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16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

17 **FOR THE COUNTY OF CONTRA COSTA**

18 ALEXCIA ANDERSON, an individual, on
19 behalf of the State of California, as a private
20 attorney general,

21 **PLAINTIFF,**

22 **v.**

23 ABC PHONES OF NORTH CAROLINA,
24 INC., a North Carolina Corporation; and
25 DOES 1 to 50, inclusive,

26 **DEFENDANTS.**

FILED
MAY 27 2020

K. BIEKER CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA

By _____ Deputy Clerk

CASE NO.

C20-00957-

**REPRESENTATIVE ACTION
COMPLAINT FOR:**

1. Penalties Pursuant to Labor Code § 2698, *et seq.* for violations of Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 510, 512, 558, 1197, 1197.1 as well as IWC Wage Order Nos. 4-2001 and 7-2001

PER LOCAL RULE, THIS
CASE IS ASSIGNED TO
DEPT 38 FOR ALL
PURPOSES

BY FAX
FIRST LEGAL
200 WEBSTER ST STE 201
OAKLAND, CA 94607
415-626-3111

COPY

1. Plaintiff ALEXCIA ANDERSON, on behalf of the people of the State of California and as an “aggrieved employee” acting as a private attorney general under the Labor Code Private Attorneys General Act of 2004, § 2698, *et seq.* (“PAGA”) complains of Defendant ABC PHONES OF NORTH CAROLINA, INC. (“Defendant” or “ABC Phones”) and the Doe Defendants and each of them, as follows:

I.

INTRODUCTION

2. This is a representative action brought pursuant to Labor Code § 2698, *et seq.*, on behalf of the State of California and several groups of aggrieved employees defined as follows:

- (1) all individuals who are employed or have been employed by ABC Phones of North Carolina, Inc. or its predecessors or merged entities in the State of California as a non-exempt hourly hour or other similar job title who worked more than eight (8) hours in a day and/or forty (40) hours in a week in a pay period where they earned a commission and whose earnings for that pay period did not exceed one and one-half (1 ½) times the minimum wage or more than half of that employee's compensation was not from commissions from February 11, 2019 and continuing into the present ("Overtime Aggrieved Employees");
- (2) All individuals who were employed by ABC Phones of North Carolina, Inc. or its predecessor, merged or related entities in California who were paid a meal and/or rest period premium within the same week that they received compensation in the form of commissions from February 11, 2019 and continuing into the present. ("Meal/Rest Period Premium Aggrieved Employees");
- (3) all current and former employees of ABC Phones of North Carolina, Inc. who worked exclusively within California for at least one pay period for one or more pay periods from February 11, 2019 and continuing into the present. ("Wage Statement Aggrieved Employees"); and
- (4) all current and former employees of ABC Phones of North Carolina, Inc. who worked exclusively within California for at least one pay period as a non-exempt hourly employee or other similar position and whose employment with ABC Phones of North Carolina, Inc. concluded at any time between February 11, 2019 and continuing into the present. ("Waiting Time Penalty Aggrieved Employees").

3. The groups referenced in paragraph 2 may also all collectively be referred to herein as aggrieved employees, other aggrieved employees, and/or all aggrieved employees where appropriate.

4. Plaintiff and all aggrieved employees worked for Defendant at one or more of its locations in California during the statutory period applicable to the claims at issue in this action.

5. Plaintiff, on behalf of the State of California as a private attorney general brings claims for alleged Labor Code violations committed against himself and all aggrieved employees presently or formerly employed by Defendant during the liability period pursuant to Labor Code § 2698, *et seq.* seeking penalties for Defendant violations of California Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 510, 512, 558, 1197, 1197.1 as well as IWC Wage Order Nos. 4-2001 and 7-2001.

6. Based upon the allegations herein, Plaintiff and all aggrieved employees are aggrieved employees within the meaning of Labor Code § 2698, *et seq.*

7. Plaintiff and all aggrieved employees worked for Defendant at one or more of its locations in California. Plaintiff is a current employee of Defendant.

II.

FACTUAL BACKGROUND

8. Plaintiff and the aggrieved employees were at all times relevant hereto were employed by Defendant ABC PHONES OF NORTH CAROLINA, INC.¹ and the Doe Defendants. Plaintiff and the aggrieved employees were at all times pertinent hereto, non-exempt employees for the purposes of overtime, meal periods, and rest periods. Plaintiff and all aggrieved employees were employed by Defendant within the statutory PAGA period.

9. Upon information and belief, Plaintiff and the other aggrieved employees are covered by California Industrial Welfare Commission Occupational Wage Order Nos. 4-2001 and No. 7-2001.

¹ All references to Defendant herein are intended to apply equally to Defendant ABC Phones of North Carolina, Inc. as well as each of the Doe Defendants.

1 10. During the statutory period applicable to the claims at issue in this action, Plaintiff
2 and the other aggrieved employees worked shifts in excess of eight (8) hours in a day and/or forty
3 (40) hours a week.

4 11. Labor Code § 1197 states the California requirement that employees must be paid
5 at least the minimum wage fixed by the Commission or by any applicable state or local law, and
6 any payment of less than the minimum wage is unlawful.

7 12. Similarly, Labor Code § 510 requires an employer to compensate an employee
8 who works more than eight (8) hours in one workday, forty (40) hours in a workweek, and for the
9 first eight (8) hours worked on the seventh consecutive day no less than one and one-half times
10 the regular rate of pay for an employee. Further, Labor Code § 510 obligates employers to
11 compensate employees at no less than twice the regular rate of pay when an employee works
12 more than twelve (12) hours in a day or more than eight (8) hours on the seventh consecutive day
13 of work. In accordance with Labor Code § 1194, Plaintiff and the other aggrieved employees
14 could not agree to work for a lesser wage.

15 13. Labor Code § 1198 provides that “the maximum hours of work and the standard
16 conditions of labor fixed by the commission shall be the maximum hours of work and the
17 standard conditions of labor for employees. The employment of any employee for longer hours
18 than those fixed by the order or under conditions of labor prohibited by the order is unlawful.”

