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Superior Court of California,
County of San Diego

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Clerk of the Superior Court
By Shiela Retez, Deputy Clerk

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

MICHAEL E. OSLEY JR., on behalf of all
others similarly situated and the State of
California under the Private Attorneys General
Act,

Plaintiffs,

vs.

BANDON FITNESS (TEXAS), INC. and DOES
1 through 50, inclusive,

Defendant.

Case No. 37-2024-00011471-CU-OE-CTL

CLASS ACTION

**FIRST AMENDED CLASS AND
REPRESENTATIVE ACTION
COMPLAINT**

1. Minimum Wage Violations
2. Failure to Pay All Overtime Wages
3. Meal Period Violations
4. Rest Period Violations
5. Paid Sick Leave Violations
6. Untimely Payment of Wages
7. Wage Statement Violations
8. Waiting Time Penalties
9. Failure to Reimburse Business Expenses
10. Unfair Competition
11. Civil Penalties under the Private Attorneys
General Act (Labor Code §§ 2698 *et seq.*)

1 Plaintiff MICHAEL E. OSLEY JR., on behalf of all others similarly situated and the State of
2 California under the Private Attorneys General Act (“Plaintiff”) brings this FIRST AMENDED
3 CLASS AND REPRESENTATIVE ACTION COMPLAINT against Defendant BANDON FITNESS
4 (TEXAS), INC. and DOES 1 through 50, inclusive (collectively “Defendant”), alleging as follows:

5 **INTRODUCTION**

6 1. This is a class and representative action filed for wage and hour violations of the
7 California Labor Code.

8 2. Defendant operates a large franchise group within the Anytime Fitness system of full-
9 service gyms.

10 3. Defendant failed to compensate Plaintiff and Class Members for all hours suffered or
11 permitted to work in violation of Labor Code section 1197 and the applicable IWC Wage Order.

12 4. Defendant’s underpayment of wages was facilitated by their company-wide practices
13 of encouraging employees to complete overtime work while off the clock and failing to include
14 commissions and other payments in the regular rate of pay for the purpose of paying overtime.
15 Defendant also failed to pay Labor Code § 226.7 premiums at the regular rate of compensation for
16 non-compliant meal periods and rest periods, including late, short, and missed meal periods.

17 5. Defendant did not reimburse Plaintiff and class members for necessary expenses
18 incurred in furtherance of the class members’ job duties.

19 6. Defendant’s employment policies, practices, and payroll administration systems
20 enabled and facilitated these violations on a company-wide basis with respect to the class members.

21 7. Plaintiff seeks to recover the underpaid damages, plus associated penalties, interests,
22 attorney’s fees, and costs.

23 **JURISDICTION & VENUE**

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

26 9. The monetary damages and restitution sought exceed the minimal jurisdiction limits of
27 the Superior Court.

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

PARTIES

12. Plaintiff Osley Jr. is an individual over 18 years of age who worked for Defendant in California as a non-exempt employee from about April 16, 2022 to December 5, 2023. Plaintiff worked as a Personal Trainer Manager.

B. Defendant

manner for the acts and omissions alleged herein. This Complaint may be amended to reflect their true names and capacities once ascertained.

16. Upon information and belief, Defendant in this action are employers, co-employers, joint employers, and/or part of an integrated employer enterprise, as each of the Defendant 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.

17. Upon information and belief, at least some of the Defendant 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.

18. Upon information and belief, Defendant acted in all respects pertinent to this action as an alter-ego, agent, servant, joint employer, joint venturer, co-conspirator, partner, in an integrated enterprise, or in some other capacity on behalf of all other co-Defendant, such that the acts and omissions of each defendant may be legally attributable to all others.

CLASS ALLEGATIONS

19. This action is brought 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 Defendant 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.

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

21. 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 Defendant' 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 Defendant, 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 who have substantial experience prosecuting, defending, resolving, and litigating wage and hour class, collective, and representative actions in California state and federal courts.

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

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

22. Common questions of law and fact as to the class members predominate over questions affecting only individual members. The common questions of law and fact exist as to whether the employment policies and practices formulated by Defendant and applied to the class members constitute violations of California law.

GENERAL ALLEGATIONS

23. Plaintiff and Class Members worked for Defendant as non-exempt employees and were compensated on an hourly basis.

24. Defendant repeatedly underpaid Plaintiff and Class Members by encouraging employees to avoid logging more than 40 hours of work per week. As such, Plaintiff and Class Members regularly completed overtime work while off the clock to comply with Defendant's practice of not clocking any more than 40 hours of work per week.

25. To meet job duties while adhering to Defendant's practice of clocking less than 40 hours per week, Plaintiff and Class Members answered emails and phone calls from clients or completed internal company work on their personal cell phone and computers while clocked out. Defendant facilitated this overtime, off-the-clock work by allowing Plaintiff and Class Members remote access to company software so that employees could complete their job duties off the clock. Consequently, Plaintiff and Class Members' time records did not reflect all hours worked and employees were not compensated for all hours worked nor were those additional hours worked considered for their sick leave accrual.

