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and all others similarly situated

SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF ORANGE

MANUEL GUTIERREZ, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

KITE ELECTRIC INCORPORATED, a
California corporation; and DOES 1 through 10,
Inclusive,

Defendants.

CASE NO. 30-2020-01133960-CU-OE-CXC
ASSIGNED FOR ALL PURPOSES TO:
The Honorable Peter Wilson
Department CX 102

**FIRST AMENDED CLASS ACTION
COMPLAINT**

1. Failure to Pay Minimum Wages
2. Failure to Pay Overtime Wages
3. Rest Period Violations
4. Waiting Time Penalties
5. Wage Statement Violations
6. Unfair Business Practices
7. PAGA Penalties for Failure to Pay Wages
8. PAGA Penalties for Rest Period Violations
9. PAGA Penalties for Waiting Time Violations
10. PAGA Penalties for Wage Statement Violations

DEMAND FOR JURY TRIAL

1 Plaintiff MANUEL GUTIERREZ, on behalf of himself, and all others similarly situated,
2 complains and alleges:

3 **INTRODUCTION**

4 1. This action arises from KITE ELECTRIC INCORPORATED, a California Corporation
5 (“KITE ELECTRIC”), and Does 1-10 (“Defendants”) use of compensation and wage statement policies
6 which fail to: pay employees minimum and overtime wages for all hours worked; correctly calculate
7 the regular rate of pay for overtime, premium wages for paid rest periods not provided, and other
8 amounts due; permit compliant paid rest periods or one hour of pay at an employee’s regular rate of
9 pay for those not provided; pay premium wages owed for paid rest periods not permitted; provide
10 accurate itemized wage statements; and, timely pay all wages owed to separated employees during all
11 or part of the time from four years before the start of this action until the trial begins (“Class Period”).

12 2. Plaintiff notified the California Labor and Workforce Development Agency (“LWDA”)
13 of these claims. The LWDA did not intervene, and Defendants did not attempt to cure within the time
14 required. Plaintiff seeks civil penalties as a representative of the State of California, as provided by the
15 Private Attorneys General Act (“PAGA”), on behalf of the aggrieved employees who held the positions
16 identified and suffered one or more of the violations alleged for the period one year and 65 days from
17 the date of filing for PAGA penalties. (“PAGA Period”). A true and correct copy of the January 28,
18 2020 Notice showing compliance with Labor Code section 2699.3 is attached as Exhibit 1.

19 **JURISDICTION AND VENUE**

20 3. Venue as to each Defendant is proper in this judicial district. Code of Civil Procedure, §
21 395. Defendants conduct business in Orange County, and all are within the jurisdiction of this Court
22 for service of process. The unlawful acts alleged have a direct effect on Plaintiff and those similarly
23 situated within California and Orange County. This Court also has jurisdiction because individual class
24 member claims are under the \$75,000 jurisdictional threshold for federal jurisdiction and the aggregate
25 claim is under the \$5,000,000 threshold of the Class Action Fairness Act of 2005 (“CAFA”).

26 4. There is no federal question, the issues are based solely on California law, including the
27 Labor Code, IWC Wage Orders, Code of Civil Procedure, and Business and Professions Code. PAGA
28 actions are not subject to removal.

1 **THE PARTIES**

2 5. MANUEL GUTIERREZ is a California resident. From about June 2019 through October
3 2019, he was employed with KITE ELECTRIC as an electrician.

4 6. KITE ELECTRIC INCORPORATED is a California Corporation.

5 7. True names and capacities of DOES 1 through 10 are unknown to Plaintiff, who sues them
6 by fictitious names. Code of Civil Procedure § 474. Plaintiff is informed, believes, and alleges, each
7 DOE Defendant is legally responsible in some manner for unlawful acts alleged. Plaintiff will amend
8 to add names and capacities of DOE Defendants when they become known.

9 8. Plaintiff is informed and believes each Defendant acted in all respects pertinent to this
10 action as the agent of the other Defendants, carried out a joint scheme, plan or policy, and the acts of
11 each Defendant are legally attributable to the other Defendants. Based on employment records and
12 policies and control over Plaintiff, Defendant employed Plaintiff.

