

1 Elliot J. Siegel (Bar No. 286798)
2 elliot@kingsiegel.com
3 Julian Burns King (Bar No. 298617)
4 julian@kingsiegel.com
5 **KING & SIEGEL LLP**
6 724 South Spring Street, Suite 201
7 Los Angeles, California 90014
8 tel: (213) 465-4802
9 fax: (213) 465-4803

7 Navid Barahmand (Bar No. 340934)
8 navid@barahmandlaw.com
9 **BARAHMAND LAW GROUP**
10 7324 Sepulveda Boulevard, Suite B
11 Van Nuys, CA 91405
12 tel: (818) 574-3355
13 fax: (818) 573-3757
14 Attorneys for Plaintiff and the Aggrieved
15 Employees

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF SAN DIEGO**
15

16 **Serenity Lynn Dunbarr**, individually and on
17 behalf of all similarly situated individuals,

18 Plaintiff,

19 vs.

20 **Pacific Drive-Ins, LLC**, a California Limited
21 Liability Company d/b/a Sonic Drive-In; **Jeffrey**
22 **Gelwix**, an individual; and **Does 1-10**,
23 inclusive;

24 Defendants.

CASE NO. 37-2024-00025683-CU-OE-CTL

(Assigned to the Hon. James A. Mangione;
Department C-75)

**FIRST AMENDED REPRESENTATIVE
COMPLAINT FOR:**

**1) PAGA Penalties (Labor Code §§ 2698, et
seq.)**

1 Plaintiff Serenity Lynn Dunbarr, on behalf of the State of California, solely in her
2 representative capacity as a private attorney general under the Private Attorney General Act of
3 2004, Labor Code § 2699, *et seq.* (“PAGA”), hereby brings this action on behalf of all “aggrieved
4 employees” and alleges as follows, by and through her counsel of record:

5 **PAGA ONLY ACTION**

6 1. PAGA authorizes “an aggrieved employee, acting as a proxy or agent of the state
7 Labor and Workforce Development Agency, to bring a civil action against an employer on behalf
8 of himself or herself and other current or former employees to recover civil penalties for Labor
9 Code violations they have sustained.” *Adolph v. Uber Techs.*, 14 Cal.5th 1104, 1113 (Cal. 2023).

10 2. “PAGA is designed primarily to benefit the general public, not the party bringing
11 the action.” *Id.*, at 1117. “A PAGA claim for civil penalties is fundamentally a law enforcement
12 action. The government entity on whose behalf the plaintiff files suit is the real party in interest.”
13 *Id.* PAGA’s default civil penalties are thus calculated to punish the employer’ for wrongdoing and
14 to deter violations rather than “compensate employees for actual losses incurred.” *Id.*

15 3. Under the authority expressed in *Adolph* and *Balderas v. Fresh Start Harvesting,*
16 *Inc.*, No. B326759, at *1 (Cal. Ct. App. Mar. 20, 2024), Ms. Dunbarr does not bring suit in her
17 individual capacity and does not seek to recover anything through this suit other than civil
18 penalties as permitted under PAGA—she brings this action solely in her representative capacity
19 under the PAGA, on behalf of the State of California, the public, and all aggrieved employees of
20 Pacific.

21 4. To the extent that statutory violations are mentioned for wage violations, Ms.
22 Dunbarr does not seek underlying general and/or special damages for those violations, but only
23 references those predicate violations as part of the State’s claim for civil penalties under PAGA.

24 5. Nothing in this complaint is—or should be construed—as an attempt to seek any
25 relief that would not be available in a PAGA-only proceeding.

26 **THE PARTIES**

27 6. Plaintiff **Serenity Lynn Dunbarr** (“Plaintiff”) is a resident of the County of
28 Sacramento in the State of California. Ms. Dunbarr was employed by Defendants as an hourly,

1 non-exempt employee of Defendants from in or around July 2023 to in or around September 2023.
2 Plaintiff was subsequently rehired in or around March 2024 until in or around April 2024.

3 7. Defendant **Pacific Drive-Ins, LLC** ("Pacific") is a California limited liability company
4 with its principal place of business at 3548 Seagate Way, Oceanside, CA 92056. Upon information
5 and belief, the Pacific employs at least 100 employees.