26. In addition to their hourly wages, Defendant paid Plaintiff and Class Members other forms of non-discretionary remuneration, including commissions and bonuses, which were based on the number of private training sessions and gym services employees sold. However, Defendant failed to provide a written commission plan to Plaintiff and Class Members explaining how commissions were computed and paid. Moreover, when Defendant paid overtime to Plaintiff and Class Members, Defendant failed to include the employees' additional remuneration into the regular rate of pay.

27. For example, in the pay period corresponding to check date, September 9, 2022, Plaintiff earned a bonus in the same pay period as overtime. However, Defendant only paid Plaintiff's overtime rate at 1.5x his straight hourly rate, rather than at the regular rate of pay, which would have included the extra remuneration in the overtime rate calculation.

28. Further, due to employee responsibilities and the continuous flow of business, Plaintiff and Class Members suffered many short, missed, let, and/or interrupted meal and rest periods. Plaintiff and Class Members were required to communicate with clients and complete other job duties during

1 their meal and rest periods. Therefore, on the occasion that Plaintiff and Class Members took meal
2 and rest periods, they were interrupted by job duties. Defendant did not pay Plaintiff or Class Members
3 due premiums for these deficient meal and rest periods. However, to the extent paid, Defendant
4 underpaid these premiums due to the regular rate miscalculation stated above regarding bonus
5 renumeration.

6 29. Notably, Defendant required Plaintiff and Class Members to incur necessary, work-
7 related costs, without reimbursement. Plaintiff or Class Members were required to download two
8 applications, Paychex and UKG, to their personal cell phones to clock in and out of work. Additionally,
9 employees also used their personal cell phones and computers to communicate with clients over the
10 phone and via email. Plaintiff and Class Members also completed internal company duties on their
11 personal computers which they used to access company software remotely. However, despite requiring
12 employees to incur these expenses, Defendant did not compensate employees for using their personal
13 devices for employment-related activities. Plaintiff further believes and alleges that other Class
14 Members likewise incurred these costs without reimbursement from Defendant.

15 30. Moreover, Defendant failed to compensate Plaintiff and Class Members in a timely
16 manner. For example, for the pay period of October 1, 2022, to October 31, 2022, Defendant paid
17 Plaintiff his bonuses and commissions more than seven days after the pay period in which they were
18 earned. Further, Defendant regularly omitted bonuses, commissions, and paid sick leave accrual from
19 wage statements for regular wages resulting in inaccurate wage statements.

20 31. These violations create derivative liability for failure to pay all wages owed each
21 payday or upon separation of employment, as a result of the regular rate underpayments.

22 **FIRST CAUSE OF ACTION**

23 **MINIMUM WAGE VIOLATIONS**

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

25 **(All Claims Alleged by Plaintiff and Class Members Against All Defendant)**

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

27 33. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code
28 §§ 1182.12, 1194, 1194.2, 1197, 1197.1 and 1198 and the IWC Wage Orders (the “Hours and Days

of Work” and “Minimum Wages” sections of the applicable orders), which require non-exempt employees be timely paid at least the state or local minimum wage (if higher) for each hour of work, and further provide a private right of action for an employer’s failure to pay all minimum wages (plus liquidated damages).

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

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

SECOND CAUSE OF ACTION

FAILURE TO PAY ALL OVERTIME WAGES

Violation of Labor Code §§ 510 and 1194

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

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

38. Defendant failed in their affirmative obligation to pay Plaintiff and class members no less than one and one-half times their respective “regular rate of pay” for all hours worked in excess of eight hours in one day, 40 hours in one week, or the first eight hours worked on the seventh day of work in any one workweek, and no less than twice their respective “regular rate of pay” for all hours

1 over 12 hours in one day and any work in excess of eight hours on any seventh day of a workweek for
2 such hours worked, in violation of Labor Code sections 204, 510, 558, 1194, and 1198 and the IWC
3 Wage Orders (the “Hours and Days of Work” sections of the applicable orders).

4 39. Plaintiff and class members are entitled to recover the full amount of the unpaid
5 overtime, in addition to interest, statutory and civil penalties, and attorneys’ fees, and costs to the
6 extent permitted by law.

7 **THIRD CAUSE OF ACTION**

8 **MEAL PERIOD VIOLATIONS**

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

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

11 41. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code
12 §§ 226.7, 558 and 512, which require non-exempt employees be provided complaint meal periods (or
13 meal period premiums in lieu thereof), and which further provide a private right of action for an
14 employer’s failure to lawfully provide all meal periods and/or pay meal period premiums at the lawful
15 regular rate of compensation.

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

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

44. 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

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

46. 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.

