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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

LANAYE D. GIBSON, an individual, on behalf
of herself, the state of California, and the
Aggrieved Employees,

Plaintiff,

v.

FRC BALANCE LLC, an Arizona limited
liability company; and DOES 1 TO 50,

Defendants.

Case Number: 23STCV00362

**First Amended PAGA Representative Action
Complaint For:**

1. Civil Penalties Under the Private Attorney
General Act (Labor Code § 2699 *et seq.*)

FILED
Superior Court of California
County of Los Angeles
03/13/2023

David W. Slayton, Executive Officer / Clerk of Court

By: K. Martinez Deputy

1 Plaintiff Lanaye D. Gibson (“Plaintiff”), on behalf of the state of California and all other
2 aggrieved employees, complains and alleges of defendants FRC Balance LLC and Does 1 to 50
3 (collectively, “Defendants”), and each of them, as follows:

4 **I. INTRODUCTION**

5 1. This is a PAGA representative action brought pursuant to the California Labor Code
6 Private Attorneys General Act of 2004 (“PAGA”), codified as California Labor Code sections 2698
7 through 2699.6.

8 2. The “PAGA Period” as used herein, is defined as the period from January 6, 2022, and
9 continuing into the present and ongoing.

10 3. Plaintiff is informed and believes and thereon alleges that the California Industrial
11 Welfare Commission (“IWC”) Wage Order applicable to the facts of this case is IWC Wage Order 5-
12 2001 (the “Applicable Wage Order”) and possibly others that may be applicable. (Cal. Code of Regs.,
13 tit. 8, § 11050.) Plaintiff reserves the right to amend or modify the definition of “Applicable Wage
14 Order” with greater specificity or add additional IWC Wage Orders if additional applicable wage orders
15 are discovered in litigation.

16 **II. JURISDICTION & VENUE**

17 4. This Court has subject matter jurisdiction over all causes of action asserted herein
18 pursuant to Article VI, section 10, of the California Constitution and Code of Civil Procedure section
19 410.10 because this is a civil action in which the matter in controversy, exclusive of interest, exceeds
20 \$25,000, and because each cause of action asserted arises under the laws of the State of California or
21 is subject to adjudication in the courts of the State of California.

22 5. This Court has personal jurisdiction over Defendants because Defendants have caused
23 injuries in the County of Los Angeles and the State of California through their acts, and by their
24 violation of the California Labor Code and California state common law. Defendants transact millions
25 of dollars of business within the State of California. Defendants own, maintain offices, transact
26 business, have an agent or agents within the County of Los Angeles, and/or otherwise are found within
27 the County of Los Angeles, and Defendants are within the jurisdiction of this Court for purposes of
28 service of process.

1 6. Venue as to Defendants is proper in this judicial district, pursuant to section 395 of the
2 Code of Civil Procedure. Defendants operate within California and do business within Los Angeles
3 County, California. The unlawful acts alleged herein have a direct effect on Plaintiff and all of
4 Defendants' employees identified above within Los Angeles County and surrounding counties where
5 Defendants may remotely operate.

6 **III. THE PARTIES**

7 **A. PLAINTIFF**

8 7. At all relevant times, Plaintiff, who is over the age of 18, was and currently is a citizen
9 of California residing in the State of California. Defendants employed Plaintiff as a non-exempt hourly
10 employee in the County of Los Angeles.

11 8. The Aggrieved Employees, at all times pertinent hereto, are or were employees of
12 Defendants during the relevant statutory period.

13 **B. DEFENDANTS**

14 9. Plaintiff is informed and believes and thereon alleges that Defendants were authorized
15 to and doing business in Los Angeles County and is and/or was the legal employer of Plaintiff and the
16 other Class Members during the applicable statutory periods. The Aggrieved Employees were, and
17 are, subject to Defendants' policies and/or practices complained of herein and have been deprived of
18 the rights guaranteed to them by: California Labor Code sections 201, 202, 203, 204, 210, 226, 226.3,
19 226.7, 256, 510, 512, 1174, 1185, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 1199, 2802, 2804, and
20 others that may be applicable; California Business and Professions Code sections 17200 through 17210
21 ("UCL"); and the Applicable Wage Order (Cal. Code of Regs., tit. 8, § 11050).

22 10. Plaintiff is informed and believes, and based thereon alleges, that during the PAGA
23 Period, Defendants did (and continue to do) business in the State of California, County of Los Angeles.

24 11. Plaintiff does not know the true names or capacities, whether individual, partner, or
25 corporate, of the defendants sued herein as Does 1 to 50, inclusive, and for that reason, said defendants
26 are sued under such fictitious names, and Plaintiff will seek leave from this Court to amend this
27 complaint when such true names and capacities are discovered. Plaintiff is informed, and believes, and
28 thereon alleges, that each of said fictitious defendants, whether individual, partners, or corporate, were

1 responsible in some manner for the acts and omissions alleged herein, and proximately caused the
2 Aggrieved Employees to be subject to the unlawful employment practices, wrongs, injuries, and
3 damages complained of herein.

