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County of San Diego
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

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

Plaintiffs,

vs.

SUDBERRY PROPERTIES, INC. and DOES 1 through 50, inclusive,

Defendants.

Case No. 37-2024-00010679-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. Failure to Pay for Authorized Rest Periods/Non-Productive Time
6. Paid Sick Leave Violations
7. Unpaid Vacation Wages
8. Untimely Payment of Wages
9. Wage Statement Violations
10. Waiting Time Penalties
11. Failure to Reimburse Business Expenses
12. Failure to Provide Records
13. Unfair Competition
14. Retaliation
15. Civil Penalties under the Private Attorneys General Act (Labor Code §§ 2698 *et seq.*)

Plaintiff VICTOR FRAGOSA, individually and on behalf of all others similarly situated and the State of California under the Private Attorneys General Act ("Plaintiff") brings this FIRST AMENDED CLASS AND REPRESENTATIVE ACTION COMPLAINT against Defendants SUDBERRY PROPERTIES, INC. and DOES 1 through 50, inclusive (collectively "Defendants"), alleging as follows:

INTRODUCTION

1. Plaintiff brings this class action on behalf of all current and former employees of Defendants of Defendants during the relevant statutory period who were not paid all wages and premiums owed to them, and were not afforded all rights under the California Labor Code because of Defendants' illegal wage and hour policies, practices, and procedures.

2. Plaintiff seeks unpaid wages, premiums, and penalties on behalf of himself and all other similarly-situated employees as a result of Defendants' practice and pattern of compelling employees to work off the clock, failing to provide compliant meal and rest periods and pay associated premiums, failing to incorporate all qualifying forms of renumeration into employees' hourly rate of pay for the purposes of paying overtime, rest period pay, premiums, sick leave, and vacation pay, and failing to reimburse employees for necessary business expenses.

3. As a result of the illegal practices and procedures outlined above, Defendants also failed to timely pay Plaintiff and similarly-situated employees all wages earned, failed to pay all waiting time penalties owed, and failed to provide legally-compliant wage statements.

4. Plaintiff also brings individual claims against Defendants for whistleblower retaliation, retaliation for the use of bereavement leave, and failure to produce employee records.

JURISDICTION & VENUE

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

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

7. This Court has jurisdiction over Defendants because, upon information and belief, Defendants 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.

8. Venue is proper in this Court under Code of Civil Procedure sections 393(a), 395, and/or 395.5 because, upon information and belief, Defendants conduct business and committed some of the alleged violations in this county.

PARTIES

A. Plaintiff Victor Fragosa

9. Plaintiff Fragosa is an individual over 18 years of age who worked for Defendants in California as a non-exempt employee from about August 1, 2022 to the present. Plaintiff worked as an hourly, non-exempt employee and held the position of Leasing Professional.

10. The State of California, via the Labor and Workforce Development Agency ("LWDA"), is the real party in interest in this action. (*Kim v. Reins Int'l California, Inc.* (2020) 9 Cal. 5th 73, 81 [The "government entity on whose behalf the plaintiff files suit is always the real party in interest."])

B. Defendants

11. Defendant Sudberry Properties, Inc. is a California corporation that maintains operations and conducts business throughout the State of California, including in this county.

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

13. Defendants own and operate a real estate development, asset management firm specializing in retail town centers, mixed-use projects, master-planned communities, apartments, hotels, and office/industrial properties

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

control over the wages, hours, and working conditions of the employees, suffered and permitted them to work, and otherwise engaged them as employees under California law.

15. Upon information and belief, at least some of the Defendants have common ownership, common management, interrelationship of operations, and centralized control over labor relations and are therefore part of an integrated enterprise and thus jointly and severally responsible for the acts and omissions alleged herein, including pursuant to Labor Code sections 558, 558.1, and 1197.1.

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

CLASS ALLEGATIONS

17. This action is brought individually and on behalf of the following class pursuant to Code of Civil Procedure section 382:

a. All current and former non-exempt employees who worked for Defendants in California at any time from four years (plus the additional 178-day statutory tolling period under Emergency Rule 9) prior to the filing of this action through date of class certification.

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

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

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

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

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

20. 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 Defendants and applied to the class members constitute violations of California law.

GENERAL ALLEGATIONS

21. Defendants failed to pay Plaintiff and the aggrieved employees at the lawful minimum wage rate for all hours worked.

22. For example, Defendants instructed Plaintiff and other aggrieved employees to clock out at the end of their scheduled shifts and continue working off the clock to complete their assigned duties, including e-mail correspondence and providing tours to prospective residents. Defendants also instructed Plaintiff to appear for work before the start of his scheduled shift to complete opening duties but not to clock in until the start of his scheduled shift. One of the performance evaluations Defendants provided to Plaintiff explicitly states that he should arrive early. *See Fig. 1 below*.

SUDBERRY PROPERTIES

Sudberry Properties, Inc.
Performance Appraisal

Team Member Name: Victor Fragosa	**Date of Hire: 8/1/2022**
Position: Leasing Professional	**Department: 1136**
Location : Circa 37	**Superviser : Rachelle Merlo**
Last Review Date: N/A	**Current Review Date: 3/13/2023**

Review Period: Check the appropriate box below:

30 Day Review [ ] 60 Day Review [ ] 90 Day Review [X] Annual Review

Ratings:
3 - Exceeds Requirements
2 - Meets Requirements
1 - Needs Improvement
0 - Unsatisfactory

Note clearly and be specific when improvement is needed in all areas.
(Include rating that appropriately matches your comments.)

Attendance/Punctuality: **Rating: 1**

Victor has improved with his timekeeping processes in isolved, I would suggest an improvement is needed to arrive to work before his scheduled shift so that Residents are not waiting for the doors to open or to help assist them.

Fig. 1, excerpt from March 13, 2023 performance appraisal.

23. Due to the volume of work and understaffing, Plaintiff often had to work through his meal periods even when he had clocked out.

24. Defendants sometimes instructed Plaintiff and other similarly-situated employees to enter future time entries for the convenience of their payroll department. However, when Plaintiff and

other aggrieved employees worked more hours than they had prospectively entered, Defendants did not adjust their entries to pay them properly.

25. Defendants' employment practices and procedures described above deprived Plaintiff and similarly-situated employees of minimum and regular as Defendants failed to pay employees all wages they had earned working off the clock. Defendants also failed to pay all overtime wages owed as many of the hours that employees worked off the clock should have counted towards overtime.

26. Defendants failed to pay Plaintiff and similarly-situated employees separately for their rest periods and failed to pay them at the proper average hourly rate of pay for the workweek including all qualifying forms of renumeration under Labor Code section 226.2. Rather, Defendants paid Plaintiff and other similarly-situated employees only at their base hourly rate of pay for their rest periods.

27. Defendants' written policies state that they consider all bonuses "discretionary" even though payment of bonuses is contingent upon certain events, such as leases, move-ins, and continued employment through certain time periods. *Fig. 2*.

Circa 37 BONUS PLAN

EMPLOYEE ACKNOWLEDGMENT AND AGREEMENT

I acknowledge I have received this information, including the bonus plan(s) attached listed below, about the "Circa 37 Bonus Plan", that I have familiarized myself with its contents, and that I agree with the terms and conditions set forth below. I understand that Circa 37 Bonus Plan supersedes and replaces any and all other bonus information provided to me prior to the date of my signature below.

Bonus Plan(s) attached: Circa 37 Bonus Plan

1. I understand the Circa 37 Bonus Plan describes a method for Sudberry Properties ("Company") to calculate bonus compensation, but that all bonus compensation is discretionary. Therefore, the method for calculation does not create an obligation for Company to pay any bonus, or to pay a particular amount if a bonus is paid. In addition, I understand that the Circa 37 Bonus Plan is for no fixed period of time, so it may be altered or rescinded by the Company, in whole or in part, at any time, with or without notice, in the sole discretion of the Company.

