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Superior Court of California,
County of San Diego

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

RAY DYER, individually and on behalf of all
others similarly situated and the State of
California under the Private Attorneys General
Act,

Plaintiffs,

vs.

KENNY BROTHERS, INC. and DOES 1
through 50, inclusive,

Defendants.

Case No. 37-2023-00045013-CU-OE-CTL

Hon. Gregory W. Polluck
Dept. 71

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. Untimely Payment of Wages
6. Wage Statement Violations
7. Waiting Time Penalties
8. Failure to Reimburse Business Expenses
9. Failure to Provide Records
10. Unfair Competition
11. Civil Penalties under the Private Attorneys
General Act (Labor Code §§ 2698 *et seq.*)

1 Plaintiff RAY DYER, individually and on behalf of all others similarly situated and the State
2 of California under the Private Attorneys General Act (“Plaintiff”) brings this FIRST AMENDED
3 CLASS AND REPRESENTATIVE ACTION COMPLAINT against Defendants KENNY
4 BROTHERS, INC. and DOES 1 through 50, inclusive (collectively “Defendants”), alleging as
5 follows:

6 **INTRODUCTION**

7 1. This is a class and representative action brought under the California Code of Civil
8 Procedure § 382 for Defendants’ violation of the California Labor Code.

9 2. Defendants failed to authorize compliant first and second meal periods and rest periods
10 to Plaintiff and the class members and further failed to pay their corresponding premiums.

11 3. Defendants further failed to pay Plaintiff and class members all minimum and overtime
12 hours worked due to off-the-clock time spent driving in between locations during split shifts.

13 4. Defendants’ employment policies, practices, and payroll administration systems
14 enabled and facilitated these violations on a company-wide basis with respect to the class members.

15 **JURISDICTION & VENUE**

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

18 6. The monetary damages and restitution sought exceed the minimal jurisdiction limits of
19 the Superior Court.

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

24 8. 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 Ray Dyer

9. Plaintiff Dyer is an individual over 18 years of age who worked for Defendants in California as a non-exempt employee from about September 21, 2022, to August 11, 2023. Plaintiff worked as a Store Manager.

10. 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

11. Defendant Kenny Brothers, Inc. is a California corporation that maintains operations and conducts business throughout the State of California, including in this county. Kenny Brothers does business as Jersey Mike’s Subs through its franchised restaurants.

12. The true names and capacities, whether individual, corporate, or otherwise, of the parties sued as DOES 1 through 50, are presently unknown, unascertainable, or uncertain, and are sued by such fictitious names under Code of Civil Procedure section 474. Upon information and belief, each of DOES 1 through 50 constitutes a legal employer or is otherwise legally responsible in some manner for the acts and omissions alleged herein. This Complaint may be amended to reflect their true names and capacities once ascertained.

13. Upon information and belief, 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 the employees, suffered and permitted them to work, and otherwise engaged them as employees under California law.

14. Upon information and belief, 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.

15. Upon information and belief, Defendants 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.

CLASS ALLEGATIONS

16. This action is brought 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.

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

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

a. Numerosity: The class is estimated to exceed 50 individuals, although the precise membership of the entire class is unknown at this time. The class is so numerous that joinder of all class members is impracticable. The identities of class members are ascertainable by inspection of Defendants' employment and payroll records.

b. Typicality: Plaintiff's claims are typical of the claims of the other class members. They were subject to the same policies and practices of Defendants, which resulted in losses to the class. Proof of common unlawful business practices, which Plaintiff experienced, will establish the right of the class to recover on the causes of action alleged herein.

c. Adequacy: Plaintiff is an adequate class representative; will take all necessary steps to protect the class members' interests adequately and fairly; has no interest antagonistic to other class members; and is represented by attorneys

1 who have substantial experience prosecuting, defending, resolving, and
2 litigating wage and hour class, collective, and representative actions in
3 California state and federal courts.

4 d. Superiority: A class action is superior to other means for adjudicating this
5 dispute. Individual joinder is impractical. Class treatment will allow for
6 common issues to be resolved in a single forum, simultaneously, and without
7 duplication of effort and expense.

8 e. Public Policy Considerations: Certification of this lawsuit as a class action
9 advances the State of California's strong public interest in ensuring its
10 approximately millions of employed residents are properly paid the wages they
11 earned for the hours they worked. Class actions provide a mechanism for
12 enforcement of labor laws and allow for vindication of employee rights by
13 unnamed class members.