4 12. Plaintiff is informed, and believes, and thereon alleges, that at all times mentioned
5 herein, Defendants were and/or are the employers of the Aggrieved Employees. At all times herein
6 mentioned, each of said Defendants participated in the doing of the acts hereinafter alleged to have
7 been done by the named Defendants. Furthermore, the Defendants, and each of them, were the agents,
8 servants, and employees of each and every one of the other Defendants, as well as the agents of all
9 Defendants, and at all times herein mentioned were acting within the course and scope of said agency
10 and employment. Defendants, and each of them, approved of, condoned, or otherwise ratified every
11 one of the acts or omissions complained of herein.

12 13. At all relevant times, Defendants, and each of them, were members of and engaged in a
13 joint venture, partnership, and common enterprise, and acting within the course and scope of and in
14 pursuance of said joint venture, partnership, and common enterprise. Further, Plaintiff is informed,
15 and believes, and thereon alleges, that all Defendants were joint employers for all purposes of Plaintiff
16 and the other Aggrieved Employees.

17 **IV. COMMON FACTS & ALLEGATIONS**

18 14. The Aggrieved Employees are, and were, at all relevant times, non-exempt employees
19 for the purposes of minimum wages, split shift premiums, overtime, rest breaks, meal periods, and the
20 other claims alleged in this complaint.

21 15. Specifically, Plaintiff was employed by Defendants within the statutory PAGA Period,
22 working as an hourly, non-exempt server for Defendants.

23 **A. MINIMUM WAGE VIOLATIONS**

24 16. Labor Code section 1197 requires employees to be paid at least the minimum wage fixed
25 by the IWC, and any payment of less than the minimum wage is unlawful. Similarly, Labor Code
26 section 1194 entitles “any employee receiving less than the legal minimum wage . . . to recover in a
27 civil action the unpaid balance of the full amount of this minimum wage.” Likewise, the Applicable
28 Wage Order also obligates employers to pay each employee minimum wages for all hours worked.

(Cal. Code of Regs., tit. 8, § 11050.) Labor Code section 1198 makes unlawful the employment of an employee under conditions that the IWC Wage Orders prohibit.

17. These minimum wage standards apply to each hour that employees work. Therefore, an employer's failure to pay for any particular time worked by an employee is unlawful, even if averaging an employee's total pay over all hours worked, paid or not, results in an average hourly wage above minimum wage. (*Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324.)

18. Here, Defendants failed to fully conform their pay practices to the requirements of the law during the relevant statutory periods. The Aggrieved Employees were not compensated for all hours worked including, but not limited to, all hours they were subject to the control of Defendants and/or suffered or permitted to work under the California Labor Code and the Applicable Wage Order.

19. Labor Code sections 1194, subdivision (a), and 1194.2, subdivision (a), provide that an employer who has failed to pay its employees the legal minimum wage is liable to pay those employees the unpaid balance of the unpaid wages as well as liquidated damages in an amount equal to the wages due and interest thereon.

20. When employees, such as the Aggrieved Employees, are not paid for all hours worked under Labor Code section 1194, they are entitled to recover minimum wages for the time which they received no compensation. (See *Sillah v. Command International Security Services* (N.D. Cal. 2015) 154 F.Supp.3d 891 [employees suing for failure to pay overtime could recover liquidated damages under Labor Code section 1194.2 if they also showed they were paid less than minimum wage].)

21. As set forth above, Defendants failed to fully compensate the Aggrieved Employees for all minimum wages.

B. UNPAID SPLIT SHIFT PREMIUMS

22. Under the Applicable Wage Order, a "split shift" is defined as "a work schedule, which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods." When an employer requires an employee to work a split shift, the employee is entitled to a split shift premium, which is equal to the difference between what the employee earned for the shift and what they would have earned had they been paid the minimum wage for their entire shift plus an extra hour. (Cal. Code of Regs., tit. 8, § 11050, subd. 4(C); *Aleman v. AirTouch Cellular* (2012)

1 209 Cal.App.4th 556, 575–576.) The Applicable Wage Order treats split shift violations as a minimum
2 wage violation. Labor Code sections 1197 and 1198 make the minimum wages set by the IWC
3 enforceable and recoverable in a civil action.

4 23. Here, the Aggrieved Employees were at times scheduled to work more than one shift in
5 the same day, with an unpaid, non-working break of longer than an hour—and longer than a bona fide
6 meal period—between the shifts. This includes many occasions when the total amount paid to the
7 Aggrieved Employees was less than the minimum wage for all hours worked plus one hour.
8 Defendants, however, failed to pay the Aggrieved Employees one hour’s pay at the state minimum
9 wage in addition to the minimum wage for the workday.

