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County of Alameda
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Attorneys for Plaintiff,
SEBASTIANA IXQUIACTAP, and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA
(*UNLIMITED JURISDICTION*)

SEBASTIANA IXQUIACTAP,

Plaintiff,

vs.

TWS RESTAURANT CORPORATION; COASTAL VALLEY ENTERPRISES; JOSEPH N. RUBIN; PAYRIGHT PAYROLL SERVICES INC.; and DOES 1 to 25, inclusive,

Defendants.

Case No.: 24CV094320

COMPLAINT FOR DAMAGES FOR:

1) **PRIVATE ATTORNEYS GENERAL ACT (“PAGA”);**

COMES NOW, Plaintiff, SEBASTIANA IXQUIACTAP (hereafter "Plaintiff"), and alleges as follows:

PARTIES, JURISDICTION, VENUE

1. Jurisdiction and Venue are proper in this Court and this action is properly filed in the County of Alameda in this judicial district because Defendants TWS RESTAURANT CORPORATION; COASTAL VALLEY ENTERPRISES; JOSEPH N. RUBIN; PAYRIGHT PAYROLL SERVICES INC.; and DOES 1 to 25, inclusive (hereafter "TWS" or "Defendants") do business in the County of Alameda and because Defendants' obligations and liabilities arise therein, and because the work that was performed by Plaintiff in the County of Alameda is the subject of this action. Moreover, Plaintiff's damages sought herein exceed $35,000.

2. Plaintiff is a female resident of the County of Santa Clara, State of California.

3. Plaintiff is informed and believes that at all times herein mentioned, Defendant TWS RESTAURANT CORPORATION is and was a California corporation, doing business in Santa Clara County, California, and which employed Plaintiff.

4. Plaintiff is informed and believes that at all times herein mentioned, Defendant COASTAL VALLEY ENTERPRISES is and was a California corporation, doing business in Santa Clara County, California, and which employed Plaintiff

5. Defendant JOSEPH N. RUBIN is a citizen of California based on Plaintiff's information and belief.

6. In relevant part, Labor Code section 558.1 states:

> (a) Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.
>
> (b) For purposes of this section, the term "other person acting on behalf of an employer" is limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term "managing agent" has the same meaning as in subdivision (b) of Section 3294 of the Civil Code.

7. Plaintiff is informed and believes and thereon alleges that JOSEPH N. RUBIN is a natural person and an owner, director, officer, and/or managing agent of Defendants TWS

RESTAURANT CORPORATION and COASTAL VALLEY ENTERPRISES, who directly or indirectly, or through an agent or any other person, employed or exercised control over the wages, hours, or working conditions of Plaintiff and the aggrieved employees (as defined below). Therefore, he is liable to Plaintiff and the aggrieved employees for his violations of, or causing Defendants to violate, Labor Code sections 203, 226, 226.7, 1193.6, 1194, 2802, and the Wage Order (no. 5) pursuant to Labor Code section 558.1.

8. The "aggrieved employees" are all current and former non-exempt or hourly paid employees who worked for Defendants at any of their California restaurant locations during the relevant time period pursuant to California Labor Code section 2698, et. seq., the Labor Code Private Attorneys General Act of 2004 ("PAGA").

9. Plaintiff is ignorant of the true names and capacities, whether individual, corporate, or associate of those defendants fictitiously sued as DOES 1 to 25, inclusive, and so Plaintiff sues them by these fictitious names. Plaintiff is informed and believes that each of the DOE defendants, numbers 1 to 25, reside in the State of California and are in some manner responsible for the conduct alleged herein. Upon discovering the true names and capacities of these fictitiously named defendants, Plaintiff will amend this complaint to show the true names and capacities of these fictitiously named defendants.

10. Unless otherwise alleged in this complaint, Plaintiff is informed, and on the basis of that information and belief, alleges that at all times herein mentioned, each of the remaining codefendants, in doing the things hereinafter alleged, were acting within the course, scope, and under the authority of their agency, employment, or representative capacity, with the consent of his/her codefendants.

GENERAL ALLEGATIONS

11. Plaintiff started working for Defendants on or around September 11, 2021 as a cashier at its El Pollo Loco restaurant located at 24119 Mission Blvd., Hayward, California 94544. Plaintiff is and was classified as an hourly, non-exempt employee. Plaintiff's last rate of pay was $21.50 per hour. Plaintiff generally worked 5 days per week at approximately 8 hours per day. In addition to cashier duties, Plaintiff also packed orders, helped in the burrito station, and prepped

some ingredients like chicken. Plaintiff stopped working for Defendants on or around June 2, 2024. Defendants terminated Plaintiff's employment on or around June 5, 2024.