47. Defendant 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).

48. Further, Defendant 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

FAILURE TO PAY ALL PAID SICK LEAVE WAGES

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

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

50. Defendant knowingly and intentionally failed in their affirmative obligation to pay sick leave wages to Plaintiff and a paid sick leave subclass in violation of Labor Code section 246 *et seq.* Paid sick leave earnings constitute wages for purposes of California wage and hour law. (*Murphy v.*

1 *Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 [“Courts have recognized that ‘wages’
2 also include those benefits to which an employee is entitled as a part of his or her compensation,
3 including money, room, board, clothing, vacation pay, and sick pay”].)

4 51. Labor Code section 246(1) governs how Defendant were required to calculate paid sick
5 leave:

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

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

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

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

17 52. Defendant failed to pay Plaintiff and class members their paid sick leave wages at one
18 of the lawful rates set forth in the statute because Defendant failed to include in their sick leave
19 calculation the additional remuneration received by Plaintiff and class members.

20 53. Furthermore, to the extent the paid sick leave paid constitutes Covid-related paid sick
21 leave, Defendant knowingly and intentionally failed in their affirmative obligation to pay Covid-19
22 Supplemental Sick Leave wages to class members at the correct rate in violation of Labor Code
23 sections 246, 248.1, 248.2, and 248 *et seq.*

24 54. Pursuant to Labor Code section 248.1, Defendant were required to provide up to 80
25 hours of Covid-19 Supplemental Paid Sick Leave to employees for the period of April 20, 2020 to
26 December 31, 2020. Labor Code section 248.2 required Defendant to provide up to 80 hours of Covid-
27 19 Supplemental Paid Sick Leave for the period of January 1, 2021 through at least September 30,
28 2021. Labor Code section 248.6 extended Covid sick leave protections and requires employers to

provide up to 80 hours of Covid-19 Supplemental Paid Sick Leave for the period of January 1, 2022 to September 30, 2022, and may be extended thereafter.

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

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

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

(II) Calculated by dividing the covered 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.

(III) The state minimum wage.

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

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

58. On information and belief, Defendant failed to pay Covid-19 Supplemental Sick Leave in the manner described above because Defendant failed to include in their sick leave calculation the additional remuneration received by class members.

59. As a result, Defendant violated the Labor Code and are liable to Plaintiff and class members for underpaid sick leave wages, in addition to interest, attorneys' fees, and costs.

SIXTH CAUSE OF ACTION

UNTIMELY PAYMENT OF WAGES

Violation of Labor Code §§ 204, 210, 218

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

61. 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

1 period, and which further provide a private right of action for an employer's failure to comply with
2 this obligation. Labor Code § 218 authorizes individuals to sue directly for wages and penalties due
3 under these sections, including Labor Code § 210(c)'s statutory late payment penalties.

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

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

15 **SEVENTH CAUSE OF ACTION**

16 **WAGE STATEMENT VIOLATIONS**

17 **Violation of Labor Code § 226**

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

19 65. This cause of action is brought by a wage statement subclass pursuant to Labor Code
20 § 226(a) which requires non-exempt employees be provided accurate itemized wage statements each
21 pay period, and which further provide a private right of action for an employer's failure to comply
22 with this obligation.

23 66. Defendant knowingly and intentionally failed in their affirmative obligation to provide
24 accurate itemized wage statements to Plaintiff and class members resulting in injury to Plaintiff and
25 class members. Specifically, the wage statements issued to Plaintiff and class members did not
26 accurately state each pay period all of the information required by Labor Code § 226(a)(1)-(9).

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

68. 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).

EIGHTH CAUSE OF ACTION

WAITING TIME PENALTIES

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

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

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

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

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

NINTH CAUSE OF ACTION

FAILURE TO REIMBURSE BUSINESS EXPENSES

Violation of Labor Code § 2802

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

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

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

TENTH CAUSE OF ACTION

UNFAIR COMPETITION

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

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

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

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

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

80. Plaintiff does not have an adequate remedy at law for past or future violations, to the extent the statute of limitations on each of the alleged causes of action do not extend to the four year

1 limitation provided under the UCL or to the extent the underlying Labor Code and IWC Wage Order
2 violations do not provide a private right of action.

3 81. Plaintiff and class members are entitled to injunctive relief against Defendant,
4 restitution, and other equitable relief to return all funds over which Plaintiff and class members have
5 an ownership interest and to prevent future damage and the public interest under Business and
6 Professions Code § 17200 *et seq.* Plaintiff and class members are further entitled to recover interest,
7 attorneys' fees, and costs to the extent permitted by law, including under Code of Civil Procedure
8 § 1021.5.

9 **ELEVENTH CAUSE OF ACTION**

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

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

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

13 82. All outside paragraphs of this Complaint are incorporated into this section.