2. If the Company elects to pay a bonus, payments occur after: 1) all reports and data have been analyzed; 2) management approves all proposed bonuses; and 3) bonuses are processed by the payroll department. Thereafter, employees receive bonus payments on the next regular pay day; former employees will receive bonus payments within a reasonable period of time.

3. For bonuses paid based on the occurrence of an event, such as a lease or move-in, I acknowledge that I am eligible to receive the bonus only if I am employed by the Company on the date the event occurs. For bonuses that are paid based on time period, such as a quarterly bonus (including if the quarterly bonus is dependent on the occurrence of certain events during each month of the quarter), I acknowledge I am eligible to receive the bonus only if I am employed by the Company on the last day of the time period.

Fig. 2, excerpt from Defendants' Bonus Plan.

28. This "Bonus Plan" constitutes an unlawful condition of employment because it provides that Plaintiff and other employees' earned bonuses were merely "discretionary" and therefore would not be included in their rate of pay for the purpose of paying overtime, sick leave, vacation pay, or premiums. Moreover, the plan is an illusory contract under which Defendants would have no obligation to pay bonuses even when the aggrieved employees meet all of the conditions for earning a bonus if it were enforceable.

29. In line with their mischaracterization of earned bonuses as "discretionary," Defendants did not include the bonuses in either their regular rate of pay for overtime, or in rest period pay. As seen in the below example wage statements, Plaintiff earned a bonus of $300 during the pay period of August 26 through September 10, 2022, but Defendants did not pay Plaintiff any separate rest period pay at a rate that incorporated that bonus, and only paid Plaintiff at 1.5 times his base hourly rate for overtime rather than 1.5 times his regular rate. Even the "Blended OT" rate is listed as $32.25 per hour, or 1.5 times Plaintiff's base rate. *See Figs. 3 and 4*.

Statement of Earnings For: **Victor Fragosa**

Sudberry Properties, Inc
5465 Morehouse Dr Ste 260
San Diego, CA 92121-4714
858-546-3000

Employee #:	1216	Department	1136	Period Begin:	8/26/2022	Check Date:	9/15/2022
Clock Number:		Divsion	02	Period End:	9/10/2022	Pay Type:	Hourly
Company Id:	3482S395	Federal Filing:	Married Filing	Exemptions:		Additional Tax:	
		State Filing:	Married One	Exemptions:	4	Additional Tax:	

Voucher Id	Check Amount	Gross Pay	Net Pay	Check Message
V16936465	$0.00	$300.00	$177.06	

EARNINGS *Not included in Totals ^Hrs/Units = Units (Units not included in Totals)

Description	Rate	Hrs/Units	Dollars	YTD Hrs/Unit	YTD Dollars
Bonus			300.00	0.00	300.00
Regular			0.00	130.37	2,802.96
Overtime			0.00	3.38	109.00

TAXES

Description	Current	YTD
SOC SEC EE	18.60	199.14
MED EE	4.35	46.57
FEDERAL WH	66.00	66.00
CALIFORNIA WH	30.69	30.69
CALIFORNIA SDI	3.30	35.33

DEDUCTIONS

Description	Current	YTD
401K	0.00	51.93

Fig. 3, wage statement for the period of Aug. 26 through Sept. 10, 2022, showing bonus payment.

Statement of Earnings For: **Victor Fragosa**

Sudberry Properties, Inc
5465 Morehouse Dr Ste 260
San Diego, CA 92121-4714
858-546-3000

Employee #:	1216	Department	1136	Period Begin:	8/26/2022	Check Date:	9/15/2022
Clock Number:		Divsion	02	Period End:	9/10/2022	Pay Type:	Hourly
Company Id:	3482S395	Federal Filing:	Married Filing	Exemptions:		Additional Tax:	
		State Filing:	Married One	Exemptions:	4	Additional Tax:	

Voucher Id	Check Amount	Gross Pay	Net Pay	Check Message
V16936466	$0.00	$1,959.01	$1,722.63	

EARNINGS *Not included in Totals ^Hrs/Units = Units (Units not included in Totals)

Description	Rate	Hrs/Units	Dollars	YTD Hrs/Unit	YTD Dollars
Regular	21.5000	77.32	1,662.38	207.69	4,465.34
Overtime	32.2500	2.62	84.50	6.00	193.50
Holiday	21.5000	8.00	172.00	8.00	172.00
Blended OT	32.2500		40.13	0.00	40.13
Bonus			0.00	0.00	300.00

TAXES

Description	Current	YTD
SOC SEC EE	121.09	320.23
MED EE	28.32	74.89
FEDERAL WH	0.00	66.00
CALIFORNIA WH	0.67	31.36
CALIFORNIA SDI	21.48	56.81

DEDUCTIONS

Description	Current	YTD
Den125	6.05	6.05
401K	58.77	110.70

Fig. 4, wage statement for the period of Aug. 26 through Sept. 10, 2022, showing regular and overtime pay.

30. Similarly, Defendants failed to provide sick leave at the proper rate of pay because they failed to include earned bonuses and other qualifying forms of compensation into employees' rate of pay for sick leave purposes.

31. Defendants also failed to provide vacation wages at the proper "final" rate of pay because they failed to include earned bonuses and other qualifying forms of compensation in employees' rate of pay for vacation wages. Moreover, because Defendants failed to properly record

all of Plaintiff and other similarly-situated employees' hours worked, particularly off the clock work, Defendants credited employees with fewer hours than they actually accrued. Thus, Defendants failed to pay all accrued and unused vacation wages upon separation for employment.

32. Plaintiff and other similarly-situated employees regularly worked through their meal periods, missed them entirely, took them late, and had them interrupted or otherwise cut short because of the volume of work and Defendants' policy and practice of understaffing. For example, Plaintiff often could not leave for a meal period because he was the only one working his shift.

33. Occasionally, when Defendants noticed that Plaintiff did not clock out for a meal period, they would call him in for a meeting to pressure him into allowing them to adjust his time and/or fill out a meal waiver form.

34. For the same reasons, Plaintiff and other similarly-situated employees were not able to take legally-compliant rest periods.

35. Even though Defendants failed to provide Plaintiff and other similarly-situated employees with the opportunity to take all legally-compliant meal and rest periods, Defendants did not pay Plaintiff and other similarly-situated employees all meal and rest period premium wages owed.

36. To the extent that Defendants paid meal and rest period premiums, they were not paid at the proper rate of pay because Defendants failed to include all qualifying forms of renumeration in employees' regular rate of pay for the purposes of paying premiums. For example, Plaintiff earned a $550 bonus in the period of September 11 to September 25, 2023. *Fig. 5*.

Statement of Earnings For: **Victor Fragosa**

Sudberry Properties, Inc
5465 Morehouse Dr Ste 260
San Diego, CA 92121-4714
858-546-3000

Employee #:	1216	Department	1136	Period Begin:	9/11/2023	Check Date:	9/29/2023
Clock Number:		Divsion	02	Period End:	9/25/2023	Pay Type:	Hourly
Company Id:	3482S395	Federal Filing:	Married Filing	Exemptions:		Additional Tax:	
		State Filing:	Married One	Exemptions:	4	Additional Tax:	

Voucher Id	Check Amount	Gross Pay	Net Pay	Check Message
V20616140	$0.00	$1,680.55	$1,480.91	

EARNINGS *Not included in Totals ^Hrs/Units = Units (Units not included in Totals)

Description	Rate	Hrs/Units	Dollars	YTD Hrs/Unit	YTD Dollars
Regular	21.7900	71.32	1,554.06	1,237.07	26,849.53
Overtime	32.6850	1.18	38.57	23.95	780.73
Meal Premium	21.7900	2.00	82.08	2.00	82.08
Blended OT	32.6850		5.84	0.00	111.37

TAXES

Description	Current	YTD
SOC SEC EE	103.82	2,794.17
MED EE	24.28	653.47
FEDERAL WH	0.00	2,592.58
CALIFORNIA WH	0.00	1,205.55

DEDUCTIONS

Description	Current	YTD
Den125	6.05	108.90
401K Pre Tax	50.42	1,001.76

Fig. 5, wage statement for Sept. 11 through Sept. 25, 2023, showing bonus.