12. It is Plaintiff's position that TWS has violated numerous Labor Code Sections against Plaintiff and other similarly situated aggrieved employees, who include all non-exempt, hourly employees who worked for TWS at their various locations/restaurants in the State of California during the relevant PAGA period.

13. TWS violated Labor Code § 1194, 1194.2, 1197, and 1197.1 because it failed to pay Plaintiff and other similarly situated aggrieved employees for all hours worked, including the statutory minimum wage for all hours worked and for "off the clock" work. This is so because TWS had a company policy wherein they would disproportionately round down the number of hours worked, resulting in "time shaving" and further resulting in aggrieved employees not being paid for all hours worked. In addition, Plaintiff worked "off the clock" both before her scheduled shift and after her scheduled shift. Plaintiff would arrive approximately 10 minutes early once or twice per week in order to open the store and take care of the products that had arrived to the store. This latter work was done prior to formally clocking in for work. In terms of after her scheduled shifts, Plaintiff would clock out and stay for about 10 to 15 minutes in order to have the new products that were delivered ready for the following workday. Since Plaintiff was not compensated for the latter described duties and time, it would be akin to a minimum wage violation. Furthermore, and to the extent that Plaintiff worked through her meal periods while clocked out for lunch, the latter would also be a minimum wage violation. Moreover, TWS failed to provide its employees with proper and accurate reporting time pay.

14. Due to the above "off the clock" violations, TWS also violated Labor Code §510 because it failed to pay Plaintiff and other aggrieved employees overtime compensation, even though they worked more than 8 hours per day, 12 hours per day, and/or 40 hours per week throughout their employment. Plaintiff's and other aggrieved employees' actual work hours entitled them to overtime compensation, however, TWS did not compensate its hourly, non-exempt employees with the correct amount of overtime due to the "off the clock" work and time shaving as described above. Furthermore, TWS failed to include bonuses/incentive payments

(which were received by Plaintiff approximately twice per year) in calculating employees' regular rate of pay for use in deciphering the correct overtime rate of pay. Additionally, the incentive, shift differential, and bonus payments were also not factored into employees' regular rate for purposes of receiving meal and rest break premiums per the *Ferra v. Loews* case.

15. TWS also violated Labor Code § 226.7 and the appropriate Industrial Welfare Commission Wage Order no. 5 because it failed to provide Plaintiff and other similarly situated aggrieved employees with 10-minute rest periods for every four hours of work, or majority portion thereof, throughout their employment. TWS did not completely relieve Plaintiff and others of all duty during said rest periods. TWS did not pay to Plaintiff and others one additional hour of pay at Plaintiff's regular rate of compensation for each workday that one or more statutory rest periods was not provided. It was not part of the company policy for employees such as Plaintiff to take even one rest break per shift. In fact, Plaintiff did not receive a single timely, uninterrupted rest break throughout her entire employment tenure. Moreover, it would not have been possible for employees such as Plaintiff to take such rest breaks due to being understaffed and due to a heavy workload, especially in the fast-paced restaurant environment. Rest breaks were not discussed and were not taken. As such, the culture as well as the policies and procedures of TWS did not lend itself to the employees receiving consistent statutory rest breaks wherein they were relieved of all work duties. The environment at TWS was not conducive to receiving statutory rest breaks under California law and timely, statutory rest breaks were not authorized or enforced.

16. TWS violated Labor Code §§ 512 and 226.7 and the appropriate Industrial Welfare Commission Wage Order no. 5 because it failed to provide hourly, non-exempt employees, including Plaintiff and others, the requisite 30-minute, uninterrupted meal periods for every five (5) hours of work throughout their employment. TWS did not completely relieve Plaintiff and other employees of all duty during said meal periods. TWS did not pay to Plaintiff and its hourly, non-exempt employees one additional hour of pay at their regular rate of compensation for each workday that one or more statutory meal periods was not provided. Like the rest breaks, receiving a consistent thirty-minute <u>uninterrupted</u> and <u>timely</u> meal break was not part of the company

culture and was not enforced by TWS. In fact, during every work week, Plaintiff would have to clock out for her meal (to show compliance on paper), continue working through her meal period, and then clock back in. During the latter situation, Plaintiff would not get a chance to eat anything during her meal break. Moreover, Plaintiff's meal periods were also interrupted by her manager (would ask her questions about customer that had called) and also by employees who would interrupt to ask her to help with orders or with the cash register. To the extent that other aggrieved employees even received meal periods, they were either late or consistently interrupted by work obligations as well. Consequently, it was the normal practice and custom of TWS not to authorize, permit, and enforce timely statutory meal periods. If TWS had Plaintiff sign a meal period waiver, it would not be valid and enforceable since Plaintiff and others generally worked more than a 5-hour shift.