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

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

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

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

26 86. Labor Code section 2699(a) provides: “Notwithstanding any other provision of law,,
27 any provision of this code that provides for a civil penalty to be assessed and collected by the Labor
28 and Workforce Development Agency or any of its departments, divisions, commissions, boards,

1 agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil
2 action brought by an aggrieved employee on behalf of himself or herself and other current or former
3 employees pursuant to the procedures specified in Section 2699.3. “

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

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

13 89. Labor Code section 2699.3 sets forth the procedure for commencing an action for civil
14 penalties under the PAGA.

15 90. On or about **February 28, 2024**, Plaintiff paid the requisite PAGA filing fee and
16 provided written notice (by online electronic filing with the LWDA and by certified mail to Defendant)
17 of Defendant’ alleged Labor Code violations, including the facts and theories to support the alleged
18 violations.

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

22 92. To date, neither Plaintiff nor Plaintiff’s counsel has received a response to Plaintiff’s
23 written PAGA notice from the LWDA.

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

27 94. Now that at least 65 days have passed from Plaintiff notifying Defendant of these
28 violations, without notice of cure from Defendant or notice from the LWDA of its intent to investigate

the alleged allegations and issue the appropriate citations to Defendant, Plaintiff exhausted all prerequisites and commenced this civil action under Labor Code section 2699 *et seq.*

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

- a. ***Unpaid Hours Worked/Minimum Wage.*** Violation of Labor Code §§ 1194, 1197, 1198; IWC Wage Orders.
- b. ***Unpaid Overtime.*** Violation of Labor Code §§ 510, 1194, 1198; IWC Wage Orders.
- c. ***Unpaid Paid Sick Leave.*** Violation of Labor Code §§ 246 through 248.7.
- d. ***Unpaid Meal Period Premium Wages.*** Violation of Labor Code §§ 226.7, 512, 1198; IWC Wage Orders.
- e. ***Unpaid Rest Period Premium Wages.*** Violation of Labor Code §§ 226.7, 516, 1198; IWC Wage Orders.
- f. ***Untimely Payment of Wages During Employment.*** Violation of Labor Code §§ 204, 204b, 210.
- g. ***Untimely Payment of Wages Upon Separation of Employment.*** Violation of Labor Code §§ 201, 202, 203, 256.
- h. ***Non-Compliant Wage Statements.*** Violation of Labor Code §§ 226, 226.3.
- i. ***Unreimbursed Employee Expenses.*** Violation of Labor Code §§ 2802, 2804.
- j. ***Failure to Maintain Accurate Records.*** Violation of Labor Code § 1174; IWC Wage Orders.

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

Dated: May 6, 2024

Ferraro Vega Employment Lawyers, Inc.



Nicholas J. Ferraro

Attorneys for Plaintiff Michael E. Osley Jr.

EXHIBIT 1

Notice of Labor Code Violations

FERRARO VEGA

SAN DIEGO EMPLOYMENT LAWYERS

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Lauren N. Vega
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February 28, 2024

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

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

Bandon Fitness (Texas), Inc.
3508 Far West Blvd, Suite 355
Austin, Texas 78731

- 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 **MICHAEL E. OSLEY JR.** (“Plaintiff(s)”) and all other “aggrieved employees” of the following “Defendant”:

BANDON FITNESS (TEXAS), INC.

Defendant 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 Defendant 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 Defendant, 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 Defendant 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). Defendant is 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 Defendant this letter should also be 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 -

Defendant employed Plaintiff during the PAGA Period in the position of Personal Trainer Manager from about April 16, 2022 to December 5, 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 Defendant 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 Defendant's violations and reserves the right to supplement this notice as further investigation is completed and further facts, witnesses, and violations are uncovered.

- PAGA CLAIMS -

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

Defendant 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.

Defendant failed to pay Plaintiff and the aggrieved employees at the lawful minimum wage rate for all hours worked, resulting in unpaid minimum wages. Specifically, Defendant compelled Plaintiff and other aggrieved employees to clock out but continue working off-the-clock and/or clock out as they approached 40 hours worked in a week (or 8 in a day) so that they could avoid compensating employees for overtime hours worked.

Due to Defendant’s practice of discouraging employees from working overtime, Plaintiff and the aggrieved employees often completed overtime work off the clock in order to comply with Defendant’s policy of refraining from overtime work. To meet job duties while adhering to Defendant’s practice of clocking less than 40 hours per week, Plaintiff and the aggrieved employees often completed off the clock, overtime work when they answered emails and phone calls from clients or completed internal company work on their personal cell phones and computers. Plaintiff and the aggrieved employees also had remote access to Defendant’s company software to allow them to complete job duties off the clock while using their personal devices. Defendant did not pay Plaintiff and other aggrieved employees wages for the time they worked off the clock despite being on notice of the off the clock work.

Therefore, Defendant’s illegal practices and procedures deprived Plaintiff and other aggrieved employees of all wages earned.

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

Defendant 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.