However, during that same period, Defendants paid him meal period premiums at his base hourly rate of pay and did not incorporate his bonus into his meal premium pay whatsoever. *Fig. 6*.

Statement of Earnings For: **Victor Fragosa**

Sudberry Properties, Inc
5465 Morehouse Dr Ste 260
San Diego, CA 92121-4714
858-546-3000

Employee #:	1216	Department	1136	Period Begin:	9/11/2023	Check Date:	9/29/2023
Clock Number:		Divsion	02	Period End:	9/25/2023	Pay Type:	Hourly
Company Id:	3482S395	Federal Filing:	Married Filing	Exemptions:		Additional Tax:	
		State Filing:	Married One	Exemptions:	4	Additional Tax:	

Voucher Id	Check Amount	Gross Pay	Net Pay	Check Message
V20616139	$0.00	$770.00	$456.00	

EARNINGS *Not included in Totals ^Hrs/Units = Units (Units not included in Totals)						TAXES			DEDUCTIONS		
Description	Rate	Hrs/Units	Dollars	YTD Hrs/Unit	YTD Dollars	Description	Current	YTD	Description	Current	YTD
Bonus			770.00	0.00	11,784.38	SOC SEC EE	47.74	2,690.35	Den125	0.00	102.85

Fig. 6, wage statement for Sept. 11 through Sept. 25, 2023, showing meal premium.

37. As a result of all of the foregoing, Defendants have not timely paid all wages owed to Plaintiff and other similarly-situated employees during their employment and/or upon separation from employment. The wages that Plaintiff and other employees earned remain owing to this day, more than seven days after the close of the pay period in which the wages were earned.

38. In the case of former employees, the earned wages remain owing long after the end of their employment. However, despite failing to timely pay all wages owed upon separation from employment, Defendants have not paid all waiting time penalties owed.

39. Moreover, due to Defendants' illegal policies, practices, and procedures described above, Defendants failed to provide Plaintiff and other similarly-situated employees accurate itemized wage statements as the wage statements failed to list the correct total number of hours worked, the proper rates of pay for each hour worked, and total gross and net wages earned.

40. Defendants required Plaintiff and other similarly-situated employees to incur costs for work-related purposes without full reimbursement. In direct consequence of their job duties, Plaintiff and similarly-situated employees unavoidably and necessarily incurred these losses, expenditures, costs, and as a matter of policy and practice. For example, Plaintiff and other similarly-situated employees often had to use their personal cell phones, tablets, computers, and other devices for work but Defendants failed to reimburse them for their use of these personal devices.

41. Defendants failed to provide all records upon Plaintiff's request. Although Plaintiff submitted a written request for his entire employee file, including timekeeping records, Defendants failed to produce any of Plaintiff's timekeeping records.

42. Defendants retaliated against Plaintiff for taking bereavement leave and for making a bona fide complaint to Defendants' human resources department. After Plaintiff took bereavement leave for the death of his mother-in-law, Plaintiff's manager withheld earned bonus money from him even though he had fulfilled all of the conditions for earning the bonus.

43. Plaintiff complained about this retaliatory conduct to Defendants' human resources department and eventually had the bonus restored to him. However, after resolving this complaint, Defendants began a campaign of harassment and micromanaging, including pretextual disciplinary writeups, which have taken such a toll on Plaintiff's mental and emotional health that he has had to take a medical leave of absence.

FIRSTCAUSE OF ACTION

MINIMUM WAGE VIOLATIONS

Violation of Labor Code §§ 1194, 1194.2 and 1197

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

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

45. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code §§ 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).

46. Defendants 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, Defendants are liable for all associated damages, including liquidated damages for the minimum wage violations pursuant to Labor Code § 1194.2.

47. Defendants' 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

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

49. 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.

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

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

THIRD CAUSE OF ACTION

MEAL PERIOD VIOLATIONS

Violation of Labor Code §§ 226.7 and 512

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

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

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

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

56. 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

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

58. 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.

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

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

FIFTH CAUSE OF ACTION

FAILURE TO PAY FOR AUTHORIZED REST PERIODS/NON-PRODUCTIVE TIME

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

62. Because Plaintiff and class members were not separately compensated for rest periods (a rate required by statute) and non-productive time, Plaintiff and class members are owed wages for this time.[1]

63. The IWC Wage Orders state Plaintiff and class members must be paid for all "hours worked" for time they are "subject to the control of the employer, and includes all the time the employee is suffered or permitted to work." Cal. Code Regs., tit. 8, § 11040, subd. 2(k).

64. The IWC Wage Orders state rest periods are "hours worked for which there will be no deduction from wages." Cal. Code Regs., tit. 8, § 11040, subd. 12(a).

65. Labor Code section 226.2 applies to employees who are compensated in whole, or in part, on a piece-rate basis. Section 226.2(a)(1) requires employers to compensate employees for "rest and recovery periods and other non-productive time spent separate from any piece rate compensation."

66. Non-productive time must be compensated at a rate no less than the applicable state or local minimum wage. Cal. Lab. Code § 226.2(a)(4).

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[1] *See Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal. App. 5th 98; *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal. App. 4th 864, 872.

67. Rest and recovery periods must be compensated the *higher* of (1) an average hourly rate taken by dividing an employee's total compensation for the workweek (exclusive of overtime and rest and recovery compensation) by the employee's total hours worked or (2) the applicable minimum wage. Cal. Lab. Code § 226.2(a)(3)(A).

68. Section 226.2 expressly requires that any employees paid in whole or in part on a piece rate basis must receive at least minimum wage for all hours worked as well as any required overtime compensation.

69. Defendants willfully failed in their affirmative obligation to pay Plaintiff and class members at least the lawful minimum wage for each hour worked (including all non-productive time) in violation of Labor Code sections 226.2, 1182.12, 1194, 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.

70. Defendants also failed in their affirmative obligation to pay Plaintiff and class members for rest periods at the rate required by section 226.2(a)(3)(A), resulting in unpaid wages to Plaintiff and class members.

71. Defendants' unlawful acts and omissions deprived Plaintiff and class members of minimum, regular and overtime, and premium 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.

<u>SIXTH CAUSE OF ACTION</u>

FAILURE TO PAY ALL PAID SICK LEAVE WAGES

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

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

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

74. Labor Code section 246(l) governs how Defendants were required to calculate paid sick leave:

> [A]n employer shall calculate paid sick leave using any of the following calculations:
>
> (1) Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.
>
> (2) Paid sick time for nonexempt employees shall be calculated 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.
>
> (3) Paid sick time for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

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

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

77. Pursuant to Labor Code section 248.1, Defendants were required to provide up to 80 hours of Covid-19 Supplemental Paid Sick Leave to employees for the period of April 20, 2020 to December 31, 2020. Labor Code section 248.2 required Defendants to provide up to 80 hours of Covid-19 Supplemental Paid Sick Leave for the period of January 1, 2021 through at least September 30, 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.

78. 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.

79. 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.

