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Clerk of the Superior Court
By Georgina Ramirez, Deputy Clerk

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10 Attorneys for Plaintiff JOSE GUTIERREZ

11 **IN THE SUPERIOR COURT OF STATE OF CALIFORNIA**

12 **FOR ORANGE COUNTY**

Judge Glenda Sanders

13 JOSE GUTIERREZ,

14 Plaintiff

15 v.

16 CANNERY SEAFOOD OF THE
17 PACIFIC, LLC; and DOES 1 through 50,
18 inclusive,

19 Defendants.

Case No.: 30-2019-01086041-CU-OE-CXC

**PRIVATE ATTORNEY GENERAL ACT
COMPLAINT**

1. Violation of PAGA for Failure to Provide Meal Periods (Lab. Code, § 226.7, 512);
2. Violation of PAGA for Failure to Provide Rest Periods (Lab. Code, § 226.7, 512);
3. Violation of PAGA for Failure to Pay All Wages Including Minimum Wages and Overtime Wages (Lab. Code, § 510, 1194);
4. Violation of PAGA for Failure to Keep Accurate Payroll Records (Lab. Code, § 1174, 226, subd. (A), (E));
5. Violation of PAGA for Failure to Reimburse for Necessary Expenditures (Lab. Code, § 2802); and
6. Violation of PAGA for Waiting Time Penalties (Lab. Code, § 201, 202, 203);

DEMAND FOR JURY TRIAL

1 Plaintiff JOSE GUTIERREZ (“Plaintiff” or “Mr. Gutierrez”) complains and alleges as
2 follows:

3 **PRELIMINARY STATEMENT**

4 1. This case arises out of the violation of numerous Labor Code provisions by
5 CANNERY SEAFOOD OF THE PACIFIC, LLC (“CSP” or “Defendant”), a California
6 corporation owning a restaurant located in Newport Beach, California. Plaintiff and similarly-
7 aggrieved employees seek wages and reimbursements that Defendant has failed and/or refused
8 to pay to their employees.

9 2. This case arises out of the violation of numerous Labor Code provisions,
10 including, but not limited to, Defendant’s failure to provide meal periods, failure to provide rest
11 periods, failure to pay overtime wages, failure to reimburse employees for business-related
12 expenses, failure to keep accurate payroll records, and failure to pay waiting time penalties as
13 set forth more fully herein. These violations concern current and past employees of CSP.

14 3. Plaintiff and other similarly situated employees seek recovery of unpaid wages,
15 including, but not limited to, overtime wages, and waiting time penalties in the State of
16 California, as a result of Defendant’s failure to provide meal and rest periods and failing to pay
17 employees all wages, including vacation time, overtime wages, and seek recovery of
18 unreimbursed job-related expenses due and owing at the time of their termination.

19 **JURISDICTION AND VENUE**

20 4. Venue is proper in Orange County, because the Defendant maintains its location
21 and transacts business in this county, the obligations and liability primarily arise in this county,
22 and worked was primarily performed by Plaintiff and similarly-aggrieved employees in Orange
23 County.

24 5. The California Superior Court has jurisdiction in the matter because the
25 individual claims are under the seventy-five thousand dollar (\$75,000.00) jurisdictional
26 threshold for federal court and, upon information and belief, Plaintiff and Defendant are
27 residents of and/or domiciled in the State of California. Further, there is no federal question at
28 issue as the issues herein is based solely on California Statutes and law, including the Labor

1 Code, Industrial Welfare Commission Wage Orders, Code of Civil Procedure, Rule of Court,
2 and Business and Professions Code.

3 **THE PARTIES**

4 **Plaintiff**

5 6. Individual and Representative Plaintiff JOSE GUTIERREZ is an individual
6 residing in Orange County.

7 7. Plaintiff was employed by Defendant as a chef from approximately 2001 through
8 February 20, 2019.

9 **Defendant**

10 8. Plaintiff is informed and believes, and based thereon alleges, that CSP is a
11 California corporation organized under the laws of the State of California and is and/or was
12 Plaintiff and similarly-aggrieved employees' employer during the Relevant Time Period, herein
13 defined as the period of one year preceding the filing of this complaint.