14 19. Common questions of law and fact as to the class members predominate over questions
15 affecting only individual members. The common questions of law and fact exist as to whether the
16 employment policies and practices formulated by Defendants and applied to the class members
17 constitute violations of California law.

18 **GENERAL ALLEGATIONS**

19 20. Plaintiff and the class members experienced missed, late, short, and interrupted first
20 and second meal periods due to the pressure to keep up with the high demands of the job and
21 understaffing.

22 21. Specifically, Plaintiff and the class members were often only scheduled to work with 1
23 or 2 people at a time, resulting in insufficient coverage for Plaintiff and the class members to take
24 compliant meal periods when there was increased volume in the store. As a result, meal periods would
25 be interrupted and shortened due to the pressure to get back to work during these times.

26 22. To the extent Plaintiff and the class members had a valid meal period waiver in effect,
27 this waiver was invalid for shifts of more than 6 hours. When Plaintiff and the class members worked
28 over 6 hours, they were entitled to a compliant meal period or meal period premium otherwise.

1 23. Plaintiff and the class members often worked over 6 hours without compliant meal
2 periods as they would often work “split shifts” which consisted of working several hours at one store
3 location, then driving to another location and working several hours there.

4 24. Defendants improperly often considered this unpaid driving time as Plaintiff’s and the
5 class members’ unpaid meal period, despite not being completely off-duty.

6 25. Plaintiff and the class members were owed meal period premiums each time they
7 worked over 6 hours in a day and were unable to take a compliant, off-duty meal period. Plaintiff and
8 the class members were additionally owed a second meal period premium each time they worked over
9 10 hours without a compliant second meal period.

10 26. Based on Plaintiff’s records and on information and belief, Defendants had an unlawful
11 policy and practice of not paying meal period premiums.

12 27. For the same reasons Plaintiff and the class members experienced non-compliant meal
13 periods, they also experienced missed and interrupted rest periods.

14 28. Defendants failed to pay rest period premiums as required by Labor Code section 226.7,
15 each time Plaintiff and the class members experienced a noncompliant rest period.

16 29. Defendants additionally failed to pay Plaintiff and the class members at the lawful
17 minimum wage rate for all hours worked, resulting in unpaid minimum wages.

18 30. As discussed above, Plaintiff and the class members worked split shifts, which meant
19 they drove between store locations throughout the day. This time was unaccounted for as Plaintiff and
20 the class members were required to clock out each time, they left the store, resulting in minimum wage
21 violations.

22 31. To the extent Defendants’ policy and practice of failing to account for driving time
23 resulted in hours worked more than 8 or 12 hours in a day, Defendants failed to pay overtime and
24 double time hours.

25 32. Defendants required Plaintiff and the class members to incur costs for work-related
26 purposes without full reimbursement, including but not limited to mileage and the use of cell phones
27 for work purposes. In direct consequence of their job duties, Plaintiff and the class members
28

1 unavoidably and necessarily incurred these losses, expenditures, and costs as a matter of policy and
2 practice.

3 33. As discussed, Plaintiff and the class members often had to drive to multiple store
4 locations throughout San Diego County. Plaintiff additionally on occasion had to deliver catering
5 orders to customers who placed orders to the store online or over the phone. Plaintiff and the class
6 members did so without proper reimbursement.

7 34. Plaintiff and the class members incurred costs and expenditures each time they used
8 their personal vehicle for work purposes. Based on Plaintiff's records and on information and belief,
9 Plaintiff and the class members were not fully reimbursed for their mileage.

10 35. Furthermore, Plaintiff and class members were required by Defendants to use their
11 personal cell phones for work-related purposes without reimbursement.

12 36. For example, Plaintiff and the class members were required to send reports every hour
13 to a manager to report the progress of the day and whether co-workers were on track with their duties.
14 Additionally, at the end of each day Plaintiff and the class members were required to take stock of the
15 ingredients and supplies in the store and report those numbers as well.

16 37. Finally, Defendants failed to provide all records upon Plaintiff's request.

17 38. On August 1, 2023, Plaintiff requested several documents to which Plaintiff is entitled
18 to under Labor Code §§ 226(b) and 432, as well as Section 7(C) of the IWC Wage Orders including
19 wage statements, time records, and copies of the arbitration agreement (to the extent one exists) and
20 the employee handbook. Plaintiff additionally requested several other documents to which he is
21 entitled to under Labor Code § 1198.5 including his new hire paperwork and his personnel file.