Defendant failed to pay Claimant and the aggrieved employees for all hours suffered or permitted to work. Due to Defendant’s practice of discouraging employees from working in excess of 40 hours per week (or 8 in a day), Plaintiff and the aggrieved employees often completed overtime work off the clock in order to comply with Defendant’s policy of refraining from overtime work. To meet job duties while adhering to Defendant’s practice of avoiding overtime, Plaintiff and the aggrieved employees often completed off the clock, overtime work when they answered emails and phone calls from clients or completed internal company work on their personal cell phones and computers. Plaintiff and the aggrieved employees also had remote access to Defendant’s company software in order to allow them to complete job duties off the clock while using their personal devices.

Defendant failed to pay all overtime wages owed because they failed to account for off the clock hours worked by Plaintiff and aggrieved employees as a result of their unlawful practices. Therefore, Defendant’s illegal practices and procedures deprived Plaintiff and other aggrieved employees of all overtime wages earned.

Additionally, Defendant paid Plaintiff and the aggrieved employees sales commissions, non-discretionary bonuses, and other forms of remuneration that Defendant also failed to include in the “regular rate of pay” when employees earned overtime. Defendant paid overtime to Plaintiff and the aggrieved employees at 1.5x their straight hourly rate. For each overtime hour worked during the period in which Plaintiff and the aggrieved employees earned commissions and bonuses, Defendant should have (but failed to) pay overtime “at the rate of no less than one and one-half times the regular rate of pay for an employee” as required by the plain

language of Labor Code section 510(a) and the IWC Wage Orders. An illustrative example of the regular rate pay violation is found on Claimant's wage statement with the check date of September 9, 2022.

EMPLOYEE EARNINGS RECORD																		
(Requested Check Dates 01/01/22 - 10/31/22)																		
Page 1018 of 1723 0943 1209-2304 Brandon Fitness Texas Inc																		
HOURS, EARNINGS, AND REIMBURSEMENTS & OTHER PAYMENTS								WITHHOLDINGS					DEDUCTIONS				NET	
CHECK DATE	DESCR	REGULAR HOURS	OVERTIME HOURS	REGULAR AMOUNT	OVERTIME AMOUNT	TOTAL EARNINGS	REIMB & OTHER PAYMENTS	SOC SEC + MED	FEDERAL TAX	STATE TAX	LOCAL TAX	OTHER	ACCIDENT PRETAX	DENTAL PRETAX	HEALTH INS - PRETAX	INS - POST TAX	VISION PRETAX	PAY
05/06	Hourly	52.57		1182.83		1182.83		90.49	74.27	21.27		13.01						983.79
05/10	Commission			132.32		132.32		10.12				1.46						120.74
05/20	Hourly	73.12		1645.20		1727.12		132.12	139.58	49.62		19.00						1386.80
06/03	Hourly	79.87		1357.79		1359.07		103.97	95.42	29.02		14.95						1115.71
06/10	Overtime		0.05		1.28													
06/10	Bonus			81.23		154.13		11.79				1.70						140.64
06/10	Commission			72.90														
06/17	Hourly	70.87		1204.79		1352.78		103.49	94.66	28.74		14.88						1111.01
06/17	Overtime		0.47		11.99													
06/17	Holiday	8.00		136.00														
QTR 2		284.43	0.52	5894.98	13.27	5908.25		S 366.31 M 85.67	403.93	CA 128.65		Disability 65.00						4858.69
07/01	Hourly	67.67		1150.39		1282.39		90.55	74.37	21.30		13.02	5.01	4.96	85.87		2.88	984.43
07/01	Commission			64.00														
07/01	PTO	4.00		68.00														
07/08	Bonus			71.69		102.49		7.84				1.13						93.52
07/08	Commission			30.80														
07/15	Hourly	70.95		1206.15		1345.47		95.38	81.94	24.08		13.71	5.01	4.96	85.87		2.88	1031.64
07/15	Overtime		0.13		3.32													
07/15	Holiday	8.00		136.00														
07/29	Hourly	27.68		470.56		1401.69		99.68	88.68	26.55		14.33	5.01	4.96	85.87		2.88	1073.73
07/29	Bonus			47.13														
07/29	PTO	4.00		68.00														
07/29	Sick	48.00		816.00														
08/10	Bonus			88.37		88.37		6.76				0.97						80.64
08/12	Hourly	77.55		1318.35		1319.63		93.39	78.84	22.94		13.43	5.01	4.96	85.87		2.88	1012.31
08/12	Overtime		0.05		1.28													
08/26	Hourly	73.62		1251.54		1384.34		98.36	86.60	25.79		14.14	5.01	4.96	85.87		2.88	1060.73
08/26	Commission			64.80														
08/26	PTO	4.00		68.00														
09/09	Hourly	66.88		1136.96		1143.85		79.96	57.74	15.21		11.50	5.01	4.96	85.87	2.50	2.88	878.22
09/09	Overtime		0.27		6.88													
09/09	Bonus			82.45		82.45		6.30				0.91						75.24
09/23	Hourly	57.28		973.76		1184.36		83.05	62.60	16.99		11.94	5.01	4.96	85.87	2.50	2.88	908.56
09/23	Commission	8.20		139.40														
09/23	Holiday	8.00		136.00														
QTR 3		525.83	0.45	9323.55	11.49	9335.04		S 535.93 M 125.34	530.77	CA 152.86		Disability 95.00	35.07	34.72	601.09	5.00	20.16	7199.02
10/07	Hourly	66.37		1128.29		1128.29		78.76	55.88	14.64		11.33	5.01	4.96	85.87	2.50	2.88	866.46
10/07	Bonus			60.57		63.17		4.83				0.69						57.65
10/07	Commission			2.60														

