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December 18, 2023

NOTICE VIA ONLINE SUBMISSION

California Labor & Workforce Development Agency (LWDA)

Attn: PAGA Administrator

<https://dir.tfaforms.net/308>

VIA U.S. CERTIFIED MAIL (RETURN RECEIPT REQUESTED)

MSH Enterprises, LLC
c/o Silvia Ariadne Heredia, Agent
124 Playa Circle
Aliso Viejo, CA 92656

MSH Enterprises, LLC
Marcos Salim Heredia
Silvia Ariadne Heredia
34255 Pacific Coast Hwy, Unit 109
Dana Point, CA 92629

**RE: Emanuel S. Polo/MSH Enterprises, LLC
Private Attorneys General Act**

To Whom It May Concern:

Pursuant to the Labor Code Private Attorneys General Act of 2004, Labor Code sections 2698, *et seq.* ("PAGA"), Mr. Emanuel S. Polo (hereafter "Polo") provides notice on behalf of himself and of all individuals currently and formerly employed in California as non-exempt or hourly paid employees (hereafter the "Aggrieved Employees"), by MSH Enterprises, LLC, a California limited liability company (hereafter "MSH"), of violations of California Labor Code §§ 201, 202, 203, 204, 221, 226, 226.7, 233, 246, 351, 353, 510, 512, 558, 558.1, 1174, 1194, 1197, 1198, and 2802. Marcos Salim Heredia and Silvia Ariadne Heredia are being included in this PAGA notice pursuant to Labor Code Section 558.1 as they were or are an owner/director/managing agent of MSH Enterprises, LLC, were involved in the day-to-day operations of the business, and as such, controlled the wages, hours, and working conditions of Polo and the other Aggrieved Employees. On behalf of himself and all other Aggrieved Employees, Polo hereby provides this notice to the Labor & Workforce Development Agency and MSH and its agents and representatives.

At all relevant times, MSH has employed persons, conducted business, and engaged in illegal payroll practices and policies, throughout California. Polo and the Aggrieved Employees are

“employees” within the meaning of Wage Order 5-2001 (hereafter “the Wage Order”) § 2, subdivision (F) and “Aggrieved Employees” within the meaning of Labor Code § 2699, subdivision (c).

An Aggrieved Employee pursuing a representative action under the PAGA could seek civil penalties for alleged Labor Code violations that affected the Aggrieved Employee, as well as separate California Labor Code violations that affected other employees. In *Huff v. Securitas Security Services USA, Inc.*, 233 Cal. Rptr. 3d 502 (Ct. App. 2018), the Court concluded that an employee affected by at least one California Labor Code violation could pursue civil penalties under PAGA on behalf of other Aggrieved Employees for all Labor Code violations by the same employer, even if such violations did not affect the employee initiating the PAGA action. Consequently, Polo can equivocally bring the following labor code violations on behalf of all other employees, including hourly, non-exempt employees who were not specifically cooks.

STATEMENT OF FACTS

MSH first began to employ Polo in or around November 2022 as a waiter/bartender at its Carmelita’s restaurant located at 34255 Pacific Coast Hwy, Unit 109 in Dana Point, California. Polo’s employment ended in or around March of 2023.

At all relevant times, MSH issued wages to Polo and all of the other Aggrieved Employees on a biweekly basis and paid them by the hour. At all relevant times, MSH classified Polo and all of the other Aggrieved Employees as non-exempt employees entitled to the protections of the Labor Code and the Wage Order. MSH employed Polo and all of the Aggrieved Employees more than six, eight, and ten hours per day. During his tenure, Polo generally worked 4-5 days a week (Mondays and Thursday-Sunday) from approximately 2:30 p.m. to 10:30 p.m. Polo’s latest rate of pay was approximately \$15.50 per hour.