19 14. At all times relevant hereto, Plaintiff alleges that Defendant had a uniform and
20 consistent policy of failing to pay wages and/or overtime when employees worked more than
21 eight (8) hours in a day and/or forty (40) hours in a week at the proper rate. Although due to
22 Defendant’s common policy and practice of including overtime wages associated with
23 commissions as a lump sum instead of all applicable hourly rates in effect during the pay period
24 as required by Labor Code § 226(a)(9) it is not possible to determine from the wage statement
25 alone the overtime rates in effect, Plaintiff and the other aggrieved employees wage statements
26 indicate that they did not receive overtime pay at one and one-half (1.5x) their regular rate of pay.
27 For instance, for the pay period of November 16, 2019 to November 30, 2019, Plaintiff worked
28 81.33 hours for Defendant and earned \$203.45 in commissions. As such, Plaintiff’s regular rate

1 should have been at least \$15.5015369 and her overtime rate should have been \$23.2523054
2 calculated as follows: $((81.33 \text{ hours} \times \$13.00 \text{ per hour base rate}) + \$203.45 \text{ in commission}$
3 $\text{wages}) / 81.33 \text{ hours} = \15.5015369 . Note that these calculations actually underestimate the
4 adjustment to the regular rate because the compensation and hours calculation have to be done on
5 a weekly basis which would lead to a lesser denominator of hours worked. However, given that
6 the wage statements issued by Defendant do not include the hourly rates in effect for the overtime
7 hours and/or the corresponding number of hours worked at each hourly rate, it is not possible to
8 perform these calculations correctly. Nevertheless, based upon the foregoing, it is clear that
9 Plaintiff should have received at least \$86.03353 in overtime wages ($\$23.2523054 \text{ overtime rate} \times$
10 $3.7 \text{ overtime hours}$)—which actually should have been more for the reasons previously discussed.
11 Unfortunately, Plaintiff only received \$76.78 in overtime time wages for this pay period. Plaintiff
12 alleges that Defendant regularly and consistently applied the unlawful policies and practices
13 described above to all Overtime Aggrieved Employees. Accordingly, Plaintiff alleges that
14 Defendant violated Labor Code sections 510, 1197, and 1198 when calculating and paying
15 overtime wages to Plaintiff and the Overtime Aggrieved Employees.

16 15. Labor Code § 558 imposes a penalty upon employers “who violates, or causes to
17 be violated...any provision regulating hours and days of work in any order of the Industrial
18 Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation,
19 fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was
20 underpaid in addition to an amount sufficient to recover underpaid wages; (2) For each
21 subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay
22 period for which the employee was underpaid in addition to an amount sufficient to recover
23 underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected
24 employee. As set forth above, Defendant failed to compensate Plaintiff and all aggrieved
25 employees for all overtime wages at the proper rates. Accordingly, through PAGA Plaintiff and
26 all aggrieved employees are entitled to recover civil penalties pursuant to Labor Code § 558 ZB,
27 *N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and not any underpaid wages.
28

1 16. Moreover, Labor Code § 1197.1 authorizes employees who are paid less than the
2 minimum fixed by an applicable state or local law, or by an order of the commission a civil
3 penalty, restitution of wages, and liquidate damages as follows: (1) for any initial violation that is
4 intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay
5 period for which the employee is underpaid....[and] (2) [f]or each subsequent violation for the
6 same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay
7 period for which the employee is underpaid regardless of whether the initial violation is
8 intentionally committed. As set forth above, Defendant failed to compensate Plaintiff and all
9 aggrieved employees for all overtime wages at the proper rates. Accordingly, through PAGA and
10 to the extent permitted by law Plaintiff and all aggrieved employees are entitled to recover PAGA
11 penalties for violations of Labor Code § 1197.1.

12 17. Labor Code § 512 requires employers to provide employees with thirty (30)
13 minute uninterrupted and duty free meal period within the first five (5) hours of work. Moreover,
14 an employee who works more than ten (10) hours per day is entitled to receive a second thirty
15 (30) minute uninterrupted and duty free meal period.

16 18. Labor Code § 226.7 provides “an employer shall not require an employee to work
17 during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable
18 regulation, standard, or order of the Industrial Welfare Commission (“IWC”). Similarly, under
19 IWC Wage Order Nos. 4-2001 and No.7-2001 prohibits an employer from “employ[ing] any
20 person for a work period of more than five (5) hours without a meal period of not less than 30
21 minutes. IWC Wage Order 7-2001 further obligates employers to provide an employee to “pay
22 the employee one (1) hour of pay at the employee’s regular rate of compensation for each
23 workday that the meal period is not provided. Accordingly, for each day that Plaintiff and all
24 aggrieved employees did not receive compliant meal periods, they were entitled to receive meal
25 period premiums pursuant to Labor Code § 226.7 and Wage Order Nos. 4-2001 and 7-2001.

26 19. With respect to rest periods, Labor Code § 226.7 provides “an employer shall not
27 require an employee to work during a meal or rest or recovery period mandated pursuant to an
28 applicable statute, or applicable regulation, standard, or order of the Industrial Welfare

1 Commission (“IWC”). Under IWC Wage Order Nos. 4-2001 and 7-2001, an employer must
2 authorize and permit all employees to take ten (10) minute duty free rest periods for every major
3 fraction of four hours worked.

4 20. At all times relevant hereto, Plaintiff and the other Meal/Rest Period Premium
5 Aggrieved Employees were not compensated with one (1) hours’ worth of pay at their regular rate
6 of compensation when they were not provided with a compliant meal period. Instead, Defendant
7 had a common policy and practice of failing to include compensation associated with
8 commissions in the meal/rest period premiums paid to Plaintiff and all aggrieved employees.
9 Instead of paying meal/rest period premiums at employees’ regular rates, on the rare occasions
10 that Defendants and the other Meal/Rest Period Premium Aggrieved Employees received a meal
11 period premium, Defendants improperly paid the premium at the employee’s hourly base rate
12 instead of at their regular rate. Defendants often referred to such premiums by pay codes,
13 including, but not limited to, “Time n Vio.”

14 21. In addition, Labor Code § 558 imposes a penalty upon employers “who violates, or
15 causes to be violated...any provision regulating hours and days of work in any order of the
16 Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial
17 violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the
18 employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For
19 each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay
20 period for which the employee was underpaid in addition to an amount sufficient to recover
21 underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected
22 employee.” For purposes of Labor Code § 558, Plaintiff seeks only the penalties assessed as civil
23 penalties pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and not any underpaid wages.

24 22. Labor Code § 226 obligates employers, semi-monthly or at the time of each
25 payment to furnish an itemized wage statement in writing showing:

- 26 (1) gross wages earned;
27 (2) total hours worked by the employee;
28 (3) the number of piece-rate units earned and any applicable piece rate if the
employee is paid on a piece rate;

- (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item;
- (5) net wages earned;
- (6) the inclusive dates of the period for which the employee is paid;
- (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number;
- (8) the name and address of the legal entity that is the employer...;
- (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee...

23. Similarly, Labor Code § 226(e) provides:

(e) (1) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees.

(2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.

(B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:

(i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).

(ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).

(iii) The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer during the pay period.

(iv) The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number.