14 9. Plaintiff is ignorant of the true names, capacities, relationships, and extent of
15 participation in the conduct herein alleged of the Defendants sued herein as DOES 1 through 50,
16 inclusive, but on information and belief allege that said Defendants are legally responsible for
17 the occurrences alleged herein, and that the damages of Plaintiff and similarly-aggrieved
18 employees were proximately caused by such Defendants. Plaintiff will amend this complaint to
19 allege the true names and capacities of the DOE Defendants when ascertained.

20 10. Plaintiff is informed and believes, and based thereon alleges, that each Defendant
21 herein was, at all times relevant to this action, the agent, employee, representing partner, and/or
22 joint venture of the remaining Defendants and was acting within the course and scope of the
23 relationship. Plaintiff is further informed and believes, based thereon alleges, that each of the
24 Defendants herein gave consent to, ratified and authorized the acts alleged herein to the
25 remaining Defendants.

26 11. Plaintiff is further informed and believes, and based thereon alleges, that
27 Defendants herein acted as a "single employer" at all relevant times. At all relevant times,
28 Defendants managed stucco and plastering work across the state of California. Defendants acted

1 in all respects pertinent to this action as the agent of the other Defendants, carried out a joint
2 scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant
3 are legally attributable to the other Defendants.

4 **ADMINISTRATIVE PREREQUISITE**

5 12. By this complaint, Plaintiff brings this case as a representative action seeking
6 penalties for the State of California in a representative capacity, as provided by the Private
7 Attorneys' General Act ("PAGA"), Labor Code sections 2698 et seq., to the extent permitted by
8 law, as an aggrieved employee who was employed by Defendant and subject to alleged
9 violations set forth in Labor Code section 2699.5. Plaintiff specifically alleged the following in
10 his/her notice to the Labor Workforce Development Agency ("LWDA") and the employer:
11 violation of Labor Code sections 201, 202, 203, 226, 226.7, 510, 512, 1194, and 2802.

12 13. Under Labor Code section 2699.3, subdivision (a), a plaintiff may bring a cause
13 of action under PAGA only after giving the Labor Workforce Development Agency ("LWDA")
14 and the employer notice of the Labor Code sections alleged to have been violated, and after
15 receiving notice from the LWDA of its intention not to investigate, or after 65 days have passed
16 without notice from the LWDA.

17 14. On May 13, 2019, prior to the filing of this complaint, Plaintiff gave written
18 notice of the specific provisions alleged to have been violated, including the facts and theories
19 to support the alleged violations, as required by Labor Code section 2699.3. The written notice
20 was given via certified mail to Defendant(s), and the LWDA by electronically filing the notice
21 via the Department of Industrial Relations website. Plaintiff was given an LWDA case number
22 of LWDA-CM-693808-19. A true and correct copy of Plaintiff's notice to the LWDA and
23 Defendant(s), dated May 13, 2019, is attached hereto as Exhibit A.

24 **GENERAL ALLEGATIONS**

25 15. Labor Code section 1194 provides that notwithstanding any agreement to work
26 for a lesser wage, an employee receiving less than the legal overtime compensation is entitled to
27 recover in a civil action the unpaid balance of their overtime compensation, including interest
28 thereon, reasonable attorneys' fees and costs of suit.

1 16. During all or a portion of the Relevant Time Period, Plaintiff and similarly-
2 aggrieved employees were employed by Defendant in the State of California. Plaintiff and
3 similarly-aggrieved employees were non-exempt employees covered under one (1) or more
4 Industrial Welfare Commission (“IWC”) Wage Orders, and Labor Code section 510, and/or
5 other applicable wage orders, regulations and statutes, and were not subject to an exemption for
6 executive, administrative and professional employees, which imposed obligations on the part of
7 Defendant to pay Plaintiff and similarly-aggrieved employees lawful overtime compensation.
8 Plaintiff and similarly-aggrieved employees were covered by one (1) or more IWC Wage
9 Orders, and Labor Code section 226.7 and other applicable Wage Orders, regulations, and
10 statutes which imposed an obligation on the part of the Defendant to pay Plaintiff and similarly-
11 aggrieved employees rest and meal period compensation.

