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County of San Diego

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Clerk of the Superior Court
By B. Ramirez ,Deputy Clerk

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

MAX ANTHONY MONTOYA, on behalf of
others similarly situated and the State of
California under the Private Attorneys General
Act,

Plaintiffs,

vs.

FIVE GUYS OPERATIONS LLC, and DOES 1
through 50, inclusive,

Defendants.

Case No. 24CU029792C

CLASS ACTION

**FIRST AMENDED CLASS AND
REPRESENTATIVE ACTION
COMPLAINT**

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

1 Plaintiff MAX ANTHONY MONTOYA, on behalf of all others similarly situated and the State
2 of California under the Private Attorneys General Act (“Plaintiff”) brings this FIRST AMENDED
3 CLASS AND REPRESENTATIVE ACTION COMPLAINT against Defendant FIVE GUYS
4 OPERATIONS LLC and DOES 1 through 50, inclusive (collectively “Defendants”), alleging as
5 follows:

6 **INTRODUCTION**

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

9 2. Defendant failed to compensate Plaintiff and class members for all hours suffered or
10 permitted to work in violation of the applicable IWC Wage Order.

11 3. Defendant’s underpayment of wages was facilitated by their company-wide practices
12 of requiring employees to complete work while off-the-clock.

13 4. Defendant also underpaid the class members’ wages by failing to include all forms of
14 remuneration, including bonuses, into the regular rate of pay calculation for overtime, sick pay, and
15 premiums.

16 5. Defendant failed to provide, authorize, and/or permit Plaintiff and the class members
17 to take compliant meal and rest periods to which they were entitled. Further, Defendant failed to pay
18 meal and rest period premiums at the regular rate of compensation.

19 6. Defendant failed to reimburse Plaintiff and class members for necessary expenses
20 incurred in furtherance of the class members’ job duties.

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

23 8. Defendant is further liable for derivative claims for wage statements, untimely
24 payment, and other associated violations.

25 9. Plaintiff seeks to recover the underpaid damages, plus associated penalties, interests,
26 attorney’s fees and costs.

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

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

A. Plaintiff Max Anthony Montoya

15. 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.”]) To the extent permitted by law, including pursuant *Balderas v. Fresh Start Harvesting, Inc.*, Court of Appeals Case No. B326759 (2nd App. Dist.) ____ Cal. App. 5th ____ (Mar. 20, 2024, *as modified* Apr. 18, 2024), the PAGA claim is brought exclusively as a representative action and does not include arbitrable claims.

16. Defendant Five Guys Operations LLC is a Delaware limited liability company that maintains operations and conducts business throughout the State of California, including in this county.

17. 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.

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

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

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

CLASS ALLEGATIONS

21. 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 Defendant in California at any time from four years (plus the additional 178-day statutory tolling period under Emergency Rule 9) prior to the filing of this action through date of class certification.

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

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

- a. Numerosity: The class is estimated to exceed 50 individuals, although the precise membership of the entire class is unknown at this time. The class is so numerous that joinder of all class members is impracticable. The identities of class members are ascertainable by inspection of Defendant's employment and payroll records.
- b. Typicality: Plaintiff's claims are typical of the claims of the other class members. They were subject to the same policies and practices of Defendant, which resulted in losses to the class. Proof of common unlawful business practices, which Plaintiff experienced, will establish the right of the class to recover on the causes of action alleged herein.
- c. Adequacy: Plaintiff is an adequate class representative; will take all necessary steps to protect the class members' interests adequately and fairly; has no interest antagonistic to other class members; and is represented by attorneys who have substantial experience prosecuting, defending, resolving, and litigating wage and hour class, collective, and representative actions in California state and federal courts.
- d. Superiority: A class action is superior to other means for adjudicating this dispute. Individual joinder is impractical. Class treatment will allow for common issues to be resolved in a single forum, simultaneously, and without duplication of effort and expense.
- e. Public Policy Considerations: Certification of this lawsuit as a class action advances the State of California's strong public interest in ensuring its approximately millions of employed residents are properly paid the wages they earned for the hours they worked. Class actions provide a mechanism for enforcement of labor laws and allow for vindication of employee rights by unnamed class members.