24. Labor Code § 226(a)(1), (5), and (9) require employers semimonthly or at the time or each payment of wages, furnish each of his or her employees, an accurate itemized statement in writing showing the gross wages earned, the total hours worked by the employee, all deductions, the net wages earned, as well as all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

25. Labor Code Section 226(e), as amended on January 1, 2013 through Senate Bill 1255 (2012), provides that an "injury" occurs when an employer violates Section 226(a) and "the employee cannot promptly and easily determine from the wage statement alone one or more of

1 the items of information provided in the statute.” Lab. Code § 226(e)(2)(B). The Labor Code
2 defines “promptly and easily determine” to mean “a reasonable person would be able to readily
3 ascertain the information without reference to other documents or information.” Lab. Code §
4 226(e)(2)(C) (emphasis added); *Willner*, 35 F. Supp. 3d 1116, 1129 (N.D. Cal. 2014) [holding
5 that an employer violated Lab. Code § 226(a)(6) and (8) even though the employer’s “address
6 appears on the checks attached to the statements and on the front of the envelopes containing the
7 statements.”) (emphasis added). Moreover, the bill analyses for SB 1255 (2012) confirm that all
8 of the required information must appear on the wage statement itself and must not require the
9 employee to reference or review other documents. (“For purposes of the bill, ‘promptly and easily
10 determine’ is defined as a reasonable person who would be able to readily ascertain the
11 information **without reference to other documents or information.**”)(emphasis added) (“Defines
12 ‘promptly and easily’ to mean a reasonable person would be able to readily ascertain the
13 information **without reference to other documents or information.**”) (emphasis added).

14 26. Based upon information and belief, at all times relevant hereto, Defendant engaged
15 in the practice of displaying wages—that Plaintiff contends were still calculated incorrectly—
16 including, but not limited to, overtime wages associated with commissions as a lump sum under
17 the category of “Overtime Com” among other categories. Defendant failed to provide any
18 information whatsoever concerning the number of overtime hours to which such compensation
19 applied nor did it identify either the hourly rate in effect.

20 27. Plaintiff contends that Defendant’s conduct with respect to the issuance of
21 itemized wage statements was substantively similar, at least in part, to the defendant in *Magadia*
22 *v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058, 1070 (N.D.Cal. 2019). Here as in *Magadia*, Plaintiff
23 alleges that when Defendant made wage payments identified the payments as a lump sum. and
24 did “not specify how many hours the employee worked or the employee’s hourly rate” applicable
25 to such wages. *Magadia*, 384 F. Supp. at 1070. In *Magadia*, Wal-Mart employees who
26 “receive[d] a MyShare incentive award at the end of a quarter and also worked overtime during
27 that quarter are given additional overtime pay based on having received the incentive....The
28 additional overtime pay appear[ed] retroactively on the employee’s wage statement as

1 “OVERTIME/INCT...The OVERTIME/INCT item appears on the employee’s wage statement as
2 a lump sum and does not specify how many hours the employee worked or the employee’s hourly
3 rate.” *Id.* Such conduct violated Labor Code § 226(a)(9).

4 28. Moreover, due to Defendant’s failure to pay Plaintiff and all aggrieved employees
5 all overtime wages, meal period premiums, and rest period premiums, the wage statements issued
6 by Defendant during the relevant time period did not indicate the correct amount of gross wages
7 earned, the total hours worked, the net wages earned, all applicable hourly rates in effect during
8 the pay period and the corresponding number of hours worked at each hourly rate. Thus, Plaintiff
9 is an aggrieved employee within the meaning of PAGA and Defendant has violated Labor Code
10 §226(a)(1), (2), (5), (8), and (9) with respect to Plaintiff and all aggrieved employees.

11 29. In addition to violating Labor Code § 226(a), Defendant also knowingly and
12 intentionally failed to pay Plaintiff and all aggrieved employees minimum wages, overtime wages
13 owed, meal period premiums, rest periods premiums including at the proper rates. Moreover,
14 Plaintiff and all aggrieved employees also suffered legal “injury” for purposes of Labor Code
15 section 226(e) insofar as they were unable to readily and easily determine from the wage
16 statements themselves the information required to be set forth by Section 226(a), the information
17 provided by Defendant was confusing and inaccurate. In addition, Plaintiff and the aggrieved
18 employees were unable to determine at all the total hours worked by the employee, the gross
19 wages earned, the net wages earned, and all applicable hourly rates in effect during the pay period
20 and the corresponding number of hours worked at each hourly rate by the employee for the
21 reasons discussed above.

22 30. Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of
23 Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250)
24 per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee
25 for each violation in a subsequent citation, for which the employer fails to provide the employee a
26 wage deduction statement or fails to keep the required in subdivision (a) of Section 226.” As
27 explained in detail above, Defendant failed to provide Plaintiff and the other aggrieved employees
28 with accurate itemized wage statements. Accordingly, Plaintiff and the other aggrieved

1 employees may also recover Labor Code § 226.3 penalties for Defendant’s violations of Labor
2 Code § 226(a) and to the extent it applies to knowing and intentional violations of Labor Code
3 sections 226.

4 31. Labor Code § 204 expressly requires that “[a]ll wages...earned by any person in
5 any employment are due and payable twice during each calendar month, on days designated in
6 advance by the employer as the regular paydays.” Violations of Labor Code § 204 are non-
7 curable under PAGA pursuant to Labor Code § 2699.5.

8 32. As discussed in detail above, Defendant failed to pay Plaintiff and all aggrieved
9 employees overtime wages, meal period premiums, and rest period premiums and/or at the proper
10 amounts for labor performed between the 1st and 15th days between the 16th calendar day of the
11 month during which the labor was performed on a regular and consistent basis. Moreover, as a
12 result of the conduct described in detail above, Defendants also failed to pay Plaintiff and the
13 other aggrieved employees all wages owed for labor performed between the 16th and last day
14 between the 1st and 10th day of the following month on a regular and consistent basis.

15 33. Labor Code § 210 provides that “in addition to, an entirely independent and apart
16 from, any other penalty provided in this article, every person who fails to pay the wages of each
17 employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For
18 any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For
19 each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for
20 each failure to pay each employee, plus 25% of the amount unlawfully withheld.” As a result of
21 the faulty compensation policies and practices described in detail above, Plaintiff and the other
22 aggrieved employees are entitled to recover penalties under Labor Code § 210 through PAGA.
23 *See Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008) (affirming an award of
24 Labor Code section 210 penalties under PAGA due to the employer’s failure to timely pay wages
25 at the proper rate in accordance with a local wage ordinance).

1 34. Under Labor Code §§ 201-202, an employer must provide an employee wages at
2 the time or discharge or within up to seventy-two (72) hours of their resignation. Labor Code §
3 203 provides “if an employer willfully fails to pay . . . any wages of an employee who is
4 discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30
5 days. Lab. Code § 203; *Mamika v. Barca*, (1998) 68 Cal.App.4th 487, 492.