MSH failed to pay Polo and other Aggrieved Employees for all time worked or subject to its control. Polo and the other Aggrieved Employees were not paid for all hours worked and consistently worked “off the clock” in that the company had a policy and practice of rounding down work hours and “time shaving” which led to Polo and others not being paid for all hours worked, which would include the minimum wage. Moreover, to the extent employees such as Polo and others worked through their meal periods and those meal periods were interrupted, they were not compensated for that time, which would be akin to a minimum wage violation. In addition, Polo and the other Aggrieved Employees were not given accurate tips to which they were entitled. Furthermore, MSH management, including General Manager [REDACTED] would often text/call Polo and others about their schedules and work-related matters while they were off the clock. Polo would often receive text messages from Christina regarding his work schedule and other work-related matters.

Due to the above “off the clock” violations, MSH failed to pay Polo and the Aggrieved Employees properly calculated overtime wages. The Aggrieved Employees’ actual work hours, which included the “off the clock” work as described above, entitled them to overtime, however, it was

not company policy to keep accurate track of all hours worked and to pay employees the accurate amount of overtime, especially since the “off the clock” work was not factored into the equation. Furthermore, any incentive payments and/or bonus payments were not factored into employees’ regular rate of pay for purposes of deciphering the correct overtime rate of pay. In addition, any bonus and/or incentive payments were not factored into the correct meal and rest break premium pay per *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 863.

MSH failed to authorize and permit Polo and others with 10-minute rest periods for every four hours of work, or majority portion thereof, throughout their employment. MSH did not completely relieve Polo and others of all duty during said rest periods. MSH did not pay to Polo and others one additional hour of pay at their regular rate of compensation for each workday that one or more statutory rest periods was not provided. It was not part of the company policy for employees such as Polo to take at least two rest breaks per shift. The concept of rest breaks was not consistently implemented as it was not company policy. Moreover, it would not have been possible for employees such as Polo to take such rest breaks due to being understaffed and due to a heavy workload, especially in the fast-paced restaurant industry. As such, the culture as well as the policies and procedures of MSH did not lend itself to the employees receiving consistent statutory rest breaks wherein they were relieved of all work duties. The environment at MSH was not conducive to receiving multiple statutory rest breaks under California law and timely, statutory rest breaks were not authorized or enforced.

MSH failed to provide Polo and the other Aggrieved Employees the requisite 30-minute, uninterrupted meal periods for every five (5) hours of work throughout their employment. MSH did not completely relieve Polo and other employees of all duty during said meal periods. MSH did not pay to Polo and its hourly, non-exempt employees one additional hour of pay at their regular rate of compensation for each workday that one or more statutory meal periods was not provided. The hourly, non-exempt employees would often not be able to receive timely meal periods before the 5th hour worked that were actually uninterrupted. The latter was due to the workload and due to being in a fast-paced restaurant environment. For example, during instances wherein Polo was able to take a meal break, MSH employees or managers would interrupt him especially since there was no break room and Polo had to take his meal periods in the kitchen where other employees would be working. Like the rest breaks, receiving a thirty-minute uninterrupted and timely meal break was not part of the company culture and was not enforced by MSH. Consequently, it was the normal practice and custom of MSH not to authorize, permit, and enforce timely statutory meal periods. To the extent that MSH argues that employees receive meal break premium pay for missed meal periods, that argument is inconsequential for PAGA penalty purposes since the PAGA penalties are for the violations themselves, irrespective of whether an employee received the premium payment for a missed, short, or interrupted meal period. In *Kirby v. Immoos Fire Protection, Inc.*, the Court stated, “section 226.7 does not give employers a lawful choice between providing either meal and rest breaks or an additional hour of pay.” See *Kirby v. Immoos Fire Protection, Inc.*, (2012) 53 Cal.4th 1244, 1256 (emphasis in original). Thus, the extra hour of pay does not excuse the violation; the employer has still committed a violation even if the remedy for the violation has been paid. See *Wert v. U.S. Bancorp*, (S.D. Cal. Mar. 22, 2016, 2016 WL 1110302 at *4). As such, the work environment and culture at MSH was not conducive to

receiving consistent, timely, statutory meal breaks under California law. Moreover, any meal or rest break premiums paid were not compensated at the weighted average regular rate, inclusive of bonuses and/or incentive payments as well as overtime compensation.