6 8. Defendant **Jeffrey Gelwix** ("Mr. Gelwix") is an individual who, on information and
7 belief, resides in the County of San Diego. Upon information and belief, Mr. Gelwix is the Managing
8 Member of Pacific. Per Labor Code § 558.1, since Mr. Gelwix is a managing agent, director, and/or
9 officer of Pacific and, upon information and belief, as he caused or directed the acts described
10 herein, he is personally liable for the penalties sought under PAGA for predicate violations of the
11 Labor Code.

12 9. The true names and capacities of the defendants named herein as Does 1 through
13 10, inclusive (together with Pacific and Mr. Gelwix, "Defendants"), are unknown to Plaintiff at this
14 time. Accordingly, Plaintiff brings this suit against them by fictitious names pursuant to California
15 Code of Civil Procedure section 474. Plaintiff believes that each of the Doe Defendants is a
16 California resident and/or does substantial business in the State of California. At all relevant times,
17 Does 1 through 10 were acting within the course and scope of their employment and agency with
18 Defendants. Plaintiff is informed and believes that each Doe Defendant is responsible for the
19 injuries and damages alleged herein. Plaintiff will amend this complaint to reflect Does 1 through
20 10's true names and capacities when they have been determined.

21 10. Except as otherwise noted herein, Defendants participated in the acts alleged
22 herein and/or were the agents, servants, employees, or representatives of the other Defendants.
23 At all times relevant to this complaint, Defendants were acting within the course, scope, and
24 authority of their agency and employment such that the acts of one defendant are legally
25 attributable to the other Defendants. Defendants, in all respects, acted as employers and/or joint
26 employers of Plaintiff and Aggrieved Employees in that each of them exercised control over the
27 wages, hours, and/or working conditions of Defendants' hourly non-exempt employees.
28

JURISDICTION AND VENUE

11. The court has jurisdiction over all causes of action in this complaint pursuant to Article VI, section 10 of the California Constitution. No federal question is at issue; Plaintiff relies solely on California statutes and law, including the Labor Code, IWC Wage Orders, Code of Civil Procedure, and the Business & Professions Code.

12. Venue as to Defendants is proper in this Superior Court pursuant to California Code of Civil Procedure section 395. The unlawful acts alleged have directly affected Plaintiff and similarly situated employees within and throughout San Diego County.

GENERAL ALLEGATIONS

13. At all times relevant to this complaint, Defendants had a company-wide policy and practice of scheduling employees for shifts where they were dismissed early without working at least half their usual or scheduled days' work after physically reporting to Defendants' premises. However, despite not being put to work or being furnished with less than half of their usual or scheduled day's work, these employees were not paid reporting time pay as required by law, but only paid for the few minutes that they actually worked prior to being dismissed.

14. Defendants also had a company-wide policy and practice of scheduling employees for "on-call" shifts. When scheduled for an on-call shift, employees were not guaranteed to be suffered or permitted to work on any given shift. Rather, employees were required to physically report in to learn if they would be put to work for any given on-call shift.

15. On multiple occasions, employees who reported in were dismissed without further work or without working at least at least half their usual or scheduled days' work after physically reporting to Defendants' premises.

16. Employees placed on on-call shifts were prevented from scheduling their time as they pleased as they were required to block off days in advance as days they might be called into work.

17. Employees were also not paid for time placed on-call, nor were they provided with reporting time pay for on-call shifts that were canceled by Defendants after employees reported into work as required by law.

1 18. Further, as a matter of uniform and systemic policy, Defendants failed to authorize
2 and/or permit non-exempt employees to take bona fide meal and rest breaks pursuant to Labor
3 Code § 226.7. Upon information and believe, Aggrieved Employees, including Plaintiff, were
4 required to skip or interrupt their meal and/or rest periods to service customers, service the drive-
5 in, otherwise interrupt or cut short their meal and/or rest periods, or remain on duty and under
6 Defendants' control during their meal and/or rest periods to perform other tasks at Defendants'
7 directions due to Defendants' policies and practices, including their scheduling and staffing
8 practices and policies.

9 19. In failing to authorize and/or permit meal and rest periods, Defendants have also
10 implemented a uniform policy of denying compensation in lieu of meal and rest periods to its non-
11 exempt employees, notwithstanding its actual knowledge that such employees were uniformly
12 denied compliant meal and rest periods.