12 17. During the Relevant Time Period, Defendant was obligated to pay Plaintiff and
13 similarly-aggrieved employees overtime compensation for all hours worked over eight (8) hours
14 of work in one (1) day or forty (40) hours in one (1) week.

15 18. During the Relevant Time Period, Defendant was obligated to provide Plaintiff
16 and similarly-aggrieved employees with a work free meal and/or rest period.

17 19. Plaintiff and similarly-aggrieved employees primarily performed non-exempt
18 work in excess of the maximum regular rate hours set by the IWC in the applicable Wage
19 Orders, regulations or statutes, and therefore entitled Plaintiff and similarly-aggrieved
20 employees to overtime compensation at time and a half rate, and when applicable, double-time
21 rates as set forth by the applicable Wage Orders, regulations and/or statutes.

22 20. Plaintiff and similarly-aggrieved employees were not paid the above due
23 overtime compensation timely upon the termination of their employment as required by Labor
24 Code sections 201, 202, and 203, and are entitled to penalties as provided by Labor Code
25 section 203.

26 21. During the Relevant Time Period, Defendant required Plaintiff and similarly-
27 aggrieved employees to work overtime without lawful compensation, in violation of the various
28 applicable Wage Orders, regulations, and statutes, and Defendant: (1) Willfully failed and

1 refused, and continue to fail and refuse to pay lawful overtime compensation to Plaintiff and
2 similarly-aggrieved employees; and (2) willfully failed and refused, and continue to fail and
3 refuse to pay due and owing wages promptly upon termination of employment to Plaintiff and
4 similarly-aggrieved employees.

5 22. During the Relevant Time Period, Defendant failed and/or refused to schedule
6 Plaintiff and similarly-aggrieved employees in an overlapping manner so as to reasonably
7 ensure meal and/or rest breaks and/or shift relief for Plaintiff and similarly-aggrieved
8 employees, thereby causing Plaintiff and similarly-aggrieved employees to work without being
9 given paid ten (10) minute rest periods for every four (4) hours or major fraction thereof worked
10 and without being given a thirty (30) minute meal period for shifts of at least five (5) hours and
11 second thirty (30) minute meal periods for shifts of at least ten (10) hours during which Plaintiff
12 and similarly-aggrieved employees were relieved of all duties and free to leave the premises.
13 Defendant further failed and/or refused to schedule Plaintiff and similarly-aggrieved employees
14 in a manner so as to reasonably ensure meal and/or rest breaks were taken within the required
15 statutory time frame and uninterrupted as required by law. Furthermore, Defendant failed and/or
16 refused to pay Plaintiff and similarly-aggrieved employees one (1) hour's pay at the employees'
17 regular rate of pay as premium compensation for failure to provide rest and/or meal periods or
18 to providing such rest and/or meal periods within the statutory time frame as a result of their
19 scheduling policy.

20 **FIRST CLAIM FOR RELIEF**

21 **VIOLATION OF THE PRIVATE ATTORNEY GENERAL ACT FOR FAILURE TO**
22 **PROVIDE MEAL PERIODS**
23 **(Lab. Code, § 226.7 and 512)**
24 **(Plaintiff against Defendant)**

25 23. Plaintiff realleges and incorporates by reference the allegations in the preceding
26 paragraphs.

27 24. Labor Code sections 226.7 and 512 provide that no employer shall employ any
28 person for a work period of more than five (5) hours without providing a meal period of not less

1 than thirty (30) minutes or employ any person for a work period of more than ten (10) hours
2 without a second meal period of not less than thirty (30) minutes.

3 25. Labor Code section 226.7 provides that if an employer fails to provide an
4 employee a meal period in accordance with this section, the employer shall pay the employee
5 one (1) hour of pay at the employee's regular rate of compensation for each workday that the
6 meal period is not provided in accordance with this section.