13 **GENERAL ALLEGATIONS**

14 9. Plaintiff re-alleges all preceding paragraphs.

15 10. During the Class Period, Defendants provided electrical sub-contracting services to the
16 construction and commercial industries, as well as residential services, and conducted business and
17 employed Plaintiff and Plaintiff Class members in Orange County and California.

18 11. During the Class Period, Plaintiff and members of the Plaintiff Class worked shifts of ten
19 or more hours per workday, but did not clock-in or out during their work shifts.

20 12. During the Class Period, Defendants failed to record hours worked or pay for time actually
21 worked by Plaintiff and members of the Plaintiff Class, including overtime.

22 13. During the Class Period, Defendant treated Plaintiff and members of the Plaintiff Class as
23 non-exempt employees, and paid them “piece rate” compensation, with additional “incentive pay.”

24 14. During the Class Period, Plaintiff and Plaintiff Class Members were required to, and did,
25 spend time at work for which wages could not be earned, known as “non-earning” or “non-service”
26 time, including loading and unloading trucks. Defendants also had a consistent policy of failing to pay
27 Plaintiff and members of the Plaintiff Class for all “non-earning” or “non-service” time, all minimum
28 and overtime wages, and failing to pay separately for rest periods, in violation of California law.

15. During the Class Period, Defendants failed to include all renumeration in the regular rate of pay when calculating and paying overtime wages premium wages for non-complaint rest periods.

16. During the Class Period, Defendants failed to have a rest period policy compliant with the provisions of the California Labor Code and IWC Wage Orders.

17. During the Class Period, Plaintiff and members of the Plaintiff Class were not authorized or permitted paid ten-minute rest periods for work periods of four (4) hours or major fractions.

18. During the Class Period, Plaintiff and members of the Plaintiff Class were not paid all premium wages for non-compliant rest periods.

19. During the Class Period, Defendants had a consistent policy and practice of failing to timely compensate Plaintiff and members of the Plaintiff Class for all wages owed during and upon separation of employment, in violation of California state wage and hour laws.

20. Wage statements provided to Plaintiff and members of the Plaintiff during the Class Period do not accurately state total hours worked, all applicable hourly rates in effect during the pay period, number of hours worked at each hourly rate, or the number of piece-rate units earned and any applicable piece-rate.

21. As a result of Defendants' violations during the Class Period, it failed to keep required records for Plaintiff and Plaintiff Class Members and violated Labor Code sections 1174 and 1174.5.

CLASS ACTION ALLEGATIONS

22. Plaintiff re-alleges all preceding paragraphs.

23. Plaintiff seeks to represent a Plaintiff Class defined as:

All persons employed by Defendants as Electricians, or in similar positions, at any time starting four years from the filing of this Complaint.

24. Plaintiff seeks to certify a Subclass defined as:

Minimum Wage Subclass

All members of the Plaintiff Class not paid at least minimum wage for all hours worked.

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1 25. Plaintiff seeks to certify a Subclass defined as:

2 **Overtime Subclass**

3 All members of the Plaintiff Class not paid all overtime wages for all
4 hours worked over eight per day or forth per week

5 26. Plaintiff seeks to certify a Subclass defined as:

6 **Rest Period Subclass**

7 All members of the Plaintiff Class working shifts of four hours or a major
8 fraction thereof without being authorized or permitted a rest period of at
9 least 10 minutes and not paid one hour at the regular rate for each such
 day.

10 27. Plaintiff seeks to certify a subclass defined as:

11 **Waiting Time Subclass**

12 All members of the Plaintiff Class to whom Defendants failed to pay all wages due
13 to them upon termination or resignation under Labor Code, §§ 201-203.

14 28. Plaintiff seeks to certify a Subclass defined as:

15 **Wage Statement Subclass**

16 All members of the Plaintiff Class to whom Defendants improperly failed to
17 provide accurate itemized wage statements under Labor Code § 226.

