* Paid sick leave earnings constitute wages for purposes of California wage and hour law.  
14 (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 [“Courts have recognized  
15 that ‘wages’ also include those benefits to which an employee is entitled as a part of his or her  
16 compensation, including money, room, board, clothing, vacation pay, and sick pay”].)

17 58. Labor Code section 246(l) governs how Defendants were required to calculate paid sick  
18 leave:

19 [A]n employer shall calculate paid sick leave using any of the following calculations:

20 (1) Paid sick time for nonexempt employees shall be calculated in the same  
21 manner as the regular rate of pay for the workweek in which the employee uses  
22 paid sick time, whether or not the employee actually works overtime in that  
23 workweek.

24 (2) Paid sick time for nonexempt employees shall be calculated by dividing the  
25 employee’s total wages, not including overtime premium pay, by the  
26 employee’s total hours worked in the full pay periods of the prior 90 days of  
27 employment.  
28

1 (3) Paid sick time for exempt employees shall be calculated in the same manner  
2 as the employer calculates wages for other forms of paid leave time.

3 59. Defendants failed to pay Plaintiff and the Paid Sick Leave Class their paid sick leave  
4 wages at one of the lawful rates set forth in the statute because Defendants failed to include in their  
5 sick leave calculation the additional remuneration received by Plaintiff and the Paid Sick Leave Class.

6 60. Furthermore, to the extent the paid sick leave paid constitutes Covid-related paid sick  
7 leave, Defendants knowingly and intentionally failed in their affirmative obligation to pay Covid-19  
8 Supplemental Sick Leave wages to the Paid Sick Leave Class at the correct rate in violation of Labor  
9 Code sections 246, 248.1, 248.2, and 248 *et seq.*

10 61. Pursuant to Labor Code section 248.1, Defendants were required to provide up to 80  
11 hours of Covid-19 Supplemental Paid Sick Leave to employees for the period of April 20, 2020 to  
12 December 31, 2020. Labor Code section 248.2 required Defendants to provide up to 80 hours of  
13 Covid-19 Supplemental Paid Sick Leave for the period of January 1, 2021 through at least September  
14 30, 2021. Labor Code section 248.6 extended Covid sick leave protections and requires employers to  
15 provide up to 80 hours of Covid-19 Supplemental Paid Sick Leave for the period of January 1, 2022  
16 to September 30, 2022, and may be extended thereafter.

17 62. Under Labor Code section 248.1, employees must be paid for Covid-19 Supplemental  
18 Paid Sick Leave at the highest of the following: (1) the regular rate of pay for the last pay period,  
19 (2) state minimum wage, (3) local minimum wage.

20 63. Under Labor Code section 248.2, non-exempt employees must be paid supplemental  
21 paid sick leave according to the highest of the following four methods:

22 (I) Calculated in the same manner as the regular rate of pay for the workweek in which  
23 the covered employee uses COVID-19 supplemental paid sick leave, whether or not  
24 the employee actually works overtime in that workweek.

25 (II) Calculated by dividing the covered employee's total wages, not including  
26 overtime premium pay, by the employee's total hours worked in the full pay periods  
27 of the prior 90 days of employment.

28 (III) The state minimum wage.

1 (IV) The local minimum wage to which the covered employee is entitled.

2 64. Labor Code section 248.6 requires employers to pay supplemental sick leave using  
3 either method (I) or (II), as identified above.

4 65. On information and belief, Defendants failed to pay Covid-19 Supplemental Sick  
5 Leave in the manner described above because Defendants failed to include in their sick leave  
6 calculation the additional remuneration received by the Paid Sick Leave Class.

7 66. As a result, Defendants violated the Labor Code and are liable to Plaintiff and the Paid  
8 Sick Leave Class for underpaid sick leave wages, in addition to interest, attorneys' fees, and costs.

9 **SIXTH CAUSE OF ACTION**

10 **UNTIMELY PAYMENT OF WAGES**

11 **Violation of Labor Code §§ 204, 210, 218 *et seq.***

12 67. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

13 68. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code  
14 §§ 204, 204b, and 210 which require non-exempt employees be timely paid all wages owed each pay  
15 period, and which further provide a private right of action for an employer's failure to comply with  
16 this obligation. Labor Code § 218 authorizes individuals to sue directly for wages and penalties due  
17 under these sections, including Labor Code § 210(c)'s statutory late payment penalties.

18 69. Defendants willfully failed in their affirmative obligation to timely pay all wages,  
19 including paid sick leave and meal and rest premiums, earned by Plaintiff and class members twice  
20 during each calendar month on days designated in advance by the employer as regular paydays (for  
21 employees paid on a non-weekly basis) and on the regularly-scheduled weekly payday weekly  
22 employees, if any, in violation of Labor Code sections 204 and 204b and the IWC Wage Orders (the  
23 "Minimum Wages" sections of the applicable orders).

24 70. Plaintiff and class members are entitled to recover the full amount of the unpaid wages,  
25 in addition to a statutory penalty in the amount of \$100 for the initial violation for each failure to pay  
26 each employee and \$200 for all subsequent violations and for all willful or intentional violations for  
27 each failure to pay each employee, plus 25 percent of the amount unlawfully withheld under provided  
28 in Labor Code § 210, in addition to interest, attorneys' fees, and costs to the extent permitted by law.