7 26. Defendant failed to schedule Plaintiff and similarly-aggrieved employees in an
8 overlapping manner so as to reasonably ensure Plaintiff and similarly-aggrieved employees
9 could take and/or receive uninterrupted and timely meal periods within the statutory timeframe.
10 As a result, Plaintiff and similarly-aggrieved employees were often forced to forego a meal
11 period and/or work during their meal period. In so doing, Defendant has intentionally and
12 improperly denied meal periods to Plaintiff and similarly-aggrieved employees in violation of
13 Labor Code sections 226.7 and 512 and other regulations and statutes.

14 27. At all times relevant hereto, Plaintiff and similarly-aggrieved employees have
15 worked more than five (5) hours in a workday.

16 28. At varying times relevant hereto, Plaintiff and similarly-aggrieved employees at
17 times have worked more than ten (10) hours in a workday.

18 29. By virtue of the Defendant's failure to schedule Plaintiff and similarly-aggrieved
19 employees in such a way as to provide a meal period, and/or work free meal period to Plaintiff
20 and similarly-aggrieved employees thereby causing Plaintiff and similarly-aggrieved employees
21 to suffer, and continue to suffer, damages in amounts which are presently unknown, but will be
22 ascertained according to proof at trial.

23 30. Plaintiff and similarly-aggrieved employees request recovery of civil penalties
24 pursuant to Labor Code section 226.7 which they are owed beginning one (1) year prior to filing
25 this complaint, in a sum as provided by the Labor Code and/or other statutes.

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1 **SECOND CLAIM FOR RELIEF**

2 **VIOLATION OF THE PRIVATE ATTORNEY GENERAL ACT FOR FAILURE TO**
3 **PROVIDE REST PERIODS**

4 **(Lab. Code, § 226.7 and 512)**

5 **(Plaintiff against Defendant)**

6 31. Plaintiff realleges and incorporates by reference the allegations in the preceding
7 paragraphs.

8 32. Labor Code section 226.7 provides that employers authorize and permit all
9 employees to take rest periods at the rate of ten (10) minutes rest time per four (4) work hours.

10 33. Labor Code section 226.7(b) provides that if an employer fails to provide
11 employee rest periods in accordance with this section, the employer shall pay the employee one
12 (1) hour of pay at the employees' regular rate of compensation for each workday that the rest
13 period is not provided.

14 34. Defendant failed and or refused to implement a relief system by which Plaintiff
15 and similarly-aggrieved employees could receive rest breaks and/or work free rest breaks.
16 Furthermore, due to Defendant's relief system, Plaintiff and similarly-aggrieved employees did
17 not receive his rest breaks within the required statutory time frame. By and through their
18 actions, Defendant intentionally and improperly denied rest periods to Plaintiff and similarly-
19 aggrieved employees in violation of Labor Code sections 226.7 and 512.

20 35. At all times relevant hereto, Plaintiff and similarly-aggrieved employees have
21 worked more than four (4) hours in a workday.

22 36. By virtue of Defendant's unlawful failure to provide rest periods to Plaintiff and
23 similarly-aggrieved employees as a result of their scheduling and shift relief system, Plaintiff
24 and similarly-aggrieved employees have suffered, and will continue to suffer, damages, in
25 amounts which are presently unknown, but will be ascertained according to proof at trial.

26 37. Plaintiff and similarly-aggrieved employees request recovery of civil penalties
27 pursuant to Labor Code section 226.7, which they are owed beginning four (4) years prior to
28 filing this complaint, in a sum as provided by the Labor Code and/or any other statute.

1 **THIRD CLAIM FOR RELIEF**

2 **VIOLATION OF THE PRIVATE ATTORNEY GENERAL ACT FOR FAILURE TO**
3 **PAY ALL WAGES INCLUDING MINIMUM WAGE AND OVERTIME WAGES**

4 **(Lab. Code, § 1194)**

5 **(Plaintiff against Defendant)**

6 38. Plaintiff realleges and incorporates by reference the allegations in the preceding
7 paragraphs.