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

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

82. As a result, Defendants 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.

SEVENTH CAUSE OF ACTION

UNPAID VACATION WAGES

Violation of Labor Code §§ 201, 202, 203, and 227.3 and 1194, and 1198

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

84. This cause of action is brought by an unpaid vacation wages subclass pursuant to Labor Code §§ 200, 201, 202, 203, and 227.3 and 1194, and 1198, which require non-exempt employees be

timely paid all vested vacation wages at their final rate of pay upon separation of employment, and which further provide a private right of action for an employer's timely failure to pay all vacation compensation upon termination.

85. Defendant offered Plaintiff and class members an employment contract or policy providing for the accrual of vacation and/or paid time off. Plaintiff and class members accrued vacation and/or PTO pursuant to the contract or policy.

86. Upon separation of Plaintiff and class members, Defendants willfully failed in their affirmative obligation to timely pay Plaintiff and class members all accrued but unused vacation at their final rate during their employment with Defendants, in violation of Labor Code sections 201(a), 202(a), and 227.3.

87. Plaintiff and class members are entitled to recover the full amount of the accrued vacation wages owed, in addition to interest, statutory and civil penalties, and attorneys' fees, and costs to the extent permitted by law.

EIGHTHCAUSE OF ACTION

UNTIMELY PAYMENT OF WAGES

Violation of Labor Code §§ 204, 210, 218

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

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

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

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

NINTH CAUSE OF ACTION

WAGE STATEMENT VIOLATIONS

Violation of Labor Code § 226

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

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

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

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

96. 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).

<u>TENTH CAUSE OF ACTION</u>

WAITING TIME PENALTIES

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

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

98. 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.

99. Defendants 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.

100. 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.

<u>ELEVENTH CAUSE OF ACTION</u>

FAILURE TO REIMBURSE BUSINESS EXPENSES

Violation of Labor Code § 2802

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

102. Defendants 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.

103. Defendants' 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.

<u>TWELFTH CAUSE OF ACTION</u>

FAILURE TO PROVIDE RECORDS

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

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

105. Plaintiff brings this cause of action exclusively *in an individual capacity*.

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

107. Labor Code section 226(b) grants employees the right to inspect or receive "a copy of records pertaining to their employment." Labor Code section 226(f) authorizes a penalty of $750 for an employer's failure to comply with a request for records made under section 226.

108. Labor Code section 1198.5 requires employers to provide an employee's "personnel records" within 30 days of receipt of the request. Section 1198.5(k) authorizes a penalty of $750 for an employer's failure to provide a copy of or permit inspection of personnel records. Section 1198.5(l) allows an employee to seek injunctive relief to obtain an employer's compliance with this section and authorizes the recovery of attorneys' fees and costs.

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

110. Plaintiff requested from Defendants all records due under the IWC Wage Orders (including the Records sections) and Labor Code sections 226, 432, and 1198.5. Defendants have failed to produce Plaintiff's timekeeping records.

111. Defendants' unlawful acts and omissions deprived Plaintiff of the ability review the documents they received during their employment and to inspect and reconcile their actual time worked with the ultimate pay they received on their wage statements. Plaintiff is entitled to recover the penalties and injunctive relief, in addition to interest, attorneys' fees, and costs to the extent

permitted by law, including under Code of Civil Procedure section 1021.5, and Labor Code sections 226 and 1198.5.

THIRTEENTH CAUSE OF ACTION

UNFAIR COMPETITION

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

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

113. Defendants 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.

114. Defendants' 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 Defendants 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.*

115. Plaintiff is a victim of Defendants' 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 Defendants pursuant to Business and Professions Code §§ 17203 and 17208.

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

117. Plaintiff and class members are entitled to injunctive relief against Defendants, restitution, and other equitable relief to return all funds over which Plaintiff and class members have an ownership interest and to prevent future damage and the public interest under Business and Professions Code § 17200 *et seq.* Plaintiff and class members are further entitled to recover interest,

attorneys' fees, and costs to the extent permitted by law, including under Code of Civil Procedure § 1021.5.

<u>FOURTEENTH CAUSE OF ACTION</u>

RETALIATION

Violation of Labor Code §§ 98.6 and 1102.5

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

119. Plaintiff brings this cause of action exclusively *in an individual capacity*.

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

121. 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."

122. 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."

123. After Plaintiff made a complaint to Human Resources regarding his manager withholding an earned bonus / commission from him for taking bereavement leave, Defendants subjected Plaintiff to retaliatory harassment which became so overbearing that Plaintiff has had to take a medical leave of absence.

124. Plaintiff will seek recovery of penalties under each Labor Code section as well as other compensatory, statutory, and punitive damages, including interest, fees, and costs, as applicable.

FIFTEENTH CAUSE OF ACTION

CIVIL PENALTIES UNDER THE PRIVATE ATTORNEYS GENERAL ACT

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

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

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

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

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

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

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

129. Labor Code section 2699(a) provides: "Notwithstanding any other provision of law,, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil

action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3. "

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

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

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

133. On or about **March 4, 2024**, Plaintiff paid the requisite PAGA filing fee and provided written notice (by online electronic filing with the LWDA and by certified mail to Defendants) of Defendants' alleged Labor Code violations, including the facts and theories to support the alleged violations.

134. A true and correct copy of Plaintiff's written PAGA notice, entitled "Notice of Labor Code Violations" is attached hereto as <u>Exhibit 1</u> and incorporated by reference as though fully set forth herein (the "<u>PAGA notice</u>").

135. To date, neither Plaintiff nor Plaintiff's counsel has received a response to Plaintiff's written PAGA notice from the LWDA.

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

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

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

138. As set forth in the PAGA notice attached as Exhibit 1 and incorporated into this Complaint, Defendants 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 Hours Worked/Non-Productive, Rest, and Recovery Periods.*** Violation of Labor Code §§ 226.2; IWC Wage Orders.

c. ***Unpaid Overtime***. Violation of Labor Code §§ 510, 1194, 1198; IWC Wage Orders.

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

e. ***Unpaid Vacation Wages.*** Violation of Labor Code § 227.3.

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

g. ***Unpaid Rest Period Premium Wages.*** Violation of Labor Code §§ 226.7, 516, 1198; IWC Wage Orders.

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

i. ***Untimely Payment of Wages Upon Separation of Employment.*** Violation of Labor Code §§ 201, 202, 203, 256.

j. ***Non-Compliant Wage Statements.*** Violation of Labor Code §§ 226, 226.3.

k. ***Unreimbursed Employee Expenses.*** Violation of Labor Code §§ 2802, 2804.

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

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

n. ***Retaliation.*** Violation of Labor Code §§ 98.6, 1102.5.

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

PRAYER

Plaintiff prays for judgment as follows:

a. For certification of this action as a class action;

b. For appointment of Plaintiff as the class representative;

c. For appointment of above-captioned counsel for Plaintiff as Class Counsel;

d. For division of class members into appropriate classes and/or subclasses according to proof;

e. For recovery of 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 9, 2024

Ferraro Vega Employment Lawyers, Inc.

Nicholas J. Ferraro

Nicholas J. Ferraro
Attorneys for Plaintiff Victor Fragosa

<u>EXHIBIT 1</u>

Notice of Labor Code Violations

FERRARO VEGA
SAN DIEGO EMPLOYMENT LAWYERS

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March 4, 2024

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

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

Sudberry Properties, Inc.
5465 Morehouse Drive - Ste 260
San Diego, CA 92121

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

SUDBERRY PROPERTIES, INC.;

Defendant(s) shall mean and include the foregoing in addition to any other related employer entities, individuals under Labor Code sections 558 and 558.1, and all others who may be later added upon further investigation and discovery as liable employers.