## WAGE STATEMENT VIOLATIONS

71. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

73. Defendants knowingly and intentionally failed in their affirmative obligation provide accurate itemized wage statements to Plaintiff and Class Members resulting in injury to Plaintiff and Class Members. Specifically, the wage statements issued to Plaintiff and Class Members did not accurately state each pay period all of the information required by Labor Code § 226(a)(1)-(9).

75. As a result, Plaintiff and Class Members are entitled to recover the statutory penalty of \$50 per employee for the initial pay period in which a violation occurred and \$100 per employee for each violation in a subsequent pay period, up to an aggregate penalty of \$4,000 per employee, in addition to interest, attorneys' fees, and costs to the extent permitted by law, including under Labor Code section 226(e).

## WAITING TIME PENALTIES

76. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

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penalties each day an employer fails to comply with this obligation, up to a maximum of 30 days wages.

78. Defendants willfully failed and continue to fail in their affirmative obligation to pay all wages earned and unpaid to Plaintiff and members of the Waiting Time Class immediately upon termination of employment or within 72 hours thereafter for employees who did not provide at least 72 hours prior notice of his or her intention to quit, and further failed to pay those sums for 30 days thereafter in violation of Labor Code sections 201 through 203 and the IWC Wage Orders.

79. Plaintiff and the Waiting Time Class are entitled to recover to a waiting time penalty for a period of up to 30 days, in addition to interest, attorneys' fees, and costs to the extent permitted by law.

## **NINTH CAUSE OF ACTION**

### **UNFAIR COMPETITION**

#### **Violation of Business and Professions Code §§ 17200 *et seq.***

80. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

81. Defendants have engaged and continue to engage in unfair and/or unlawful business practices in the State of California in violation of California Business and Professions Code § 17200 by committing the foregoing wage and hour violations alleged throughout this Complaint.

82. Defendants' dependance on these unfair and/or unlawful business practices deprived Plaintiff and continue to deprive other class members of compensation to which they are legally entitled, constitutes unfair and/or unlawful competition, and provides an unfair advantage to Defendants over competitors who have been and/or are currently employing workers in compliance with California's wage and hour laws. These failures constitute unlawful, deceptive, and unfair business acts and practices in violation of Business and Professions Code section 17200 *et seq.*

83. Plaintiff is a victim of Defendants' unfair and/or unlawful conduct alleged in this Complaint, and Plaintiff, as an individual and on behalf of others similarly situated, seeks full restitution of the moneys as necessary and according to proof to restore all monies withheld, acquired, and/or converted by Defendants pursuant to Business and Professions Code §§ 17203 and 17208.

84. Plaintiff does not have an adequate remedy at law for past or future violations, to the extent the statute of limitations on each of the alleged causes of action do not extend to the four year limitation provided under the UCL or to the extent the underlying Labor Code and IWC Wage Order violations do not provide a private right of action.

85. Plaintiff and class members are entitled to injunctive relief against Defendants, restitution, and other equitable relief to return all funds over which Plaintiff and class members have an ownership interest and to prevent future damage and the public interest under Business and Professions Code § 17200 *et seq.* Plaintiff and class members are further entitled to recover interest, attorneys' fees, and costs to the extent permitted by law, including under Code of Civil Procedure § 1021.5.

### TENTH CAUSE OF ACTION

## CIVIL PENALTIES UNDER THE PRIVATE ATTORNEYS GENERAL ACT

**Violation of Labor Code §§ 2698 *et seq.***

**(By Plaintiff on Behalf of the State and the Aggrieved Employees Against All Defendants)**

86. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

87. Plaintiff brings this cause of action as a proxy for the State of California on behalf of the following “aggrieved employees” pursuant to the Private Attorneys General Act (“PAGA”), codified as Labor Code section 2698 *et seq.*:

a. All current and former non-exempt employees who worked for Defendants in California at any time from one year prior to the postmark date of the initial PAGA notice through date of trial.

88. Plaintiff reserves the right to amend, supplement, or add to this description of the aggrieved employees according to proof.

89. The State of California, via the Labor and Workforce Development Agency (“LWDA”), is the real party in interest in this action with respect to this cause of action. (*Kim v. Reins Int’l California, Inc.* (2020) 9 Cal. 5th 73, 81 [The “government entity on whose behalf the plaintiff files suit is always the real party in interest.”])

1           90. Labor Code section 2699(a) provides: “Notwithstanding any other provision of law,,  
2 any provision of this code that provides for a civil penalty to be assessed and collected by the Labor  
3 and Workforce Development Agency or any of its departments, divisions, commissions, boards,  
4 agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil  
5 action brought by an aggrieved employee on behalf of himself or herself and other current or former  
6 employees pursuant to the procedures specified in Section 2699.3. “

7           91. Labor Code section 2699(f) provides: “For all provisions of this code except those for  
8 which a civil penalty is specifically provided, there is established a civil penalty for a violation of these  
9 provisions, as follows: ... (2) If, at the time of the alleged violation, the person employs one or more  
10 employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period  
11 for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for  
12 each subsequent violation.”