22 39. Defendants failed to produce all documents requested outside of Plaintiff's wage
23 statements. Defendants have refused to comply with Labor Code sections 226, 432, and 1198.5 by
24 failing to produce and stating their intent not to produce all of the abovementioned documents and all
25 others stated in Plaintiff's original request.

26 40. Because of the aforementioned violations, Defendants failed to provide accurate
27 itemized wage statements that included the accurate gross or net wages in violation of Labor Code
28 section 226(a)(1) and (5). Likewise, in violation of Labor Code section 226(a)(9), Defendants failed

1 to state on employee wage statements each pay period the applicable hourly rates in effect and the
2 number of hours worked at that rate, as Defendants failed to pay all wages and premiums owed to
3 employees. The amounts stated are instead depreciated and underpaid, resulting in an inaccurate
4 reflection on the pay stub.

5 41. Defendants additionally failed to list employees' "total hours worked", as the class
6 members worked off-the-clock including during uncompensated meal periods. Therefore, Defendants
7 have provided inaccurate and non-compliant wage statements to class members.

8 42. These violations create derivative liability for failure to timely pay all wages owed each
9 payday or upon separation of employment.

10 **FIRST CAUSE OF ACTION**

11 **MINIMUM WAGE VIOLATIONS**

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

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

14 43. All outside paragraphs of this Complaint are incorporated into this section.

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

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

1 46. Defendants' unlawful acts and omissions deprived Plaintiff and class members of
2 minimum, regular and overtime wages in amounts to be determined at trial. Plaintiff and class
3 members are entitled to recover the full amount of the unpaid wages, plus liquidated damages in an
4 amount equal to the wages unlawfully unpaid (and interest thereon), in addition to interest, attorneys'
5 fees, and costs to the extent permitted by law, including under Labor Code sections 1194 and 1194.2.

6 **SECOND CAUSE OF ACTION**

7 **FAILURE TO PAY ALL OVERTIME WAGES**

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

9 47. All outside paragraphs of this Complaint are incorporated into this section.

10 48. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code
11 §§ 204, 510, 558, 1194, and 1198, which require non-exempt employees be timely paid overtime
12 wages all overtime hours worked, and which further provide a private right of action for an employer's
13 failure to pay all overtime compensation for overtime hours worked.

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

21 50. Plaintiff and class members are entitled to recover the full amount of the unpaid
22 overtime, in addition to interest, statutory and civil penalties, and attorneys' fees, and costs to the
23 extent permitted by law.

24 **THIRD CAUSE OF ACTION**

25 **MEAL PERIOD VIOLATIONS**

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

27 51. All outside paragraphs of this Complaint are incorporated into this section.
28

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

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

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

55. Plaintiff and class members are entitled to recover the full amount of the meal period premiums owed, in addition to interest, statutory and civil penalties, and attorneys' fees, and costs to the extent permitted by law.

FOURTH CAUSE OF ACTION

REST PERIOD VIOLATIONS

Violation of Labor Code §§ 226.7 and 516

1. All outside paragraphs of this Complaint are incorporated into this section.

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

3. Defendants willfully failed in their affirmative obligation to consistently authorize and permit Plaintiff and class members to receive compliant, duty-free rest periods of not less than ten (10) minutes for every four hours worked (or major fraction thereof) in violation of Labor Code sections 226.7, 516, 558, and 1198 and the IWC Wage Orders (the “Rest Periods” sections of the applicable orders).

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

FIFTH CAUSE OF ACTION

UNTIMELY PAYMENT OF WAGES

Violation of Labor Code §§ 204, 210, 218

5. All outside paragraphs of this Complaint are incorporated into this section.

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

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

8. Plaintiff and class members are entitled to recover the full amount of the unpaid wages, in addition to a statutory penalty in the amount of \$100 for the initial violation for each failure to pay each employee and \$200 for all subsequent violations and for all willful or intentional violations for

each failure to pay each employee, plus 25 percent of the amount unlawfully withheld under provided in Labor Code § 210, in addition to interest, attorneys' fees, and costs to the extent permitted by law.