6 35. As described in detail above, Defendant failed to pay Plaintiff and other aggrieved
7 employees whose employment concluded all wages owed, including but not limited to regular
8 wages, overtime wages, and meal/rest period premiums or at the proper amounts within the time
9 constraints proscribed in Labor Code §§ 201-202 at the time of their termination/separation.

10 36. Separate and independent of the foregoing, at all times relevant hereto, Defendant
11 engaged in a common pattern and practice of failing to pay Plaintiff and the Waiting Time
12 Penalty Aggrieved Employees any wages whatsoever upon their separation from the company
13 and/or within the time constraints proscribed in Labor Code §§ 201-202. For instance, although
14 Plaintiff was terminated by Defendant in or around December 17, 2019, Defendant failed to pay
15 Plaintiff wages owed for the pay period of December 1, 2019 to December 15, 2019 until
16 December 20, 2019 and did not pay Plaintiff any wages associated with time worked after
17 December 17, 2019 and/or accrued vacation until January 7, 2020. Based upon information and
18 belief, Defendant engaged in the same conduct with respect to Plaintiff and all Waiting Time
19 Penalty Aggrieved Employees.

20 37. Plaintiff fully and completely exhausted her administrative remedies under PAGA
21 prior to proceeding with this action. Plaintiff filed her PAGA Notice online with the Labor
22 Workforce Development Agency (“LWDA”) and sent a letter by certified mail to Defendants
23 setting forth the facts and theories of the violations alleged against Defendants, as prescribed by
24 Labor Code § 2698 *et seq.* **Exh. A.** As required by PAGA, Plaintiff submitted the \$75.00 filing
25 fee with the LWDA by regular mail. Pursuant to Labor Code § 2699.3(a)(2)(A), no notice was
26 received and/or will have been received by Plaintiff from the LWDA evidencing its intention to
27 investigate within sixty-five (65) calendar days of the postmark date of the PAGA notice. Plaintiff
28 is therefore, entitled to commence and proceed with a civil action pursuant to Labor Code § 2699.

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III.

JURISDICTION AND VENUE

38. This Court has subject matter jurisdiction over any and all causes of action asserted herein pursuant to Article VI, § 10 of the California Constitution and California Code of Civil Procedure § 410.10 by virtue of the fact that this is a civil action in which the matter in controversy, exclusive of interest, exceeds \$25,000, and because each cause of action asserted arises under the laws of the State of California or is subject to adjudication in the courts of the State of California.

39. This Court has personal jurisdiction over Defendants because Defendants have caused injuries in the County of Contra Costa through their acts, and by their violation of the California Labor Code and California state common law.

40. Venue as to each Defendants is proper in this judicial district, pursuant to Code of Civil Procedure § 395. Defendants operates within California and does business within Contra Costa County, California. The unlawful acts alleged herein have a direct effect on Plaintiff and all “employees” within the State of California and Contra Costa County.

IV.

PARTIES

A. PLAINTIFF

41. Plaintiff ALEXCIA ANDERSON is a resident of California and who worked for Defendants and was harmed by activities in Contra County during the statutory period applicable to her claims.

42. Plaintiff and all aggrieved employees are, and at all times pertinent hereto, have been classified as employees by Defendants. Defendants hires employees to work in California.

43. Upon information and belief, Plaintiff and all aggrieved employees are covered by California Industrial Welfare Commission Occupational Wage Order Nos. 4-2001 and/or 7-2001.

44. Plaintiff represents the state of California in prosecuting claims against Defendants on behalf of several groups of employees defined as:

- 1 (1) all individuals who are employed or have been employed by ABC Phones of North
2 Carolina, Inc. or its predecessors or merged entities in the State of California as a
3 non-exempt hourly hour or other similar job title who worked more than eight (8)
4 hours in a day and/or forty (40) hours in a week in a pay period where they earned a
5 commission and whose earnings for that pay period did not exceed one and one-half
6 (1 ½) times the minimum wage or more than half of that employee’s compensation
7 was not from commissions from February 11, 2019 and continuing into the present
8 (“Overtime Aggrieved Employees”);
- 9 (2) All individuals who were employed by ABC Phones of North Carolina, Inc. or its
10 predecessor, merged or related entities in California who were paid a meal and/or rest
11 period premium within the same week that they received compensation in the form of
12 commissions from February 11, 2019 and continuing into the present. (“Meal/Rest
13 Period Premium Aggrieved Employees”);
- 14 (3) all current and former employees of ABC Phones of North Carolina, Inc. who worked
15 exclusively within California for at least one pay period for one or more pay periods
16 from February 11, 2019 and continuing into the present. (“Wage Statement
17 Aggrieved Employees”); and
- 18 (4) all current and former employees of ABC Phones of North Carolina, Inc. who worked
19 exclusively within California for at least one pay period as a non-exempt hourly
20 employee or other similar position and whose employment with ABC Phones of
21 North Carolina, Inc. concluded at any time between February 11, 2019 and
22 continuing into the present. (“Waiting Time Penalty Aggrieved Employees”).

18 **B. DEFENDANTS**

19 45. Defendant ABC PHONES OF NORTH CAROLINA, INC. is believed to be a
20 North Carolina Corporation operating within the State of California including within Contra
21 Costa County. This includes, but is not limited to, at its location referred to as Oak Grove in
22 Concord, California. Defendant’s principal place of business is believed to be 8510 Colonnade
23 Center Drive, Suite 300, Raleigh, NC, 27615. Defendant has done and does business throughout
24 the State of California including Contra Costa County.²

25
26
27 ²It should also be noted that PAGA penalties cannot be used to invoke diversity jurisdiction under CAFA or be
28 included when calculating the amount in controversy for the purposes of removal. *See e.g. Yocupicio v. PAE Group, LLC* 795 F.3d 1057, 1062 (9th Cir. 2015) (holding that “the amount involved in the non-class claims cannot be used to satisfy the CAFA jurisdictional amount, and the CAFA diversity provisions cannot be invoked to give the district court jurisdiction over the non-class claims.”).

46. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants sued herein as DOES 1 to 50, inclusive, are currently unknown to Plaintiff, who therefore sues Defendants by such fictitious names under Code of Civil Procedure § 474. Plaintiff is informed and believes, and based thereon alleges, that each of the Defendants designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and capacities of the Defendants designated hereinafter as DOES when such identities become known.

47. Plaintiff is informed and believes, and based thereon alleges, that each Defendants acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are legally attributable to the other Defendants. Furthermore, Defendants in all respects acted as the employer and/or joint employer of Plaintiff and the other aggrieved employees.

V.