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

GENERAL ALLEGATIONS

25. Plaintiff and class members worked for Defendant as non-exempt employees and were compensated on an hourly basis.

26. Defendant required Plaintiff to complete pre-opening tasks, such as completing inventory. However, Plaintiff was not permitted to clock in while he completed these tasks, which resulted in approximately one hour to one and half hours of off-the-clock work. Similarly, class members were not permitted to remain on the clock to complete their closing duties. Rather, they were required to clock out but continue working until all closing tasks were finished. These tasks resulted in up to two hours of off-the-clock work several times per week. Additionally, Plaintiff and class members were required to review and respond to Teams messages from the group work chat, even on days that they were not scheduled to work. Plaintiff and class members were required to respond to messages in a timely manner or risk receiving a write-up for their delayed response. Due to this requirement to complete off-the-clock work, all hours worked were not directly compensated, resulting in the underpayment of regular wages to Plaintiff and class members.

27. Defendant failed to compensate Plaintiff and class members for all overtime hours worked as a result of Defendant's unlawful policy and practice of requiring Plaintiff and class members to complete pre and post-opening tasks and respond to work-related messages all while off-the-clock.

28. Further, Defendant failed to pay Plaintiff and class members overtime wages at the “regular rate of pay” for overtime hours worked, resulting in unpaid overtime wages. For example, during the pay period from July 15, 2024, to July 28, 2024, Plaintiff earned wages labeled “Secret Shopper” in the same pay period that he earned overtime wages. However, Defendant failed to properly include the additional renumeration payment in Plaintiff’s overtime rate, as the 1.37 overtime hours were paid at 1.5x Plaintiff’s base rate of \$22.25 rather than 1.5x his “regular rate of pay.”

1 Defendant committed the same “regular rate of pay” and overtime violations against Plaintiff and class
2 members as a matter of common payroll administration and company policy in a manner susceptible
3 to common proof.

4 29. Defendant did not provide Plaintiff and class members will all sick leave accrued based
5 upon the actual hours that they worked. Because of Defendant’s unlawful requirement of Plaintiff and
6 class members to complete off-the-clock work as discussed above, Plaintiff and class members worked
7 overtime hours that were not accounted for when calculating an employee’s accrued paid sick leave.

8 30. Further, Defendant failed to pay Plaintiff and class members sick leave at the lawful
9 statutory rate inclusive of all earnings. For example, during the pay period from July 15, 2024, to July
10 28, 2024, Plaintiff earned wages labeled “Secret Shopper” in the same pay period that he was paid
11 sick leave. However, Defendant failed to properly include the additional remuneration payment in
12 Plaintiff’s paid sick leave, resulting in underpaid sick leave wages.

13 31. Plaintiff and class members suffered many short, missed, late, and/or interrupted meal
14 periods. Plaintiff and class members frequently worked through their meal periods despite having
15 clocked out, to fulfill their job duties in a timely manner. Moreover, when Plaintiff attempted to take
16 a compliant meal period, he was often required to end his break prematurely and return to work on the
17 line. Plaintiff also would often take his meal period late because as an assistant manager, he was
18 required to finish certain tasks before taking his meal period. Thus, even if it was his time to take a
19 meal period he would continue working until those tasks were complete. Defendant failed to pay the
20 class members all meal premiums owed when they experienced such non-compliant meal periods. To
21 the extent that Defendant paid any meal period premiums, the premiums were not paid at the regular
22 rate of compensation because the premium did not factor in bonuses or other forms of remuneration,
23 instead electing to pay Plaintiff and class members at their base hourly rate.

24 32. Similarly, Plaintiff and class members were not authorized and permitted to take all
25 rest periods to which they were entitled. Plaintiff and other class members rarely, if at all, took all
26 their rest periods. For similar reasons as their noncompliant meal periods, due to high demands of the
27 job, Plaintiff and other class members were required to work through their rest periods. Defendant
28 had a practice of requiring employees to complete work quickly, thus discouraging rest periods to

1 fulfill customer demands. Specifically, Plaintiff regularly experienced interrupted rest breaks because
2 as assistant manager he was often asked to cancel orders, open the register, authenticate \$50 or \$100
3 bills, answer customer complaints, or phone calls from other store managers. Defendant failed to pay
4 the class members all rest period premiums owed when they experienced such non-compliant rest
5 periods. To the extent that Defendant paid any rest period premiums, the premiums were not paid at
6 the regular rate of compensation because the premium did not factor in bonuses or other forms of
7 remuneration, instead electing to pay Plaintiff and class members at their base hourly rate.