SIXTH CAUSE OF ACTION

WAGE STATEMENT VIOLATIONS

Violation of Labor Code § 226

9. All outside paragraphs of this Complaint are incorporated into this section.

10. This cause of action is brought by a wage statement subclass pursuant to Labor Code § 226(a) which requires non-exempt employees be provided accurate itemized wage statements each pay period, and which further provide a private right of action for an employer's failure to comply with this obligation.

11. Defendants knowingly and intentionally failed in their affirmative obligation to 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).

12. Defendants' unlawful acts and omissions deprived Plaintiff and class members of accurate itemized wage statements, causing confusion and concealing wage and premium underpayments.

13. 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).

SEVENTH CAUSE OF ACTION

WAITING TIME PENALTIES

Violation of Labor Code §§ 201 *et seq.*

14. All outside paragraphs of this Complaint are incorporated into this section.

15. This cause of action is brought by a waiting time subclass pursuant to Labor Code §§ 201 through 203, which require an employer to timely pay all wages earned upon termination of

1 employment, and which further provide a private right of action to recover statutory waiting time
2 penalties each day an employer fails to comply with this obligation, up to a maximum of 30 days
3 wages.

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

9 17. Plaintiff and class members are entitled to recover a waiting time penalty for a period
10 of up to 30 days, in addition to interest, attorneys' fees, and costs to the extent permitted by law.

11 **EIGHTH CAUSE OF ACTION**

12 **FAILURE TO REIMBURSE BUSINESS EXPENSES**

13 **Violation of Labor Code § 2802**

14 18. All outside paragraphs of this Complaint are incorporated into this section.

15 19. Defendants willfully failed in their affirmative obligation to reimburse Plaintiff and a
16 reimbursement subclass for all necessary expenditures, losses, expenses, and costs incurred by them
17 in direct discharge of the duties of their employment, in violation of Labor Code section 2802.

18 20. Defendants' unlawful acts and omissions deprived Plaintiff and class members of
19 lawful reimbursements for business expenses in amounts to be determined at trial. Plaintiff and class
20 members are entitled to recover the amount unreimbursed expenses of Plaintiff and class members in
21 addition to interest, attorneys' fees, and costs to the extent permitted by law, including under Labor
22 Code section 2802.

23 **NINTH CAUSE OF ACTION**

24 **FAILURE TO PROVIDE RECORDS**

25 **Violation of Labor Code §§ 226, 432, and 1198.5**

26 21. All outside paragraphs of this Complaint are incorporated into this section.

27 22. Plaintiff brings this cause of action exclusively *in an individual capacity*.
28

1 23. Labor Code section 432 states that [i]f an employee. . . signs any instrument relating to
2 the obtaining or holding of employment, he shall be given a copy of the instrument upon request.”

3 24. Labor Code section 226(b) grants employees the right to inspect or receive “a copy of
4 records pertaining to their employment.” Labor Code section 226(f) authorizes a penalty of \$750 for
5 an employer’s failure to comply with a request for records made under section 226.

6 25. Labor Code section 1198.5 requires employers to provide an employee’s “personnel
7 records” within 30 days of receipt of the request. Section 1198.5(k) authorizes a penalty of \$750 for
8 an employer’s failure to provide a copy of or permit inspection of personnel records. Section 1198.5(l)
9 allows an employee to seek injunctive relief to obtain an employer’s compliance with this section and
10 authorizes the recovery of attorneys’ fees and costs.

11 26. Section 7 (Records) of the IWC Wage Orders, which may be enforced through Labor
12 Code section 1198, requires that employers maintain time records of when an employee begins and
13 ends each work period and when the employee takes meal periods, among other required employment
14 and payroll records. Section 7(C) states that “[a]n employee’s records shall be made available for
15 inspection by the employee upon reasonable request.”

16 27. Plaintiff requested from Defendants all records due under the IWC Wage Orders
17 (including the Records sections) and Labor Code sections 226, 432, and 1198.5. Defendants failed to
18 provide time records, a signed copy of the arbitration agreement (to the extent one exists), the
19 employee handbook, new hire paperwork, and Plaintiff’s personnel file.