17. Furthermore, under California law, however, employees must make an affirmative decision <u>every day</u> regarding whether to waive their meal periods. August 13, 2003 DLSE Opinion Letter ("The decision to forego a meal period may not, therefore, be based on a specific requirement of the employer or on a policy or practice which could reasonably be perceived to be a condition of employment. Therefore, blanket "waivers" of meal periods …whether written or oral, will not be considered valid."). If TWS had Plaintiff sign an on-duty meal period agreement wherein Plaintiff agreed to work through the meal periods, it would be invalid and unenforceable because the nature of Plaintiff's job does not and did not prevent her from taking a meal period and the company could have hired "breakers" to relieve Plaintiff of her job duties so that she can actually take a timely, uninterrupted meal period. Moreover, any such "on duty" meal period agreement did not allow for Plaintiff to revoke such an agreement even if it was signed. As such, Plaintiff and others did not always receive statutory, timely meal periods during their employment. To the extent that TWS argues that employees receive meal break premium pay for missed meal periods, <u>that argument is inconsequential for PAGA penalty purposes since the PAGA penalties are for the violations themselves, irrespective of whether an employee received the premium payment for a missed, short, or interrupted meal period.</u> In *Kirby v. Immoos Fire Protection, Inc.*, the Court stated, "section 226.7 does not give employers a lawful choice between

providing *either* meal and rest breaks *or* an additional hour of pay." *See Kirby v. Immoos Fire Protection, Inc.*, (2012) 53 Cal.4th 1244, 1256 (emphasis in original). Thus, the extra hour of pay does not excuse the violation; the employer has still committed a violation even if the remedy for the violation has been paid. *See Wert v. U.S. Bancorp*, (S.D. Cal. Mar. 22, 2016, 2016 WL 1110302 at *4). As such, the work environment and culture at TWS was not conducive to receiving consistent, timely, statutory meal breaks under California law. Moreover, any meal or rest break premiums paid were not compensated at the weighted average regular rate, inclusive of bonuses and/or incentive payments as well as overtime compensation.

18. Furthermore, during the relevant time period, and due to the above labor code violations, TWS failed to pay Plaintiff and other similarly situated aggrieved employees all wages due to them within any time period specified by California Labor Code section 204. Since Plaintiff was not compensated for his "off the clock" work and since Plaintiff did not receive meal and rest break premiums, Plaintiff would still be owed wages pursuant to Labor Code Section 204. TWS was also in violation of California Labor Code section 226(a) by failing to include pertinent information on the wage statements, including but not limited to, the correct hourly rate, all hours worked, overtime hours worked, correct overtime pay, gross wages earned, net wages earned, premium pay for missed meal and rest breaks, all deductions, the correct start and end of the pay period, all employee identifying information, the correct and complete name and address of the legal employer, and reimbursement for business expenses, among others. As such, TWS did not provide Plaintiff and other similarly situated aggrieved employees with complete, accurate itemized wage statements.

19. During the relevant time period, TWS also failed to keep accurate and complete payroll records showing the actual hours worked per day and the wages paid to Plaintiff and others pursuant to California Labor Code sections 1174(d).

20. TWS also violated Labor Code § 203 because it willfully failed to pay Plaintiff and other similarly situated aggrieved employees earned and due wages upon separation of employment, either immediately upon involuntary termination, or within 72 hours of resignation. These earned but unpaid wages include compensation for all hours worked, including minimum

wages, overtime compensation, and premium pay for missed meal and rest breaks.

21. During the relevant time period, Plaintiff and other aggrieved employees incurred necessary, business-related expenses and costs that were not reimbursed by TWS. These costs include, but are not limited to uniforms, use of personal cell phones for work purposes, and masks. In terms of personal cell phone use, Plaintiff was contacted on her personal cell phone and was given work instructions or was provided additional information regarding orders even if Plaintiff was already at home (yet another example of "off the clock" work). Accordingly, TWS was in violation of California Labor Code sections 2800 and 2802.

22. Additionally, TWS violated Labor Code Section 351 and 353 by taking some of the tips meant for employees and also deducting the tips from employees' earned wages. TWS also deducted the credit card fee from employees' tips and did not timely provide the credit card and even cash tips to aggrieved employees. As such, aggrieved employees were not given accurate tips to which they were entitled.

23. Furthermore, TWS did not provide proper and correct/accurate sick pay (inclusive of all bonuses/shift differentials/incentive payments) that was also delineated on employee pay stubs and also failed to provide proper sick leave in violation of Labor Code sections 233 and 246. Moreover, there were no suitable seating/rest break facilities for the employees pursuant to Wage Order no. 5-2001 as employees did not have a designated break area and would have to take meal breaks at the same table as customers.