18 29. Plaintiff seeks to certify a subclass of employees defined as follows:

19 **UCL Subclass Subclass**

20 All members of the Minimum Wage, Overtime, and Rest Period Subclasses.

21 30. Plaintiff reserves the right to modify the Class description or further divide it into
22 subclasses or limit it to particular issues. California Rules of Court, Rule 3.765(b).

23 31. This action has been brought and may be maintained as a class action pursuant to Code of
24 Civil Procedure section 382 because there is a well-defined common interest of many persons and it is
25 impractical to bring them all before the court.

26 32. **Ascertainable Class**: The proposed class and subclasses are ascertainable because they
27 can be identified and located using Defendants' payroll and personnel records.

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1 33. **Numerosity**: While the precise number of Class Members has not yet been determined,
2 Plaintiff is informed and believes there are over 100 putative Class members in California affected by
3 Defendants' policies. Joinder of all members of the proposed Class is not practicable

4 34. **Typicality**: The claims of the named Plaintiff are typical of the claims of the proposed
5 Plaintiff Class. Plaintiff and all members of the Class and subclasses sustained injuries and damages
6 arising out of and caused by the Defendants' common course of conduct in violation of laws,
7 regulations that have the force and effect of law, and statutes as alleged.

8 35. **Adequacy of Representation**: Plaintiff will fairly and adequately represent and protect
9 the interests of the members of the Class. Proposed Class Counsel, Cohelan Khoury & Singer and Law
10 Offices of Sahag Majarian II, who represent Plaintiff, are competent and experienced in litigating
11 employment class actions. Plaintiff is aware and understands his obligation to faithfully assist in the
12 preparation of the case and to make decisions in the best interests of the putative class.

13 36. **Superiority of Class Action**: A class action is superior to other available means for the
14 fair and efficient adjudication of this controversy. Each Class member has been damaged and is entitled
15 to recovery by Defendants' illegal policies and practices, and a Class action allows them to litigate their
16 claims in the most efficient and economical manner for the parties and judicial system. There are no
17 likely difficulties managing this action that preclude its maintenance as a class action.

18 37. The predominating common questions of law and fact include:

- 19 a. Whether Defendants violated the law by failing to properly calculate Plaintiff
20 Class Members' regular rate of pay;
- 21 b. Whether Defendants compensated Plaintiff Class Members for all hours worked,
22 including minimum, regular, and/or overtime wages for all hours worked
23 including hours worked during rest periods;
- 24 c. Whether Defendants violated California law by failing to provide Class members
25 with paid ten-minute rest periods for each four hours, or major fraction, worked;
- 26 d. Whether the Plaintiff Class is entitled to penalties under Section 226;
- 27 e. Whether the Plaintiff Class is entitled to waiting time penalties under § 203;

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f. Whether Defendants violated Labor Code §§ 203, 226, 1194, or Wage Order 16-2001, and whether a violation of fundamental public policy is established;

h. Whether Plaintiff Class and Subclasses are entitled to equitable relief pursuant to Business and Professions Code, §§ 17200, *et seq.*

FIRST CAUSE OF ACTION

Failure to Pay Minimum Wages

(Plaintiff and the Minimum Wages Subclass against Each Defendant)

38. Plaintiff re-alleges all preceding paragraphs.

39. By failing to pay all wages for hours Plaintiff and members of the Plaintiff Class were under their control, including when clocked out, but continuing to work, Defendants failed to pay all minimum wages earned and violated Labor Code section 1194 and IWC Wage Orders, including Wage Order No. 16-2001.

40. Defendants' unlawful acts deprived Plaintiff and members of the Plaintiff Class of minimum, regular, and overtime wages in amounts to be determined at trial, and they are entitled to recover these amounts, along with liquidated damages for unpaid minimum wages, and interest, attorneys' fees, and costs. Labor Code section 1194.2.

SECOND CAUSE OF ACTION

Failure to Pay Overtime Wages

(Plaintiff and the Overtime Subclass against Each Defendant)

41. Plaintiff re-alleges all preceding paragraphs.

42. By their failure to record and pay for all time Plaintiff and members of the Plaintiff Class were under their control, by paying them a disguised piece rate, and by their failure to correctly calculate the regular rate of pay, Defendants failed to pay all overtime wages earned, for hours worked over eight (8) hours in one day or forty (40) hours in one week, and violated provisions of Labor Code section 1194 and IWC Wage Orders, including 16-2001.