10 **C. OVERTIME VIOLATIONS**

11 24. Labor Code section 510 requires employers to compensate employees who work more
12 than eight hours in one workday, forty hours in a workweek, and for the first eight hours worked on
13 the seventh consecutive day no less than one and one-half times the regular rate of pay for an employee.
14 (Lab. Code, § 510, subd. (a).) Further, Labor Code section 510 obligates employers to compensate
15 employees at no less than twice the regular rate of pay when an employee works more than twelve
16 hours in a day or more than eight hours on the seventh consecutive day of work. (Lab. Code, § 510,
17 subd. (a).) These rules are also reflected in the Applicable Wage Order.

18 25. In accordance with Labor Code section 1194 and the Applicable Wage Order, the
19 Aggrieved Employees could not then agree and cannot now agree to work for a lesser wage than the
20 amount provided by Labor Code sections 510 or the Applicable Wage Order.

21 26. Here, Defendants violated their duty to accurately and completely compensate the
22 Aggrieved Employees for all overtime worked. The Aggrieved Employees periodically worked hours
23 that entitled them to overtime compensation under the law but were not fully compensated for those
24 hours.

25 27. These actions were and are in clear violation of California’s overtime laws as set forth
26 in Labor Code sections 510, 1194, 1199, and the Applicable Wage Order. (Cal. Code of Regs., tit. 8,
27 § 11050.) As a result of Defendants’ faulty policies and practices, the Aggrieved Employees were not
28 compensated for all hours worked or paid accurate overtime compensation.

1 **D. REST BREAK VIOLATIONS**

2 28. Pursuant to Labor Code section 226.7 and the Applicable Wage Order, Defendants were
3 and are required to provide the Aggrieved Employees with compensated, duty-free rest periods of not
4 less than ten minutes for every major fraction of four hours worked. Under the Applicable Wage Order,
5 an employer must authorize and permit all employees to take ten minute duty free rest periods for every
6 major fraction of four hours worked. (Cal. Code of Regs., tit. 8, § 11050.)

7 29. Likewise, Labor Code section 226.7 provides that “[a]n employer shall not require an
8 employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute,
9 or applicable regulation, standard, or order of the Industrial Welfare Commission” (Lab. Code, §
10 226.7, subd. (b).) Labor Code section 226.7 also provides that employers must pay their employees
11 one additional hour of pay at the employee’s regular rate for each workday that a “meal or rest or
12 recovery period is not provided.” (Lab. Code, § 226.7, subd. (c).) The “regular rate” for these purposes
13 must factor in all nondiscretionary payments for work performed by the employee, including non-
14 discretionary bonuses, commissions, and other forms of wage payments exceeding the employees’ base
15 hourly rate. (*Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878.) Thus, the Wage
16 Orders set when and for how long the rest period must take place and the Labor Code establishes that
17 violations of the IWC Wage Orders are unlawful and sets forth the premium pay employer must pay
18 their employees when employers fail to provide rest periods.

19 30. The California Supreme Court has held that, during required rest periods, “employers
20 must relieve their employees of all duties and relinquish any control over how employees spend their
21 break time.” (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 260.) Relinquishing
22 control over employees during rest periods requires that employees be “free to leave the employer’s
23 premises” and be “permitted to attend to personal business.” (*Id.* at p. 275.) The *Brinker* Court
24 explained in the context of rest breaks that employer liability attaches from adopting an unlawful
25 policy:

26 “An employer is required to authorize and permit the amount of rest break time
27 called for under the wage order for its industry. If it does not—if, for example,
28 it adopts a uniform policy authorizing and permitting only one rest break for

1 employees working a seven-hour shift when two are required—it has violated
2 the wage order and is liable.” (*Brinker Rest. Corp. v. Superior Court* (2012) 53
3 Cal.4th 1004, 1033.)

4 31. Here, Defendants periodically did not permit the Aggrieved Employees to take
5 compliant duty-free rest breaks, free from Defendants’ control as required by Labor Code section
6 226.7, the Applicable Wage Order, and applicable precedent. (See *Augustus v. ABM Security Services,*
7 *Inc.* (2016) 2 Cal.5th 257, 269 [concluding that “during rest periods employers must relieve employees
8 of all duties and relinquish control over how employees spend their time.”].) At all relevant times, the
9 Aggrieved Employees were periodically not provided with legally-compliant and timely rest periods
10 of at least ten minutes for each four hour work period, or major fraction thereof due to Defendants’
11 unlawful rest period policies/practices. The Aggrieved Employees were often expected and required
12 to continue working through rest periods to meet the expectations Defendants and finish the workday.
13 In some cases when the Aggrieved Employees worked more than ten hours in a shift, Defendants failed
14 to authorize and/or permit a third mandated rest period. As a result, the Aggrieved Employees were
15 periodically unable to take compliant rest periods.