FIRST CAUSE OF ACTION

**PLAINTIFF AND ALL AGGRIEVED EMPLOYEES AGAINST ALL DEFENDANTS
FOR PENALTIES PURSUANT TO LABOR CODE § 2698, ET SEQ. FOR VIOLATIONS
OF LABOR CODE §§ 1. 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 510, 512, 558, 1197,
1197.1 as well as IWC Wage Order Nos. 4-2001 and 7-2001**

48. Plaintiff, on behalf of the State of California, realleges and incorporates by reference all previous paragraphs.

49. As a result of the acts alleged above, Plaintiff seeks penalties under Labor Code § 2698, *et seq.* because of Defendants' violations of Labor Code §§ 201, 202, 203, 204, 210, 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 510, 512, 558, 1197, 1197.1 as well as IWC Wage Order Nos. 4-2001 and 7-2001

50. Under Labor Code §§ 2699(f)(2) and 2699.5, for each such violation, Plaintiff and all other aggrieved employees are entitled to penalties in an amount to be shown at the time of trial subject to the following formula unless a civil penalty is already proscribed under the Labor Code:

\$100 for the initial violation per employee per pay period; and

1 \$200 for each subsequent violation per employee per pay period.
2 These penalties will be allocated 75% to the Labor Workforce Development Agency and 25% to
3 the affected employees.

4 51. In addition, to the extent permitted by law under PAGA, Plaintiff seeks separate
5 PAGA penalties for Defendants’ violations of Labor Code §§ 226(a) and 226(e). For violations of
6 Labor Code § 226(a), Plaintiff seeks the default penalty provided by Labor Code § 226.3. Labor
7 Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of Section 226 shall be
8 subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per
9 violation in an initial violation and one thousand dollars (\$1,000) per employee for each violation
10 in a subsequent citation, for which the employer fails to provide the employee a wage deduction
11 statement or fails to keep the required in subdivision (a) of Section 226.” Accordingly, through
12 PAGA and only to the extent permitted by law, Plaintiff and the aggrieved employees are entitled
13 to recover penalties for violations of Labor Code § 226.3 and seeks default and/or separate Labor
14 Code Section 226.3 PAGA penalties for Defendants’ violations of Labor Code § 226(e).³

15 52. Labor Code § 210 provides that “in addition to, an entirely independent and apart
16 from, any other penalty provided in this article, every person who fails to pay the wages of each
17 employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For
18 any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For
19 each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for
20 each failure to pay each employee, plus 25% of the amount unlawfully withheld.” Pursuant to
21 Labor Code § 210, “[t]welve and one-half percent of the penalty recovered shall be paid into a
22 fund within the Labor and Workforce Development Agency dedicated to educating employers
23 about state labor laws, and the remainder shall be paid into the State Treasury to the credit of the

24

25 ³ Plaintiff does not seek statutory penalties under Labor Code § 226(e); rather, Plaintiff only seeks civil penalties
26 under PAGA for Defendant’s knowing and intentional violation of Labor Code § 226(e) similar to the ability of
27 recovering Labor Code § 256 civil penalties under PAGA for a willful violation of Labor Code §§ 201-202 and only
28 to the extent such penalties are recoverable by the State under PAGA. *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 381 (2014); *Esparza v. KS Industries, L.P.* 13 Cal.App.5th 1228, 1242 (2017) (explaining that the Labor Code § 256 penalties only exist if the employer’s failure to timely pay wages upon separation was willful and that it is a “civil penalty” “recovered or imposed by the Labor Commissioner.”); *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058, 1082 (N.D.Cal. 2019) (explaining that since 1948 the Legislature and courts have found references in the Labor Code to “knowing and intentional” as synonymous to “willful.”).

1 General Fund.” As a result of the faulty compensation policies and practices described in detail
2 above, the State of California is entitled to recover penalties under Labor Code § 210 through
3 PAGA.

4 53. Further, Labor Code § 558 imposes a penalty upon employers “who violates, or
5 causes to be violated...any provision regulating hours and days of work in any order of the
6 Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial
7 violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the
8 employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For
9 each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay
10 period for which the employee was underpaid...” Based upon the above factual allegations
11 related to overtime wages and meal/rest period violations, Plaintiff and the aggrieved employees
12 are entitled to recover civil penalties under Labor Code § 558. *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175
13 (2019).

14 **RELIEF REQUESTED**

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

- 16 1. For penalties under Labor Code § 2698, *et seq.* for Plaintiff and all aggrieved
17 employees because of Defendants’ violation of Labor Code §§ 201, 202, 203, 204, 210, 226(a),
18 226(e), 226.3, 510, 512, 558, 1197, 1197.1 as well as IWC Wage Order Nos. 4-2001 and 7-2001
19 2. An award providing for payment of costs of suit;
20 3. An award of attorneys’ fees; and
21 4. Such other and further relief as this Court may deem proper and just.

22 Dated: May 27, 2020

WINSTON LAW GROUP, P.C.

23
24
25 By: David Winston
26 DAVID S. WINSTON
27 Attorney for Plaintiff and the Aggrieved Employees
28

Exhibit A

WINSTON LAW GROUP, P.C.

1180 S BEVERLY DR., SUITE 320 • LOS ANGELES, CA 90035 • (424) 288-4568

February 11, 2020

Via Online Filing with the LWDA & by Certified Mail to Defendant

ABC Phones of North Carolina, Inc.
8510 Colonnade Center Drive Suite 300
Raleigh, NC 27615

Re: *ALEXCIA ANDERSON VS. ABC PHONES OF NORTH CAROLINA INC. -
California Labor Code § 2699 Penalties*

Gentlepersons:

This firm and Ackermann & Tilajef, P.C. represent Alexcia Anderson (“Plaintiff” or “Ms. Anderson”) and a proposed group of current and former employees working for ABC Phones of North Carolina, Inc. dba Victra and/or any businesses or entities doing business as ABC Phones of North Carolina, Inc. dba Victra (“Defendant” or “ABC Phones”) in California for violations of California Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 510, 512, 558, 1197, 1197.1 as well as IWC Wage Order Nos. 4-2001 and 7-2001.