8 33. Defendant also required Plaintiff and class members to incur necessary, work-related
9 expenses, without reimbursements. Specifically, Plaintiff and class members were required to use
10 their personal cell phones to use the Microsoft Teams application to communicate with each other.
11 Thus, in direct consequence of their job duties, Plaintiff and class members were required to use their
12 personal cell phones for work-related purposes. Defendant did not reimburse Plaintiff and class
13 members for these necessary expenses.

14 34. These violations create derivative liability for failure to timely pay all wages owed each
15 payday or upon separation of employment.

16 35. As a result of the foregoing issues, Defendant failed to provide accurate itemized wage
17 statements to Plaintiff and class members each pay period as a result of the policies set forth above.
18 Defendant failed to list the correct “gross wages earned” as employees earned wages and premiums
19 that were not paid, resulting in an inaccurate reflection and recording of “gross wages earned” on those
20 wage statements. Likewise, Defendant failed to state on employee wage statements each pay period
21 the applicable hourly rates in effect and the number of hours worked at that rate as Defendant failed
22 to pay all wages and premiums owed to employees. The amounts stated are instead depreciated and
23 underpaid, resulting in an inaccurate reflection on the pay stub.

24 36. Further, Defendant’s wage statements failed to accurately list employees’ “total hours
25 worked” because of Defendant’s unlawful practice of requiring Plaintiff and class members to
26 complete off-the-clock work. Thus, Plaintiff and class members cannot promptly and easily determine
27 from the wage statement alone the wages paid or earned without reference to other documents or
28 information. These wage statement violations are significant because they create confusion among

1 Plaintiff and class members with respect to what amounts were owed and paid, at what rate, the
2 number of hours worked, and how those amounts were or should be calculated. The wage
3 statements reflect a false statement of earnings and conceal the underpayments of employee wages.

4 **FIRST CAUSE OF ACTION**

5 **MINIMUM WAGE VIOLATIONS**

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

7 **(All Claims Alleged by Plaintiff and Class members Against All Defendant)**

8 37. All outside paragraphs of this Complaint are incorporated into this section.

9 38. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code
10 §§ 1182.12, 1194, 1194.2, 1197, 1197.1 and 1198 and the IWC Wage Orders (the “Hours and Days
11 of Work” and “Minimum Wages” sections of the applicable orders), which require non-exempt
12 employees be timely paid at least the state or local minimum wage (if higher) for each hour of work,
13 and further provide a private right of action for an employer’s failure to pay all minimum wages (plus
14 liquidated damages).

15 39. Defendant willfully failed in their affirmative obligation to pay Plaintiff and class
16 members at least the lawful minimum wage for each hour worked in violation of Labor Code sections
17 1182.12, 1194, 1194.2, 1197, 1197.1 and 1198 and the IWC Wage Orders (the “Hours and Days of
18 Work” and “Minimum Wages” sections of the applicable orders), including payment at the lawful
19 local and county minimum wage ordinances in effect. As a result, Defendant are liable for all
20 associated damages, including liquidated damages for the minimum wage violations pursuant to Labor
21 Code § 1194.2.

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

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

FIFTH CAUSE OF ACTION

FAILURE TO PAY ALL PAID SICK LEAVE WAGES

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

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

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

56. Labor Code section 246(l), in conjunction with Labor Code section 248 *et seq.*, 248.1, 248.2, and 248.6, in addition to the applicable County sick pay ordinances in locales worked by class members, govern how Defendant were required to calculate paid sick leave.

57. Defendant failed to pay Plaintiff and class members their paid sick leave wages at one of the lawful rates set forth in the statute or ordinance because Defendant failed to include in their sick leave calculation the additional remuneration received by Plaintiff and class members (i.e., at the regular rate of pay and/or calculated based on total wages earned).

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

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

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66. Defendant 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).

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

68. As a result, Plaintiff and class members are entitled to recover the statutory penalty of \$50 per employee for the initial pay period in which a violation occurred and \$100 per employee for each violation in a subsequent pay period, up to an aggregate penalty of \$4,000 per employee, in addition to interest, attorneys' fees, and costs to the extent permitted by law, including under Labor Code section 226(e).