16 32. In such cases where Defendants did not offer the Aggrieved Employees the opportunity
17 to receive a compliant off-duty rest period, “the court may not conclude employees voluntarily chose
18 to skip those breaks.” (*Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 410
19 (2015) [“If an employer fails to provide legally compliant meal or rest breaks, the court may not
20 conclude employees voluntarily chose to skip those breaks.”]; *Brinker Rest. Corp. v. Superior Court,*
21 *supra*, 53 Cal.4th at p. 1033 [“No issue of waiver ever arises for a rest break that was required by law
22 but never authorized; if a break is not authorized, an employee has no opportunity to decline to take
23 it.”].)

24 33. In addition to failing to authorize and permit compliant rest periods, the Aggrieved
25 Employees were not compensated with one hour’s worth of pay at their regular rate of compensation
26 when they were not provided with a compliant rest period in accordance with Labor Code section
27 226.7, subdivision (c). Thus, Defendants have violated Labor Code section 226.7 and the Applicable
28 Wage Order.

1 34. Based on the foregoing, Plaintiff seeks to recover, on behalf of the state of California,
2 rest period premiums and penalties.

3 **E. MEAL BREAK VIOLATIONS**

4 35. Labor Code section 512 and the Applicable Wage Order require employers to provide
5 employees with a thirty-minute uninterrupted and duty-free meal period within the first five hours of
6 work. (Lab. Code, § 512, subd. (a) [“An employer shall not employ an employee for a work period of
7 more than five hours per day without providing the employee with a meal period of not less than 30
8 minutes”]; Cal. Code of Regs., tit. 8, § 11050 [“No employer shall employ any person for a work
9 period of more than five (5) hours without a meal period of not less than 30 minutes”].)
10 Additionally, an employee who works more than ten hours per day is entitled to receive a second thirty-
11 minute uninterrupted and duty-free meal period. (Lab. Code, § 512, subd. (a) [“An employer shall not
12 employ an employee for a work period of more than 10 hours per day without providing the employee
13 with a second meal period of not less than 30 minutes”].)

14 36. “An on-duty meal period is permitted only when the nature of the work prevents an
15 employee from being relieved of all duty and the parties agree in writing to an on-duty paid meal
16 break.” (*Lubin v. The Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 932.) The written agreement must
17 include a provision allowing the employee to revoke it at any time. (*Ibid.*) Generally, the California
18 Department of Industrial Relations, Division of Labor Standards Enforcement (“DLSE”) and courts
19 have “found that the nature of the work exception applies: (1) where the work has some particular
20 external force that requires the employee to be on duty at all times, and (2) where the employee is the
21 sole employee of a particular employer.” (*Id.* at p. 945, internal quotation marks omitted; *Abdullah v.*
22 *U.S. Security Associates, Inc.* (9th Cir. 2013) 731 F.3d 952, 958–959.) “[I]t is the employer’s obligation
23 to determine whether the nature of the work prevents an employee from being relieved before requiring
24 an employee to take an on-duty meal period.” (*Lubin v. The Wackenhut Corp.*, *supra*, 5 Cal.App.5th
25 at p. 946.)

26 37. Here, the Aggrieved Employees were never asked to sign any enforceable document
27 agreeing to an on-duty meal period. Moreover, nothing in the nature of their work involved the kind
28 of “external force” that might justify on-duty meal breaks. (*Lubin v. The Wackenhut Corp.*, *supra*, 5

1 Cal.App.5th at p. 945.) Nevertheless, Defendants periodically did not provide compliant off-duty meal
2 periods within the first five hours of work for the Aggrieved Employees.

3 38. As with rest breaks, meal breaks must be duty-free. (*Brinker Restaurant Corp. v.*
4 *Superior Court* (2012) 53 Cal.4th 1004, 1035 [“The IWC’s wage orders have long made a meal period’s
5 duty-free nature its defining characteristic.”].) Relinquishing control over employees during meal
6 periods requires that employees be “free to leave the employer’s premises” and be “permitted to attend
7 to personal business.” (*Augustus v. ABM Security Services, Inc., supra*, 2 Cal.5th at p. 275.) Under
8 Labor Code section 512, if an employer maintains a uniform policy that does not authorize and permit
9 the amount of meal time called for under the law (as specified in the Labor Code and/or applicable
10 IWC Wage Order), “it has violated the wage order and is liable.” (*Brinker Restaurant Corp. v. Superior*
11 *Court, supra*, 53 Cal.4th at p. 1033.)