Ms. Anderson wishes to bring a representative action on behalf of the State of California based upon alleged improper acts committed against her and several groups of aggrieved employees defined as:

- (1) all individuals who are employed or have been employed by ABC Phones of North Carolina, Inc. or its predecessors or merged entities in the State of California as a non-exempt hourly hour or other similar job title who worked more than eight (8) hours in a day and/or forty (40) hours in a week in a pay period where they earned a commission and whose earnings for that pay period did not exceed one and one-half (1 ½) times the minimum wage or more than half of that employee’s compensation was not from commissions from one (1) year prior present (“Overtime Aggrieved Employees”);
- (2) All individuals who were employed by ABC Phones of North Carolina, Inc. or its predecessor, merged or related entities in California who were paid a meal and/or rest period premium within the same week that they received compensation in the form of commissions from one (1) year prior to the date of this letter and continuing into the present. (“Meal/Rest Period Premium Aggrieved Employees”);

- (3) all current and former employees of ABC Phones of North Carolina, Inc. who worked exclusively within California for at least one pay period for one or more pay periods from one (1) year prior to the date of this letter and continuing into the present. (“Wage Statement Aggrieved Employees”); and
- (4) all current and former employees of ABC Phones of North Carolina, Inc. who worked exclusively within California for at least one pay period as a non-exempt hourly employee or other similar position and whose employment with ABC Phones of North Carolina, Inc. concluded at any time between one (1) year prior to the submission of this letter and continuing into the present. (“Waiting Time Penalty Aggrieved Employees”).

These groups may all collectively be referred to herein as aggrieved employees and/or all aggrieved employees where appropriate. The purpose of this letter is to comply with the Private Attorneys General Act of 2004, pursuant to California Labor Code § 2698 *et seq.* We herein set forth some of the facts and theories of California Labor Code violations which we allege Defendant engaged in with respect to our client and all aggrieved employees.¹

DEFENDANT VIOLATED AND CONTINUES TO VIOLATE LABOR CODE § 510, 1197, and 1198 AND WAGE ORDER NOS. 4-2001 and 7-2001

Labor Code § 510 requires an employer to compensate an employee who works more than eight (8) hours in one workday, forty (40) hours in a workweek, and for the first eight (8) hours worked on the seventh consecutive day no less than one and one-half times the regular rate of pay for an employee. Further, Labor Code § 510 obligates employers to compensate employees at no less than twice the regular rate of pay when an employee works more than twelve (12) hours in a day or more than eight (8) hours on the seventh consecutive day of work. In accordance with Labor Code § 1194, Plaintiff and the other aggrieved employees could not agree to work for a lesser wage.

In addition, Labor Code § 1197 states the California requirement that employees must be paid at least the minimum wage fixed by the Commission or by any applicable state or local law, and any payment of less than the minimum wage is unlawful.

Similarly, Labor Code § 1198 provides that “the maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those

¹ See *Cardenas v. McLane FoodServices, Inc.* (C.D. Cal. Jul. 8, 2011) 796 F. Supp. 2d 1246, 1261; *Moua v. Int'l Bus. Machines Corp.* (N.D. Cal. Jan. 31, 2012) No. 5:10-CV-01070 EJD, 2012 WL 370570, at *5; *York v. Starbucks Corp.*, (C.D. Cal. Nov. 1, 2012) No. CV 08-07919 GAF PJWX, 2012 WL 10890355, at *4.

fixed by the order or under conditions of labor prohibited by the order is unlawful.”

When calculating an employee's regular rate, California and federal courts, with limited exceptions, look to the federal Fair Labor Standards Act (“FLSA”). *Huntington Mem'l Hosp. v. Sup. Ct.*, 131 Cal. App. 4th 893, 902 (2005); *Alonzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1129 (C.D. Cal. 2011) (using FLSA standards to determine the regular rate of pay in a Cal. Labor Code § 510 overtime claim); *Advanced—Tech Sec. Servs., Inc. v. Sup. Ct.*, 163 Cal. App. 4th 700, 707 (2008).² Under the FLSA, the regular rate of pay includes all forms of remuneration including non-discretionary bonuses, shift differentials, and pay for completing certain tasks. *See* 29 U.S.C. § 207(e); *Huntington Mem'l*, 131 Cal. App. 4th at 90 (holding that shift differential must be included in the regular rate when calculating and paying overtime); *accord Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 468-69 (1948); *O'Brien v. Town of Agawam* 350 F.3d 279, 295 (1st Cir. 2003); *cf Alvarado v. Dart Container Corp. of California*, 4 Cal.5th 542, 568 (2018) (explaining that for the purposes of calculating the per hour value of an employer's flat sum attendance bonuses that California, unlike the FLSA, uses the non-overtime hours worked during the pay period as the divisor instead of all hours worked during the pay period).

Plaintiff alleges that Defendant had a uniform and consistent policy of failing to pay wages and/or overtime when employees worked more than eight (8) hours in a day and/or forty (40) hours in a week at the proper rate. Although due to Defendant's common policy and practice of including overtime wages associated with commissions as a lump sum instead of all applicable hourly rates in effect during the pay period as required by Labor Code § 226(a)(9) it is not possible to determine from the wage statement alone the overtime rates in effect, Plaintiff and the other aggrieved employees wage statements indicate that they did not receive overtime pay at one and one-half (1.5x) their regular rate of pay. For instance, for the pay period of November 16, 2019 to November 30, 2019, Plaintiff worked 81.33 hours for Defendant and earned \$203.45 in commissions. As such, Plaintiff's regular rate should have been at least \$15.5015369 and her overtime rate should have

² The DLSE routinely “takes the position that the failure of the [IWC] to define the term ‘regular rate’ indicates the Commission's intent that in determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California will adhere to the standards adopted by the U.S.” (*Huntington Mem'l*, *supra*, 131 Cal. App. 4th at p. 902-903; *Advanced—Tech*, *supra*, 163 Cal.App.4th at p. 707; *see also*, Division of Labor Standards Enforcement, Enforcement and Interpretations Manual, § 49.1.2 [noting “in not defining the term ‘regular rate of pay’, the Industrial Welfare Commission has manifest its intent to adopt the definition of regular rate of pay set out in the Fair Labor Standards Act.”].) In addition, numerous DLSE opinion letters take the position California will adhere to the standards adopted by the U.S. Dept. of Labor when determining an employee's regular rate. (*See also*, Cal. Dept. Industrial Relations, DLSE, H. Thomas Cadell, Jr., opinion letter, Calculation of Regular Rate of Pay (Jan. 29, 2003) pp. 2, fn. 1, 3, Cal. Dept. Industrial Relations, DLSE, H. Thomas Cadell, Jr., opinion letter, Calculation of Regular Rate of Pay in Cases Involving Piece Rate (Feb. 22, 1993) p. 2 & fn. 2; Cal. Dept. Industrial Relations, DLSE, H. Thomas Cadell, Jr., opinion letter, Explicit Wage Agreements (Jan 29, 1992) p. 1, Cal. Dept. Industrial Relations, DLSE, H. Thomas Cadell, Jr., opinion letter, Calculation of Regular Rate of Pay (Mar. 6, 1991) p. 1.)

been \$23.2523054 calculated as follows: $((81.33 \text{ hours} \times \$13.00 \text{ per hour base rate}) + \$203.45 \text{ in commission wages}) / 81.33 \text{ hours} = \15.5015369 . Note that these calculations actually underestimate the adjustment to the regular rate because the compensation and hours calculation have to be done on a weekly basis which would lead to a lesser denominator of hours worked. However, given that the wage statements issued by Defendant do not include the hourly rates in effect for the overtime hours and/or the corresponding number of hours worked at each hourly rate, it is not possible to perform these calculations correctly. Nevertheless, based upon the foregoing, it is clear that Plaintiff should have received at least \$86.03353 in overtime wages ($\$23.2523054 \text{ overtime rate} \times 3.7 \text{ overtime hours}$)—which actually should have been more for the reasons previously discussed. Unfortunately, Plaintiff only received \$76.78 in overtime time wages for this pay period. Plaintiff alleges that Defendant regularly and consistently applied the unlawful policies and practices described above to all Overtime Aggrieved Employees. Accordingly, Defendant violated Labor Code sections 510, 1197, and 1198 when calculating and paying overtime wages to Plaintiff and the Overtime Aggrieved Employees.