This office serves as legal counsel for Plaintiff. If the California Labor and Workforce Development Agency ("LWDA") does not investigate the facts, allegations, and violations set forth in this notice within the statutorily prescribed 65-day period under Labor Code section 2699.3, Plaintiff intends to commence a civil action against Defendants as a proxy and agent of the State of California under the Private Attorneys General Act ("PAGA"). "PAGA allows an 'aggrieved employee'—a person affected by at least one Labor Code violation committed by an employer—to pursue penalties for all the Labor Code violations committed by that employer." *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal. App. 5th 745, 751; *Kim v. Reins International California, Inc.* (2020) 9 Cal. 73, 79. Plaintiff maintains standing to pursue these claims against Defendants, as Plaintiff experienced one or more of the alleged violations during the relevant statutory period, which continue through the present date. *Cf. Johnson v. Maxim Healthcare Servs., Inc.*, 281 Cal. Rptr. 3d 478, 481 (Cal. Ct. App. 2021).

Through this notice, Plaintiff requests that Defendants complete an internal investigation and audit of the wage and hour and employment practices at issue and make a good faith effort to correct any violations. Plaintiff attempts to identify the non-compliant policies and practices affecting the aggrieved employees so that the parties may resolve the underlying damages and penalties in judgment or settlement approved by the Superior Court of California under Labor Code section 2699(k). Defendants are notified that any attempt to resolve this case should be conducted in coordination with Plaintiff's counsel to protect the interests of Plaintiff, the aggrieved employees, and the State of California via the LWDA. Plaintiff advises Defendants this letter should be also considered a reasonable attempt at settlement of this matter, subject to an exchange of additional documents and information. *Graham v. Daimler Chrysler Corp.* (2004) 24 Cal. 4th 553, 561.

- BACKGROUND -

Defendants employed Plaintiff during the PAGA Period as a non-exempt employee in the position of Leasing Agent from about August 1, 2022 to the present. During their employment Plaintiff and the other aggrieved employees were subject to the wage and hour and employment protections set forth in the California Labor Code and IWC Wage Orders.

Through this notice, Plaintiff informs the LWDA of the Labor Code violations set forth herein. The "aggrieved employees" include Plaintiff and the following individuals:

> All current and former non-exempt employees who worked for Defendants in the State of California during one-year period preceding the date of this notice through the current date and the date of trial in any pending action (the "aggrieved employees" and the "PAGA Period").

Plaintiff reserves the right to expand or narrow the definition of the "aggrieved employees" in the forthcoming civil action. Furthermore, Plaintiff seeks all recoverable civil penalties for Defendants' violations and reserves the right to supplement this notice as further investigation is completed and further facts, witnesses, and violations are uncovered.

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- PAGA CLAIMS –

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

Defendants violated Labor Code sections 1194, 1197, and 1198, along with the California Minimum Wage Order, the applicable local minimum wage ordinances, and the "Hours and Days of Work" and "Minimum Wages" sections of the applicable IWC Wage Orders with respect to the aggrieved employees.

Labor Code section 1194 renders it unlawful for an employee to receive less than the legal minimum wage for hours worked in California. Labor Code section 1197 further mandates that "[t]he minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful." Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful. The California Minimum Wage Order and the applicable sections of the IWC Wage Orders further require payment of minimum wages for all hours worked. The "Minimum Wages" sections of the applicable IWC Wage Order provide that "[e]very employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise." The foregoing California wage laws require payment of "not less than the applicable minimum wage *for all hours worked* in the payroll period" and California law does not allow averaging of pay over the hours worked in the pay period, even if the total pay results in an average above the minimum wage. *Armenta v. Osmose, Inc.* (2005) 135 Cal. App. 3d 314, 324.

Defendants failed to pay Plaintiff and the aggrieved employees at the lawful minimum wage rate for all hours worked, resulting in unpaid minimum wages. For example, Defendants instructed Plaintiff and other aggrieved employees to clock out at the end of their scheduled shifts and continue working off the clock to complete their assigned duties, including e-mail correspondence and providing tours to prospective residents. Further, due to the volume of work and understaffing, Plaintiff often had to work through his meal periods when he had clocked out. Defendants also instructed Plaintiff to appear for work before the start of his scheduled shift to complete opening duties but not to clock in until the start of his scheduled shift. One of the performance evaluations Defendants provided to Plaintiff explicitly states that he should arrive early. *See Fig. 1 below.*

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/ / /

SUDBERRY PROPERTIES

Sudberry Properties, Inc.
Performance Appraisal

Team Member Name: Victor Fragosa	**Date of Hire: 8/1/2022**
Position: Leasing Professional	**Department: 1136**
Location : Circa 37	**Superviser : Rachelle Merlo**
Last Review Date: N/A	**Current Review Date: 3/13/2023**
Review Period: Check the appropriate box below:	

30 Day Review [ ] 60 Day Review [ ] 90 Day Review [X] Annual Review

Ratings:
3 - Exceeds Requirements
2 - Meets Requirements
1 - Needs Improvement
0 - Unsatisfactory

Note clearly and be specific when improvement is needed in all areas.
(Include rating that appropriately matches your comments.)

Attendance/Punctuality: **Rating: 1**

Victor has improved with his timekeeping processes in isolved, I would suggest an improvement is needed to arrive to work before his scheduled shift so that Residents are not waiting for the doors to open or to help assist them.

Fig. 1, excerpt from March 13, 2023 performance appraisal.

Additionally, Defendants sometimes instructed Plaintiff and other aggrieved employees to enter *future* time entries for the convenience of their payroll department. However, when Plaintiff and other aggrieved employees worked more hours than they had prospectively entered, Defendants did not adjust their entries to pay them properly.

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 Hours Worked/Non-Productive, Rest, and Recovery Periods
Violation of Labor Code §§ 226.2; IWC Wage Orders

In addition to the foregoing unpaid wage violations, Defendants also violated Labor Code sections 226.2 and the "Hours and Days of Work," "Minimum Wages," and "Rest Periods" sections of the applicable IWC Wage Orders with respect to the aggrieved employees.

Labor Code section 226.2(a)(1) also requires employers to compensate employees for "rest and recovery periods and other non-productive time spent separate from any piece rate compensation." Under Labor Code section 226.2(a)(3), rest and recovery periods must be paid at an hourly rate that is no less than the higher of (i) an average hourly rate taken by dividing an employee's total compensation for the workweek (exclusive of overtime and rest and recovery compensation) by the employee's total hours worked and (ii) the applicable minimum wage. Under Labor Code section 226.2(a)(4), other nonproductive time must be paid at an hourly rate that is no less than the applicable minimum wage.

Furthermore, the "Hours and Days of Work," "Minimum Wages," and "Rest Periods" sections of the applicable IWC Wage Orders—as addressed in *Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal. App. 5th 98—require employers to separately compensate all employees, not just piece-rate employees, for all hours worked, including rest periods and nonproductive time, to comply with California's minimum wage obligations.

Defendants failed to pay Plaintiff and other aggrieved employees separately for their rest periods and failed to pay them at the proper average hourly rate of pay for the workweek including all qualifying forms of renumeration under Labor Code section 226.2. Rather, Defendants paid Plaintiff and other aggrieved employees only at their base hourly rate of pay for their rest periods. Defendants' written policies state that they consider all bonuses "discretionary" even though payment of bonuses is contingent upon certain events, such as leases, move-ins, and continued employment through certain time periods. *Fig. 2.*

Circa 37 BONUS PLAN

EMPLOYEE ACKNOWLEDGMENT AND AGREEMENT

I acknowledge I have received this information, including the bonus plan(s) attached listed below, about the "Circa 37 Bonus Plan", that I have familiarized myself with its contents, and that I agree with the terms and conditions set forth below. I understand that Circa 37 Bonus Plan supersedes and replaces any and all other bonus information provided to me prior to the date of my signature below.