8 39. Defendant failed to pay Plaintiff and similarly-aggrieved employees for both
9 minimum wages and overtime premium for hours worked in excess of over eight (8) hours per
10 day and forty (40) hours per week for work performed for the Defendant as a result of being
11 subjected to Defendant's unlawful rounding scheme. Defendant rounded the wages of all
12 employees to the nearest fifteen (15) minute interval. Plaintiff alleges on information and belief
13 that Defendant's rounding policy on average favored Defendant, and therefore resulted in lost
14 wages for Plaintiff and similarly-aggrieved employees.

15 40. To the extent that such unpaid wages were for hours worked in excess of eight
16 (8) in one day or forty (40) in one week, such wages were required to be paid at an overtime rate
17 of one-and-a-half times each employee's base rate of pay.

18 41. By virtue of Defendant's unlawful failure to provide all wages owed to Plaintiff
19 and similarly-aggrieved employees, Plaintiff and similarly-aggrieved employees have suffered,
20 and will continue to suffer, damages in amounts which are presently unknown, but will be
21 ascertained according to proof at trial.

22 42. Plaintiff and similarly-aggrieved employees request recovery of civil penalties
23 pursuant to Labor Code section 226.7, which they are owed beginning four (4) years prior to
24 filing this complaint, in a sum as provided by the Labor Code and/or any other statute.

25 43. Additionally, Plaintiff and similarly-aggrieved employees is entitled to attorneys'
26 fees, costs, pursuant to Labor Code section 1194 and prejudgment interest.

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1 breaks due to Defendant's failure to schedule Plaintiff and similarly-aggrieved employees in an
2 overlapping manner so as to provide them with a meal and/or rest break.

3 48. Plaintiff is informed and believes, and based thereon alleges, that Defendant's
4 failure to keep accurate payroll records, as described above, violated Labor Code section 1174,
5 subdivision (d), and the applicable wage order. Plaintiff and similarly-aggrieved employees are
6 entitled to penalties of one hundred dollars (\$100.00) for the initial violation and two hundred
7 dollars (\$200.00) for each subsequent violation for every pay period during which these records
8 and information were not kept by Defendant.

9 49. Plaintiff is informed and believes, and based thereon alleges, that Defendant's
10 failure to keep and maintain accurate records and information, as described above, was willful,
11 and Plaintiff and similarly-aggrieved employees are entitled to a civil penalty of five hundred
12 dollars (\$500.00) per employee pursuant to Labor Code section 1174.5.

13 50. Defendant knowingly and intentionally failed to, and continues to fail to, furnish
14 Plaintiff and similarly-aggrieved employees with timely, itemized statements that accurately
15 reflect the total number of hours worked, as required by Labor Code section 226, subdivision
16 (2), and Plaintiff and similarly-aggrieved employees suffered injury as a result. Consequently,
17 Defendant is liable to Plaintiff and similarly-aggrieved employees for the amounts provided by
18 Labor Code section 226, subdivision (e).

19 51. Plaintiff has complied with the reporting requirements under Labor Code
20 sections 2698-2699, individually and on behalf of all aggrieved employees. Plaintiff requests
21 and is entitled to recover from Defendant's penalties for failure to keep accurate payroll records,
22 interest, attorney's fees and costs pursuant to Labor Code section 1174, as well as all statutory
23 penalties and attorneys' fees against Defendant.

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1 **FIFTH CLAIM FOR RELIEF**
2 **VIOLATION OF THE PRIVATE ATTORNEY GENERAL ACT FOR FAILURE TO**
3 **REIMBURSE FOR NECESSARY EXPENDITURES**

4 **(Lab. Code, § 2802)**

5 **(Plaintiff against Defendant)**

6 52. Plaintiff realleges and incorporates by reference the allegations in the preceding
7 paragraphs.