13           92. Any allegations regarding violations of the IWC Wage Orders are enforceable as  
14 violations of Labor Code section 1198, which states: “[t]he employment of any employee for longer  
15 hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.”

16           93. Labor Code section 2699.3 sets forth the procedure for commencing an action for civil  
17 penalties under the PAGA.

18           94. On or about December 29, 2022, Plaintiff paid the requisite PAGA filing fee and  
19 provided written notice (by online electronic filing with the LWDA and by certified mail to  
20 Defendants) of Defendants’ alleged Labor Code violations, including the facts and theories to support  
21 the alleged violations.

22           95. A true and correct copy of Plaintiff’s written PAGA notice, entitled “Notice of Labor  
23 Code Violations” is attached hereto as Exhibit 1 and incorporated by reference as though fully set  
24 forth herein (the “PAGA notice”).

25           96. To date, neither Plaintiff nor Plaintiff’s counsel has received a response to Plaintiff’s  
26 written PAGA notice from the LWDA.

1           97.     Within 33 calendar days of the postmark date of the notice sent by Plaintiff, neither  
2 Plaintiff nor Plaintiff's counsel has received written notice by certified mail from any defendant  
3 providing a description of any actions taken to cure the alleged violations.

4           98.     Now that at least 65 days have passed from Plaintiff notifying Defendants of these  
5 violations, without notice of cure from Defendants or notice from the LWDA of its intent to investigate  
6 the alleged allegations and issue the appropriate citations to Defendants, Plaintiff exhausted all  
7 prerequisites and commenced this civil action under Labor Code section 2699 *et seq.*

8           99.     As set forth in the PAGA notice attached as Exhibit 1 and incorporated into this  
9 Complaint, Defendants committed the following violations and are liable for all corresponding civil  
10 penalties:

- 11           a.     ***Unpaid Hours Worked/Minimum Wage.*** Violation of Labor Code §§ 1194,  
12                   1197, 1198; IWC Wage Orders.
- 13           b.     ***Unpaid Overtime.*** Violation of Labor Code §§ 510, 1194, 1198; IWC Wage  
14                   Orders.
- 15           c.     ***Unpaid Paid Sick Leave.*** Violation of Labor Code §§ 246 through 248 *et seq.*
- 16           d.     ***Unpaid Meal Period Premium Wages.*** Violation of Labor Code §§ 226.7, 512,  
17                   1198; IWC Wage Orders.
- 18           e.     ***Unpaid Rest Period Premium Wages.*** Violation of Labor Code §§ 226.7, 516,  
19                   1198; IWC Wage Orders.
- 20           f.     ***Untimely Payment of Wages During Employment.*** Violation of Labor Code  
21                   §§ 204, 204b, 210.
- 22           g.     ***Untimely Payment of Wages Upon Separation of Employment.*** Violation of  
23                   Labor Code §§ 201, 202, 203, 256.
- 24           h.     ***Non-Compliant Wage Statements.*** Violation of Labor Code §§ 226, 226.3.

25           100.    Plaintiff seeks to collect all recoverable civil penalties for the Labor Code violations  
26 alleged in this Complaint and the PAGA notice (including amendments thereto) against Defendants  
27 pursuant to Labor Code section 2699(a) and (f), in addition to attorneys' fees, costs, and interest to the  
28 extent permitted by law, including under Labor Code section 2699(g).

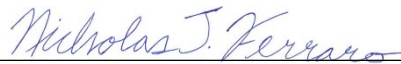
**PRAYER**

Plaintiff prays for judgment as follows:

- a. For certification of this action as a class action;
- b. For appointment of Plaintiff as the class representative;
- c. For appointment of above-captioned counsel for Plaintiff as Class Counsel;
- d. For division of Class Members into appropriate classes and/or subclasses according to proof;
- e. For recovery of damages in amount according to proof;
- f. For all recoverable pre- and post-judgment interest;
- g. For recovery of all civil and statutory penalties and liquidated damages;
- h. For disgorgement of all amounts wrongfully obtained;
- i. For this action to be maintained as a representative action under the PAGA;
- j. For Plaintiff and Plaintiff's counsel to be provided with all enforcement capability as if the action were brought by the State of California or the California Division of Labor Enforcement;
- k. For recovery of all civil penalties and other recoverable amounts under the PAGA;
- l. For restitution and injunctive relief;
- m. For reasonable attorneys' fees and costs of suit, including expert fees, to the extent permitted by law, including (without limitation) under Labor Code §§ 218.5, 226, 1194, 2802, and Code of Civil Procedure section 1021.5; and
- n. For such other relief the Court deems just and proper.