Extract from Plaintiff's Wage Statement with Check Date of 09/09/2022

Plaintiff earned a bonus of \$82.45, but that amount was not factored into his overtime rate. Instead, he was paid at a rate of 1.5x his base hourly rate rather than 1.5x the regular rate of pay. Defendant committed this same “regular rate of pay” violation against the other aggrieved employees as well, when employees earned forms of pay like bonuses and commissions required to be included in the regular rate but were not, as a matter of payroll administration and company policy. This resulted in significant underpayment of wages to employees.

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

Unpaid Paid Sick Leave
Violation of Labor Code §§ 246 through 248.7

Defendant violated Labor Code sections 246 through 248.7 with respect to the aggrieved employees.

Labor Code section 246 requires employers to provide paid sick leave to its workforce on the terms set forth in the statute. Employers must comply with the accrual, use, and notice provisions of Labor Code sections 246, 246.5, 247, and must further ensure that they maintain the paid sick leave records required by Labor Code section 247.5. Employers have the option of providing 24 hours of paid sick leave to employees or to allow employees to accrue paid sick leave each pay period. If an employer chooses the accrual method, employees must accrue sick leave at a rate of one hour for every thirty hours worked in a given pay period as set forth in Labor Code section 246(b)(1). Under the accrual method, employees must begin accruing paid sick leave at the commencement of employment.

Employers must pay sick leave in accordance with one of the three permissible methods provided in Labor Code section 246(l): (1) “the same manner as the regular rate of pay for the workweek;” (2) “by dividing the employee’s total wages, not including overtime premium pay, by the employee’s total hours worked in the full pay periods of the prior 90 days;” or (3) “for exempt employee ... in the same manner as the employer calculates wages for other forms of paid leave time.” Labor Code sections 248.6 and 248.7 similarly require paid sick leave to be paid at a regular rate-based calculation in excess of the base hourly rate and at the lawful accrual rate.

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

Defendant failed to comply with California’s paid sick leave laws with respect to the aggrieved employees. First, Defendant failed to provide Plaintiff and aggrieved employees with all sick leave accrued. Plaintiff and aggrieved employees worked off the clock, overtime hours that were not accounted for when calculating an employee’s accrued paid sick leave. Therefore, Plaintiff and other aggrieved employees were not awarded the total accrued sick leave time they had earned.

Further, as illustrated on the below wage statement for Plaintiff, Defendant failed to include any information regarding Plaintiff’s available sick leave. Additionally, Defendant also failed to provide Plaintiff and other aggrieved employees with the amount of paid sick leave available in another separate writing. As a result, Plaintiff and aggrieved employees were not aware of the amount of paid sick leave available to them.

PERSONAL AND CHECK INFORMATION Michael E Osley Jr. Soc Sec #: xxx-xx-xxxx Employee ID: 31585 Home Department: 404 PT Manager/ 400 California Pay Period: 10/31/22 to 11/13/22 Check Date: 11/18/22 Check #: 2386 NET PAY ALLOCATIONS			EARNINGS	BASIS OF PAY	DESCRIPTION	HRS/UNITS	RATE THIS PERIOD (\$)	YTD HOURS	YTD (\$)
					Hourly	76.35	17.0000	1297.95	2568.70
					Bonus				68.30
					Commission				59.70
					Total Hours	76.35		151.10	
					Gross Earnings		1297.95		2696.70
					Total Hrs Worked	76.35			
			WITHHOLDIN GS	DESCRIPTION	FILING STATUS		THIS PERIOD (\$)		YTD (\$)
				Social Security			74.35		154.95
				Medicare			17.39		36.24
				Fed Income Tax	SMS		76.23		149.20
				CA Income Tax	SMI2 0 0		21.99		42.78
				CA Disability			13.19		27.49
				TOTAL			203.15		410.66
			DEDUCTION	DESCRIPTION			THIS PERIOD (\$)		YTD (\$)
				Accident Pretax			5.01		10.02
				Dental Pretax			4.96		9.92
				Health Ins - Pr			85.87		171.74
				Ins - Post Tax			2.50		5.00
				Vision Pretax			2.88		5.76
				TOTAL			101.22		202.44

Extract of wage statement without any information regarding Plaintiff's available paid sick leave

Moreover, Defendant failed to pay sick leave at the correct rate because they failed to factor in bonuses, commissions, and/or other forms of remuneration, as required by section 246. Instead, Defendant paid sick leave to Plaintiff and the aggrieved employees at their base hourly rate, resulting in inaccurate sick leave accrual.