20 28. Defendants’ unlawful acts and omissions deprived Plaintiff of the ability review the
21 documents they received during their employment and to inspect and reconcile their actual time
22 worked with the ultimate pay they received on their wage statements. Plaintiff is entitled to recover
23 the penalties and injunctive relief, in addition to interest, attorneys’ fees, and costs to the extent
24 permitted by law, including under Code of Civil Procedure section 1021.5, and Labor Code sections
25 226 and 1198.5.
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1 **TENTH CAUSE OF ACTION**

2 **UNFAIR COMPETITION**

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

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

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

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

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

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

22 61. Plaintiff and class members are entitled to injunctive relief against Defendants,
23 restitution, and other equitable relief to return all funds over which Plaintiff and class members have
24 an ownership interest and to prevent future damage and the public interest under Business and
25 Professions Code § 17200 *et seq.* Plaintiff and class members are further entitled to recover interest,
26 attorneys' fees, and costs to the extent permitted by law, including under Code of Civil Procedure
27 § 1021.5.

1 **ELEVENTH CAUSE OF ACTION**

2 **CIVIL PENALTIES UNDER THE PRIVATE ATTORNEYS GENERAL ACT**

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

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

5 29. All outside paragraphs of this Complaint are incorporated into this section.

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

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

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

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

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

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

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

6 36. Labor Code section 2699.3 sets forth the procedure for commencing an action for civil
7 penalties under the PAGA.

8 37. On or about **October 10, 2023**, Plaintiff paid the requisite PAGA filing fee and
9 provided written notice (by online electronic filing with the LWDA and by certified mail to
10 Defendants) of Defendants’ alleged Labor Code violations, including the facts and theories to support
11 the alleged violations.

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

15 39. To date, neither Plaintiff nor Plaintiff’s counsel has received a response to Plaintiff’s
16 written PAGA notice from the LWDA.

17 40. Within 33 calendar days of the postmark date of the notice sent by Plaintiff, neither
18 Plaintiff nor Plaintiff’s counsel has received written notice by certified mail from any defendant
19 providing a description of any actions taken to cure the alleged violations.

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

24 42. As set forth in the PAGA notice attached as Exhibit 1 and incorporated into this
25 Complaint, Defendants committed the following violations and are liable for all corresponding civil
26 penalties:

- 27 a. ***Unpaid Hours Worked/Minimum Wage.*** Violation of Labor Code §§ 1194,
28 1197, 1198; IWC Wage Orders.

- b. ***Unpaid Overtime.*** Violation of Labor Code §§ 510, 1194, 1198; IWC Wage Orders.
- c. ***Unpaid Meal Period Premium Wages.*** Violation of Labor Code §§ 226.7, 512, 1198; IWC Wage Orders.
- d. ***Unpaid Rest Period Premium Wages.*** Violation of Labor Code §§ 226.7, 516, 1198; IWC Wage Orders.
- e. ***Untimely Payment of Wages During Employment.*** Violation of Labor Code §§ 204, 204b, 210.
- f. ***Untimely Payment of Wages Upon Separation of Employment.*** Violation of Labor Code §§ 201, 202, 203, 256.
- g. ***Non-Compliant Wage Statements.*** Violation of Labor Code §§ 226, 226.3.
- h. ***Unreimbursed Employee Expenses.*** Violation of Labor Code §§ 2802, 2804.
- i. ***Failure to Provide Employee Records.*** Violation of Labor Code §§ 226, 432, 1174, 1198.5; IWC Wage Orders.
- j. ***Failure to Maintain Accurate Records.*** Violation of Labor Code § 1174; IWC Wage Orders.

43. Plaintiff seeks to collect all recoverable civil penalties for the Labor Code violations alleged in this Complaint and the PAGA notice (including amendments thereto) against Defendants pursuant to Labor Code section 2699(a) and (f), in addition to attorneys' fees, costs, and interest to the 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;

- 1 f. For all recoverable pre- and post-judgment interest;
- 2 g. For recovery of all civil and statutory penalties and liquidated damages;
- 3 h. For disgorgement of all amounts wrongfully obtained;
- 4 i. For this action to be maintained as a representative action under the PAGA;
- 5 j. For Plaintiff and counsel of record to be provided with all enforcement capability as if
- 6 the action were brought by the State of California or the California Division of Labor
- 7 Enforcement;
- 8 k. For recovery of all civil penalties and other recoverable amounts under the PAGA;
- 9 l. For restitution and injunctive relief;
- 10 m. For reasonable attorneys' fees and costs of suit, including expert fees, to the extent
- 11 permitted by law, including (without limitation) under Labor Code §§ 218.5, 226,
- 12 1194, 2802, 2699, and Code of Civil Procedure section 1021.5; and
- 13 n. For such other relief the Court deems just and proper.

14
15 Dated: December 15, 2023

Ferraro Vega Employment Lawyers, Inc.