24. Accordingly, Plaintiff now seeks civil penalties on behalf of herself and the aggrieved employees based on Defendants' alleged violations of the California Labor Code and the Wage Order.

FIRST (AND ONLY) CAUSE OF ACTION

PRIVATE ATTORNEYS GENERAL ACT

Representative Claim for PAGA penalties under California Labor Code sections 201, 202, 203, 204 and/or 204b, 226, 226.3, 226.7, 233,246, 351, 353, 510, 512, 558, 558.1, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 2698, 2699, 2800, 2802, and the applicable Industrial Welfare Commission Wage Order No. 5-2001

(Against All Named Defendants and all DOE Defendants)

25. Plaintiff re-alleges and incorporates by reference each and every allegation in

paragraphs 1 through 24, inclusive, of this Complaint as though fully set forth herein.

26. Pursuant to law, on June 17, 2024 and July 13, 2024, Plaintiff provided the required written notice to the California Labor & Workforce Development Agency (LWDA) and Defendants of the specific violations of the California Labor Code that Defendants and DOE defendants have violated and continue to violate.

27. Pursuant to California Labor code section 2699.3, no response was received from the LWDA within 65 days of the postmark date of the above-alleged letter.

28. Plaintiff therefore has exhausted all administrative remedies required of her under California Labor Code sections 2698, 2699, and 2699.3, and, as a result, may prosecute this cause of action and pursue penalties in a representative action for Defendants' violations of the Labor Code.

29. Pursuant to California Labor Code section 2699, any provisions of the Labor Code that provides for a civil penalty to be assessed and collected by the LWDA or any of its departments, divisions, commissions, boards, agencies, or employees for violation of the 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 California Labor Code section 2699.3.

30. Plaintiff is an "aggrieved employee" because Plaintiff was employed by the alleged violator and had one or more of the alleged violations committed against her, and therefore is properly suited to represent the interests of all current and former non-exempt or hourly paid employees who worked for Defendants at any of their California locations during the relevant time period.

31. Based on the acts alleged above, Plaintiff, on behalf of herself and others, seeks penalties under California Labor Code sections 2698 and 2699 because of Defendants' violations of numerous provisions of the California Labor Code as alleged in this Complaint.

32. Plaintiff therefore has exhausted all administrative remedies required of her under California Labor Code sections 2698, 2699, and 2699.3, and, as a result, may prosecute this cause of action and pursue penalties in a representative action for Defendants' violations of the Labor

Code.

33. California Labor Code section 2699 et seq. imposes penalties upon culpable Defendants for violating the Labor Code.

34. California Labor Code section 558 establishes a civil penalty as follows: Any employer or other person action on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission (including the "Hours and Days of Work" section of the Wage Order) shall be subject to a civil penalty of (1) for any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid …; (2) for each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid …;

35. Plaintiff seeks penalties for Defendants' misconduct as alleged herein as permitted by law, <u>but only those penalties that are required to be shared with the LWDA as Plaintiff is not seeking individual/victim specific relief or underpaid wages under this particular cause of action</u>.

36. Specifically, Plaintiff seeks penalties under California Labor Code section 2699, for the following:

Violations of California Labor Code sections 201, 202, 203, 204 and/or 204b, 226, 226.3, 226.7, 233, 246, 351, 353, 510, 512, 558, 558.1, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 2800, and 2802 via 2698 and 2699, and any other Labor Codes and Wage Order no. 5 violated on the facts alleged in this Complaint.

37. Pursuant to Labor Code section 2698 et seq., Plaintiff seeks to recover attorney's fees, costs, and civil penalties on behalf of Plaintiff and other current and former Aggrieved Employees as alleged herein in an amount to be shown according to proof at trial and within the jurisdictional limits of this Court.

WHEREFORE, Plaintiff prays for Judgment against Defendants and each of them, as follows:

1. For the imposition of civil penalties;

2. For maximum civil penalties available under Labor Code Section 2699 against

Defendants in a manner and amount authorized by that statute, as described more particularly in the Complaint and representative PAGA claims;

3. For all costs and disbursements incurred in this suit;

4. Reasonable attorney's fees where available by law, including but not limited to, pursuant to Labor Code section 2698 et seq., Code of Civil Procedure section 1021.5, and/or other applicable laws; and

5. For such other and further relief as this Court may deem proper.

Respectfully submitted,

MESSRELIAN LAW INC.

Dated: September 30, 2024

By Maralle Messrelian ____________________
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Maralle Messrelian, Esq., Of Counsel
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