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10 Attorneys for Plaintiff Cesar Flores,
11 individually and on behalf of all others similarly situated

12 **IN THE SUPERIOR COURT OF CALIFORNIA**

13 **COUNTY OF SAN DIEGO**

14 CESAR FLORES, individually and on behalf of
15 all others similarly situated,

16 Plaintiff(s),

17 v.

18 TEMPO 5TH AVE, LLC; and DOES 1 through
19 100,

20 Defendant(s).

Case No. 37-2023-00049817-CU-OE-CTL

COMPLAINT

1. Failure to Provide Compliant Meal Periods
2. Failure to Provide Compliant Rest Periods
3. Wage Statement Penalties
4. Waiting Time Penalties
5. Violation of Unfair Competition Law
6. Private Attorneys General Act

21 **RELEVANT PARTIES**

22 1. Plaintiff Cesar Flores ("Plaintiff") is an adult resident of San Diego County, California, and
23 was at all times relevant residing in San Diego County, California.

24 2. Defendant Tempo 5th Ave, LLC ("Defendant") is a California corporation with its principal
25 place of business located in San Diego County, California. Defendant is registered to and does
26 conduct business in the State of California and is subject to the laws of the State of California. All
27 acts and omissions of Defendant employees as alleged herein occurred while they were acting
28 within the course and scope of their employment.

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1 3. Plaintiff is unaware of the true names or capacities of the Defendants sued herein as DOES 1
2 through 100, inclusive (“Doe Defendants”), and therefore sues said Doe Defendants by such
3 fictitious names. Plaintiff will seek leave of this Court to amend this Complaint to insert the true
4 names and capacities of such Doe Defendants when such information has been obtained. Plaintiff is
5 informed and believes, and based on such information and belief alleges, that each of the fictitiously
6 named Doe Defendants has participated in some way in the wrongful acts and omissions alleged
7 below, and is liable to Plaintiff for damages and other relief to which Plaintiff is entitled. Defendant
8 and Doe Defendants are collectively referred to as “Defendants”.

9 **JURISDICTION AND VENUE**

10 4. This action is properly filed in San Diego County, California because the acts and omissions
11 that give rise to Plaintiff’s claims took place in San Diego County, California, and Defendants
12 transact substantial business in this County.

13 5. This Court has jurisdiction over Defendants because Defendants’ unlawful conduct as
14 alleged herein occurred in San Diego County, California, California and Plaintiff suffered damages
15 from such conduct within San Diego County, California, California.

16 **FACTUAL ALLEGATIONS**

17 6. At all times relevant, Plaintiff was Defendants’ employee.

18 7. Plaintiff was employed by Defendants from 11/1/2022 to 4/2/2023.

19 8. Defendants failed to provide Plaintiff with compliant meal breaks because meal breaks were
20 regularly missed, late, or short because of severe understaffing.

21 9. Despite not being provided with compliant meal breaks, Defendant did not pay premium pay
22 for these missed breaks at Plaintiff’s regular rate of pay.

23 10. Defendant failed to provide Plaintiff with compliant rest breaks because rest breaks were
24 regularly missed or short because of severe understaffing.

25 11. Despite not being provided with compliant rest breaks, Defendant did not pay premium pay
26 for these missed breaks at Plaintiff’s regular rate of pay.

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12. Defendants failed to provide Plaintiff with accurate wage statements because the wage statements issued to Plaintiff did not accurately list total wages owed and hours worked, among other things.

13. Due to Defendants' failure to pay all wages due to Plaintiff during their employment, it follows that Defendant failed to pay all wages due at the conclusion of Plaintiff's employment as well. Therefore, Defendants are liable to Plaintiff for waiting time penalties.

PAGA ALLEGATIONS

14. Pursuant to Labor Code section 2699(a), any provision of the Labor Code which provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency ("LWDA") for violations of the Labor Code may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures outlined in Labor Code section 2699.3.

15. Pursuant to Labor Code section 2699.3, an aggrieved employee may pursue a civil action under PAGA after the following requirement have been met:

16. The aggrieved employee has provided written notice by online filing to the LWDA and by certified mail to the employer (hereinafter "Employee's Notice") of the specific provisions of the Labor Code alleged to have been violated, including the facts and theories to support the alleged violations; and

17. The LWDA has provided notice (hereinafter "LWDA's Notice") to the employer and the aggrieved employee by certified mail that it does not intend to investigate the aggrieved employee's claims. Upon receipt of the LWDA's Notice, or if the LWDA does not provide such Notice within 65 calendar days of the postmark date of the Employee's Notice, the aggrieved employee may commence a civil action pursuant to Labor Code section 2699 to recover civil penalties in addition to any other penalties to which the employee may be entitled.