EIGHTH CAUSE OF ACTION

WAITING TIME PENALTIES

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

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

70. This cause of action is brought by a waiting time subclass pursuant to Labor Code §§ 201 through 203, which require an employer to timely pay all wages earned upon termination of employment, and which further provide a private right of action to recover statutory waiting time penalties each day an employer fails to comply with this obligation, up to a maximum of 30 days wages.

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

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

1 **NINTH CAUSE OF ACTION**

2 **FAILURE TO REIMBURSE BUSINESS EXPENSES**

3 **Violation of Labor Code § 2802**

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

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

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

13 **TENTH CAUSE OF ACTION**

14 **UNFAIR COMPETITION**

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

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

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

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

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

3 80. Plaintiff does not have an adequate remedy at law for past or future violations, to the
4 extent the statute of limitations on each of the alleged causes of action do not extend to the four-year
5 limitation provided under the UCL or to the extent the underlying Labor Code and IWC Wage Order
6 violations do not provide a private right of action.

7 81. Plaintiff and class members are entitled to injunctive relief against Defendant,
8 restitution, and other equitable relief to return all funds over which Plaintiff and class members have
9 an ownership interest and to prevent future damage and the public interest under Business and
10 Professions Code § 17200 *et seq.* Plaintiff and class members are further entitled to recover interest,
11 attorneys' fees, and costs to the extent permitted by law, including under Code of Civil Procedure
12 § 1021.5.

13 **ELEVENTH CAUSE OF ACTION**

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

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

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

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

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

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

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

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

3 86. Labor Code section 2699(a) provides: “Notwithstanding any other provision of law,,
4 any provision of this code that provides for a civil penalty to be assessed and collected by the Labor
5 and Workforce Development Agency or any of its departments, divisions, commissions, boards,
6 agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil
7 action brought by an aggrieved employee on behalf of the employee and other current or former
8 employees against whom a violation of the same provision was committed pursuant to the procedures
9 specified in Section 2699.3. “

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

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

15 89. On or about **December 3, 2024**, Plaintiff paid the requisite PAGA filing fee and
16 provided written notice (by online electronic filing with the LWDA and by certified mail to Defendant)
17 of Defendant’s alleged Labor Code violations, including the facts and theories to support the alleged
18 violations.

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

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

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

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

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

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

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

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

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 and Code of Civil Procedure § 1021.5.
- 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, associated with the PAGA claims pursuant to Labor Code § 2699, and Code of Civil Procedure section 1021.5 and any other applicable sections; and
- o. For such other relief the Court deems just and proper.

Dated: February 7, 2025

Ferraro Vega Employment Lawyers, Inc.



Nicholas J. Ferraro

Attorney for Plaintiff Max Anthony Montoya

EXHIBIT 1

Notice of Labor Code Violations

FERRARO VEGA
SAN DIEGO EMPLOYMENT LAWYERS

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December 3, 2024

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

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

Five Guys Operations LLC
1940 Duke Street, Fifth Floor
Alexandria, VA 22314

- 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 **MAX ANTHONY MONTOYA** (“Plaintiff(s)”) and all other “aggrieved employees” of the following “Defendant(s)”:

FIVE GUYS OPERATIONS LLC

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 an aggrieved employee.

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(s). 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 in the position of Assistant Manager from about October 2023 to August 2024. 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.

- 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. Defendant required Plaintiff and aggrieved employees to complete work while off-the-clock, without compensation.

First, Defendant required Plaintiff to complete pre-opening tasks, such as completing inventory. However, Plaintiff was not permitted to clock in while he completed these tasks, which resulted in approximately one hour to one and half hours of off-the-clock work. Similarly, aggrieved employees were not permitted to remain on the clock to complete their closing duties. Rather, they were required to clock out but continue working until all closing tasks were finished. These tasks resulted in up to two hours of off-the-clock work several times per week. Defendant did not compensate Plaintiff and aggrieved employees for all this off-the-clock work.

Second, Plaintiff and the aggrieved employees were also required to review and respond to Teams messages from the group work chat, even on days that they were not scheduled to work. Plaintiff and the aggrieved employees were required to respond to messages in a timely manner or risk receiving a write-up for their delayed response. Defendant did not compensate Plaintiff and the aggrieved employees for the time they spent responding to work-related messages while off-the-clock.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, up to the maximum amount allowed as set forth under the Labor Code.