8 53. Labor Code section 2802 states that "An employer shall indemnify his or her
9 employee for all necessary expenditures or losses incurred by the employee in direct
10 consequence of the discharge of his or her duties...."

11 54. Plaintiff and similarly-aggrieved employees were not reimbursed by Defendant
12 for necessary expenditures as a direct consequence of the discharge of their duties.

13 55. Defendant knowingly, willingly, and intentionally attempted to offset the cost of
14 doing business on Plaintiff and similarly-aggrieved employees.

15 56. Defendant had a corporate practice and policy of requiring Plaintiff and
16 similarly-aggrieved employees to shoulder the burden of Defendant's cost of doing business by
17 failing to reimburse Plaintiff and similarly-aggrieved employees for necessary business
18 expenditures, specifically the cost of utilizing cell phones to communicate with other
19 employees, including Defendant's agents.

20 57. Accordingly, Plaintiff and similarly-aggrieved employees are entitled to an
21 award of "necessary expenditures or losses" and civil penalties in accordance with Labor Code
22 section 2802, which shall also include all reasonable costs, including, but not limited to,
23 attorneys' fees and interest.

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1 **SIXTH CLAIM FOR RELIEF**

2 **VIOLATION OF THE PRIVATE ATTORNEY GENERAL ACT FOR FAILURE TO**
3 **PAY WAGES OF TERMINATED OR RESIGNED EMPLOYEES**

4 **(Lab. Code, § 201, 202, 203)**

5 **(Plaintiff against Defendant)**

6 67. Plaintiff realleges and incorporates by reference the allegations in the preceding
7 paragraphs.

8 68. Plaintiff and similarly-aggrieved employees were entitled to be promptly paid
9 lawful overtime compensation and other premiums, as required by Labor Code sections 201,
10 202, and 203, upon the termination of their employment with Defendant. Defendant refused
11 and/or failed to promptly compensate Plaintiff and similarly-aggrieved employees all wages
12 owed as a result of their unlawful rounding scheme and failure to provide meal and/or rest
13 periods. Plaintiff seeks the payment of civil penalties pursuant to Labor Code section 203,
14 according to proof.

15 69. Plaintiff also seeks attorneys' fees, costs, and prejudgment interest pursuant to
16 Labor Code section 203.

17 **PRAYER FOR RELIEF**

18 **WHEREFORE**, Plaintiff prays for the following relief:

- 19 1. For penalties in an amount according to proof;
20 2. For reasonable attorney's fees and costs, pursuant to the PAGA; and
21 3. For such other and further relief as this Court may deem just and proper.

22
23 Dated: July 25, 2019

MAHONEY LAW GROUP, APC

24
25 By: /s/ Joshua D. Klein
26 Joshua D. Klein, Esq.
27 Attorney for Plaintiff JOSE GUTIERREZ
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1 **DEMAND FOR JURY TRIAL**

2 Plaintiff JOSE GUTIERREZ hereby demands a jury trial on all issues so triable.

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4 Dated: July 25, 2019

MAHONEY LAW GROUP, APC

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6 By: /s/ Joshua D. Klein
7 Joshua D. Klein, Esq.
8 Attorney for Plaintiff JOSE GUTIERREZ
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EXHIBIT A



Joshua D. Klein
(562) 590-5550 phone
(562) 590-8400 facsimile
jklein@mahoney-law.net

May 13, 2019

Via Certified Electronic Mail #7016 1370 0000 2461 5535
LABOR AND WORKFORCE DEVELOPMENT AGENCY
PAGAfilings@dir.ca.gov

VIA U.S. MAIL & CERTIFIED MAIL

Return Receipt Requested

ATTN: Brandon L. Sylvia
Rutan & Tucker, LLP
611 Anton Blvd., Ste. 1400
Costa Mesa, CA 92626

Re: Jose Gutierrez v. Cannery Seafood of the Pacific LLC

**NOTICE OF LABOR CODE VIOLATIONS PURSUANT TO
LABOR CODE SECTION § 2698 ET SEQ.**

To: California Labor and Workforce Development Agency, AutoZone, Inc.
From: Jose Gutierrez, on behalf of herself and all other aggrieved employees who were subject to the employer's wage and hour policies as set forth below.