12 39. During the applicable statutory periods here, the Aggrieved Employees were
13 periodically denied legally-compliant and timely off-duty meal periods of at least thirty minutes due to
14 Defendants’ unlawful meal period policy and practices. As a result of Defendants’ uniform meal period
15 policies and practices, the Aggrieved Employees were often not permitted to take compliant first meal
16 periods before the end of the fifth hour of work. The Aggrieved Employees were also periodically not
17 permitted to take second meal periods for shifts in excess of ten hours. Defendants thus violated Labor
18 Code section 512 and the Applicable Wage Order by failing to advise, authorize, or permit the
19 Aggrieved Employees to receive thirty-minute, off-duty meal periods within the first five hours of their
20 shifts.

21 40. Labor Code section 226.7 provides that “[a]n employer shall not require an employee
22 to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or
23 applicable regulation, standard, or order of the Industrial Welfare Commission.” (Lab. Code, § 226.7,
24 subd. (b).) Labor Code section 226.7, subdivision (c), and the Applicable Wage Order further obligate
25 employers to pay employees one additional hour of pay at the employee’s regular rate of compensation
26 for each workday that the meal period is not provided. (Lab. Code, § 226.7, subd. (c); Cal. Code of
27 Regs., tit. 8, § 11050 [“If an employer fails to provide an employee a meal period in accordance with
28 the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the

1 employee's regular rate of compensation for each workday that the meal period is not provided.”].)
2 The “regular rate” for these purposes must factor in all nondiscretionary payments for work performed
3 by the employee, including non-discretionary bonuses, commissions, and other forms of wage
4 payments exceeding the employees’ base hourly rate. (*Ferra v. Loews Hollywood Hotel, LLC* (2021)
5 11 Cal.5th 858, 878.)

6 41. Accordingly, for each day that the Aggrieved Employees did not receive compliant
7 meal periods, they were and are entitled to receive meal period premiums pursuant to Labor Code
8 section 226.7 and the Applicable Wage Order. Defendants, however, failed to pay the Aggrieved
9 Employees applicable meal period premiums for many workdays that the employees did not receive a
10 compliant meal period. Thus, Defendants have violated Labor Code section 226.7 and the Applicable
11 Wage Order.

12 42. Based on the foregoing, Plaintiff seeks to recover, on behalf of the state of California,
13 meal period premiums and penalties.

14 **F. UNTIMELY WAGES DURING EMPLOYMENT**

15 43. Labor Code section 204 expressly requires employers who pay employees on a weekly,
16 biweekly, or semimonthly basis to pay all wages “not more than seven calendar days following the
17 close of the payroll period.” Labor Code section 210, subdivision (a), makes employers who violate
18 Labor Code section 204 subject to a penalty of:

19 “(1) For any initial violation, one hundred dollars (\$100) for each
20 failure to pay each employee.

21 “(2) For each subsequent violation, or any willful or intentional
22 violation, two hundred dollars (\$200) for each failure to pay each
23 employee, plus 25 percent of the amount unlawfully withheld.” (Lab.
24 Code, § 210, subd. (a).)

25 44. Notably, the penalty provided by Labor Code section 210 is “[i]n addition to, and
26 entirely independent and apart from, any other penalty provided in this article” (Lab. Code, § 210,
27 subd. (a).)

28 ///

1 45. Due to Defendants’ failure to pay the Aggrieved Employees the wages described above,
2 along with rest and meal break premiums, Defendants failed to timely pay the Aggrieved Employees
3 within seven calendar days following the close of payroll in accordance with Labor Code section 204
4 on a regular and consistent basis. (See *Parson v. Golden State FC, LLC* (N.D. Cal., May 2, 2016, No.
5 16-CV-00405-JST) 2016 WL 1734010, at p. *3–5, 2016 U.S. Dist. LEXIS 58299 [finding that a failure
6 to pay rest period premiums can support claims under Labor Code sections 203 and 204].)

7 **G. UNTIMELY WAGES AT SEPARATION**

8 46. Labor Code section 203 provides “if an employer willfully fails to pay . . . any wages
9 of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty”
10 for up to thirty days. (Lab. Code § 203; *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.) As a result
11 of Defendants’ failure to pay the Aggrieved Employees for the wages described above, along with rest
12 and meal break premiums, Defendants violated and continue to violate Labor Code section 203.

13 47. Due to Defendants’ faulty pay policies, those Aggrieved Employees whose employment
14 with Defendants concluded were not compensated for each and every hour worked at the appropriate
15 rate. Defendants have failed to pay formerly-employed Aggrieved Employees whose sums were
16 certain at the time of termination within at least seventy-two hours of their resignation and have failed
17 to pay those sums for thirty days thereafter.