43. Defendants' unlawful acts deprived Plaintiff and members of the Plaintiff Class of overtime wages in amounts to be determined at trial, and they are entitled to recover these amounts, along with interest, attorneys' fees, and costs.

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1 **THIRD CAUSE OF ACTION**

2 **Failure to Provide Rest Periods**

3 **(Plaintiff and the Rest Period Subclass against Each Defendant)**

4 44. Plaintiff re-alleges all preceding paragraphs.

5 45. By failing to authorize and permit Plaintiff and Plaintiff Subclass Members a paid rest
6 period of at least 10 minutes for every four (4) hours or major fraction thereof worked per day, or
7 provide premium wages at the regular rate of pay when these periods were not permitted or authorized,
8 Defendants willfully violated Labor Code section 226.7 and IWC Wage Orders, including 16-2001.

9 46. Defendants' unlawful acts deprived Plaintiff and members of the Plaintiff Class and Rest
10 Period Subclass of premium wages or other compensation in amounts to be determined at trial, and
11 they are entitled to recover such amounts, plus interest, attorneys' fees, and costs.

12 **FOURTH CAUSE OF ACTION**

13 **Failure to Pay Wages Due at Termination**

14 **(Plaintiff and the Waiting Time Subclass against Each Defendant)**

15 47. Plaintiff re-alleges all preceding paragraphs.

16 48. Defendants had a uniform policy of willfully failing to timely pay former employees all
17 earned wages within the time required by law. An employer who willfully fails to timely pay such
18 wages must, as a penalty, continue to pay the subject employee's wages until the back wages are paid
19 in full or an action is commenced. Labor Code § 203. The penalty cannot exceed 30 days of wages.

20 49. Members of the Waiting Time Subclass are no longer employed by Defendants.

21 50. Defendants willfully failed to pay Waiting Time Subclass Members wages due at
22 termination or within 72 hours of resignation, and failed to pay those sums for 30 days thereafter.

23 51. Defendants' willful failure to pay wages to the Waiting Time Subclass Members violates
24 Labor Code section 203 because Defendants knew wages were due to the Waiting Time Subclass
25 Members, but failed to pay them.

26 **FIFTH CAUSE OF ACTION**

27 **Failure to Provide Itemized Wage Statements**

28 **(Plaintiff and the Wage Statement Subclass against Each Defendant)**

52. Plaintiff re-alleges all preceding paragraphs.

53. Defendants must itemize in wage statements all deductions from payment of wages and
to accurately report, among other things, total hours worked, all hourly wage rates earned, and gross

1 and net wages earned. Labor Code § 226(a). Defendants knowingly and intentionally failed to comply
2 with Labor Code section 226(a) on wage statements provided to Plaintiff and members of the Wage
3 Statement Subclass because, among other reasons, the wage statements failed to accurately set forth all
4 hours worked, and all hourly rates earned, gross and net wages earned.

5 54. The wage statements issued to Plaintiff and members of the Plaintiff Class were inaccurate
6 and incorrect causing confusion and damage to Plaintiff and members of the Plaintiff Class and
7 concealed from them their earnings to which they were entitled to receive by law. As a consequence of
8 Defendants' knowing and intentional failure to comply with section 226(a), Plaintiff and Wage
9 Statement Subclass members are entitled to actual damages or penalties not to exceed \$4,000 for each
10 employee pursuant to Labor Code section 226(b), with interest and attorneys' fees and costs.

11 **SIXTH CAUSE OF ACTION**
12 **Violations of the Unfair Competition Law**
13 **(Plaintiff and the UCL Subclass against Each Defendant)**

14 55. Plaintiff re-alleges all preceding paragraphs.

15 56. At all relevant times, Defendants engaged in unlawful and unfair business practices in
16 violation of Business and Professions Code section 17200 *et seq.* through common and systemic
17 policies and practices which failed to provide employment protections, wages, premiums, and other
18 funds owed Plaintiff and the UCL Subclass in violation of the Labor Code and IWC Wage Orders.