Dated: March 9, 2023

***Ferraro Vega Employment Lawyers, Inc.***



Nicholas J. Ferraro

*Attorneys for Plaintiff Katherine Wishnick*

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**EXHIBIT 1**  
**Notice of Labor Code Violations**

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# FERRARO VEGA

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SAN DIEGO EMPLOYMENT LAWYERS

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December 29, 2022

## NOTICE OF LABOR CODE VIOLATIONS CALIFORNIA LABOR CODE SECTIONS 2698 *et seq.*

**VIA CERTIFIED U.S. MAIL**  
***- Electronic Return Receipt -***

**BIG DADDY'S OIL 22, INC.**  
3300 E. Flamingo Road, Suite 15  
Las Vegas, NV 89121

**BIG DADDY'S OIL 26, INC.**  
3300 E. Flamingo Road, Suite 15  
Las Vegas, NV, 89121

**BIG DADDY'S OIL 23, INC.**  
3300 E. Flamingo Road, Suite 15  
Las Vegas, NV 89121

**BIG DADDY'S OIL, LLC**  
1291 Galleria Drive, Suite 230  
Henderson, NV 89014

**BIG DADDY'S OIL 24, INC.**  
3300 E. Flamingo Road, Suite 15  
Las Vegas, Nevada 89121

***- PAGA Notice & Filing Fee -***  
Submitted electronically to the Labor and  
Workforce Development Agency

Dear LWDA Officer and Company Representatives:

This letter serves as written notice under Labor Code section 2699.3 on behalf of **KATHERINE WISHNICK** (“Plaintiff(s)”) and all other “aggrieved employees” of the following “Defendant(s)”:

**BIG DADDY'S OIL 22, INC.;**  
**BIG DADDY'S OIL 23, INC.;**  
**BIG DADDY'S OIL 24, INC.;**  
**BIG DADDY'S OIL 26, INC.;**  
**BIG DADDY'S OIL, LLC**  
**DBA AM/PM ARCO**

Defendant(s) shall mean and include the foregoing in addition to any other related employer entities, individuals under Labor Code sections 558 and 558.1, and all others who may be later added upon further investigation and discovery as liable employers.

This office serves as legal counsel for Plaintiff. If the California Labor and Workforce Development Agency (“LWDA”) does not investigate the facts, allegations, and violations set forth in this notice within the statutorily prescribed 65-day period under Labor Code section 2699.3, Plaintiff intends to commence a civil action against Defendants as a proxy and agent of the State of California under the Private Attorneys General Act (“PAGA”). “PAGA allows an ‘aggrieved employee’—a person affected by at least one Labor Code violation committed by an employer—to pursue penalties for all the Labor Code violations committed by that employer.” *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal. App. 5th 745, 751; *Kim v. Reins International California, Inc.* (2020) 9 Cal. 73, 79.

Through this notice, Plaintiff requests that Defendants complete an internal investigation and audit of the wage and hour and employment practices at issue and make a good faith effort to correct any violations. Plaintiff attempts to identify the non-compliant policies and practices affecting the aggrieved employees so that the parties may resolve the underlying damages and penalties in a settlement approved by the Superior Court of California under Labor Code section 2699(k). Defendants are notified that any attempt to resolve this case be conducted in coordination with Plaintiff’s counsel to protect the interests of Plaintiff, the aggrieved employees, and the State of California via the LWDA. This settlement attempt is in compliance with relevant California law. *Graham v. Daimler Chrysler Corp.* (2004) 24 Cal. 4th 553, 561.

## **- BACKGROUND -**

Defendants employed Plaintiff during the PAGA Period in the position of Cashier at multiple of Defendants’ locations about December 2020 to October 2022. During their employment Plaintiff and the other aggrieved employees were subject to the wage and hour and employment protections set forth in the California Labor Code and IWC Wage Orders.

Through this notice, Plaintiff informs the LWDA of the Labor Code violations set forth herein. The “aggrieved employees” include Plaintiff and the following individuals:

All current and former non-exempt employees who worked for Defendants in the State of California during one-year period preceding the date of this notice through the current date and the date of trial in any pending action (the “aggrieved employees” and the “PAGA Period”).

Plaintiff reserves the right to expand or narrow the definition of the “aggrieved employees” in the forthcoming civil action. Furthermore, Plaintiff seeks all recoverable civil penalties for Defendants’ violations and reserves the right to supplement this notice as further investigation is completed and further facts, witnesses, and violations are uncovered.

## **- PAGA CLAIMS -**

### **Unpaid Hours Worked/Minimum Wage Violation of Labor Code §§ 1194, 1197, 1198; IWC Wage Orders**

Defendants violated Labor Code sections 1194, 1197, and 1198, along with the California Minimum Wage Order, the applicable local minimum wage ordinances, and the “Hours and Days of Work” and “Minimum Wages” sections of the applicable IWC Wage Orders with respect to the aggrieved employees.

Labor Code section 1194 renders it unlawful for an employee to receive less than the legal minimum wage for hours worked in California. Labor Code section 1197 further mandates that “[t]he minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful.” Labor Code section 1198 renders “employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]” unlawful. The California Minimum Wage Order and the applicable sections of the IWC Wage Orders further require payment of minimum wages for all hours worked. The “Minimum Wages” sections of the applicable IWC Wage Order provide that “[e]very employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.” The foregoing California wage laws require payment of “not less than the applicable minimum wage *for all hours worked* in the payroll period” and California law does not allow averaging of pay over the hours worked in the pay period, even if the total pay results in an average above the minimum wage. *Armenta v. Osmose, Inc.* (2005) 135 Cal. App. 3d 314, 324.