Bonus Plan(s) attached: Circa 37 Bonus Plan

1. I understand the Circa 37 Bonus Plan describes a method for Sudberry Properties ("Company") to calculate bonus compensation, but that all bonus compensation is discretionary. Therefore, the method for calculation does not create an obligation for Company to pay any bonus, or to pay a particular amount if a bonus is paid. In addition, I understand that the Circa 37 Bonus Plan is for no fixed period of time, so it may be altered or rescinded by the Company, in whole or in part, at any time, with or without notice, in the sole discretion of the Company.

2. If the Company elects to pay a bonus, payments occur after: 1) all reports and data have been analyzed; 2) management approves all proposed bonuses; and 3) bonuses are processed by the payroll department. Thereafter, employees receive bonus payments on the next regular pay day; former employees will receive bonus payments within a reasonable period of time.

3. For bonuses paid based on the occurrence of an event, such as a lease or move-in, I acknowledge that I am eligible to receive the bonus only if I am employed by the Company on the date the event occurs. For bonuses that are paid based on time period, such as a quarterly bonus (including if the quarterly bonus is dependent on the occurrence of certain events during each month of the quarter), I acknowledge I am eligible to receive the bonus only if I am employed by the Company on the last day of the time period.

Fig. 2, excerpt from Defendants' Bonus Plan.

In line with their mischaracterization of earned bonuses as "discretionary," Defendants did not include them in either their regular rate of pay for overtime, or in rest period pay. *See Figs. 3 and 4.*

Statement of Earnings For: **Victor Fragosa**

Sudberry Properties, Inc
5465 Morehouse Dr Ste 260
San Diego, CA 92121-4714
858-546-3000

Employee #:	1216	Department	1136	Period Begin:	8/26/2022	Check Date:	9/15/2022
Clock Number:		Divsion	02	Period End:	9/10/2022	Pay Type:	Hourly
Company Id:	3482S395	Federal Filing:	Married Filing	Exemptions:		Additional Tax:	
		State Filing:	Married One	Exemptions:	4	Additional Tax:	

Voucher Id	Check Amount	Gross Pay	Net Pay	Check Message
V16936465	$0.00	$300.00	$177.06	

EARNINGS *Not included in Totals ^Hrs/Units = Units (Units not included in Totals)

Description	Rate	Hrs/Units	Dollars	YTD Hrs/Unit	YTD Dollars
Bonus			300.00	0.00	300.00
Regular			0.00	130.37	2,802.96
Overtime			0.00	3.38	109.00

TAXES

Description	Current	YTD
SOC SEC EE	18.60	199.14
MED EE	4.35	46.57
FEDERAL WH	66.00	66.00
CALIFORNIA WH	30.69	30.69
CALIFORNIA SDI	3.30	35.33

DEDUCTIONS

Description	Current	YTD
401K	0.00	51.93

Fig. 3, wage statement for the period of Aug. 26 through Sept. 10, 2022, showing bonus payment.

Statement of Earnings For:	Victor Fragosa							Sudberry Properties, Inc
Employee #:	1216	Department	1136	Period Begin:	8/26/2022	Check Date:	9/15/2022	5465 Morehouse Dr Ste 260
Clock Number:		Divsion	02	Period End:	9/10/2022	Pay Type:	Hourly	San Diego, CA 92121-4714
Company Id:	3482S395	Federal Filing:	Married Filing	Exemptions:		Additional Tax:		858-546-3000
		State Filing:	Married One	Exemptions:	4	Additional Tax:		

Voucher Id	Check Amount	Gross Pay	Net Pay	Check Message
V16936466	$0.00	$1,959.01	$1,722.63	

EARNINGS	*Not included in Totals		^Hrs/Units = Units (Units not included in Totals)			TAXES			DEDUCTIONS		
Description	Rate	Hrs/Units	Dollars	YTD Hrs/Unit	YTD Dollars	Description	Current	YTD	Description	Current	YTD
Regular	21.5000	77.32	1,662.38	207.69	4,465.34	SOC SEC EE	121.09	320.23	Den125	6.05	6.05
Overtime	32.2500	2.62	84.50	6.00	193.50	MED EE	28.32	74.89	401K	58.77	110.70
Holiday	21.5000	8.00	172.00	8.00	172.00	FEDERAL WH	0.00	66.00			
Blended OT	32.2500		40.13	0.00	40.13	CALIFORNIA WH	0.67	31.36			
Bonus			0.00	0.00	300.00	CALIFORNIA SDI	21.48	56.81			

Fig. 4, wage statement for the period of Aug. 26 through Sept. 10, 2022, showing regular and overtime pay.

As seen in the above examples, Plaintiff earned a bonus of $300 during the pay period of August 26 through September 10, 2022, but Defendants did not pay Plaintiff any separate rest period pay at a rate that incorporated that bonus, and only paid Plaintiff at 1.5 times his base hourly rate rather than 1.5 times his regular rate.

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.

<u>Unpaid Overtime</u>
Violation of Labor Code §§ 510, 1194, 1198; IWC Wage Orders

Defendants violated Labor Code sections 510, 1194, and 1198, along with the "Hours and Days of Work" sections of the applicable IWC Wage Orders with respect to the aggrieved employees.

<u>Labor Code section 510</u> 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." <u>Labor Code section 1194</u> renders it unlawful for an employee to receive less than the legal overtime rate for overtime hours worked in California. <u>Labor Code section 1198</u> 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 <u>IWC Wage Orders</u> further require payment of overtime wages for all overtime hours worked, including the "<u>Hours and Days of Work</u>" sections.

Defendants failed to pay Plaintiff and the aggrieved employees overtime wages and the lawful rate of pay for overtime hours worked, resulting in unpaid overtime wages. As described above, Defendants compelled Plaintiff and other aggrieved employees to work off the clock during meal periods and before and after scheduled shifts. Because of this illegal practice, the aggrieved employees worked hours that should have counted towards overtime, but were not paid any wages for their time and labor.

Moreover, as described in the Unpaid Rest Periods section above, Defendants mischaracterized earned bonuses as "discretionary" and did not include them in aggrieved employees' regular rate of pay for overtime purposes. As a result, Defendants failed to pay overtime wages at the proper wage.

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

Defendants 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."

Defendants failed to comply with California's paid sick leave laws with respect to the aggrieved employees. As described in the preceding sections, Defendants mischaracterized employees' earned bonuses as "discretionary" and did not incorporate them into aggrieved employees' hourly rate for rest period or overtime pay and similarly failed to include them into aggrieved employees' hourly rate for sick leave.

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 Vacation Wages
Violation of Labor Code § 227.3

Defendants violated Labor Code section 227.3 with respect to the aggrieved employees.

Labor Code section 227.3 requires "whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination."

Defendants maintained an unlawful policy and practice of failing to pay all accrued and unused vacation wages upon separation of employment at the lawful rate of pay, resulting in forfeiture of vested vacation time and wages. As described above, Defendants failed to properly record all of Plaintiff and other aggrieved employees' hours worked. As a result, aggrieved employees accrued fewer vacation hours than they actually earned. Further, Defendants failed to pay aggrieved employees at the proper rate of vacation pay because they failed to include earned bonuses and other forms of qualifying renumeration in employees' hourly rate of pay due to their mischaracterization of all bonuses as "discretionary."

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

Defendants violated Labor Code sections 226.7, 512, and 1198, along with the related sections of the IWC Wage Orders with respect to the aggrieved employees.