Assuming *arguendo*, the commission was earned in a prior pay period, then Defendants would have been obligated to pay overtime wages on the overtime hours worked and to allocate the commission wages to each workweek/pay period as appropriate. *Peabody v. Time Warner Cable, Inc.*, 59 Cal. 4th 662, 666, 328 P.3d 1028, 1030 (2014).

Further, Labor Code § 558 imposes a penalty upon employers “who violates, or causes to be violated...any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected employee.” For purposes of Labor Code § 558, Plaintiff seeks only the penalties assessed as civil penalties pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and not any underpaid wages.

Labor Code § 1197.1 authorizes employees who are paid less than the minimum fixed by an applicable state or local law, or by an order of the commission a civil penalty, restitution of wages, and liquidate damages as follows: (1) for any initial violation that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee is underpaid....[and] (2) [f]or each subsequent violation for the same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed. As set forth above,

Defendant failed to compensate Plaintiff and all aggrieved employees for all overtime wages at the proper rates. Accordingly, through PAGA and to the extent permitted by law Plaintiff and all aggrieved employees are entitled to recover liquidated damages for violations of Labor Code § 1197.1.

DEFENDANT VIOLATED AND CONTINUES TO VIOLATE LABOR CODE §§ 226.7, 512, and 1198 AS WELL AS IWC WAGE ORDER NOS. 4-2001 and 7-2001

Labor Code § 512 requires employers to provide employees with thirty (30) minute uninterrupted and duty free meal period within the first five (5) hours of work. Moreover, an employee who works more than ten (10) hours per day is entitled to receive a second thirty (30) minute uninterrupted and duty free meal period.

Labor Code § 226.7 provides “an employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission (“IWC”). Similarly, under IWC Wage Order 7-2001 prohibits an employer from “employ[ing] any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes. IWC Wage Order 7-2001 further obligates employers to provide an employee to “pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each workday that the meal period is not provided. Accordingly, for each day that Plaintiff and all aggrieved employees did not receive compliant meal periods, they were entitled to receive meal period premiums pursuant to Labor Code § 226.7 and Wage Order Nos. 4-2001 and 7-2001.

Plaintiff, the Meal/Rest Period Premium Aggrieved Employees were not compensated with one (1) hours’ worth of pay at their regular rate of compensation when they were not provided with a compliant meal period. Instead, Defendant had a common policy and practice of failing to include compensation associated with commissions in the meal/rest period premiums paid to Plaintiff and all aggrieved employees. Instead of paying meal/rest period premiums at employees’ regular rates, on the rare occasions that Defendants and the other Meal/Rest Period Premium Aggrieved Employees received a meal period premium, Defendants improperly paid the premium at the employee’s hourly base rate instead of at their regular rate. Defendants often referred to such premiums by pay codes, including, but not limited to, “Time n Vio.”

Courts routinely find that meal and rest period premiums must be paid at the employees’ regular rate. *See e.g. In re Taco Bell Wage & Hour Actions*, No. 1:07-cv-01314-SAB, 2016 U.S. Dist. LEXIS 32690, at *4-5 (E.D.Cal. Mar. 14, 2016) (denying the defendant’s motion for judgment notwithstanding the verdict after a jury found in favor of the employees on their claim that the defendant underpaid meal period premiums at the base rate instead of at the regular rate); *Ibarra v.*

Wells Fargo Bank, N.A., No. CV 17-4344 PA (ASx)) 2018 U.S. Dist. LEXIS 78513, at *14 (C.D. Cal. May 8, 2018) (awarding \$97 million to the employees and finding that meal and rest period premiums must be paid at the employees' regular rate because certain employees in California are eligible for meal/rest periods and do not even have an hourly base rate); *Magadia v. Wal-Mart Assocs.* (N.D. Cal. Jan. 9, 2018, No. 17-CV-00062-LHK) 2018 U.S. Dist. LEXIS 4715, at *3 (certifying a class of non-exempt employees who were paid meal period premiums at their hourly base rate without including non-discretionary incentive awards in the meal period premiums); *Seckler v. Kindred Healthcare Operating Group, Inc.*, No. SACV 10-01188 DDP, 2013 WL 812656, at *6 (C.D. Cal. Mar. 5, 2013) (certifying a class of employees who were "paid for at least one missed meal period payment at the base rate instead of the regular rate to which they were entitled."); *accord Studley v. Alliance Healthcare Servs., Inc.* No. SACV1000067CJCANX, 2012 WL 12286522, at *4 and 7, fn. 4 (C.D. Cal. July 26, 2012). Indeed, many employees who are eligible for meal/rest periods and premiums for non-compliant meal/rest periods, such as those in *Ibarra*, do not even have an hourly rate.

Further, Labor Code § 558 imposes a penalty upon employers "who violates, or causes to be violated...any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages; and (3) Wages recovered pursuant to this section shall be paid to the affected employee." For purposes of Labor Code § 558, Plaintiff seeks only the penalties assessed as civil penalties pursuant to *ZB, N.A. v. Sup. Ct.* 8 Cal.5th 175 (2019) and not any underpaid wages.

DEFENDANT VIOLATED AND CONTINUES TO VIOLATE LABOR CODE §§ 226(a), 226(e), and 226.3

As to Plaintiff and all aggrieved employees, Defendant also failed to provide accurate itemized wage statements in accordance with Labor Code § 226(a)(1, 5, 8, and 9). Labor Code § 226 obligates employers, semi-monthly or at the time of each payment to furnish an itemized wage statement in writing showing:

- (1) gross wages earned;
- (2) total hours worked by the employee;
- (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate;
- (4) all deductions, provided that all deductions made on written orders of the employee may

be aggregated and shown as one item;

(5) net wages earned;

(6) the inclusive dates of the period for which the employee is paid;

(7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number;

(8) the name and address of the legal entity that is the employer...;

(9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee...