Defendants failed to pay Plaintiff and the aggrieved employees at the lawful minimum wage rate for all hours worked, resulting in unpaid minimum wages.

Defendants had an unlawful policy and practice of requiring Plaintiff and other aggrieved employees clock out regardless of their ability to take a compliant meal break. In other words, Plaintiff and other aggrieved employees were routinely asked to work through their meal break without regular or overtime compensation, or meal break premiums for the time worked. Plaintiff and other aggrieved employees were asked to clock out even when they continued to work to make it appear as though they had taken a lawful 30-minute meal period when in reality they either had a shorter or interrupted meal period or no meal period at all. This unlawful policy resulted in an underpayment of regular and overtime wages to Plaintiff and aggrieved employees.

Plaintiff and aggrieved employees were deprived of regular and overtime wages each time they were denied a compliant meal period and required to clock out but forced to continue working.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code sections 558 (\$50/\$100), 1197.1 (\$100/\$250), 1199 / “Penalties” section of the IWC Wage Orders (\$50/\$100), and 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

**Unpaid Overtime**  
**Violation of Labor Code §§ 510, 1194, 1198; IWC Wage Orders**

Defendants violated Labor Code sections 510, 1194, and 1198, along with the “Hours and Days of Work” sections of the applicable IWC Wage Orders with respect to the aggrieved employees.

Labor Code section 510 requires “[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee;” and “any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee;” and “any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.” Labor Code section 1194 renders it unlawful for an employee to receive less than the legal overtime rate for overtime hours worked in California. Labor Code section 1198 renders “employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]” unlawful. The IWC Wage Orders further require payment of overtime wages for all overtime hours worked, including the “Hours and Days of Work” sections.

First, as stated in the “Unpaid Hours Worked” section above, Defendants engaged in an unlawful practice of requiring Plaintiff and other aggrieved employees to clock out for a meal period, even when they were unable to take a compliant 30-minute meal break. When Plaintiff and aggrieved employees worked more than 8 hours, this practice resulted in unpaid overtime wages.

Second, Defendants failed to pay overtime and double time at the “regular rate of pay.” Defendants paid Plaintiff and aggrieved employee’s bonuses, “maintenance” payments and other forms of remuneration that Defendants failed to include in the overtime and double time rates in the pay periods when employees worked overtime hours. Maintenance payments were earned as extra compensation for maintenance work done during a shift.

Defendants paid overtime to Plaintiff and the aggrieved employees at 1.5x their straight hourly rate and double time at 2.0x their straight hourly rate. For each overtime hour they worked during the period in which Plaintiff and the aggrieved employees earned commissions, bonuses, or any additional remuneration, Defendants should have (but failed to) pay overtime “at a rate of no less than ***one and one-half the regular rate of pay*** for an employee” and

“*twice* the regular rate of pay” for double time hours as required by the plain language of Labor Code section 510(a) and IWC Wage Orders.

An illustrative example of the regular rate of pay violation is found on Plaintiff’s wage statement for the pay period ending **03/13/2022** with the pay date of **03/18/2022**.

|                        |       |          |                |                 |
|------------------------|-------|----------|----------------|-----------------|
| Regular                | 80.00 | 1,360.00 | Bonus Earnings | 250.00          |
| Overtime @ 1.5         | 21.85 | 557.18   |                |                 |
| Double Time @ 2        | 1.27  | 43.18    |                |                 |
| -----                  |       |          |                |                 |
| <b>Total Hours:</b>    |       |          |                | <b>103.12</b>   |
| <b>Total Earnings:</b> |       |          |                | <b>2,210.36</b> |

**Extract from Plaintiff’s “Check History Detail” for the Pay Period Ending 03/13/2022 and a Pay Date of 03/18/2022**

During this pay period, Plaintiff earned a bonus of \$250.00 that was not factored in Plaintiff’s overtime rate, as the 21.85 overtime hours was instead paid at a rate of 1.5x Plaintiff’s base rate of \$17.00, rather than 1.5x of her regular rate of pay, which should have factored in incentives like Bonus Earnings that appears on that wage statement. Additionally, Defendants did not factor in the bonus in Plaintiff’s double time rate, which was paid at a rate of 2.0x Plaintiff’s base rate. Defendants should have (but failed to) pay overtime and double time at the regular rate of pay. Defendants committed the same “regular rate of pay” violation against Plaintiff and other aggrieved employees.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code sections 558 (\$50/\$100), 1199 / “Penalties” section of the IWC Wage Orders) (\$50/\$100), and 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

#### **Unpaid Paid Sick Leave** **Violation of Labor Code §§ 246 through 248.5**

Defendants violated Labor Code sections 246 through 248.5 with respect to the aggrieved employees.

Labor Code section 246 requires employers to provide paid sick leave to its workforce on the terms set forth in the statute. Employers must comply with the accrual, use, and notice provisions of Labor Code sections 246, 246.5, 247, and must further ensure that they maintain the paid sick leave records required by Labor Code section 247.5. Employers have the option of providing 24 hours of paid sick leave to employees or to allow employees to accrue paid sick leave each pay period. If an employer chooses the accrual method, employees must accrue sick leave at a rate of one hour for every thirty hours worked in a given pay period as set forth

in Labor Code section 246(b)(1). Under the accrual method, employees must begin accruing paid sick leave at the commencement of employment.