18. On 8/4/23, Plaintiff provided written notice by online filing to the LWDA and by certified mail to Defendants of specific provisions of the Labor Code alleged to have been violated by Defendants, including the facts and theories to support the alleged violations.

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1 19. The 65-day notice period has elapsed, and the LWDA did not provide Plaintiff with written
2 notice that it intends to investigate the alleged violations of the Labor Code. Thus, Plaintiff seeks
3 PAGA Penalties on behalf of all Aggrieved Employees.

4 20. The Aggrieved Employees are defined as “All other nonexempt, hourly employees, current
5 and former, who were employed by Defendants within one year prior to 8/4/23, through final
6 disposition of this action.”

7 **FIRST CAUSE OF ACTION**

8 **Failure to Provide Compliant Meal Periods**

9 **By Plaintiff Against All Defendants**

10 21. Plaintiff incorporates by reference the paragraphs above.

11 22. Labor Code section 512 and the Wage Orders provide that “an employer shall not employ an
12 employee for a work period of more than five hours per day without providing the employee with a
13 meal period of not less than 30 minutes” or “for a work period of more than 10 hours per day
14 without providing the employee with a second meal period of not less than 30 minutes”.

15 23. An employer provides compliant meal breaks to its employees “if it relieves its employees
16 of all duty, relinquishes control over their activities and permits them a reasonable opportunity to
17 take an uninterrupted 30-minute break.” (*Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th
18 1004, 1040 (2012)).

19 24. Not only must an employer affirmatively relieve its employees of all duty during their meal
20 breaks, it also must not “impede or discourage” its employees from taking compliant meal breaks.
21 (*Brinker*, supra).

22 25. Defendants failed to provide Plaintiff with compliant meal breaks as alleged herein.

23 26. For each day that Defendants failed to provide Plaintiff with a compliant meal break,
24 Defendants were required to remit premium pay pursuant to Labor Code section 226.7(c), which is
25 one additional hour of pay at Plaintiff’s regular rate of pay. (*Ferra v. Loews Hollywood Hotel, LLC*,
26 11 Cal. 5th 858 (2021)).

27 27. Defendants failed to pay premium pay at Plaintiff’s regular rate of pay for each day a meal
28 break was missed.

1 28. Plaintiff is therefore entitled to recover premium pay for missed meal breaks, interest,
2 penalties, attorney fees, and costs.

3 **SECOND CAUSE OF ACTION**

4 **Failure to Provide Compliant Rest Periods**

5 **By Plaintiff Against All Defendants**

6 29. Plaintiff incorporates by reference the paragraphs above.

7 30. Labor Code section 226.7 and the Wage Orders requires employers to authorize and permit
8 its employees to take rest periods based on the total hours worked daily at the rate of 10 minutes net
9 per four hours or major fraction thereof.

10 31. Furthermore, “[d]uring rest periods employers must relieve employees of all duties and
11 relinquish control over how employees spend their time.” (*Augustus v. ABM Sec. Servs., Inc.*, 2 Cal.
12 5th 257, 269 (2016)).

13 32. Defendants failed to provide Plaintiff with compliant rest breaks as alleged herein.

14 33. For each day that Defendants failed to provide Plaintiff with a compliant rest break,
15 Defendants were required to remit premium pay pursuant to Labor Code section 226.7(c), which is
16 one additional hour of pay at Plaintiff’s regular rate of pay. (*Ferra v. Loews Hollywood Hotel, LLC*,
17 11 Cal. 5th 858 (2021)).

18 34. Defendants failed to pay premium pay at Plaintiff’s regular rate of pay for each day a rest
19 break was missed.

20 35. Plaintiff is therefore entitled to recover premium pay for missed rest breaks, interest,
21 penalties, attorney fees, and costs.

22 **THIRD CAUSE OF ACTION**

23 **Wage Statement Penalties**

24 **By Plaintiff Against All Defendants**

25 36. Plaintiff incorporates by reference the paragraphs above.

26 37. Labor Code section 226(a) requires employers to provide itemized wage statements to its
27 employees that identify accurate information regarding their compensation. Defendants, as a matter

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1 of policy and practice, failed in its affirmative obligation to provide accurate itemized wage
2 statements to Plaintiff in violation of Labor Code section 226(a).

3 38. As alleged herein, the wage statements that Defendants issued to Plaintiff were inaccurate
4 and incomplete.