Unpaid Overtime
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.

Labor Code section 510 requires “[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee;” and “any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee;” and “any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.” Labor Code section 1194 renders it unlawful for an employee to receive less than the legal overtime rate for overtime hours worked in California. Labor Code section 1198 renders “employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]” unlawful. The IWC Wage Orders further require payment of overtime wages for all overtime hours worked, including the “Hours and Days of Work” sections.

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.

First, as a result of off-the-clock work, Defendant failed to compensate Plaintiff and the aggrieved employees for all overtime hours worked. As discussed above, Defendant engaged in an unlawful policy and practice of requiring Plaintiff and the aggrieved employees to complete pre and post-opening tasks and respond to work-related messages all while off-the-clock.

Second, Defendant failed to pay Plaintiff and the aggrieved employees overtime wages at the lawful rate of pay for overtime hours worked, resulting in unpaid wages. Plaintiff and aggrieved employees earned other forms of non-discretionary remuneration outside of their base hourly wages, including “Secret Shopper” pay. When Plaintiff and the aggrieved employees earned supplemental remuneration and overtime wages in the same pay periods, Defendant failed to properly factor in the bonuses and other non-discretionary income into the “regular rate of pay” for overtime wages. Instead, Defendant unlawfully paid overtime based on a multiple of only the aggrieved employees’ base hourly rate, without including other nonexcludable forms of income earned in the same pay period. An example of Defendant’s regular rate violation for overtime is below:

UKG Five Dept Operations LLC 1840 Duke Street 5th Floor Alexandria, VA 22314		Emp No Location	0314148 001117	Check No. Check Date Period Start Period End Pay Group Pay Rate Job	79347955 06/02/2024 07/15/2024 07/28/2024 CASTOR 22.25 SHFTLD																																																																																																																																																															
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Extract of Plaintiff's wage statement from the pay period from July 15, 2024, to July 28, 2024, where he earned additional remuneration labeled "Secret Shopper."

During the pay period from July 15, 2024, to July 28, 2024, Plaintiff earned wages labeled "Secret Shopper" in the same pay period that he earned overtime wages. For each overtime hour worked during the period in which Plaintiff and the aggrieved employees earned the additional forms of remuneration, Defendant should have (but failed to) pay overtime "at a rate no less than one and one-half times the regular rate of pay for an employee" and "twice the regular rate of pay" for double time hours as required by the plain language of Labor Code section 510(a) 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, up to the maximum amount allowed as set forth under the Labor Code.

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.

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

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

UKG Five Oaks Operations LLC 1840 Duke Street 5th Floor Alexandria, VA 22314		Emp No Location	0314148 001117	Check No. Check Date Period Start Period End Pay Group Pay Rate Job	79347955 06/02/2024 07/15/2024 07/28/2024 CASTOR 22.25 SHFTLD				
Alex Anthony Montoya Phone Number: SSN: XXX-XX-XXXX		Dept/Store AR #	001117 FIV1002						
EARNINGS									
Pay Type	Period Start	Period End	Hours	Pay Rate	Current	YTD	Tax Code	Current	YTD
			22.44	22.25	49.29		Ca Disability Empl	19.85	272.52
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Regular Pay						40.30	Federal Income Tax	525.40	1672.81
Regular Pay			1.37	11.33	15.54	62.30	Employer Medicare	36.16	258.24
Cost of Goods Sold						713.87	Social Security Empl	111.32	1536.15
Cost of Goods Sold			1.37	22.25	30.48				
Double Time					42.07	2099.16			
Overtime 1.5x					95.07	463.75			
Credit Card Tip					178.00	17.83			
Credit Card Tip			8.00	22.25	17.80	7.24			
Sick Pay						300.00			
CA Sick Pay									
OT Lookback					50.00				
Referral Bonus	07/15/2024	07/21/2024			53.34	912.84			
Secret Shopper	07/22/2024	07/28/2024							
Secret Shopper									

Extract of Plaintiff's wage statement from the pay period from July 15, 2024, to July 28, 2024, where he earned additional remuneration labeled "Secret Shopper."