Labor Code section 512 and the IWC Wage Orders require that employers provide an uninterrupted 30-minute meal period after no more than five hours of work and a second meal period after no more than 10 hours of work. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1049. Labor Code section 226.7 requires that if a meal period is late, missed, short, or interrupted, the employer must pay one additional hour of pay at the employee's "regular rate" of compensation. *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 862 ("We hold that the terms are synonymous: "regular rate of compensation" under section 226.7(c), like "regular rate of pay" under section 510(a), encompasses all nondiscretionary payments, not just hourly wages"). "[T]ime records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage." *Donohue v. AMN Services, LLC* (2021) 11 Cal. 5th 58, 61. Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful. The IWC Wage Orders, including Section 11 (Meal Periods), further require one uninterrupted 30-minute meal period after no more than five hours of work and a second meal period after no more than 10 hours of work and an additional hour of pay at the employee's regular rate of compensation for each workday that a compliant meal period is not provided. Pursuant to Section 11(A) of the IWC Wage Orders, the California Supreme Court has held that the on-duty meal period exception is "exceedingly narrow" and applies only when (1) "the nature of the work prevents the employee from being relieved of all duty" and (2) *both* "the employer and employee have agreed, in writing, to the on-duty meal period." *Augustus v. AMB Security Services, Inc.* (2016) 2 Cal. 5th 257, 266-276 (emphasis added). If these two requirements are not met, then the employer owes the employee one hour of premium pay for each non-compliant meal period taken under the purported on-duty meal arrangement. *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal. 5th 444, 459.

As described above, Plaintiff and other aggrieved employees regularly worked through their meal periods, missed them entirely, took them late, had them interrupted or otherwise cut short because of the volume of work and Defendants' policy and practice of understaffing. For example, Plaintiff often could not leave for a meal period because he was the only one working his shift. Nevertheless, Defendants did not pay Plaintiff and other aggrieved employees all meal period premium wages owed. Occasionally, when Defendants noticed that Plaintiff did not take a meal period, they would call him to allow them to adjust his time and/or fill out a meal waiver form.

To the extent that Defendants ever paid meal period premiums, they were not paid at employees' regular rate of pay because Defendants failed to include all qualifying forms of renumeration. For example, Plaintiff earned a $550 bonus in the period of September 11 to

September 25, 2023. *Fig. 5*. However, during that same period, Defendants paid him meal period premiums at his base hourly rate of pay and did not incorporate his bonus into his meal premium pay whatsoever. *Fig. 6*.

Statement of Earnings For:	Victor Fragosa			Sudberry Properties, Inc
Employee #: 1216 Clock Number: Company Id: 3482S395	Department 1136 Divsion 02 Federal Filing: Married Filing State Filing: Married One	Period Begin: 9/11/2023 Period End: 9/25/2023 Exemptions: Exemptions: 4	Check Date: 9/29/2023 Pay Type: Hourly Additional Tax: Additional Tax:	5465 Morehouse Dr Ste 260 San Diego, CA 92121-4714 858-546-3000

Voucher Id	Check Amount	Gross Pay	Net Pay	Check Message
V20616139	$0.00	$770.00	$456.00	

EARNINGS	*Not included in Totals	^Hrs/Units = Units (Units not included in Totals)				TAXES			DEDUCTIONS		
Description	Rate	Hrs/Units	Dollars	YTD Hrs/Unit	YTD Dollars	Description	Current	YTD	Description	Current	YTD
Bonus			770.00	0.00	11,784.38	SOC SEC EE	47.74	2,690.35	Den125	0.00	102.85

Fig. 5, wage statement for Sept. 11 through Sept. 25, 2023, showing bonus.

Statement of Earnings For:	Victor Fragosa			Sudberry Properties, Inc
Employee #: 1216 Clock Number: Company Id: 3482S395	Department 1136 Divsion 02 Federal Filing: Married Filing State Filing: Married One	Period Begin: 9/11/2023 Period End: 9/25/2023 Exemptions: Exemptions: 4	Check Date: 9/29/2023 Pay Type: Hourly Additional Tax: Additional Tax:	5465 Morehouse Dr Ste 260 San Diego, CA 92121-4714 858-546-3000

Voucher Id	Check Amount	Gross Pay	Net Pay	Check Message
V20616140	$0.00	$1,680.55	$1,480.91	

EARNINGS	*Not included in Totals	^Hrs/Units = Units (Units not included in Totals)				TAXES			DEDUCTIONS		
Description	Rate	Hrs/Units	Dollars	YTD Hrs/Unit	YTD Dollars	Description	Current	YTD	Description	Current	YTD
Regular	21.7900	71.32	1,554.06	1,237.07	26,849.53	SOC SEC EE	103.82	2,794.17	Den125	6.05	108.90
Overtime	32.6850	1.18	38.57	23.95	780.73	MED EE	24.28	653.47	401K Pre Tax	50.42	1,001.76
Meal Premium	21.7900	2.00	82.08	2.00	82.08	FEDERAL WH	0.00	2,592.58			
Blended OT	32.6850		5.84	0.00	111.37	CALIFORNIA WH	0.00	1,205.55			

Fig. 6, wage statement for Sept. 11 through Sept. 25, 2023, showing meal premium.

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.

<u>Unpaid Rest Period Premium Wages</u>
Violation of Labor Code §§ 226.7, 516, 1198; IWC Wage Orders

Defendants violated Labor Code sections 226.7, 516, and 1198, and the related sections of the IWC Wage Orders with respect to Plaintiff and the aggrieved employees.

<u>Labor Code sections 226.7</u> and <u>516</u> and the <u>IWC Wage Orders</u> 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. <u>Labor Code section 226.7</u> 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"). <u>Labor Code section 1198</u> 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 <u>IWC Wage Orders,</u> including <u>Section 12</u> (<u>Rest Periods</u>), further require one uninterrupted 10-minute rest period for each four-hour period (or major faction 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.

As described above, Defendants failed to provide Plaintiff and other aggrieved employees all legally-compliant meal periods because of the volume of work and Defendants' policy and practice of understaffing. Nevertheless, Defendants did not pay Plaintiff and other aggrieved employees all rest period premium wages owed. To the extent that Defendants ever rest meal period premiums, they were not paid at employees' regular rate of pay because Defendants failed to include all qualifying forms of renumeration.

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

Defendants violated Labor Code sections 204 and/or 204b and 210, as applicable, with respect to Plaintiff and the aggrieved employees.

Labor Code section 204(a) requires payment of "all wages" for non-exempt employees at least twice each calendar month. Labor Code section 204(d) states all wages due must be paid "not more than seven calendar days following the close of the payroll period." Labor Code section 204b applies to employees paid on a weekly basis and also requires the payment for all labor within the required pay periods. Labor Code section 210 provides "every person who fails to pay the wages of an employee as provided in Section … 204 … shall be subject to a civil penalty" of $100 for an initial violation and $200 plus 25% of the amount unlawfully withheld for a subsequent violation.

Because Defendants failed to pay all wages and premiums in each pay period in which such wages were earned at the lawful rate, Defendants violated Labor Code section 204 and/or 204b (for weekly employees, as applicable). Defendants violated Labor Code sections 204 and 204b by failing to pay all wages and premiums owed on the regular pay days scheduled each pay period within seven calendar days of the close of the payroll period, as a result of the policies and practices set forth in this notice. As described above, Defendants failed to pay Plaintiff and other aggrieved employees all wages owed for the time they spent working off the clock, and they often underpaid wages and premiums because they did not include earned bonuses into employees' regular rate of pay. Moreover, they often failed to pay meal and rest period premiums altogether. As these amounts remain owing to this day, well after seven days of the close of the payroll period, Defendants have failed to comply with Labor Code section 204.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees as provided under Labor Code section 2699 ($100/$200) per violation per pay period per employee, and Labor Code section 210 ($100/$200) per violation per pay period, along with all other civil penalties permitted by law.