Additionally, MSH violated Labor Code Section 351 and 353 by taking some of the tips meant for employees and did not timely provide the credit card and even cash tips to other Aggrieved Employees. As such, other similarly situated employees were not given accurate tips to which they were entitled.

MSH failed to reimburse Polo and the other Aggrieved Employees for business expenses they incurred in direct consequence of the discharge of their duties. MSH required Polo and the Aggrieved Employees to use their own personal cell phones to communicate with management concerning work matters. MSH management texted Polo and the others on a regular basis regarding their work schedules. However, MSH did not provide Polo and the others with mobile phones and did not reimburse Polo and the other Aggrieved Employees for these mobile phone expenses. Accordingly, MSH was in violation of California Labor Code sections 2800 and 2802.

MSH unlawfully deducted wages from the wages earned by Polo and the other Aggrieved Employees in violation of Labor Code § 221. For example, Polo's paystubs have deductions being uniforms.

MSH failed to pay its employees all wages due to them within any time period specified by California Labor Code section 204, including the minimum wages and overtime as described above as well as meal/rest break premiums.

MSH did not provide Polo and other Aggrieved Employees accurate, itemized wage statements. Wage statements must include, among other things, total hours worked by the employee. Labor Code § 226(a)(2). MSH issued wage statements that inaccurately reflected total hours worked, gross and net wages earned, and the number of hours worked at each hourly rate because of MSH's failure to properly pay wages as explained herein. Labor Code §§ 226(a)(1), (2), (5), (9). MSH's failure to maintain accurate records as to the hours worked daily by employees also constitutes a violation of Labor Code section 1174(d).

Finally, because MSH did not properly pay all wages earned as explained herein, MSH also failed to pay final wages owed to Polo and other Aggrieved Employees in violation of Labor Code section 203. These earned but unpaid wages include minimum wages and compensation for all hours worked, overtime compensation, premium pay for missed meal and rest breaks, and business expense reimbursement, among others.

MSH failed to provide paid sick leave to Polo and all of the other Aggrieved Employees in violation of Labor Code sections 233 and 246. MSH also failed to provide Polo and all of the other Aggrieved Employees with an itemized wage statement or separate writing that set forth the amount of paid sick leave available.

For the reasons herein, on behalf of himself and the Aggrieved Employees, Polo alleges that MSH committed the following violations of the California Labor Code and the Wage Order: 1) failed to pay wages for all time worked or subject to MSH' control, including correctly-calculated overtime wages and accurate tips; 2) failed to provide meal periods or pay correctly-calculated premium wages in lieu thereof; 3) failed to authorize and permit rest periods or pay correctly-calculated premium wages in lieu thereof; 4) failed to reimburse reasonably necessary business expenses; 5) failed to provide compliant wage statements; 6) failed to maintain accurate records; 7) failed to provide sick leave/statements of sick leave available; and 8) failed to timely pay all wages owed during and upon separation of employment.

Accordingly, Polo now seeks civil penalties on behalf of himself and the Aggrieved Employees based on MSH's alleged violations of the California Labor Code and the Wage Order.

THE WAGE ORDER

Wage Order 5-2001 applies to "all persons employed in the public housekeeping industry," where "Public Housekeeping Industry" includes "Restaurants." (*Id.*, §§ 1 & 2(P)(1).)

At all relevant times during the applicable limitations period, MSH operated a restaurant. Accordingly, Polo and the Aggrieved Employees are entitled to the protections provided under the Wage Order.

FAILURE TO PAY WAGES FOR ALL HOURS WORKED AT THE CORRECT RATES OF PAY

Labor Code §§ 510, 558, 1194, 1197, and 1198

Labor Code sections 510, 1194, and 1197 require employers to pay the wages agreed to and at least minimum wages for all time under the employer's control, overtime wages for hours worked over eight per day or forty per week at one and one-half times the employee's regular rate of pay, and double-time wages for hours worked over twelve in one day or for the first eight hours of work on the seventh consecutive day of work at two times the employee's regular rate of pay. Labor Code section 558 establishes a civil penalty for violation of Labor Code section 510. Labor Code section 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

MSH failed to pay all minimum, regular, and overtime wages to Polo and other Aggrieved Employees because MSH paid wages based on rounded times, did not pay for off-the-clock work, and failed to pay overtime wages based on correct regular rates of pay.