Factual Statement

Please note that this firm, Mahoney Law Group, APC, represents the interests of Mr. Jose Gutierrez ("Plaintiff" or "Mr. Gutierrez"), who intends to file a complaint alleging various Labor Code violations and seeking civil penalties under the Private Attorneys General Act of 2004, Labor Code section 2698 et seq. ("PAGA") on behalf of himself and all other aggrieved employees.

Theories of Labor Code Violations and Remedies

Cannery Seafood of the Pacific LLC ("Defendant") is a corporation headquartered in Newport Beach, CA. Mr. Gutierrez worked as a chef for Defendant from sometime in 2001 through on or around February 20, 2019. Mr. Gutierrez was paid an hourly wage and worked as a non-exempt employee, thereby entitling him to all applicable benefits conferred by the Labor Code.

Mr. Gutierrez alleges Defendant violated various sections of the Labor Code, including sections 201, 202, 203, 226, 226.7, 510, 512, 1194, and 2802, by failing to provide him and all other aggrieved employees all wages for all hours worked, including minimum wage and overtime

hours, failing to provide all meal and rest periods or premium compensation in lieu thereof, failure to reimburse employees for all necessary expenses incurred in carrying out their job duties, failure to pay all wages due at termination, and failing to provide accurate wage statements. Mr. Gutierrez and similarly aggrieved employees consist of identifiable, current, and/or former similarly situated persons who worked for Defendant in non-exempt positions in California during the liability period of one year prior to the filing of a complaint alleging a PAGA cause of action.

Defendant failed to pay Mr. Gutierrez and other aggrieved employees at the legally mandated wage rates for all hours worked in violation of California law. Specifically, Mr. Gutierrez's paystubs indicate that all regular and overtime hours worked were rounded to fifteen-minute intervals. An employer's rounding policy is only permissible if, over a period of time, the policy is neutrally-applied and does not favor the employer. (*See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889.) Mr. Gutierrez alleges on information and belief that Defendant's rounding policy on average favored Defendant, and thereby caused him to receive reduced wages than he actually worked. Further, to the extent such unpaid wages were for hours worked in excess of eight (8) in one day or forty (40) in one week, such wages were required to be paid at an overtime rate of one-and-a-half times (1.5x) each employee's base rate of pay. Defendant's failure to compensate Mr. Gutierrez and other aggrieved employees for all owed minimum and overtime wages is actionable under PAGA as a violation of Labor Code sections 510 and 1194.

Defendant also failed to provide Mr. Gutierrez and other aggrieved employees with meal and rest periods in accordance with California law. Due to Defendant's policy and practices, Mr. Gutierrez alleges that Defendant never provided him nor other aggrieved employees the opportunity to take any rest breaks. Furthermore, Mr. Gutierrez and other aggrieved employees were not always provided the opportunity to make meal breaks. Despite being a chef, Mr. Gutierrez was required to sign an "On-Duty Meal Agreement", thereby waiving his right to take duty-free meal periods. On-duty meal periods are permitted by the IWC Wage Orders "only when the nature of the work prevents an employee from being relieved of all duty..." (IWC Wage Order 5, 8 CCR § 11050.) Although "California state courts have not addressed the substantive scope of the 'nature of the work' exception" (*Abdullah v US Sec. Associates, Inc.* (2013) 731 F.3d 952, 958.), the Division of Labor Standards Enforcement has provided guidance, including that the work should "some particular, external force that requires the employee to be on duty at all times" and "the employee is the sole employee of a particular employer." (DLSE Opinion Letter 2009.06.09 at 7.) The employer has the burden of establishing fact to justify requiring an on-duty meal period. (DLSE Opinion Letter 2002.09.04 at 2.) Mr. Gutierrez alleges that the circumstances of his work as a chef were insufficient to warrant requiring on-duty meal periods.