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

Further, Labor Code section 246.5(c)(1) provides that employers “shall not deny an employee the right to use accrued sick days, discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using accrued sick days...” However, for example, Defendant required Plaintiff to attend work despite having previously notified his manager that he was sick and would be unable to work that day. As a result, Defendant effectively denied Plaintiff's right to use sick leave in violation of Labor Code section 246.5(c)(1). Moreover, Defendant's agents retaliated against Plaintiff for attempting to use sick leave by berating him and assigning him work that would have required him to scrub the floor on his hands and knees. Shortly thereafter, Defendant discharged Plaintiff.

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.

Secretly Paying a Lower Wage
Violation of Labor Code § 223

Labor Code section 223 renders it unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or contract. Defendant systematically paid employees wages less than those specified in their contract and withheld bonus and commission wage information to secretly pay employees a lower wage than what they were owed. Additionally, Defendant undercounted the number of hours that Plaintiff and other aggrieved employees worked and underpaid them as a result.

For example, initially, Defendant told Plaintiff that he would receive commissions and bonuses depending on how many private training sessions he sold, among other gym services. Plaintiff was initially promised a certain percentage of those services sold, however, when he received his wage statements the amount was received was different from what he had been told he would receive. Plaintiff received commissions and bonuses at different rates from what he was contracted for. Moreover, Plaintiff was never provided a written explanation of how bonuses and commissions were to be calculated. In fact, when he inquired about the bonus and commission rates, he received conflicting responses which added additional confusion regarding his pay. Considering that Plaintiff did not receive the compensation he was contracted for, Defendant secretly paid him a lower wage.

Further, due to Defendant's practice of discouraging employees from working in excess of 40 hours per week, Plaintiff and the aggrieved employees often missed meal/rest periods and completed overtime work off the clock in order to comply with Defendant's policy of refraining from overtime work. To meet job duties while adhering to Defendant's practice of clocking less than 40 hours per week, Plaintiff and the aggrieved employees often completed off the clock, overtime work when they answered emails and phone calls from clients or completed internal company work on their personal cell phones and computers. Plaintiff and the aggrieved employees also had remote access to Defendant's company software to allow them to complete job duties off the clock while using their personal devices. Therefore, Defendant's illegal practices and procedures deprived Plaintiff and other aggrieved employees of all wages earned.

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

Defendant 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.

Due to employee responsibilities and the continuous flow of business, Plaintiff and aggrieved employees suffered many short, missed, late, and/or interrupted meal periods. On occasion, when Plaintiff and the aggrieved employees were able to take a meal period, this time was often interrupted because they were regularly expected to answer phone calls and emails during that time. As a result, Plaintiff and the aggrieved employees were not afforded compliant meal periods.

When Defendant did not provide compliant meal periods, Defendant failed to pay Plaintiff and other aggrieved employees a meal period premium in violation of Labor Code section 226.7. To the extent Defendant ever paid a meal period premium, Defendant violated Labor Code section 226.7 because such premiums were not paid at the regular rate of compensation to aggrieved employees, which would have factored in bonuses, commissions, and other compensation.

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

Defendant 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.

Defendant required Plaintiff and other aggrieved employees to effectively waive or otherwise forego their rest periods contrary to the law. Due to employees' job responsibilities and the steady flow of business, Plaintiff and the aggrieved employees were not always able to take all their rest periods because they were required to respond to phone calls and emails.

To the extent Defendant ever paid a rest period premium, Defendant violated Labor Code section 226.7 because such premiums were not paid at the regular rate of compensation to aggrieved employees, which would have factored in bonuses, commissions, and other compensation.

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

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

Defendant 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 Defendant failed to pay all wages and premiums in each pay period in which such wages were earned at the lawful rate, Defendant violated Labor Code section 204 and/or 204b (for weekly employees, as applicable). Defendant 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.

Defendant underpaid Plaintiff and other aggrieved employees’ minimum, regular, overtime wages, and paid sick leave, including at the lawful regular rate of compensation/pay. Defendant is separately liable for not paying the full amount owed to Plaintiff and other aggrieved employees each payday in violation of Labor Code sections 204 and/or 204b. Furthermore, as illustrated in the wage statement below, Defendant employed a practice of paying Plaintiff commissions more than seven days after the pay period in which they were earned.