19 57. Defendants' business practices deprived Plaintiff and the UCL Subclass of compensation
20 and other funds to which they are legally entitled, constitute unlawful and unfair business practices,
21 provide an unfair advantage to Defendants over its competitors who comply with wage and hour and
22 employment laws, and unjustly enrich them.

23 58. Because Plaintiff is a victim of Defendants' unfair and unlawful conduct, as alleged in
24 this Complaint, Plaintiff, as an individual and on behalf of Class Members, seeks restitution of all
25 monies and property withheld, acquired or converted by Defendants pursuant to Business and
26 Professions Code sections 17202, 17203, 17204, and 17208.

27 59. Plaintiff and members of the Plaintiff Class are entitled to an injunction, restitution, and
28 other equitable relief against such unlawful practices to return all funds over which Plaintiff and
members of the Plaintiff Class have an ownership interest, and to prevent future damage pursuant to

1 Business and Professions Code section 17200 *et seq.*

2 **SEVENTH CAUSE OF ACTION**

3 **PAGA Penalties for Failure to Pay Wages**
4 **(By Plaintiff and Aggrieved Employees Against Each Defendant)**

5 60. Plaintiff re-alleges all preceding paragraphs of this Complaint.

6 61. “Notwithstanding any agreement to work for a lesser wage, any employee receiving less
7 than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled
8 to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime
9 compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” Labor Code §
10 1194(a).

11 62. “[A]ny provision of this code that provides for a civil penalty to be assessed and collected
12 by the Labor and Workforce Development Agency or any of its departments, divisions, commissions,
13 boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through
14 a civil action brought by an aggrieved employee on behalf of himself or herself and other current or
15 former employees pursuant to the procedures specified in Section 2699.3.” Labor Code § 2699(a).

16 63. “For all provisions of this code except those for which a civil penalty is specifically
17 provided, there is established a civil penalty for a violation of these provisions [] (2) If, at the time of
18 the alleged violation, the person employs one or more employees, the civil penalty is one hundred
19 dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred
20 dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.” Labor Code
21 § 2699(f)(2).

22 64. Section 2699.3(a) applies to any alleged violation of Labor Code sections 510, 1194, and
23 1194.1, and allows for recovery of PAGA civil penalties. Labor Code § 2699.5.

24 65. Defendants failed to pay all minimum, regular, and overtime wages during the PAGA
25 Period. Plaintiff will seek \$100 for the initial pay period an employee was underpaid, and \$200 for each
26 subsequent violation.

27 66. Defendants’ conduct violates Wage Order 16-2001, by failing to pay minimum wages to
28 employees. Plaintiff will also seek \$50 for the initial pay period an employee was underpaid, and \$100
for each subsequent violation.

1 **EIGHTH CAUSE OF ACTION**

2 **PAGA Penalties for Failure to Provide Rest Periods**
3 **(By Plaintiff and Aggrieved Employees Against Each Defendant)**

4 67. Plaintiff re-alleges all preceding paragraphs of this Complaint.

5 68. By failing to authorize and permit Plaintiff a rest period of at least 10 minutes for every
6 four (4) hours or major fraction thereof worked per day, Defendants willfully violated provisions of
7 Labor Code section 226.7 and Wage Order No. 16-2001.

8 69. By failing to provide one hour of pay at their regular rate of compensation when rest
9 periods were not permitted or authorized, Defendants willfully violated the provisions of Labor Code
10 section 226.7 and Wage Order No. 16-2001.

11 70. During the applicable statutory period, Defendants failed to provide rest periods. Plaintiff
12 will seek penalties of \$100 for the initial pay period an employee was underpaid, and \$200 for each
13 subsequent violation. Labor Code section 2699(f)(2).]

14 **NINTH CAUSE OF ACTION**

15 **PAGA Penalties for Failure to Pay Wages Due at Termination**
16 **(By Plaintiff and Aggrieved Employees Against Each Defendant)**

17 71. Plaintiff re-alleges all preceding paragraphs.