Employers must pay sick leave in accordance with one of the three permissible methods provided in Labor Code section 246(l): (1) “the same manner as the regular rate of pay for the workweek;” (2) “by dividing the employee’s total wages, not including overtime premium pay, by the employee’s total hours worked in the full pay periods of the prior 90 days;” or (3) “for exempt employee ... in the same manner as the employer calculates wages for other forms of paid leave time.”

Under Labor Code section 246(i), employers must provide employees “with written notice of the amount of paid sick leave available ... for use on either the employee’s itemized wage statement ... or in a separate writing provided on the designated pay date with the employee’s payment of wages.”

To the extent aggrieved employees earned paid sick leave, Defendants violated Labor Code section 246(l) because sick leave was not paid at the lawful regular rate of pay throughout the relevant period. The lawful regular rate of pay must factor in commissions, bonuses and all other forms of compensation. Based on Defendants’ noncompliance with the regular rate of pay requirements applicable to overtime and meal/rest period premiums, Plaintiff alleges on information and belief that the regular rate miscalculation equally applied to paid sick leave with respect to the aggrieved employees, resulting in underpayments.

The failure to calculate and pay paid sick leave at one of the lawful rates set forth in Labor Code § 246(l)(1)-(3) and 247 *et seq.* was applied as a matter of common policy and practice to aggrieved employees in those periods where they earned additional payments, commissions, bonuses, or other forms of non-excludable remuneration and also received paid sick leave.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees as provided under Labor Code section 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

### **Unpaid Meal Period Premium Wages** **Violation of Labor Code §§ 226.7, 512, 1198; IWC Wage Orders**

Defendants violated Labor Code sections 226.7, 512, and 1198, along with the related sections of the IWC Wage Orders with respect to the aggrieved employees.

Labor Code section 512 and the IWC Wage Orders require that employers provide an uninterrupted 30-minute meal period after no more than five hours of work and a second meal period after no more than 10 hours of work. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1049. Labor Code section 226.7 requires that if a meal period is late, missed, short, or interrupted, the employer must pay one additional hour of pay at the employee’s

“regular rate” of compensation. *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 862 (“We hold that the terms are synonymous: “regular rate of compensation” under section 226.7(c), like “regular rate of pay” under section 510(a), encompasses all nondiscretionary payments, not just hourly wages”). “[T]ime records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage.” *Donobue v. AMN Services, LLC* (2021) 11 Cal. 5th 58, 61. Labor Code section 1198 renders “employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]” unlawful. The IWC Wage Orders, including Section 11 (Meal Periods), further require one uninterrupted 30-minute meal period after no more than five hours of work and a second meal period after no more than 10 hours of work and an additional hour of pay at the employee’s regular rate of compensation for each workday that a compliant meal period is not provided. Pursuant to Section 11(A) of the IWC Wage Orders, the California Supreme Court has held that the on-duty meal period exception is “exceedingly narrow” and applies only when (1) “the nature of the work prevents the employee from being relieved of all duty” and (2) *both* “the employer and employee have agreed, in writing, to the on-duty meal period.” *Augustus v. AMB Security Services, Inc.* (2016) 2 Cal. 5th 257, 266-276 (emphasis added). If these two requirements are not met, then the employer owes the employee one hour of premium pay for each non-compliant meal period taken under the purported on-duty meal arrangement. *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal. 5th 444, 459.

Defendants failed to provide compliant meal periods to Plaintiff and aggrieved employees.

First, Plaintiff and other employees experienced missed, late, short, and interrupted meal periods in order to keep up with the high demand of the job. Additionally, Plaintiff’s signed Meal Break Waiver is invalid for shifts when she worked more than 6 hours and shifts more than 12 hours when she did not take a compliant first meal period. When Plaintiff and other aggrieved employees experienced these missed, late, short, and interrupted meal periods, Defendants failed to pay meal period premiums at the regular rate as required by Labor Code section 226.7.

Second, as discussed in sections above, Defendants had an unlawful policy and practice of requiring Plaintiff and aggrieved employees to clock out for a meal period, even on days when they were denied a compliant meal period. This practice deprived employees of being paid their owed meal period premiums. On many occasions, Defendants unlawfully avoided compensating Plaintiff and aggrieved employees their owed meal premium payments by requiring they clock out and keep working to make it seem as though employees took compliant meal breaks

Finally, to the extent that Defendants paid meal period premiums, Defendants failed to pay Plaintiff and other aggrieved employees a meal period premium at the “regular rate of compensation” because the premiums paid did not factor in all forms of remuneration including commissions, bonuses or the maintenance payment, instead electing to pay aggrieved employees at their base hourly rate.