During the pay period from July 15, 2024, to July 28, 2024, Plaintiff earned wages labeled "Secret Shopper" in the same pay period that he received sick pay. However, Defendant only paid Plaintiff sick pay at his base hourly rate, resulting in underpaid sick pay.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, up to the maximum amount allowed as set forth under the Labor Code.

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.

First, Plaintiff and the aggrieved employees routinely experienced missed, late, short, and interrupted meal periods in order to keep up with the high demands of the job. Plaintiff and aggrieved employees frequently worked through their meal periods despite having clocked out, to fulfill their job duties in a timely manner. Moreover, when Plaintiff attempted to take a compliant meal period, he was often required to end his break prematurely and return to work on the line. Plaintiff would also take lunch late often because as an assistant manager, he was required to finish certain tasks before taking his own lunch. Therefore, even if it was his time to take a meal period he would continue working until those tasks were complete.

Second, to the extent Defendant paid meal period premiums, Defendant failed to pay Plaintiff and the other aggrieved employees a meal period premium at the “regular rate of compensation” because premiums paid did not factor in all forms of remuneration and instead paid aggrieved employees at their base hourly rate.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, up to the maximum amount allowed as set forth under the Labor Code.

Unpaid Rest Period Premium Wages **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.

Labor Code sections 226.7 and 516 and the IWC Wage Orders require that employers authorize and permit an uninterrupted 10-minute rest period for each four-hour period (or major fraction thereof) that an employee works. Labor Code section 226.7 requires that if a rest period is non-compliant, the employer must pay one additional hour of pay at the employee’s “regular rate” of compensation. *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11

Cal. 5th 858, 862 (“We hold that the terms are synonymous: “regular rate of compensation” under section 226.7(c), like “regular rate of pay” under section 510(a), encompasses all nondiscretionary payments, not just hourly wages”). Labor Code section 1198 renders “employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]” unlawful. The IWC Wage Orders, including Section 12 (Rest Periods), further require one uninterrupted 10-minute rest period for each four-hour period (or major fraction thereof) worked and an additional hour of pay at the employee’s regular rate of compensation for each workday that a compliant rest period is not authorized or permitted.

Plaintiff and other aggrieved employees routinely experienced missed and non-compliant rest periods to keep up with the high demands of the job. Defendant had a practice of requiring employees to complete work quickly, thus discouraging rest periods to fulfill customer demands. Specifically, Plaintiff regularly experienced interrupted rest breaks because as assistant manager he was often asked to cancel orders, open the register, authenticate \$50 or \$100 bills, answer customer complaints, or phone calls from other store managers. Additionally, Plaintiff missed his second rest break. On information and belief, Defendant had a policy and practice of not paying rest period premiums to employees who were not authorized to take rest periods.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, up to the maximum amount allowed as set forth under the Labor Code.

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 a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, up to the maximum amount allowed as set forth under the Labor Code.

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.

In fact, Plaintiff did not receive his final wages until approximately 50 days after he was terminated. Defendant did not pay Plaintiff any corresponding waiting time penalties to remedy their delay.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, up to the maximum amount allowed as set forth under the Labor Code.

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. 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, up to the maximum amount allowed as set forth under the Labor Code.

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 aggrieved employees were required to use their personal cell phones to use the Microsoft Teams application to communicate with each other. Plaintiff and aggrieved employees were not reimbursed for using their personal cell phone for business purposes.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, up to the maximum amount allowed as set forth under the Labor Code.

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, up to the maximum amount allowed as set forth under the Labor Code.

Attorneys’ Fees and Costs **Labor Code § 2699(k)(1)**

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(k)(1).

- 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.

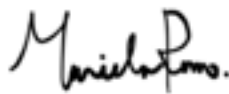
If you have any questions regarding the scope of your obligations to preserve evidence, please consult your legal counsel and always err on the side of caution. Periodic or regularly scheduled purges or deletions of information covered by this hold must be suspended immediately.

- CONCLUSION -

If the LWDA does not pursue enforcement, Plaintiff intends to bring representative claims on behalf of the State of California and the aggrieved employees seeking civil penalties for violations of the Labor Code and the IWC Wage Orders, along with attorneys' fees, costs, interest, and other appropriate relief.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Mariela R. Romo".

Mariela R. Romo

Cc Plaintiff Max Anthony Montoya

Terry Garcia, Human Resources Generalist
tgarcia@fiveguys.com