18 72. Labor Code sections 201-202 require employers to pay wages earned by employees within
19 certain times. Defendants had a consistent and uniform policy, practice, and procedure of willfully
20 failing to pay the earned wages of Defendants' former employees. An employer that willfully fails to
21 timely pay all final wages must, as a statutory penalty, pay an employee's wages for 30 days, or until
22 back wages are paid in full. Labor Code section 203.

23 73. Defendants failed to pay Plaintiff and other aggrieved employees all final wages,
24 including minimum, regular, and overtime wages, and meal and rest period premium wages, as required
25 by Labor Code sections 201-202.

26 74. Defendants failed to pay Plaintiff and other aggrieved employees penalties due them based
27 on Defendants' failure to pay all final wages in a timely manner as required by Labor Code section
28 203. Plaintiff will seek penalties of \$100 for the initial pay period an employee was not reimbursed,
and \$200 for each subsequent violation.

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1 **TENTH CAUSE OF ACTION**

2 **PAGA Penalties for Failure to Provide Accurate Itemized Wage Statements**
3 **(By Plaintiff and Aggrieved Employees Against Each Defendant)**

4 75. Plaintiff re-alleges all preceding paragraphs.

5 76. Every employer shall, semimonthly or at the time of each payment of wages, furnish each
6 of his or her employees an accurate itemized statement in writing showing, among other things, gross
7 wages earned, total hours worked, net wages earned, and all applicable hourly rates in effect during the
8 pay period and the number of hours worked at each hourly rate by the employee. Labor Code § 226(a).

9 77. Defendants intentionally and willfully violated Section 226 by failing to provide wage
10 statements which included information called for in Section 226(a)(1) (2), (5) and (9).

11 78. Aggrieved employees are entitled to pursue civil penalties under the PAGA for violations
12 of Labor Code section 226. Labor Code § 2699.5.

13 79. Labor Code section 226.3 provides for civil penalties for violations of Section 226.
14 Plaintiff seeks civil penalties of \$250 for the initial violation and \$1,000 for each subsequent violation.

15 **PRAYER FOR RELIEF**

16 Plaintiff prays for judgment as follows:

- 17 A. For certification of this action as a class action;
- 18 B. For appointment of Plaintiff as the representative of the Class;
- 19 C. For appointment of counsel for Plaintiff as Class Counsel;
- 20 D. For injunctive relief;
- 21 E. For compensatory damages in an amount according to proof;
- 22 F. For all interest accrued to date;
- 23 G. This action be maintained as a PAGA Representative Action, and Plaintiff and his
24 counsel be provided with enforcement capability as if the action were brought by the DLSE;
- 25 H. For recovery of civil penalties under Labor Code section 2699 for failure to pay
26 all minimum and overtime wages owed pursuant to Section 1194, according to proof;
- 27 I. For recovery of civil penalties under Labor Code sections 558 and 1197.1 for
28 failing to pay minimum and overtime wages for all hours worked;

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1 J. For recovery of civil penalties under Labor Code section 2699 for failure to
2 authorize and permit rest periods, pursuant to Labor Code section 226.7(a), according to proof;

3 K. For recovery of civil penalties under Labor Code section 2699 for failure to pay
4 all rest period premiums due pursuant to Labor Code section 226.7(b), according to proof;

5 L. For recovery of civil penalties under Labor Code section 2699 for failing to
6 provide accurate itemized wage statements pursuant to Labor Code sections 226 and 226.3, according
7 to proof;

8 M. For recovery of civil penalties under Labor Code section 2699(f)(2) for failing to
9 timely pay all final wages (and waiting time penalties) on time each pay period or upon termination of
10 employment pursuant to Labor Code sections 201-203;

11 N. For recovery of civil penalties under Labor Code section 2699(f)(2) for failing to
12 pay statutory waiting time penalties due pursuant to Labor Code section 203;

13 O. For all applicable civil penalties to be distributed 75% to the LWDA and 25% to
14 the aggrieved employees, subject to approval by the Court, Labor Code section 2699(i);