13 20. Defendants further failed to compensate employees for all time worked time when
14 employees were forced to interrupt and/or work through their meal periods but were clocked out
15 under Defendants' time-keeping system (and therefore treated as not working). This resulted in
16 employees being denied both straight time and overtime pay, where applicable, for the time
17 during which they were on call or under Defendants' control despite being off the clock for
18 timekeeping purposes.

19 21. Additionally, as a matter of uniform and systemic policy, Defendants required non-
20 exempt employees to utilize their personal cell phones for work-related purposes, including
21 answering texts and calls from their supervisors while at work or on a break and general
22 administrative matters. Defendants failed to compensate their non-exempt employees for
23 reasonable costs associated with utilizing their personal cell phones for work-related purposes.

24 22. As a matter of uniform and systemic policy, Defendants required non-exempt
25 employees to purchase work-related uniforms, including black pants and non-slip shoes,
26 necessary for the performance of their work duties without reimbursing those employees for the
27 costs associated with their uniform purchases.

28 23. As a matter of uniform and systemic policy, Defendants failed to provide its non-

exempt employees with accurate itemized wage statements in accordance with California's Labor Code. Upon information and believe, Defendants failed to furnish Plaintiff, or Aggrieved Employees, either semimonthly or at the time of each payment of wages, either as a detachable part of the check or separately, an accurate, itemized statement in writing showing pick pay, gross wages earned, all deductions, and the net wages earned by Plaintiff for the inclusive dates for which the Plaintiff worked.

FIRST CAUSE OF ACTION

California Labor Code §2699, et seq.

Private Attorneys General Act ("PAGA") Penalties

(Plaintiff and Aggrieved Employees Against Defendants)

24. Standing. Under the California Private Attorneys General Act ("PAGA"), Labor Code § 2698, *et seq.*, an aggrieved employee may bring a representative action as a private attorney general, on behalf of herself and other current or former employees to recover penalties for an employer's violations of the Labor Code and IWC Wage Orders.

25. Ms. Dunbarr, by nature of her employment with Defendants, is an aggrieved employee for purposes of this Complaint with standing to bring an action under PAGA.

26. Plaintiff, on behalf of herself, the State of California, and all other Aggrieved Employees, brings this representative action pursuant to Labor Code § 2699, *et seq.*, seeking civil penalties for Defendants' violation of Labor Code §§ 201, 202, 203, 204, 206.5 226, 226.3, 226.7, 510, 512, 558, 1182.12, 1174, 1194, 1194.2, 1197, 1197.1, 1198¹, 1199, 1401, and 2802 as described herein, plus attorneys' fees and costs.

27. Ms. Dunbarr does not bring suit in her individual capacity and does not seek to recover anything through this suit other than civil penalties as permitted under PAGA—he brings

¹ Defendants also denied Aggrieved Employees the right to suitable seating. Wage Order No. 5 provides that "[a]ll working employees *shall* be provided with suitable seats when the nature of the work reasonably permits the use of seats." *Id.* § 11050(14)(A) (emphasis added). "When the employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats *shall* be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties." *Id.* § 11050(14)(B).

1 this action solely in her representative capacity under the PAGA, on behalf of the State of
2 California and all aggrieved employees of Pacific.

3 28. Entitlement to Penalties. Per Labor Code § 2699(f), and based on the foregoing,
4 Plaintiff and Aggrieved Employees are entitled to civil penalties in an amount to be shown at trial
5 subject to the following formula: (a) In an amount set forth as a civil penalty in the underlying
6 statute; or (b) \$100 per initial violation per employee per pay period, and \$200 for each
7 subsequent violation per employee per pay period.

8 29. These penalties may be stacked separately for each of Defendants' violations of the
9 Labor Code. *See, e.g., Hernandez v. Towne Park, Ltd.*, No. CV 12-02972, 2012 WL 2373372, at *17,
10 n.77 (C.D. Cal. June 22, 2012) ("[F]ederal courts applying California law have concluded that
11 stacking is appropriate."); *see also O'Connor v. Uber Techs., Inc.*, No. 13-CV-03826-EMC, 2016 WL
12 3548370, at *7 (N.D. Cal. June 30, 2016) ("Finally, Plaintiff ignores the potential for stacking of
13 PAGA penalties related to wage-and-hour claims other than the gratuities and expense
14 reimbursement claim, i.e., meal and rest breaks, minimum wage and overtime, and workers'
15 compensation.").