An illustrative example of the regular rate of pay violation is found on Plaintiff's wage statement for the pay period ending 03/13/2022 with the pay date of 03/18/2022.

|                 |       |          |             |          |
|-----------------|-------|----------|-------------|----------|
| Regular         | 80.00 | 1,280.00 | Maintenance | 150.00   |
| Overtime @ 1.5  | 15.47 | 371.28   |             |          |
| Meal Graveyard  | 2.00  | 32.00    |             |          |
| <hr/>           |       |          |             |          |
| Total Hours:    |       |          |             | 97.47    |
| Total Earnings: |       |          |             | 1,833.28 |

Extract from Plaintiff's "Check History Detail" for the Pay Period Ending 02/13/2022 and a Pay Date of 02/18/2022

During this pay period, Plaintiff earned two "Meal Graveyard" premiums which were not paid at the regular rate of compensation, but instead paid at Plaintiff's base rate of \$16.00. Defendants failed to factor in Defendants maintenance earnings that appear on the wage statement above. Indeed, Defendants maintained a policy and practice of not paying meal period premiums at the regular rate of compensation in accordance with California law.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees as provided under Labor Code section 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

### **Unpaid Rest Period Premium Wages** **Violation of Labor Code §§ 226.7, 516, 1198; IWC Wage Orders**

Defendants violated Labor Code sections 226.7, 516, and 1198, and the related sections of the IWC Wage Orders with respect to Plaintiff and the aggrieved employees.

Labor Code sections 226.7 and 516 and the IWC Wage Orders require that employers authorize and permit an uninterrupted 10-minute rest period for each four-hour period (or major fraction thereof) that an employee works. Labor Code section 226.7 requires that if a rest period is non-compliant, the employer must pay one additional hour of pay at the employee's "regular rate" of compensation. *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 862 ("We hold that the terms are synonymous: "regular rate of compensation" under section 226.7(c), like "regular rate of pay" under section 510(a), encompasses all nondiscretionary payments, not just hourly wages"). Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful. The IWC Wage Orders, including Section 12 (Rest Periods), further require one uninterrupted 10-minute rest period for each four-hour period (or major fraction thereof) worked and an additional hour of pay at

the employee's regular rate of compensation for each workday that a compliant rest period is not authorized or permitted.

On information and belief, Defendants had a policy and practice of not paying rest period premiums to employees who were unable to take rest periods. To the extent Defendants ever paid a rest period premium, Defendants violated Labor Code section 226.7 because such premiums were not paid at the correct regular rate of compensation to aggrieved employees, which would have factored in bonuses and other forms of compensation. As discussed throughout this correspondence, Defendants had a non-compliant policy and practice of miscalculating and underpaying the regular rate of pay applicable to overtime and other premiums. Based on this practice, Plaintiff alleges that rest period premiums were equally deficient with respect to payments made to the aggrieved employees.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code section 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

#### **Untimely Payment of Wages During Employment** **Violation of Labor Code §§ 204, 204b, 210**

Defendants violated Labor Code sections 204 and/or 204b and 210, as applicable, with respect to Plaintiff and the aggrieved employees.

Labor Code section 204(a) requires payment of "all wages" for non-exempt employees at least twice each calendar month. Labor Code section 204(d) states all wages due must be paid "not more than seven calendar days following the close of the payroll period." Labor Code section 204b applies to employees paid on a weekly basis and also requires the payment for all labor within the required pay periods. Labor Code section 210 provides "every person who fails to pay the wages of an employee as provided in Section ... 204 ... shall be subject to a civil penalty" of \$100 for an initial violation and \$200 plus 25% of the amount unlawfully withheld for a subsequent violation.

Because Defendants failed to pay all wages and premiums in each pay period in which such wages were earned at the lawful rate, Defendants violated Labor Code section 204 and/or 204b (for weekly employees, as applicable). Defendants violated Labor Code sections 204 and 204b by failing to pay all wages, sick leave, and premiums owed on the regular pay days scheduled each pay period within seven calendar days of the close of the payroll period, as a result of the policies and practices set forth in this notice. Indeed, Defendants failed to pay all premiums, overtime, regular, sick leave, and other earnings on time each payday.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees as provided under Labor Code section 2699

(\$100/\$200) per violation per pay period per employee, and Labor Code section 210 (\$100/\$200) per violation per pay period, along with all other civil penalties permitted by law.

**Untimely Payment of Wages Upon Separation of Employment**  
**Violation of Labor Code §§ 201, 202, 203, 256**

Defendants violated Labor Code sections 201, 202, and 203 with respect to the aggrieved employees by failing to pay all wages and premiums owed upon termination of employment.

Labor Code section 201 requires that if an employer fires an employee, the wages must be paid immediately. Labor Code section 202 requires that if an employee quits without providing 72 hours' notice, his or her wages must be paid no later than 72 hours thereafter. Labor Code section 202 states that if an employee provides 72 hours' notice, the final wages are payable upon his or her final day of employment. Labor Code section 203 requires an employer who fails to comply with Labor Code sections 201 or 202 to pay a waiting time penalty for each employee, up to a period of 30 days additional compensation.

Defendants failed to pay all wages, sick leave, and premiums owed to aggrieved employees during their employment as set forth in this notice, and also failed to timely pay those amounts to departing employees upon separation of employment. Defendants did not pay waiting time penalties for the late payments. As a result, Defendants violated Labor Code sections 201, 202, and 203.

