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To: Jeff Su
From: Applicant
Date: July 28, 2016
Re: Wong v. Pavlik Foods, Inc.

Dear Mr. Su

The following is the memorandum you requested regarding Arnold Wong's potential suit. In the attached memorandum I have addressed:

- (1) whether the facts support class certification of current and former employees of Pavlik Foods, Inc. ("Pavlik") for back wages under the Unfair Competition Law ("UCL");
- (2) an argument that Wong can bring a representative claim under the Private Attorney General Act ("PAGA") without having to satisfy class certification requirements; and
- (3)(a) who may recover civil penalties under the UCL, and under PAGA, (b) the prerequisites that must be satisfied before filing suit and (c) whether employees get to keep all civil penalties recovered.

Best regards,
Applicant

1. Class Certification under the UCL

For the reasons explained below, it seems unlikely that the court will grant Mr. Wong class certification to sue under the UCL.

Under the UCL, a class action claimant must meet the standing requirements of UCL Section 17204 and comply with Section 382 of the Columbia Code of Procedure. Section 17204 provides that an action can be brought "by a person who has suffered an injury in fact and has lost money or property as a result of unfair competition."

Arnold Wong will be able to assert an injury in fact because (among his many injuries) he was not paid by Bruce Pavlik, the head of Pavlik, for missed lunch hours or overtime work and was never given a final paycheck after his termination. Mr. Wong has lost money as a result of unfair competition.

Section 382 provides that class actions are permitted, "when the question is

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one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court..." The Columbia Supreme Court (the "Court") has held that Section 382 is comparable to Federal Rule of Civil Procedure ("FRCP") 23 in that it requires sufficient numerosity, common issues of law and fact, a community of interest among the represented parties, and adequate representation of the class interests by the nominal parties. *Campbell v. Omnibus Industries, Inc.* The requirements of Section 382 are set forth and analyzed below.

Numerosity

Numerosity requires that the class be so numerous that joinder of all members is impracticable. In *Westlund v. Palladin Farms, Inc.*, the Columbia Superior Court held that numerosity was satisfied when the plaintiff had a class of 225 workers.

Here, Mr. Wong estimated that Pavlik had between 350 and 400 hours plant workers over the course of a year and that Pavlik had a lot of turnover. Because Pavlik had so much turnover, the potential class likely exceeds 400 class members. This would surely satisfy the numerosity requirement.

Commonality

Commonality requires that there are questions of law or fact common to the class.

Mr. Wong said that it was fairly common for Mr. Pavlik to not give employees their pay stubs. As for Mr. Wong's specific injury, he mentioned employees receiving time off for lunch was a "hit-and-miss proposition" in that some workers got time off and others didn't. In addition, Mr. Wong also stated that many employees were paid less than minimum wage and some former employees were made to sign a release of liability before Mr. Pavlik would pay them only about half of what they were owed for their final payment. One problem with Mr. Wong's potential case is that all class members do not have the same claims.

In his interview, Mr. Wong stated that he couldn't say there was any one thing that applied to all the workers because Mr. Pavlik continually "changed the deal" for different groups of workers. In *Westlund*, the court denied the plaintiff's motion for class certification because the facts and specific types of wage violations varied among the injured employees. Here, it seems that the specific types of wage violations also vary significantly between workers because Mr. Pavlik treated groups of workers differently.

Accordingly, the court might not find that the class can fulfill the commonality requirement for class action certification.

Typicality

Typicality requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class.

As stated above, Mr. Wong's claim might not be typical to that of the class members because groups of workers were treated differently by Mr. Pavlik and suffered various types of injuries. Mr. Wong commented that Mr. Pavlik often made "little side deals with individual employees" and that it was thus "hard to say whether any one thing affected more than just a few of the hourly workers." In *Westlund*, the plaintiff's claim for failure of being reimbursed for meals and rent was not shared by many members of the potential class. The plaintiff was also one of the only salaried workers. Here, although Mr. Wong, like most of the class members, was an hourly worker, it seems that the claims between the injured class members vary significantly between groups of workers.

Accordingly, the court probably find that Mr. Wong's claim does not satisfy the typicality requirement.

Adequacy of Representation

Adequacy of representation requires that the representative parties fairly and adequately protect the interests of the class.

In his interview, when asked whether he would be willing to stand up for all of the workers, Mr. Wong responded, "Yeah, I guess so. That's what started this whole thing because I was speaking up for them. I'd like to be able to give their money too if there's a way to do it." Although Mr. Wong's initial response of "Yeah, I guess so" is not particularly enthusiastic, Mr. Wong seems motivated to help other workers gain the compensation they were improperly denied. However, even if Mr. Wong is motivated to represent the interests of the class, it seems unlikely that the court will find Mr. Wong can fairly and adequately represent the class's interests because the injuries suffered by the employees vary greatly among the different groups of workers.

Accordingly, under the current facts, I do not think it is likely that the court will certify a class of current and former Pavlik employees to sue for recovery of back wages under the UCL.

2. Claim for Back Wages under PAGA

Under Section 2699 of PAGA, "any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency...for a violation of the Labor Code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3."

Section 2699.3 requires that before a civil action can be brought by an aggrieved employee, (1) the employee or his or her representative must give

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written notice by certified mail to the Labor and Workforce Development Agency ("Agency") and the employer of the specific provisions of PAGA alleged to have been violated, including the facts and theories supporting the alleged violations; and (2) the Agency will notify the employer and the aggrieved employee that it does not intend to investigate the alleged violation within 30 days of the postmark date of the notice and in the event of receiving that notice or if no notice is provided within 33 days of the postmark date of the notice, the aggrieved employee may file a civil action.

In *Arentz v. Angelina Dairy, Inc.*, the Court held that, "The Act [PAGA] authorizes a representative action only for the purposes of seeking statutory penalties for Labor Code Violations." As you noted in your Interoffice Memorandum dated July 25, 2016 re: Possible Violations of Columbia Labor Code ("CLC"), failure to pay all wages due upon discharge from employment (back wages) is a violation of Section 201 of the CLC.

The Court in *Arentz* further explicitly stated that aggrieved employee plaintiffs under PAGA do not need to satisfy class action requirements because the employee plaintiff is suing "as the proxy or agent of the state's labor law enforcement agencies."

Accordingly, Mr. Wong will be able to bring a representative claim under PAGA on behalf of current and former employees for back wages without having to satisfy class certification requirements.

3. Monetary Relief

(a) Recovery of Civil Penalties Under the UCL: Under Section 17206 of the UCL, civil penalties for violations will be assessed and recovered in a civil action brought in the name of the people of the State of Columbia by the Attorney General.

(b) PAGA Prerequisites: The prerequisites that need to be satisfied before Mr. Wong can file suit under PAGA are described above in the second section of this memorandum.

(c) PAGA Civil Penalties: Employees do not have the right to recover all civil penalties. Under PAGA Section 2699(e), 75% of civil penalties are given to the Agency and 25% of the civil penalties are given to the aggrieved employees.

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