TIP VIOLATIONS

Labor Code §§ 351 and 353

Labor Code § 351 prohibits an employer or agent of the employer from collecting, taking, or receiving any gratuity or a part thereof that is paid, given to, or left for an employee by a patron,

or deducting any amount from wages due an employee on account of a gratuity, or requiring an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Labor Code § 351 further declares that every gratuity is the sole property of the employee or employees to whom it was paid, given, or left for. Labor Code § 353 requires every employer to keep accurate records of all gratuities it receives, whether received directly from the employee or indirectly by means of deductions from the wages of the employee or otherwise.

At all relevant times, MSH did not provide the Aggrieved Employees with accurate tips to which they were entitled in violation of Labor Code § 351 and did not maintain records showing tips received and paid to its employees in violation of Labor Code § 353.

FAILURE TO PROVIDE MEAL PERIODS

Labor Code §§ 226.7, 512, and 1198

Employers must provide employees a 30-minute, uninterrupted meal period after no more than five hours of work, and a second such meal period after no more than 10 hours work. Labor Code § 512(a); IWC Wage Order(s) §§ 11(A)-(B); *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1049. If an employer fails to provide an employee a meal period in accordance with California law, the employer must pay the employee one hour of pay at the employee's regular rate for each work day the meal period is not provided. Lab. Code § 226.7(c); IWC Wage Order(s), § 11(D); *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 863.

MSH failed to provide Polo and other Aggrieved Employees with compliant meal periods and failed to pay one hour of correctly-calculated premium pay for each day such a meal period was not provided.

FAILURE TO AUTHORIZE AND PERMIT REST PERIODS

Labor Code § 226.7 & 1198

The Rest Period section of the applicable Wage Order provides: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof." IWC Wage Order(s), § 12(A). If an employer fails to provide an employee a rest period in accordance with California law, the employer must pay the employee one hour of pay at the employee's regular rate for each work day a rest period is not provided. IWC Wage Order(s), § 12(B); Labor Code § 226.7(c); *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 863.

MSH failed to authorize and permit Polo and other Aggrieved Employees to take compliant rest periods and failed to pay one hour of correctly-calculated premium pay for each day such a rest period was not provided.

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UNLAWFUL DEDUCTIONS

(Lab. Code § 221)

Under Labor Code § 221, “It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.”

MSH unlawfully deducted wages from the wages earned by Polo and all of the other Aggrieved Employees in violation of Labor Code § 221.

FAILURE TO PROVIDE ACCURATE WAGE STATEMENTS

Labor Code §§ 226

California employers are required to provide itemized wage statements showing, among other things, “gross wages earned,” “total hours worked by the employee,” “net wages earned,” and “all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.” Labor Code §§ 226(a)(1), (2), (5), (9).

MSH did not provide itemized wage statements accurately reflecting Polo’s and other Aggrieved Employees’ gross wages earned, total hours worked, net wages earned, tips earned, and all applicable hourly rates and the number of hours worked at each rate.

FAILURE TO PROVIDE ACCURATE RECORDS

Labor Code §§ 1174, 1174.5, 1198; IWC Wage Order(s), § 7

An employer must maintain payroll records showing hours worked daily by, and wages paid to, its employees, in accordance with rules established by the Industrial Welfare Commission. Labor Code §1174. An employer must also maintain time records showing when each work period, and meal period, begins and ends. IWC Wage Order(s), § 7.

Because MSH rounded employees’ time worked, did not record off-the-clock work, and interrupted employees’ meal periods, MSH failed to maintain accurate records as to the hours worked daily by employees and as to when each work period and meal period began and ended.

FAILURE TO REIMBURSE FOR EXPENSES

Labor Code §§ 1198, 2802, and 2804

An employer must reimburse its employees for their reasonable business-related expenses. Labor Code § 2802. The right to reimbursement cannot be waived. Labor Code § 2804.