18 **H. FAILURE TO REIMBURSE BUSINESS EXPENSES**

19 48. At all relevant times herein, Defendants were subject to Labor Code section 2802, which
20 states that “an employer shall indemnify his or her employees for all necessary expenditures or losses
21 incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her
22 obedience to the directions of the employer.” The purpose of this section is to “prevent employers
23 from passing along their operating expenses onto their employees.” (*Gattuso v. Harte-Hanks Shoppers,*
24 *Inc.* (2007) 42 Cal.4th 554, 562.)

25 49. At all relevant times herein, Defendants were subject to Labor Code section 2804, which
26 states that “any contract or agreement, express or implied, made by any employee to waive the benefits
27 of this article or any part thereof, is null and void, and this article shall not deprive any employee or his
28 personal representative of any right or remedy to which he is entitled under the laws of this State.”

1 50. Thus, the Aggrieved Employees were and are entitled to reimbursement for the expenses
2 they incurred during the course of their duties. The duty to reimburse even extends to the use of
3 equipment the employee may already own and would be required to pay for anyway. (*Cochran v.*
4 *Schwan's Home Serv., Inc.* (2014) 228 Cal.App.4th 1137, 1144 [“The threshold question in this case
5 is this: Does an employer always have to reimburse an employee for the reasonable expense of the
6 mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation in
7 which the employee incurred an extra expense that he or she would not have otherwise incurred absent
8 the job? The answer is that reimbursement is always required. Otherwise, the employer would receive
9 a windfall because it would be passing its operating expenses on to the employee.”].)

10 51. Here, Defendants failed to fully reimburse the Aggrieved Employees for necessary
11 expenditures incurred as a direct consequence and requirement of performing their job duties, including
12 the costs associated with their personal cell phone they required to perform their work. Consequently,
13 Defendants failed to comply with Labor Code section 2802.

14 **I. WAGE STATEMENT VIOLATIONS**

15 52. Defendants also failed to provide accurate itemized wage statements in accordance with
16 Labor Code sections 226, subdivisions (a)(1), (2), (5), and (9). Labor Code section 226, subdivision
17 (a), obligates employers, semi-monthly or at the time of each payment to furnish an itemized wage
18 statement in writing showing:

- 19 (1) The gross wages earned;
- 20 (2) The total hours worked by the employee;
- 21 (3) The number of piece-rate units earned and any applicable piece
22 rate if the employee is paid on a piece rate basis;
- 23 (4) All deductions, provided that all deductions made on written
24 orders of the employee may be aggregated and shown as one item;
- 25 (5) The net wages earned;
- 26 (6) The inclusive dates of the period for which the employee is paid;
- 27 (7) The name of the employee and only the last four digits of his or
28 her social security number or an employee identification number other

1 than a social security number;

2 (8) The name and address of the legal entity that is the employer; and

3 (9) All applicable hourly rates in effect during the pay period and the
4 corresponding number of hours worked at each hourly rate by the
5 employee.

6 53. Due to Defendants' failure to pay the Aggrieved Employees properly as described
7 above, the wage statements issued do not indicate the correct amount of gross wages earned, total hours
8 worked, or the net wages earned, or the applicable hourly rates in effect during the pay period and the
9 corresponding number of hours worked at each hourly rate. Thus, Defendants have violated Labor
10 Code section 226, subdivisions (a)(1), (2), (5), and (9).

11 54. In addition to Labor Code section 226, subdivision (a), Defendants also knowingly and
12 intentionally failed to provide the Aggrieved Employees with accurate itemized wage statements in
13 violation of Labor Code section 226, subdivision (e). Defendants knew that they were not providing
14 the Aggrieved Employees with wage statements required by California law but nevertheless failed to
15 correct their unlawful practices and policies. (See *Garnett v. ADT LLC* (E.D. Cal. 2015) 139 F.Supp.3d
16 1121, 1134 [finding the defendant knowingly and intentionally violated Labor Code section 226
17 because the "[d]efendant knew that it was not providing total hours worked to plaintiff or other
18 employees paid on commission" even though it believed that employees paid solely on commission or
19 commission and salary "are exempt and therefore we do not record hours on a wage statement."].)

20 **J. RECORDKEEPING VIOLATIONS**

21 55. Labor Code section 226, subdivision (a), requires employers to keep an accurate record
22 of, among other things, all hours worked by employees. Labor Code section 226.3 provides, in
23 pertinent part, as follows:

24 "Any employer who violates subdivision (a) of Section 226 shall be subject to a
25 civil penalty in the amount of two hundred fifty dollars (\$250) per employee per
26 violation in an initial citation and one thousand dollars (\$1,000) per employee
27 for each violation in a subsequent citation, for which the employer fails to
28 provide the employee a wage deduction statement or fails to keep the records

1 required in subdivision (a) of Section 226. The civil penalties provided for in
2 this section are in addition to any other penalty provided by law.” (Lab. Code,
3 § 226.3, emphasis added.)