16
17 

Nicholas J. Ferraro

Attorneys for Plaintiff Ray Dyer

EXHIBIT 1

Notice of Labor Code Violations

FERRARO VEGA

SAN DIEGO EMPLOYMENT LAWYERS

Nicholas J. Ferraro
nick@ferrarovega.com
Lauren N. Vega
lauren@ferrarovega.com

ATTORNEYS AT LAW
3160 Camino del Rio South, Suite 308
San Diego, California 92108

619-693-7727
619-350-6855 fax
ferrarovega.com

October 10, 2023

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

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

Kenny Brothers, Inc.
(dba Jersey Mike's Subs)
811 Spindrift Dr.
Del Mar, CA 92014

- 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 **RAY DYER** ("Plaintiff(s)") and all other "aggrieved employees" of the following "Defendant(s)":

KENNY BROTHERS, INC.
dba Jersey Mike's Subs

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. Plaintiff maintains standing to pursue these claims against Defendants, as Plaintiff experienced one or more of the alleged violations during the relevant statutory period, which continue through the present date. *Cf. Johnson v. Maxim Healthcare Servs., Inc.*, 281 Cal. Rptr. 3d 478, 481 (Cal. Ct. App. 2021).

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 judgment or settlement approved by the Superior Court of California under Labor Code section 2699(k). Defendants are notified that any attempt to resolve this case should 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. Plaintiff advises Defendants this letter should be also considered a reasonable attempt at settlement of this matter, subject to an exchange of additional documents and information. *Graham v. Daimler Chrysler Corp.* (2004) 24 Cal. 4th 553, 561.

- BACKGROUND -

Defendants employed Plaintiff during the PAGA Period in the position of Store Manager from about September 21, 2022, to August 11, 2023. 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 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." *Donohue 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.

First, Plaintiff and, on information and belief, the aggrieved employees experienced late, missed, and interrupted first and second meal periods due to the pressure to keep up with the high demands of the job and understaffing.

Specifically, Plaintiff and the aggrieved employees often only were scheduled to work with 1 to 2 other people at a time. This meant that there was not enough coverage for Plaintiff and the aggrieved employees to take compliant meal periods when the store would get busy. As a result, to the extent Plaintiff and the aggrieved employees were able to take meal breaks they would often be cut short or interrupted as they were pressured by Defendants to get back to work.

To the extent Plaintiff and the aggrieved employees had a valid meal waiver in effect, this meal waiver was invalid for shifts over 6 hours. When Plaintiff and the aggrieved employees worked over 6 hours, they were entitled to a compliant meal break or meal period premiums otherwise.

Plaintiff and the aggrieved employees often worked over 6 hours without compliant first meal periods as they would often work several hours at one location then be asked to drive to other store locations and work several hours there. Defendants referred to these shifts as "split shifts". Defendants improperly considered this unpaid driving time as Plaintiff's and, on information and belief, the aggrieved employees' meal break.

Plaintiff and the aggrieved employees were owed meal period premiums each time they worked over 6 hours in a day and were unable to take a compliant, off-duty meal periods. Plaintiff and the aggrieved employees were additionally owed meal period premiums each time they worked over 10 hours without a compliant second meal period. Based on Plaintiff's records and on information and belief, Defendants had an unlawful policy and practice of not paying meal period premiums.

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.

For the reasons discussed above, Plaintiff and the aggrieved employees experienced missed and interrupted rest periods. When Plaintiff and the aggrieved employees experienced these missed and interrupted rest periods, Defendants failed to pay rest period premiums at the regular rate of pay as required by Labor Code section 226.7. Defendants had an unlawful policy and practice of not paying Plaintiff and, on information and belief, the aggrieved employees rest period premiums when they experienced non-compliant rest periods.

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 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. As discussed above, Plaintiff and the aggrieved employees worked split shifts which meant they drove between store locations throughout the day. This time was unaccounted for as Plaintiff and the aggrieved employees were required to clock out each time, he left a store. Additionally, this time was considered by Defendants to be their meal period. Defendants’ policy and practice of not paying Plaintiff for this time resulted in unlawful off-the-clock work and unpaid hours.

To the extent other aggrieved employees also engaged in off-the-the clock work, Defendants failed to pay them the minimum wage for all hours worked in violation of Labor Code section 1194.

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.