Untimely Payment of Wages Upon Separation of Employment
Violation of Labor Code §§ 201, 202, 203, 256

Defendants violated Labor Code sections 201, 202, and 203 with respect to the aggrieved employees by failing to pay all wages and premiums owed upon termination of employment.

Labor Code section 201 requires that if an employer fires an employee, the wages must be paid immediately. Labor Code section 202 requires that if an employee quits without providing 72 hours' notice, his or her wages must be paid no later than 72 hours thereafter. Labor Code section 202 states that if an employee provides 72 hours' notice, the final wages are payable upon his or her final day of employment. Labor Code section 203 requires an employer who fails to comply with Labor Code sections 201 or 202 to pay a waiting time penalty for each employee, up to a period of 30 days additional compensation.

Defendants failed to pay all wages and premiums owed to aggrieved employees during their employment as set forth in this notice, and also failed to timely pay those amounts to departing employees upon separation of employment. Defendants did not pay waiting time penalties for the late payments. As a result, Defendants violated Labor Code sections 201, 202, and 203. As described above, Defendants failed to pay Plaintiff and other aggrieved employees all wages and premiums owed during their employment. These amounts remain owing to this day and were not paid when aggrieved employees' employment with Defendants ended. Defendants have also not paid aggrieved employees all waiting time penalties owed.

As a result, Plaintiff may recover civil penalties on behalf of aggrieved employees and the State of California as provided under Labor Code sections 256 and/or 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Non-Compliant Wage Statements
Violation of Labor Code §§ 226, 226.3

Defendants violated Labor Code sections 226(a) and 226.3 with respect to the aggrieved employees by failing to furnish itemized wage statements each pay period that accurately list all information required by Labor Code section 226(a)(1) through (9).

Labor Code section 226(a) requires an employer to furnish wage statements to employees semimonthly or at the time of each payment of wages, "an accurate itemized statement in writing showing:" (1) gross wages earned, (2) total hours worked, (3) the number of piece rate units earned and applicable piece-rate in effect, (4) all deductions, (5) net wages earned, (6) the inclusive dates of the pay period, (7) the name of the employee and last four digits of SSN or an EIN, (8) the name and address of the legal name of the employer, and (9) all applicable hourly rates in effect during the pay period and the number of hours worked at each hourly rate by the employee.

Defendants failed to provide accurate itemized wage statements to the aggrieved employees each pay period as a result of the policies and practices set forth in this notice. As a result of the illegal practices and procedures discussed above, Defendants violated Labor Code section 226(a)(1) and (5) by not listing the correct "gross wages earned" or "net wages earned," as the employees earned wages and premiums that were not paid, resulting in an inaccurate reflection, and recording of "gross wages earned" on those wage statements. Likewise, in violation of Labor Code section 226(a)(9), Defendants failed to state on employee wage statements each pay period the applicable hourly rates in effect and the number of hours worked at that rate, as Defendants failed to pay all wages and premiums owed to employees. The amounts stated are instead depreciated and underpaid, resulting in an inaccurate reflection on the pay stub.

Plaintiff and other aggrieved employees cannot promptly and easily determine from the wage statement alone the wages paid or earned without reference to other documents or information. Indeed, these wage statement violations are significant because they sow confusion among Plaintiff and other aggrieved employees with respect to what amounts were owed and paid, at what rates, the number of hours worked, and how those amounts were or should be calculated. The wage statements reflect a false statement of earnings and concealed the underlying problems and underpayments of employee wages.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code sections 226.3 ($250/$1,000) and 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

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

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

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

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

Defendants required Plaintiff and the aggrieved employees to incur costs for work-related purposes without full reimbursement. 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 other aggrieved employees often had to use their personal cell phones, tablets, computers, and other devices for work but Defendants failed to reimburse them.

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

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

Defendants violated Labor Code sections 226, 432, 1198.5, and 1174 with respect to the aggrieved employees.

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

Defendants failed to provide all records upon Plaintiff's request. Although Plaintiff submitted a written request for his entire employee file, including timekeeping records, Defendants failed to produce any of Plaintiff's timekeeping records.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code sections 226.3 ($250/$1,000), 1174.5 ($500), and 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

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

Defendants violated Labor Code sections 1174 and the IWC Wage Orders by failing to maintain accurate employee payroll records with respect to Plaintiff and other aggrieved employees.

Labor Code section 1174 requires that employers maintain accurate "payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments." Section 7(A) of the IWC Wage Orders, which may be enforced through Labor Code section 1198, mandates similar recordkeeping obligations.

Because of the policies and practices set forth in this notice, including the failure to accurately account for wages earned or hours worked, Defendants failed to accurately maintain records in accordance with Labor Code section 1174 and the IWC Wage Orders.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code section 1174.5 ($500) and 2699 ($100/$200), along with all other civil penalties permitted by law.

Unlawful Employment Condition
Violation of Labor Code § 432.5

Defendants violated Labor Code section 432.5 with respect to Plaintiff and other aggrieved employees by requiring that they agree to an unlawful term or condition in writing during their employment.

Labor Code section 432.5 states that "[n]o employer, or agent, manager, superintendent, or officer thereof, shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer, or agent, manager, superintendent, or officer thereof to be prohibited by law."

As shown in *Fig. 1* above, Defendants maintained a written policy and agreement with Plaintiff and the other aggrieved employees that their earned bonuses were merely "discretionary" and therefore would not be included in their rate of pay for the purpose of paying overtime, sick leave, vacation pay, or premiums. Moreover, the "Bonus Plan" is an illusory contract under which Defendants have no obligation to pay bonuses even when the aggrieved employees meet all of the conditions for earning a bonus.

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.

<u>Retaliation</u>
Violation of Labor Code §§ 98.6 and 1102.5

Defendants 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."

After Plaintiff made a complaint to Human Resources regarding his manager withholding an earned bonus / commission from him for taking bereavement leave, Defendants have subjected Plaintiff to harassing behavior and micromanaging which has become so overbearing that Plaintiff has had to take a medical leave of absence.

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.

<u>Attorneys' Fees and Costs</u>
Labor Code § 2699(g)

Plaintiff has been compelled to retain the services of counsel to protect the interests of other aggrieved employees and the State of California. Plaintiff continues to incur attorneys' fees and costs, which are recoverable under California law, including Labor Code section 2699(g).

- LITIGATION HOLD NOTICE –

This letter imposes a duty upon all defendants and their respective employees, officers, directors, executives, attorneys, human resource and payroll personnel, accountants, and other agents to preserve all physical and electronic evidence, including electronically stored information and emails, which relate to the employment of Plaintiff and the aggrieved employees specified in this notice. Evidence includes, but is not limited to, Defendants' written employment and payroll policies and handbooks; the aggrieved employees' personnel files and payroll records, such as paystubs, time records, wage statements, compensation reports, as well as the underlying electronically data in Excel or similar format. Memoranda and internal and external correspondence relating to the subject matter of this notice shall also be maintained. Failure to preserve and retain relevant evidence may constitute spoliation of evidence and result in an adverse inference or sanctions.

If you have any questions regarding the scope of your obligations to preserve evidence, please consult your legal counsel and always err on the side of caution. Periodic or regularly scheduled purges or deletions of information covered by this hold <u>must be suspended immediately</u>.

- 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.

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Please advise if the LWDA intends to investigate any of the factual or legal allegations set forth in this notice. Defendants may contact Plaintiff's counsel with any questions regarding this letter or the forthcoming lawsuit.

Sincerely,

David Lin

Cc Plaintiff Victor Fragosa

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