As a result, Plaintiff may recover civil penalties on behalf of aggrieved employees and the State of California as provided under Labor Code section 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

**Non-Compliant Wage Statements**  
**Violation of Labor Code §§ 226, 226.3**

Defendants violated Labor Code sections 226(a) and 226.3 with respect to the aggrieved employees by failing to furnish itemized wage statements each pay period that accurately list all information required by Labor Code section 226(a)(1) through (9).

Labor Code section 226(a) requires an employer to furnish wage statements to employees semimonthly or at the time of each payment of wages, "an accurate itemized statement in writing showing:" (1) gross wages earned, (2) total hours worked, (3) the number of piece rate units earned and applicable piece-rate in effect, (4) all deductions, (5) net wages earned, (6) the inclusive dates of the pay period, (7) the name of the employee and last four digits of SSN or an EIN, (8) the name and address of the legal name of the employer, and (9) all applicable hourly rates in effect during the pay period and the number of hours worked at each hourly rate by the employee.

Defendants failed to provide accurate itemized wage statements to the aggrieved employees each pay period as a result of the policies and practices set forth in this notice. Defendants violated Labor Code section 226(a)(1) and (5) by not listing the correct “gross wages earned” or “net wages earned,” as the employees earned wages and premiums that were not paid, resulting in an inaccurate reflection, and recording of “gross wages earned” on those wage statements. Likewise, in violation of Labor Code section 226(a)(9), Defendants failed to state on employee wage statements each pay period the applicable hourly rates in effect and the number of hours worked at that rate, as Defendants failed to pay all wages and premiums owed to employees. The amounts stated are instead depreciated and underpaid, resulting in an inaccurate reflection on the wage statement.

Defendants violated Labor Code section 226(a)(2) by failing to accurately list employees’ “total hour worked,” as the wage statements did not accurately include the uncompensated time Plaintiff and other aggrieved employees worked due to Defendants policy and practice of requiring employees to work off the clock during uncompensated meal periods.

Plaintiff and other aggrieved employees cannot promptly and easily determine from the wage statement alone the wages paid or earned without reference to other documents or information. Indeed, these wage statement violations are significant because they sow confusion among Plaintiff and other aggrieved employees with respect to what amounts were owed and paid, at what rates, the number of hours worked, and how those amounts were or should be calculated. The wage statements reflect a false statement of earnings and concealed the underlying problems and underpayments of employee wages.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code sections 226.3 (\$250/\$1,000) and 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

### **Failure to Maintain Accurate Records** **Violation of Labor Code § 1174; IWC Wage Orders**

Defendants violated Labor Code sections 1174 and the IWC Wage Orders by failing to maintain accurate employee payroll records with respect to Plaintiff and other aggrieved employees.

Labor Code section 1174 requires that employers maintain accurate “payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments.” Section 7(A) of the IWC Wage Orders, which may be enforced through Labor Code section 1198, mandates similar recordkeeping obligations.

Because of the policies and practices set forth in this notice, including the failure to accurately account for wages earned or hours worked, Defendants failed to accurately maintain records in accordance with Labor Code section 1174 and the IWC Wage Orders.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code section 1174.5 (\$500) and 2699 (\$100/\$200), along with all other civil penalties permitted by law.

**Attorneys' Fees and Costs**  
**Labor Code § 2699(g)**

Plaintiff has been compelled to retain the services of counsel to protect the interests of other aggrieved employees and the State of California. Plaintiff continues to incur attorneys' fees and costs, which are recoverable under California law, including Labor Code section 2699(g).

**- LITIGATION HOLD NOTICE -**

This letter imposes a duty upon all defendants and their respective employees, officers, directors, executives, attorneys, human resource and payroll personnel, accountants, and other agents to preserve all physical and electronic evidence, including electronically stored information and emails, which relate to the employment of Plaintiff and the aggrieved employees specified in this notice. Evidence includes, but is not limited to, Defendants' written employment and payroll policies and handbooks; the aggrieved employees' personnel files and payroll records, such as paystubs, time records, wage statements, compensation reports, as well as the underlying electronically data in Excel or similar format. Memoranda and internal and external correspondence relating to the subject matter of this notice shall also be maintained. Failure to preserve and retain relevant evidence may constitute spoliation of evidence and result in an adverse inference or sanctions.

If you have any questions regarding the scope your obligations to preserve evidence, please consult your legal counsel and always err on the side of caution. Periodic or regularly scheduled purges or deletions of information covered by this hold must be suspended immediately.

**- CONCLUSION -**

If the LWDA does not pursue enforcement, Plaintiff intends to bring representative claims on behalf of the State of California and the aggrieved employees seeking civil penalties for violations of the Labor Code and the IWC Wage Orders, along with attorneys' fees, costs, interest, and other appropriate relief.

Please advise if the LWDA intends to investigate any of the factual or legal allegations set forth in this notice. Defendants may contact Plaintiff's counsel with any questions regarding this letter or the forthcoming lawsuit.

Sincerely,

A handwritten signature in blue ink that reads "Nicholas J. Ferraro". The signature is written in a cursive, flowing style.

Nicholas J. Ferraro

Cc Plaintiff Katherine Wishnick  
Michelle Reily, General Manager  
[Kakuna2403@aol.com](mailto:Kakuna2403@aol.com)