To the extent Defendants policy and practice of failing to account for Plaintiff’s and the aggrieved employees’ drive time, or otherwise off the clock work resulted in hours worked more than 8 or 12 hours in a day, Defendants failed to pay overtime and double time hours.

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.

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 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.

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 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 pay stub.

Furthermore, Defendants violated Labor Code section 226(a)(2) by failing to list employees’ “total hours worked,” as aggrieved employees worked off-the-clock, including during uncompensated meal periods, rendering the total hours listed as an inaccurate reflection of hours worked.

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.

Unreimbursed Employee Expenses
Violation of Labor Code §§ 2802, 2804

Defendants violated Labor Code section 2802 with respect to the aggrieved employees by failing to reimburse the aggrieved employees for all necessary expenditures or losses incurred as part of their job duties.

Labor Code section 2802 requires an employer to “indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.” *See, e.g., Espinoza v. West Coast Tomato Growers, LLC*, 2016 WL 4468175 at *4, n.2 (S.D. Cal. Aug. 24, 2016, No. 14-CV-2984 W (KSC)).

Labor Code section 2804 affirms that “[a]ny contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof, is null and void, and this article shall not deprive any employee or his personal representative of any right or remedy to which he is entitled under the laws of this State.”

Defendants required Plaintiff and the aggrieved employees to incur costs for work-related purposes without full reimbursement, including but not limited to mileage and the use of cell phones for work purposes. In direct consequence of their job duties, Plaintiff and the aggrieved employees unavoidably and necessarily incurred these losses, expenditures, costs, and as a matter of policy and practice.

As discussed above, Plaintiff often had to drive to multiple store locations throughout San Diego County. Plaintiff additionally on occasion had to deliver catering orders to customers who placed orders to the store online or over the phone. Plaintiff and the aggrieved employees incurred costs and expenditures each time they used their personal vehicle for work purposes. Based on Plaintiff’s records and on information and belief, Plaintiff and the aggrieved employees were not fully reimbursed for their mileage.

Furthermore, Plaintiff and the aggrieved employees were required by Defendants to use their personal cell phones for work-related purposes without reimbursement. For example, Plaintiff and the aggrieved employees were required to send reports every hour to their manager to report back how the day was going and whether their coworkers were on track with their duties. Additionally, at the end of the day Plaintiff and the aggrieved employees would have to take stock of everything and report back those numbers.

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.

Failure to Provide Employee Records
Violation of Labor Code §§ 226, 432, 1174, 1198.5; IWC Wage Orders

Defendants violated Labor Code sections 226, 432, and 1198.5 with respect to the aggrieved employees.

Labor Code section 226(b) requires employers to “afford current and former employees the right to inspect or receive a copy of records pertaining to their employment, upon reasonable request to the employer.” Labor Code section 432 states that “[i]f an employee ... signs any instrument relating to the obtaining or holding of employment, he shall be given a copy of the instrument upon request.” Labor Code section 1198.5 grants “[e]very current and former employee, or his or her representative, ... the right to inspect and receive a copy of the personnel files that the employer maintains relating to the employee’s performance or to any grievance concerning the employee.” Section 7(A) (Records) of the IWC Wage Orders, which may be enforced through Labor Code section 1198, mandates that employers maintain and make available “time records showing when the employee begins and ends each work period” as well as time records showing “[m]eal periods, split shift intervals, and daily hours worked[.]” Labor Code section 1174(d) requires these and other records be maintained for at least three years.

Defendants failed to provide all records upon Plaintiff’s request. On August 1, 2023, Plaintiff requested several documents to which Plaintiff is entitled to under Labor Code §§ 226(b) and 432, as well as Section 7(C) of the IWC Wage Orders including wage statements, time records, and copies of the arbitration agreement (to the extent one exists) and the employee handbook. Plaintiff additionally requested several other documents to which he is entitled to under Labor Code § 1198.5 including his new hire paperwork and his personnel file.

Defendants failed to produce all documents requested outside of Plaintiff’s wage statements. Defendants have refused to comply with Labor Code sections 226, 432, and 1198.5 by failing to produce and stating their intent not to produce all of the abovementioned documents and all others stated in Plaintiff’s original request.

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), 1174.5 (\$500), 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 of 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

E.M.

Cc Plaintiff Ray Dyer
Grace Welter - gwelter@buchalter.com
Gabriel Green - ggreen@buchalter.com
Yvonne Ricardo - yricardo@buchalter.com