4 56. Likewise, Labor Code section 1174, subdivision (d), requires every employer, including
5 Defendants, to:

6 “Keep, at a central location in the state or at the plants or establishments at which
7 employees are employed, payroll records showing the hours worked daily by
8 and the wages paid to, and the number of piece-rate units earned by and any
9 applicable piece rate paid to, employees employed at the respective plants or
10 establishments. These records shall be kept in accordance with rules established
11 for this purpose by the commission, but in any case shall be kept on file for not
12 less than three years. An employer shall not prohibit an employee from
13 maintaining a personal record of hours worked, or, if paid on a piece-rate basis,
14 piece-rate units earned.” (Lab. Code, § 1174, subd. (d), emphasis added.)

15 57. As explained in detail above, Defendants failed to provide the Aggrieved Employees
16 with accurate itemized wage statements. Defendants did so, in part, because they failed to accurately
17 track hours worked by the Aggrieved Employees. Defendants have thus failed to keep accurate records
18 of the “total hours worked by the employee[s]” in violation of Labor Code section 226, subdivision (a),
19 and are therefore subject to the penalties provided by Labor Code section 226.3. These penalties are
20 “in addition to any other penalty provided by law.” (Lab. Code, § 226.3.)

21 58. The failure to accurately track hours worked also resulted in a failure of Defendants to
22 keep a record of all “payroll records showing the hours worked daily by” Defendants’ employees,
23 including Plaintiff and the other Aggrieved Employees, in violation of Labor Code section 1174,
24 subdivision (d).

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1 **V. CAUSES OF ACTION**

2 **First Cause of Action**

3 *Penalties Pursuant to the California Private Attorneys General Act of 2004*

4 *("PAGA") and Other Provisions of the California Labor Code*

5 *(Against All Defendants)*

6 59. Plaintiff realleges and incorporates by reference all previous paragraphs.

7 60. Based on the above allegations incorporated by reference, Defendants violated
8 California Labor Code §§ 201, 202, 203, 204, 210, 226, 226.3, 226.7, 256, 510, 512, 1174, 1185, 1194,
9 1194.2, 1197, 1197.1, 1198, 1198.5, 1199, 2802, 2804, and others that may be applicable; California
10 Business and Professions Code sections 17200 through 17210 ("UCL"); and the Applicable Wage
11 Orders (Cal. Code of Regs., tit. 8, §§ 11050). As a result of the acts alleged above, Plaintiff seeks
12 penalties on behalf of the Aggrieved Employees under California Labor Code §§ 2698-2699.6 because
13 of Defendants' violation of the California Labor Code and applicable IWC Wage Orders.

14 61. Under California Labor Code §§ 2699(f)(2) and 2699.5, for each such violation, the
15 Aggrieved Employees are entitled to penalties in an amount to be shown at the time of trial subject to
16 the following formula:

17 A. \$100 for the initial violation per employee per pay period; and

18 B. \$200 for each subsequent violation per employee per pay period.

19 62. These penalties shall be allocated seventy-five percent (75%) to the Labor and
20 Workforce Development Agency (LWDA) and twenty-five percent (25%) to the affected employees.
21 These penalties may be stacked separately for each of Defendants' violations of the California Labor
22 Code. *See e.g., Hernandez v. Towne Park, Ltd.*, No. CV 12-02972 MMM (JCGx) 2021 U.S. Dist.
23 LEXIS 86975, at *59, fn. 77 (C.D. Cal. June 22, 2012) (holding that although the plaintiff did not seek
24 stacked PAGA penalties, that "PAGA penalties can be 'stacked,' i.e., multiple PAGA penalties can be
25 assessed for the same pay period for different Labor Code violations."); *see Lopez v. Friant & Assoc.,*
26 *LLC* No. A148849, 2017 Cal. App. LEXIS 839, at *1 (Ct. App. Sept. 26, 2017) ("hold[ing] a plaintiff
27 seeking civil penalties under PAGA for a violation of Labor Code section 226(a) does not have to
28 satisfy the 'injury' and 'knowing and intentional' requirements of section 266(e)(1) and acknowledging

1 that a Plaintiff could recover separately under PAGA for violations of Labor Code §§ 226(a) and
2 226(e)).

3 63. In addition, to the extent permitted by law, Defendants failed to provide all Aggrieved
4 Employees with accurate itemized wage statements in compliance with Labor Code §§ 226(a), Plaintiff
5 seeks on behalf of the Aggrieved Employees separate PAGA penalties for Defendants' violations of
6 Labor Code §§ 226(a) and 226(e).