PERSONAL AND CHECK INFORMATION			EARNINGS				
Michael E Osley Jr.			BASIS OF PAY	DESCRIPTION	HRS/UNITS	RATE THIS PERIOD (\$)	YTD HOURS
Soc Sec #: xxx-xx-xxxx Employee ID: 31585				Hourly			74.75
Home Department: 404 PT Manager/ 400 California				Bonus		68.30	1270.75
Pay Period: 10/01/22 to 10/31/22				Commission		59.70	68.30
Check Date: 11/10/22 Check #: 1934				Total Hours			59.70
NET PAY ALLOCATIONS				Gross Earnings		128.00	74.75
				Total Hrs Worked			1398.75
			WITHHOLDING	DESCRIPTION	FILING STATUS	THIS PERIOD (\$)	YTD (\$)
			GS	Social Security		7.94	80.60
				Medicare		1.86	18.85
				Fed Income Tax	SMS		72.97
				CA Income Tax	SMI2 0 0		20.79
				CA Disability		1.41	14.30
				TOTAL		11.21	207.51
			DEDUCTION	DESCRIPTION		THIS PERIOD (\$)	YTD (\$)
				Accident Pretax			5.01
				Dental Pretax			4.96
				Health Ins - Pr			85.87
				Ins - Post Tax			2.50
				Vision Pretax			2.88
				TOTAL			101.22

Extract of Wage Statement Showing that Bonus and Commissions were Paid Over Seven Days after Pay Period Earned

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

Defendant 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.

Defendant failed to pay all wages, paid sick leave, and premiums owed to the 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. Defendant did not pay waiting time penalties for the late payments. As a result, Defendant 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

Defendant 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.

Defendant 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. Defendant repeatedly failed to include commissions and bonuses in paystubs for the pay period earned and instead created separate wage statements only showing bonus and commission earnings and wage statements for regular hourly pay. As a result, wage statements issued by Defendant do not accurately reflect the correct amount of wages earned per corresponding pay period. Thus, Defendant violated Labor Code section 226(a)(1) and (5) by not listing the correct “gross wages earned” or “net wages earned” on wage statements for the applicable pay period.

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 create 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**

Defendant 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.”

Defendant required Plaintiff and the aggrieved employees to incur costs for work-related purposes without full reimbursement. 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. Plaintiff and the aggrieved employees were repeatedly required to use their personal cell phones and computers to communicate with clients and complete daily duties. Plaintiff and the aggrieved employees were even required to download an app called Paychex and UKG to their personal cell phone to clock in and out of work. At no point in time were Plaintiff and the aggrieved employees reimbursed for using their personal devices for employment-related activities.

Thus, in direct consequence of their job duties, Plaintiff and the aggrieved employees unavoidably and necessarily incurred losses, expenditures, costs and expenses that Defendant did not fully and compliantly reimburse as a matter of policy and practice.

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 Commission Agreement **Violation of Labor Code § 2751**

Defendant violated Labor Code section 2751 by failing to provide to provide written commission plans to Plaintiff and the aggrieved employees. When an employer pays commissions as part of employee compensation, section 2751(a) requires that the employer provide a written contract that sets “forth the method by which the commissions” are “computed and paid.” Section 2751(b) requires an employer to provide a copy of the commission agreement that is signed by both the employer and the employee.

Defendant informed Plaintiff and the aggrieved employees that they would receive commissions and bonuses depending on how many private training sessions were sold, among other gym services. However, Defendant failed to provide a written commission plan to Plaintiff and the aggrieved employees that explained how commissions were computed and paid.

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

Defendant 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, Defendant 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.

Retaliation **Violation of Labor Code §§ 98.6 and 1102.5**

Defendant violated Labor Code sections 98.6 and 1102.5 by retaliating against Plaintiff for making complaints about workplace conditions.

Section 98.6 provides that an employer shall not “discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to their rights that are under the jurisdiction of the Labor Commissioner, made a written or oral complaint that they are owed unpaid wages, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of themselves or others of any rights afforded them.”

Section 1102.5 provides that no employer, or person acting on behalf of an employer, shall “make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.”

Here, when Plaintiff made complaints about Defendant’s workplace condition, including requiring him to complete physical labor that he was unable to complete because of his physical disability and illness, Defendant retaliated against him by subjecting him to verbal and emotional abuse, a hostile work environment, and finally by terminating his employment.

Sections 98.6 and 1102.5 each provide for \$10,000 in civil penalties in addition to whatever other remedies Plaintiff may recover. Labor Code §§ 98.6(b)(3), 1102.5(e)(1). Plaintiff will seek

recovery of civil penalties under each section as well as other compensatory, statutory, and punitive damages.

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 Defendant 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, Defendant' 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. Defendant may contact Plaintiff's counsel with any questions regarding this letter or the forthcoming lawsuit.

Sincerely,

A handwritten signature in black ink, appearing to read "Mariela Romo". The signature is fluid and cursive, with a large initial "M" and a distinct "R" at the end.

Mariela Romo

Cc Nicholas J. Ferraro
Lauren N. Vega
David X. Lin

Plaintiff, Michael E. Osley Jr.

Bandon Fitness Human Resources
Bandon.HR@anytimefitness.com