16 30. These penalties shall be allocated seventy-five percent to the Labor and Workforce
17 Development Agency and twenty-five percent to the affected employees.

18 31. The Aggrieved Employees are entitled to civil penalties under PAGA arising from
19 the following predicate violations of the Labor Code.²

20 32. *Failure to Pay Minimum Wage for All Hours Worked.* California law requires
21 employers to compensate employees for all time that an employee is "suffered or permitted to
22 work," which includes all time "when any employer 'directs, commands or restrains' an
23 employee." *See, e.g., Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 583 (2000).

24 33. The Wage Orders also require that each workday an employee is required to report
25 for work and does report, but is not put to work or is furnished less than half said employee's
26

27 ² To the extent that statutory violations are mentioned for wage violations, Plaintiff does
28 not seek underlying general and/or special damages for those violations, but only references them
as part of the State's claim for civil penalties under PAGA for those predicate violations.

1 usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's
2 work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's
3 regular rate of pay, which shall not be less than the minimum wage.

4 34. Defendants failed to compensate Plaintiff and the Class for all hours worked
5 because Defendants had a policy and/or practice whereby they required and/or pressured Class
6 Members to work under Defendants' control while off-the-clock, including but not limited to
7 forcing or requiring Class Members to work while they were clocked out for their meal periods.

8 35. Defendants further failed to pay Plaintiff and Class Members any wages for time
9 engaged in this off-the-clock work.

10 36. Defendants implemented other uniform policies and practices resulting in off-the-
11 clock work and underpayment of wages, including requiring Class Members to service the drive-
12 in while off the clock. Defendants also failed to pay employees who were scheduled to "on-call"
13 shifts and were required to remain available to be summoned to work during the shift for the
14 entire shift period. This on-call shift time was compensable either because it was "controlled" time
15 or because it was required to be compensated as reporting time pay. Defendants further failed to
16 pay reporting time to employees who were directed to show up to work via phone or in person
17 but not furnished with at least half their usual or scheduled day's work. *See Ward v. Tilly's, Inc.*,
18 31 Cal. App. 5th 1167, 1183 (2019), *review denied* (May 15, 2019).

19 37. *Failure to Pay Required Overtime.* California Labor Code §§ 510 and 1198 provide
20 that it is unlawful to employ persons without compensating them at a rate of pay either time-and-
21 one-half or two-times that person's regular rate of pay, depending on the number of hours worked
22 by the person on a daily or weekly basis.

23 38. Plaintiff and Aggrieved Employees who work more than eight hours in a day or
24 more than forty hours in a workweek are to be paid at the rate of time and one-half (1½) for all
25 hours worked in excess of eight hours in a day or more than forty hours in a workweek. An
26 employee's regular rate of pay includes all remuneration for employment paid to, or on behalf of,
27 the employee, including commissions, non-discretionary bonuses and incentive pay. *Alvarado v.*
28 *Dart Container Corp.*, 4 Cal. 5th 542, 573 (2018), as modified (Apr. 25, 2018).

39. Plaintiff and other Class Members were not paid overtime premiums for all of the hours they worked in excess of eight hours in a day, in excess of twelve hours in a day, in excess of eight hours on the seventh consecutive day of work in a workweek, and in excess of forty hours in a week.

40. *Failure to Provide Compliant Meal Periods.* Labor Code section 226.7, 512(a), and 1198 provide that no employer shall require an employee to work during any meal period mandated by an applicable order of the IWC. “An off-duty meal period, therefore, is one in which the employee is relieved of all duty during the 30-minute meal period . . . an employer’s obligation is to provide an off-duty meal period: an uninterrupted 30–minute period during which the employee is relieved of all duty.” *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1035 (2012).

41. Defendants’ policies and practices served to deprive the Aggrieved Employees of legally compliant 30-minute breaks free of employer control and/or relieved of all duties.

42. Upon information and belief, employees were required to skip breaks, interrupt their breaks, cut them short, take them after the fifth hour of work, work through them, or remain under Defendant’s control during breaks due to Defendants’ policies and practices.

43. *Failure to Provide Compliant Rest Periods.* Labor Code § 226.7, 512(a), and 1198 provide that no employer shall require an employee to work during any rest or meal period mandated by an applicable order of the IWC.