7 64. For violations of Labor Code § 226(a), Plaintiff seeks on behalf of the Aggrieved
8 Employees the default penalty provided by Labor Code § 226.3. Labor Code § 226.3 provides that
9 "[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the
10 amount of two hundred fifty dollars (\$250) per employee per violation in an initial violation and one
11 thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the
12 employer fails to provide the employee a wage deduction statement or fails to keep the required in
13 subdivision (a) of Section 226." Accordingly, through PAGA and to the extent permitted by law the
14 Aggrieved Employees are entitled to recover penalties for violations of Labor Code § 226.3 and seeks
15 default PAGA penalties for each of Defendants' numerous violations of Labor Code § 226(e).

16 65. Further, Plaintiff, as an Aggrieved Employee, need not demonstrate or prove that
17 Defendants' conduct in refusing to provide accurate and itemized wage statements was knowing,
18 intentional, or willful.

19 66. Labor Code § 210 provides that "in addition to, and entirely independent and apart from,
20 any other penalty provided in this article, every person who fails to pay the wages of each employee as
21 provided in Sections...204...shall be subject to a civil penalty as follows: (1) For any initial violation,
22 one hundred dollars (\$100) for each failure to pay each employee; (2) For each subsequent violation,
23 or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each
24 employee, plus 25% of the amount unlawfully withheld." As a result of the faulty compensation
25 policies and practices described in detail above, the other Aggrieved Employees are entitled to recover
26 penalties under Labor Code § 210 through PAGA.

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67. Plaintiff has complied with the procedures for bringing suit specified in California Labor Code § 2699.3 and has fully exhausted her administrative remedies under PAGA prior to proceeding with the PAGA claim. On or about January 6, 2023, Plaintiff filed her PAGA Notice online with the Labor Workforce Development Agency (“LWDA”) and sent a letter by certified mail to Defendant setting forth the facts and theories of the violations alleged against Defendant, as prescribed by Labor Code § 2698, *et seq.* As required by PAGA, Plaintiff submitted the \$75.00 filing fee with the LWDA by regular mail. Pursuant to Labor Code § 2699.3(a)(2)(A), no notice was and/or will have been received by Plaintiff from the LWDA evidencing its intention to investigate within sixty-five (65) calendar days of the postmark date of the PAGA notice. Plaintiff is therefore entitled to commence and proceed with a civil action pursuant to Labor Code § 2699.

VI. PRAYER FOR RELIEF

Plaintiff prays for judgment for herself and for all others on whose behalf this suit is brought against Defendants, as follows:

1. For penalties and other relief allowable under Labor Code § 2699, *et seq.* all Aggrieved Employees because of Defendants’ violation of Labor Code § 1198; and IWC Wage Order 5-2001;
2. A civil penalty against Defendants in the amount of \$100 for the initial violation and \$200 for each subsequent violation as specified in section 2699(f)(2) of the California Labor Code for all Aggrieved Employees;
3. An award of reasonable attorney’s fees against Defendants as specified in Labor Code § 2699(g)(1), for all the work performed by the undersigned counsel in connection with the PAGA claims;
4. An award of all costs incurred by the undersigned counsel for Plaintiff in connection with Plaintiff’s and the Aggrieved Employees’ claims against Defendants as provided for in Labor Code § 2699(g)(1); and

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1 **5.** For such other and further relief, this Court may deem just and proper.

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3 Dated: March 13, 2023

MELMED LAW GROUP P.C.

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JONATHAN MELMED

6 Attorney for Plaintiff and the Aggrieved
7 Employees

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am over the age of 18 years and am employed in the county of Los Angeles, State of California. I am not a party to the action. My business address is 1801 Century Park East, Suite 850, Los Angeles, CA 90067.

I declare that on the date hereof, March 13, 2023, I served the foregoing document(s) described as:

- **FIRST AMENDED PAGA REPRESENTATIVE ACTION COMPLAINT**

BY ELECTRONIC SERVICE (via electronic filing service provider): I caused the document(s) to be electronically transmitted to Case Anywhere, an electronic filing service provider, at www.caseanywhere.com pursuant to the Court's Order Authorizing Electronic Service Governing the matter entitled, Gibson v. FRC Balance, LLC, Case No. 23STCV00362, mandating electronic service. The transmission was reported as complete and without error to the addressees as stated on the service list.

A courtesy copy was sent by email to the following:

**OGLETREE, DEAKINS, NASH, SMOAK &
STEWART, P.C.**

Tracie Childs
tracie.childs@ogletree.com
Cameron J. Davila
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Katie M. Greenbaum
katie.greenbaum@ogletree.com
4660 La Jolla Village Drive, Suite 900
San Diego, California 92122

I declare under penalty of perjury under the laws of California that the above is true and correct. I further declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on March 13, 2023, in Los Angeles, California.



Alma Hernandez