Pertinently, Defendant did not compensate Mr. Gutierrez and other aggrieved employees with premium pay for every meal period and rest period that was not provided or interrupted. Defendant's conduct is actionable under PAGA as violations of Labor Code sections 226.7 and 512.

By failing to include on the paystubs of Mr. Gutierrez and other aggrieved employees time for work lost through Defendant's rounding, as well as rest and meal break premium wages,

Defendant failed to keep accurate payroll records and failed to provide Mr. Gutierrez and other aggrieved employees with complete and accurate wage statements. Defendant's conduct is actionable under PAGA as a violation of Labor Code section 226.

As a further result of Defendant's failure to pay all wages owed as described herein and throughout their employment, Defendant also violated Labor Code sections 201, 202, and 203, due to its uniform policy, practice, and procedure of failing to pay all wages earned and due to former employees at the time their employment ended.

Further, Mr. Gutierrez alleges that Defendant failed to compensate him and other aggrieved employees for all necessary business expenditures the incurred. Defendant required Mr. Gutierrez and other aggrieved employees to utilize their personal cell phones for business purposes such as communicating with other employees and supervisors, and did not provide an alternative means of communication. However, Defendant failed to reimburse or indemnify its employees for the above necessary business expenditures. Defendant's conduct is actionable under PAGA as a violation of Labor Code section 2802.

The facts and claims contained herein are based on the information available at the time of this writing. Therefore, if through discovery and/or expert review, Mr. Gutierrez becomes aware of additional compensation owed or losses incurred by Mr. Gutierrez or by any other aggrieved employee of the Defendant, Mr. Gutierrez expressly reserves the right to revise these facts and/or add any new claims by amending the claim letter or by adding applicable causes of action to the complaint which will relate back to the date of this letter.

RIGHT TO CURE/DEMAND

NOTICE is hereby given to Defendant that the employer may cure the alleged violations within 33 calendar days of the postmark date of this notice. If the Defendant cures the violations, the employer shall give written notice within the 33 calendar days indicated above by certified mail to Mr. Gutierrez's attorney and by online filing with the agency as set forth in Labor Code section 2699.3(c)(2). In order to cure these violations, the following demands are made:

1. Defendant agrees to pay to Mr. Gutierrez and to all other non-exempt employees who worked for Defendant in California within the past 12 months all meal and rest period premium pay for each day meal and/or rest period was not taken, maximum of 2 hours of premium pay per workday.

2. Defendant shall agree to reimburse Mr. Gutierrez and aggrieved employees who were required to incur any business expenses for the benefit of Defendant, including but not limited to the cost of tools used for the benefit of Defendant.

3. Defendant shall agree to pay Mr. Gutierrez and to all other non-exempt employees who worked for Defendant in California within the past 12 months all wages owed but not compensated, and all overtime pay owed but not compensated.

May 13, 2019

Page 4 of 4

4. Defendant shall pay to each formerly employed aggrieved employee a waiting time penalty of one day's pay at the employee's regularly rate of pay for up to thirty (30) days for Defendant's failure to pay all wages earned and due upon separation of employment.

5. Defendant shall agree to pay accrued interest to Mr. Gutierrez and all aggrieved employees at the rate of ten percent (10%) per annum for said unpaid wages.

6. Defendant shall re-issue corrected itemized wage statements to Mr. Gutierrez and all aggrieved employees for the 12-month period prior to the date of this notice.

If Defendant wants clarification of any of the alleged violations or facts and theories upon which they are based at this time, Defendant is invited to contact Mr. Gutierrez's counsel. Otherwise, Mr. Gutierrez will presume Defendant fully understands the allegations contained herein.

If the Labor and Workforce Development Agency intends to investigate the allegations set forth herein, please provide notice via certified mail to:

Mahoney Law Group, APC
Joshua D. Klein
249 E. Ocean Blvd., Suite 814
Long Beach, CA 90802
Tel: (562) 590-5550
Email: jklein@mahoney-law.net

Sincerely,



Joshua D. Klein, Esq.

MAHONEY LAW GROUP, APC