MSH failed to reimburse Polo and other Aggrieved Employees for their reasonable business-related expenses, including use of their own personal cell phones in effectuating their job duties.

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**FAILURE TO TIMELY PAY WAGES DURING EMPLOYMENT
& UPON SEPARATION**

Labor Code §§ 201-204

An employer must pay “[a]ll wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment...twice during each calendar month, on days designated in advance by the employer as the regular paydays.” Labor Code § 204. An employer must pay all wages owed to terminated employees at the time of termination, or within 72 hours to employees who quit. Labor Code §§ 201-202. If an employer willfully fails to timely pay all wages to separated employees, the wages continue at the same rate for up to 30 days, until paid. Labor Code § 203.

As a result of its failure to pay all wages earned, as described above, MSH failed to pay all final wages due to Polo and other Aggrieved Employees and violated Labor Code Sections 201-204.

**FAILURE TO PROVIDE SICK LEAVE &
FAILURE TO PROVIDE NOTICE OF AVAILABLE SICK LEAVE**

Labor Code §§ 233, 246

Labor Code section 233 states,

Any employer who provides sick leave for employees shall permit an employee to use in any calendar year the employee’s accrued and available sick leave entitlement, in an amount not less than the sick leave that would be accrued during six months at the employee’s then current rate of entitlement, for the reasons specified in subdivision (a) of Section 246.5.

Labor Code § 246 states,

An employer shall provide an employee with written notice that sets forth the amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick leave, for use on either the employee’s itemized wage statement described in Section 226 or in a separate writing provided on the designated pay date with the employee’s payment of wages.

Labor Code section 246(a)(1) states,

An employee who, on or after July 1, 2015, works in California for the same employer for 30 or more days within a year from the commencement of employment is entitled to paid sick days as specified in this section.

An employer must pay its non-exempt employees for paid sick leave at the employees’ regular rate of pay. Labor Code § 246(l). An Employer must calculate this pay either “in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick leave, whether

or not the employee actually works overtime in that workweek” or “by dividing the employee’s total wages, not including overtime premium pay, by the employee’s total hours worked in the full pay periods of the prior 90 days of employment.” Labor Code §§ 246(l)(1)-(2).

MSH failed to provide Polo and all of the other Aggrieved Employees with paid sick leave and/or failed to pay sick leave wages to Polo and other Aggrieved Employees at the employees’ regular rates of pay. MSH also failed to provide Polo and all of the other Aggrieved Employees with an itemized wage statement or separate writing that set forth the amount of paid sick leave available.

PERSON ACTING ON BEHALF OF EMPLOYERS WHO VIOLATES LABOR CODE

Labor Code § 558.1

In relevant part, Labor Code section 558.1 states:

(a) Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.

At all relevant times, Marcos Salim Heredia and Silvia Ariadne Heredia were employers of Polo and all of the other Aggrieved Employees, and/or “owner,” “managing agent,” and/or “officer” of MSH Enterprises, LLC. Marcos Salim Heredia and Silvia Ariadne Heredia directly or indirectly, or through an agent or other person, employed and exercised control over the wages, hours, and/or working conditions of Polo and the Aggrieved Employees, and caused the violations to the Labor Code and the Wage Order described above. On behalf of himself and all of the other Aggrieved Employees, Polo seeks the same civil penalties against Marcos Salim Heredia and Silvia Ariadne Heredia on the same grounds for which he seeks civil penalties against MSH Enterprises, LLC.

CONCLUSION

As noted above, this letter constitutes the required notice under the California Labor Code Private Attorneys General Act of 2004. Please be advised that Emanuel Polo will seek both reasonable attorneys’ fees and costs under Labor Code § 2699, subdivision (g) (1) in a civil action should the LWDA decline to pursue this matter. This letter also serves as a formal notice under the catalyst theory and Code of Civil Procedure §1021.5 to resolve this matter before litigation.

Sincerely,



Maralle Messrelan, Esq.

maralle@mmlawapc.com