44. Employers must authorize and permit employees to be relieved of all duty during their rest and meal periods: “A rest period, in short, must be a period of rest.”³ *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal.5th 257, 273 (2016).

45. Employees must also be free to leave the employer’s premises during their rest period. *See id.* at 270; *see also* Department of Industrial Relations, “Rest Periods,” *available at*

³ Employees must also be free to leave the premises. *Augustus*, 2 Cal. 5th at 270; *see also* Department of Industrial Relations, “Rest Periods/Lactation Accommodations,” *available at* https://www.dir.ca.gov/dlse/FAQ_RestPeriods.htm (“Q. Can my employer require that I stay on the work premises during my rest period? A. No, your employer cannot impose any restraints not inherent in the rest period requirement itself.”)

1 https://www.dir.ca.gov/dlse/FAQ_RestPeriods.htm ("Q. Can my employer require that I stay on
2 the work premises during my rest period? A. No, your employer cannot impose any restraints not
3 inherent in the rest period requirement itself.").

4 46. On information and belief, Defendants failed to authorize or permit all required
5 compliant paid rest periods for shifts worked by Aggrieved Employees by requiring them to skip
6 rest periods, interrupt rest periods, work through rest periods, or remain on the premises during
7 rest periods.

8 47. *Failure to Provide and Maintain Compliant Wage Statements.* Labor Code § 226
9 requires employers to furnish employees with an accurate, itemized statement in writing showing,
10 among other things, (1) gross wages earned; (2) total hours worked by the employee (for hourly-
11 paid, non-exempt employees); (3) all deductions; (4) net wages earned; (5) the inclusive dates of
12 the period for which the employee is paid; (6) the name of the employee and the last four digits
13 of her or her social security number; (7) the name and address of the legal entity that is the
14 employer; and (8) all applicable hourly rates in effect during the pay period and the corresponding
15 number of hours worked at each hourly rate by the employee.

16 48. At all times relevant to this complaint, Defendants' failure to pay premium wages
17 for missed meal and/or rest periods further ensured that Plaintiff and Aggrieved Employees' wage
18 statements inaccurately reflected gross and net wages earned. Defendants also failed to list all
19 required reporting time pay or on call pay on wage stubs. Defendants' failure to compensate all
20 hours worked, earned premium pay, and/or all required overtime hours and rates further left the
21 wage statements they provided to employees to be inaccurate.

22 49. Defendants have also failed to keep accurate payroll records for Plaintiff and
23 Aggrieved Employees in accordance with Labor Code § 1174. Defendants' failure to keep and
24 maintain accurate payroll records reflecting hours worked and wages earned has impeded Plaintiff
25 and Aggrieved Employees' ability to calculate unpaid wages earned.

26 50. Defendants knowingly and intentionally failed to comply with Labor Code § 226,
27 causing injury and damages to Plaintiffs and Aggrieved Employees.

28 51. *Failure to Reimburse Necessary Business Expenses.* Labor Code § 2802 provides that

1 “[a]n employer shall indemnify her or her employee for all necessary expenditures or losses
2 incurred by the employee in direct consequence of the discharge of her or her duties, or of her or
3 her obedience to the directions of the employer.” Lab. Code § 2802.

4 52. On information and belief, Defendants required Aggrieved Employees to use their
5 personal cellphones in the regular course of employment by answering texts and/or calls from
6 their supervisors for purposes of scheduling and re-scheduling future work, being assigned tasks,
7 and general administrative matters but failed to reimburse them for this usage. *See Cochran v.*
8 *Schwan’s Home Serv., Inc.*, 228 Cal. App. 4th 1137, 1144 (“We hold that when employees must
9 use their personal cell phones for work related calls, Labor Code section 2802 requires the
10 employer to reimburse them. Whether the employees have cell phone plans with unlimited
11 minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell
12 phone bills.”).

13 53. On information and belief, Defendants required Aggrieved Employees to purchase
14 work-related uniforms, including black pants and non-slip shoes, necessary for performance of
15 their work duties without reimbursing those employees for the costs associated with their uniform
16 purchases.