5 39. Defendants knowingly and intentionally issued wage statements that were inaccurate and
6 incomplete, and the issuance of inaccurate and incomplete wage statements caused injury to
7 Plaintiff in that Plaintiff was unable to accurately verify and/or calculate their wages.

8 40. Plaintiff is therefore entitled to the recovery of wage statement penalties, attorney fees, and
9 costs.

10 **FOURTH CAUSE OF ACTION**

11 **Waiting Time Penalties**

12 **By Plaintiff Against All Defendants**

13 41. Plaintiff incorporates by reference the paragraphs above.

14 42. Labor Code sections 201 and 202 require that an employer provide an employee with all
15 wages due and payable either: (a) immediately upon termination, or (b) within 3 days of the
16 employee's resignation.

17 43. Labor Code section 203 provides that if an employer willfully fails to pay wages owed in
18 accordance with Labor Code sections 201 or 202, then the wages of the employee continue as a
19 penalty from the due date at the same rate until paid or until an action is commenced, not to exceed
20 thirty days.

21 44. As alleged herein, Defendants willfully did not pay Plaintiff all wages owed at the
22 conclusion of employment.

23 45. Plaintiff is therefore entitled to the recovery of waiting time penalties, interest, attorney fees,
24 and costs.

25 **FIFTH CAUSE OF ACTION**

26 **Violation of Unfair Competition Law**

27 **By Plaintiff Against All Defendants**

28 46. Plaintiff incorporates by reference the paragraphs above.

1 47. Defendants' conduct described herein constitutes unfair competition.

2 48. Specifically, Defendants have gained an unfair advantage over other similarly situated
3 businesses by unlawfully reducing their overhead costs by not paying their employees what they are
4 owed.

5 49. Pursuant to Business and Professions Code 17203, Plaintiff is entitled to restitution of all
6 wrongfully withheld wages.

7 50. Plaintiff may recover attorney fees pursuant to Code of Civil Procedure section 1021.5.

8 **SIXTH CAUSE OF ACTION**

9 **Private Attorneys General Act**

10 **By Plaintiff and the Aggrieved Employees Against All Defendants**

11 51. Plaintiff incorporates by reference the paragraphs above.

12 52. PAGA permits Plaintiff and the Aggrieved Employees to recover civil penalties for the
13 violation(s) of the Labor Code.

14 53. As alleged herein, Defendants' conduct violates numerous sections of the Labor Code.

15 54. With respect to violations of Labor Code sections 226.7 and 558 for Defendants' failure to
16 provide Plaintiff and the Aggrieved Employees with compliant meal periods or compensation in
17 lieu thereof, the penalties in Labor Code sections 558 and 2699 apply.

18 55. With respect to violations of Labor Code section 226.7 for Defendants' failure to provide
19 Plaintiff and the Aggrieved Employees with compliant rest periods or compensation in lieu thereof,
20 the penalties in Labor Code section 2699 apply.

21 56. With respect to violations of Labor Code section 226(a) for failure to provide accurate wage
22 statements to Plaintiff and the Aggrieved Employees, the penalties in Labor Code sections 226.3
23 and 2699 apply.

24 57. With respect to violations of Labor Code section 203 for failure to pay all wages due to
25 Plaintiff and the Aggrieved Employees and the conclusion of their employment, the penalties in
26 Labor Code section 2699 apply.

27 58. Additionally, Plaintiff and the Aggrieved Employees are entitled to attorney's fees pursuant
28 to Labor Code section 2699(g).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1ST Cause of Action

1. Damages and/or penalties pursuant to Labor Code section 226.7
2. Interest
3. Attorneys' fees
4. Costs
5. Other relief the court deems proper

2ND Cause of Action

1. Damages and/or penalties pursuant to Labor Code section 226.7
2. Interest
3. Attorneys' fees
4. Costs
5. Other relief the court deems proper

3RD Cause of Action

1. Penalties pursuant to Labor Code section 226
2. Attorneys' fees
3. Costs
4. Other relief the court deems proper

4TH Cause of Action

1. Penalties pursuant to Labor Code section 203
2. Attorneys' fees
3. Costs
4. Other relief the court deems proper

5TH Cause of Action

1. Restitution of all wrongfully withheld wages
2. Attorneys' fees
3. Costs

1 4. Other relief the court deems proper

2 6TH Cause of Action

3 1. All applicable civil penalties available pursuant to Labor Code section 2698, et seq.

4 2. Attorneys' fees

5 3. Costs

6 4. Other relief the court deems proper

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8 DATED: November 15, 2023

/s/ Daniel Ginzburg

DANIEL GINZBURG

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10 Attorney for Plaintiff
11 Cesar Flores, individually and on
12 behalf of all others similarly situated
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