15 P. For disgorgement of all amounts wrongfully obtained;

16 Q. For reasonable attorneys' fees and costs;

17 R. For such other relief the Court deems just and proper.

18 Dated: April 3, 2020

COHELAN KHOURY & SINGER
LAW OFFICES OF SAHAG MAJARIAN II

19 By: Jeff Geraci
20 Jeff Geraci, Esq.
21 Attorneys for Plaintiff Manuel Gutierrez, on behalf of
22 himself and all others similarly situated

DEMAND FOR JURY TRIAL

23 Plaintiff demands a jury trial of all claims triable as of right by jury.

24 Dated: April 3, 2020

COHELAN KHOURY & SINGER
LAW OFFICES OF SAHAG MAJARIAN II

25 By: Jeff Geraci
26 Jeff Geraci, Esq.
27 Attorneys for Plaintiff Manuel Gutierrez, on behalf of
28 himself and all others similarly situated

EXHIBIT 1

COHELAN KHOURY & SINGER

A PARTNERSHIP OF PROFESSIONAL LAW CORPORATIONS

TIMOTHY D. COHELAN, APLC*
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JEFF GERACI
J. JASON HILL†
MARTA MANUS
KRISTINA DE LA ROSA

(† Also admitted in Illinois)

January 28, 2020

Notice Via Online Submission

California Labor and Workforce Development Agency

Via Certified U.S. Mail with Return Receipt

Kite Electric Incorporated
2 Thomas
Irvine, California 92618

Kite Electric Incorporated
c/o Tracy Adams
2 Thomas
Irvine, California 92618

Re: Mr. Manuel Gutierrez, on behalf of himself and all similarly-situated Kite Electric Incorporated employees, as an individual and proposed Representative of the State of California

Dear PAGA Administrator:

Mr. Manuel Gutierrez submits notice of Labor Code and Industrial Welfare Commission Wage Order violations by Kite Electric Incorporated ("Kite Electric" or "Defendant"). Mr. Gutierrez seeks to represent himself and other aggrieved employees in a Private Attorneys General Act ("PAGA") action against Kite Electric. Labor Code §§ 2698, *et seq.* For purposes of this notice, "aggrieved employees" includes all the Company's non-exempt employees in California, subject to the same or similar policies described below.

Factual Statement

Mr. Gutierrez was hired by Kite Electric as an electrician in June 2019 and laid off for lack of work in October 2019. Mr. Gutierrez and other electricians worked shifts of ten hours per day or longer, but did not clock-in or out. Wage statements were issued with "hours" worked and a \$25 per hour rate shown, but these are not actual hours worked or rates paid. The basis for the wages is not completely clear based on documents produced by Kite Electric, but it appears to be an undefined piece rate, with additional "incentive pay." Although Mr. Gutierrez and other aggrieved employees fill out "work sheets," showing jobs completed and the rate for each, wage statements issued by Kite Electric do not include the number of pieces completed nor a rate earned per piece.

Kite Electric issues no meal or rest period policies. There is a "sign off" on the back of the "work sheets," also translated into Spanish, which employees must sign before being paid which purports to state that employees understand, "I am required to take a 30-minute lunch and am entitled to rest periods each workday at the rate of 10 minutes net rest time for each four hours of work or major fraction thereof." This is an incomplete and misleading statement of California's meal and rest period law and Kite Electric's obligations. One result of the piece rate nature of the work, and the lack of compliant policies, is that employees received no rest periods, nor do they receive separate, additional pay for rest periods.

Mr. Gutierrez and the aggrieved employees also perform unpaid work, including unloading trucks. There is no possibility to be paid for this work because it is not considered part of a particular job assignment and there is no job code it can be attributed to.

As a result of the policies described above, Kite Electric violates Industrial Welfare Commission Wage Orders, including 16-2001, and the Labor Code provisions described below.

Labor Code §§ 510 and 1194 (Minimum, Regular, and Overtime Wages)

Labor Code sections 510 and 1194 require employers to pay at least minimum wages for all hours worked and overtime wages for hours worked over eight per day or forty per week. Although some wage statements showed “overtime,” Kite Electric did not record hours worked or pay for time actually worked, including overtime.