17 54. Procedural Requirements Met. Plaintiff has satisfied all prerequisites to serve as a
18 representative to enforce California’s labor laws including without limitation the penalty
19 provisions identified above. Specifically, on May 30, 2024, Plaintiff gave written notice to the
20 LDWA and to Defendants of Defendants’ violations. *See Exhibit A.* Plaintiff did not receive notice
21 from the LWDA that it would be investigating the complaint nor did Plaintiff receive notice from the
22 LWDA that it was declining to investigate within the 65-day period under Labor Code § 2699.3. On
23 July 25, 2024, the sixty-five-day notice period expired as to all defendants. Since the LWDA took
24 no steps within the prescribed time to intervene, Plaintiff has exhausted all required
25 administrative remedies required to seek penalties under PAGA. *See* Lab. Code § 2699.3(a)(2).

26 55. Plaintiff—solely as a representative of the People of the State of California—is
27 entitled to seek any and all penalties otherwise capable of being collected by the Labor
28 Commission or Department of Labor Standards Enforcement (“DLSE”) on behalf of the State of

1 California through this Action.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiff respectfully prays for judgment as follows:

- 4 A. For civil penalties under PAGA to be determined by trial;
- 5 B. For pre- and post-judgment interest as allowed;
- 6 C. For preliminary and permanent injunctive relief;
- 7 D. For reasonable attorney's fees and costs and expert fees and costs; and
- 8 E. For such other relief as this Court deems just and proper.
- 9

10 Dated: July 25, 2024

Respectfully submitted,

11 **KING & SIEGEL LLP**

12

13 By: /s/ Elliot Siegel
14 Elliot J. Siegel
15 Attorneys for Plaintiff

16 **BARAHMAND LAW GROUP**

17

18 By: /s/ Navid Barahmand
19 Navid Barahmand
20 Attorneys for Plaintiff

21

22

23

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Exhibit A

King & Siegel LLP

Julian Burns King
julian@kingsiegel.com

Lawrence Beall
lawrence@kingsiegel.com

Erum Siddiqui
erum@kingsiegel.com

Elliot J. Siegel
elliot@kingsiegel.com

Rachael Sauer
rsauer@kingsiegel.com

Priscilla Hernandez
priscilla@kingsiegel.com

Julia Crawford
jcrawford@kingsiegel.com

Robert J. King
robert@kingsiegel.com

Andrea Obando
andrea@kingsiegel.com

Tiffany Nguyen
tiffany@kingsiegel.com

May 30, 2024

Original filed online via the LWDA's PAGA Claim Notice Portal

Labor & Workforce Development Agency

1515 Clay Street, Ste. 801
Oakland, CA 94612

Copy Sent via certified mail to:

PACIFIC DRIVE-INS, LLC
c/o Madden, Jones, Cole & Johnson
3010 Old Ranch Parkway, Suite 450
Seal Beach, California 90740

PACIFIC DRIVE-INS, LLC
c/o Jeffrey Gelwix
3548 Seagate Way, Suite 100
Oceanside, California 92056

Re: Serenity Lynn Dunbarr v. Pacific Drive-Ins, LLC et al.

To Whom it May Concern:

We represent Serenity Lynn Dunbarr ("Plaintiff") against defendants Pacific Drive-Ins, LLC and Jeffrey Gelwix ("Defendants") in a lawsuit filed against Defendants in San Diego County Superior Court (the "Action"). A copy of the Complaint filed in the Action is enclosed as **Exhibit A**.

Together with this correspondence, the enclosed Complaint serves as notice pursuant to Labor Code § 2699.3, *et seq.* that we intend to prosecute representative claims for civil penalties under the Private Attorney's General Act ("PAGA") on behalf of those of Defendants' employees employed from one year prior to filing of this Notice through trial (the "Aggrieved Employees") for the Labor Code violations asserted in the Complaint. *See* Cal. Lab. Code §§ 2699, *et seq.*

As set forth in greater detail in the Complaint, Defendants violated their obligations under the California Labor Code by (1) failing to pay minimum wage for all hours worked; (2) failing to pay required overtime pursuant to Lab. Code §§ 510, 1198 (3-4) failing to provide rest and meal breaks pursuant to Lab. Code § 226.7(b); (5) failing to reimburse employees for business

expenditures pursuant to Lab. Code §2802; and (6) failing to provide and maintain records under Lab. Code §§ 226, 432, and 1198.5 due to Defendant's practices and policies.

Please feel free to contact us with any questions.

Sincerely,

Elliot J. Siegel
Elliot J. Siegel
KING & SIEGEL LLP