Similarly, Labor Code § 226(e) provides:

(e) (1) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees.

(2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.

(B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:

(i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).

(ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).

(iii) The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer during the pay period.

(iv) The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number.

Here as in *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058, 1070 (N.D.Cal. 2019), Plaintiff alleges that when Defendant paid some overtime wages associated with commissions—it identified the payments as a lump sum. and did “not specify how many hours the employee worked or the employee’s hourly rate” applicable to such wages. *Magadia*, 384 F. Supp. at 1070. In *Magadia*, Wal-Mart employees who “receive[d] a MyShare incentive award at the end of a quarter

and also worked overtime during that quarter are given additional overtime pay based on having received the incentive....The additional overtime pay appear[ed] retroactively on the employee's wage statement as "OVERTIME/INCT...The OVERTIME/INCT item appears on the employee's wage statement as a lump sum and does not specify how many hours the employee worked or the employee's hourly rate." *Id.* Based upon information and belief, Defendant engaged in the practice of displaying wages—that Plaintiff contends were still calculated incorrectly—including, but not limited to, overtime wages associated with commissions as a lump sum under the category of "Overtime Com" among other categories. Defendant failed to provide any information whatsoever concerning the number of overtime hours to which such compensation applied nor did it identify either the hourly rate in effect.

Moreover, due to Defendant's failure to pay Plaintiff and all aggrieved employees all overtime wages, meal period premiums, and rest period premiums, the wage statements issued by Defendant do not indicate the correct amount of gross wages earned, the total hours worked, the net wages earned, all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate. Thus, Plaintiff is an aggrieved employee within the meaning of PAGA and Defendant has violated Labor Code §226(a)(1), (2), (5), (8), and (9) with respect to Plaintiff and all aggrieved employees.

Plaintiff and the aggrieved employees will prevail on their claim for PAGA penalties under Labor Code § 226(a). *See Lopez v. Friant & Assocs., LLC*, 15 Cal.App.5th 773, 788 (2017) ("hold[ing] a plaintiff seeking civil penalties under PAGA for a violation of Labor Code section 226(a) does not have to satisfy the 'injury' and 'knowing and intentional' requirements of section 226(e)(1)."); *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal.App.5th 667, 679 (2018) (finding that the "requirements for a section 226(e) claim do not apply to a PAGA claim for a violation of section 226(a).");

In addition to violating Labor Code § 226(a), Defendant also knowingly and intentionally failed to pay Plaintiff and all aggrieved employees minimum wages, overtime wages owed, meal period premiums, rest periods premiums including at the proper rates. Moreover, Plaintiff and all aggrieved employees also suffered legal "injury" for purposes of Labor Code section 226(e) insofar as they were unable to readily and easily determine from the wage statements themselves the information required to be set forth by Section 226(a), the information provided by Defendant was confusing and inaccurate. In addition, Plaintiff and the aggrieved employees were unable to determine at all the total hours worked by the employee, the gross wages earned, the net wages earned, and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee for the reasons discussed above.

Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the required in subdivision (a) of Section 226.” As explained in detail above, Defendant failed to provide Plaintiff and the other aggrieved employees with accurate itemized wage statements. Accordingly, Plaintiff and the other aggrieved employees may also recover Labor Code § 226.3 penalties for Defendant’s violations of Labor Code § 226(a).

DEFENDANT VIOLATED AND CONTINUES TO VIOLATE LABOR CODE §§ 204 AND 210

Labor Code § 204 expressly requires that “[a]ll wages...earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays.” Violations of Labor Code § 204 are non-curable under PAGA pursuant to Labor Code § 2699.5.

As discussed in detail above, Defendant failed to pay Plaintiff and all aggrieved employees overtime wages, meal period premiums, and rest period premiums and/or at the proper amounts for labor performed between the 1st and 15th days between the 16th calendar day of the month during which the labor was performed on a regular and consistent basis. Moreover, as a result of the conduct described in detail above, Defendants also failed to pay Plaintiff and the other aggrieved employees all wages owed for labor performed between the 16th and last day between the 1st and 10th day of the following month on a regular and consistent basis.

Labor Code § 210 provides that “in addition to, an entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25% of the amount unlawfully withheld.” As a result of the faulty compensation policies and practices described in detail above, Plaintiff and the other aggrieved employees are entitled to recover penalties under Labor Code § 210 through PAGA. *See Amaral v. Cintas Corp. No. 2, 163 Cal.App.4th 1157, 1209 (2008)* (affirming an award of Labor Code section 210 penalties under PAGA due to the employer’s failure to timely pay wages at the proper rate in accordance with a local wage ordinance).

DEFENDANT VIOLATED AND CONTINUES TO VIOLATE LABOR CODE §§ 201-203

Under Labor Code §§ 201-202, an employer must provide an employee wages at the time or discharge or within up to seventy-two (72) hours of their resignation. Labor Code § 203 provides “if an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30 days. Lab. Code § 203; *Mamika v. Barca*, (1998) 68 Cal.App.4th 487, 492.

As described in detail above, Defendant failed to pay Plaintiff and other aggrieved employees whose employment concluded all wages owed, including but not limited to regular wages and overtime wages within the time constraints proscribed in Labor Code §§ 201-202 at the time of their termination/separation.

Separate and independent of the foregoing, Defendant engaged in a common pattern and practice of failing to pay Plaintiff and the Waiting Time Penalty Aggrieved Employees any wages whatsoever upon their separation from the company and/or within the time constraints proscribed in Labor Code §§ 201-202. For instance, although Plaintiff was terminated by Defendant in or around December 17, 2019, Defendant failed to pay Plaintiff wages owed for the pay period of December 1, 2019 to December 15, 2019 until December 20, 2019 and did not pay Plaintiff any wages associated with time worked after December 17, 2019 and/or accrued vacation until January 7, 2020. Based upon information and belief, Defendant engaged in the same conduct with respect to all Waiting Time Penalty Aggrieved Employees.

Thus, as result of Defendants’ faulty policies described above, Plaintiff and all aggrieved employees left their employment with Defendants without being compensated for each and every hour worked at the appropriate rate in violation of Labor Code §§ 201, 202, and 203.

CONCLUSION

Therefore, pursuant to Labor Code § 2699.3, we write to inform you and the Labor and Workforce Development Agency of the alleged Labor Code violations. If Defendants are interested in attempting to resolve this matter on a class-wide basis, including the PAGA claims, please

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contact me or have a lawyer you choose to retain contact me so that we can discuss the possibility of early mediation on or before **March 6, 2020**.

Very truly yours,

WINSTON LAW GROUP, P.C.

By: David Winston
DAVID S. WINSTON

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