When Mr. Gutierrez and other aggrieved employees performed work such as unloading trucks, he was not paid at all for this time. California employers cannot satisfy the obligation to pay employees at least minimum wage for all time worked by averaging wages earned in time spent in “earning” or “service” time with “non-earning” or “non-service” time. *Armenta v. Osmose* (2005) 135 Cal.App.4th 314, 322-24; *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal. App. 4th 36, 41.

While paying piece rate, which was apparently every pay period, Kite Electric was required to pay separately for each required rest period, but it did not. “[A] piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law.” *Bluford v. Safeway*, 216 Cal. App. 4th 864, 872 (2013); *Vaquero v. Stoneledge Furniture, LLC*, (2017) 9 Cal.App.5th 98.

In addition to not correctly calculating or stating overtime hours, Kite Electric did not attempt to calculate the correct regular rate by adding all compensation, including “incentive pay.” As a result, earned overtime wages were further underpaid.

Labor Code §§ 512 and 226.7 (Rest Periods and Premium Wages)

Kite Electric must authorize and permit employees “10 minutes’ rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours,” and 30 minutes for shifts of 10 hours or more. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1029-30 (2012).

If rest breaks are late, missed, or too short, the employer is liable for an hour of pay at the employee’s regular rate (“premium wages”). Labor Code § 226.7; Industrial Welfare Commission (“IWC”) Wage Order 16-2001

Because of Kite Electric’s piece-rate compensation plan, the lack of a rest period policy including Mr. Gutierrez and other aggrieved employees did not receive compliant rest periods. *Bluford v. Safeway*; *Vaquero v. Stoneledge Furniture, LLC*. This included second and third rest periods in longer shifts. Premium wages were not paid for non-compliant breaks.

Labor Code § 226 (Wage Statements)

California employers must provide itemized wage statements showing, among other things, “total hours worked by the employee,” “all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee,” “the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis.” Labor Code § 226(a)(2)(3)(9). Kite Electric’s wage statements did not include at all, or did not include accurately, hours worked, pieces completed, or applicable hourly or piece rates.

Labor Code §§ 201-203 (Final Wages)

An employer must pay all wages due to involuntarily terminated employees at the time of termination, or within 72 hours to employees voluntarily terminating. Cal. Labor Code § 201. If an employer willfully fails to timely pay all wages to separated employees, the wages continue at the same rate for up to 30 days, until paid. As a result of its failure to pay all wages earned, Kite Electric failed to pay all final wages due Mr. Gutierrez and other aggrieved employees, and violated Sections 201-203.

Kite Electric also independently violates these statutes by a policy of paying final wages late. For example, Mr. Gutierrez’ last day of work was October 4, 2019, when he was involuntarily laid-off, but he did not receive his final check until October 9, 2019.

Labor Code § 1174 (Payroll Records)

Labor Code section 1174 requires employers to keep “payroll records showing the hours worked daily by and the wages paid to the employee.” An employer may be liable under Section 1174 if it fails to record when employees report to work, the start and end time of their shifts, and the total hours worked or meal periods. See *Carrillo v. Schneider Logistics, Inc.*, 823 F. Supp.2d 1040, 1044 (2011). Because its policies forced Mr. Gutierrez and other aggrieved employees to work off the clock, and because it did not accurately keep or report time worked, Kite Electric did not keep required records showing hours worked.

Conclusion

Defendant’s employment practices, as described in detail above, violate IWC Wage Orders 7-2001 and the California Labor Code, including sections 201-203, 218.5, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1194, 1194.2, and 2699.

Our client requests the Labor and Workforce Development Agency (“LWDA”) initiate enforcement for the violations described above. If the LWDA does not pursue enforcement, Mr. Gutierrez will pursue claims for statutory penalties and seek all remedies available for violations of the Labor Code and Industrial Welfare Commission Wage Orders 16-2001, including all available penalties set forth in Labor Code section 2699(f).

Very truly yours,
COHELAN KHOURY & SINGER


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