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Individually and on behalf of all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

CRAIG RUSSELL, individually and on
behalf of all others similarly situated

Plaintiff,

vs.

NUTANIX, INC.; and DOES 1 through 20,
inclusive,

Defendants.

Case No. 20CV366943

Honorable Patricia M. Lucas – Dept. 3

[Filed as a matter of right pursuant to Labor Code
§ 2699.3(a)(2)(C)]

**FIRST AMENDED CLASS ACTION AND
REPRESENTATIVE ACTION COMPLAINT
FOR:**

1. Failure to Pay Minimum Wages;
2. Failure to Pay Overtime Wages;
3. Failure to Timely Pay All Earned Wages;
4. Failure to Provide Meal Periods;
5. Failure to Permit Rest Breaks;
6. Failure to Provide Accurate Itemized Wage Statements;
7. Failure to Pay All Wages Due Upon Separation of Employment;
8. Failure to Reimburse Necessary Business Expenses;

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9. Violation of Business and Professions Code §§ 17200, *et seq.*; and
10. Enforcement of Labor Code § 2698 *et. seq.* (“PAGA”)

DEMAND FOR JURY TRIAL

Plaintiff Craig Russell, individually and on behalf of others similarly situated, alleges as follows:

NATURE OF ACTION AND INTRODUCTORY STATEMENT

1. Plaintiff Craig Russell (“Plaintiff”) brings this putative class action against Defendants Nutanix, Inc., (“Defendant Nutanix”) and DOES 1 through 20, inclusive (collectively, “Defendants”), on behalf of himself individually and a putative class of employees working throughout California.

2. Defendant Nutanix is a cloud-computing company that sells software, cloud services, and software-defined storage.

3. Through this action, Plaintiff alleges that Defendants have engaged in a systematic pattern of wage and hour violations under the California Labor Code and Industrial Welfare Commission (“IWC”) Wage Orders, all of which contribute to Defendants’ deliberate unfair competition. These wage and hour violations arise from, Defendants’ misclassification of salaried employees as exempt from California’s wage and hour laws, the failure to pay overtime, the incorrect listing of the hours worked on wage statements as 86.77 instead of the actual hours worked, and the failure to reimburse employees for their business expenses, among other violations.

4. Plaintiff is informed and believes, and thereon alleges, that Defendants have increased their profits by violating state wage and hour laws by, among other things:

- (a) Failing to pay all wages for all hours worked, including minimum and overtime wages;
- (b) Failing to pay overtime wages at the proper rates;
- (c) Failing to timely pay all earned wages;

- 1 (d) Failing to provide meal periods or compensation in lieu thereof;
- 2 (e) Failing to authorize or permit rest breaks or provide compensation
- 3 in lieu thereof;
- 4 (f) Failing to provide accurate itemized wage statements;
- 5 (g) Failing to pay all wages due upon separation of employment; and
- 6 (h) Failing to reimburse all business expenses incurred by employees in
- 7 direct consequence of the discharge of his or her duties.

8 5. Plaintiff brings this lawsuit seeking monetary relief against Defendants on behalf

9 of himself and all others similarly situated in California to recover, among other things, unpaid

10 wages and benefits, interest, attorneys' fees, costs and expenses and penalties pursuant to Labor

11 Code §§ 201-203, 204, 210, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1182.12, 1194,

12 1194.2, 1197, 1197.1, 1198, 2800, and 2802.

13 **JURISDICTION AND VENUE**

14 6. This is a class action, pursuant to California Code of Civil Procedure § 382. The

15 monetary damages and restitution sought by Plaintiff exceeds the minimal jurisdictional limits

16 of the Superior Court and will be established according to proof at trial.

17 7. This Court has jurisdiction over this action pursuant to the California Constitution,

18 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those

19 given by statutes to other courts. The statutes under which this action is brought do not specify

20 any other basis for jurisdiction.

21 8. This Court has jurisdiction over all Defendants because, upon information and

22 belief, they are citizens of California, have sufficient minimum contacts in California or

23 otherwise intentionally avail themselves of the California market so as to render the exercise of

24 jurisdiction over them by the California courts consistent with traditional notions of fair play and

25 substantial justice.

26 9. Venue is proper in this Court because, upon information and belief, Defendants

27 reside, transact business or have offices in this county and the acts and omissions alleged herein

28 took place in this county.

THE PARTIES

10. Plaintiff is a citizen of California. Plaintiff was employed by Defendants during the Class Period in California.

11. Plaintiff is informed and believes, and thereon alleges, that Defendants at all times hereinafter mentioned, were and are employers as defined in and subject to the Labor Code and IWC Wage Orders, whose employees were and are engaged throughout this county and the State of California.

12. Plaintiff is unaware of the true names or capacities of the defendants sued herein under the fictitious names DOES 1 through 20, but will seek leave of this Court to amend this Complaint and serve such fictitiously named defendants once their names and capacities become known.

13. Plaintiff is informed and believes, and thereon alleges, that each defendant acted in all respects pertinent to this action as the agent of the other defendant, 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 defendant. Furthermore, defendants in all respects acted as the employer and/or joint employer of Plaintiff and the class members.

14. Plaintiff is informed and believes, and thereon alleges, that each and all of the acts and omissions alleged herein were performed by, or are attributable to, Defendants and/or DOES 1 through 20, acting as the agent or alter ego for the other, with legal authority to act on the other's behalf. The acts of any and all Defendants were in accordance with, and represent, the official policy of Defendants.

15. At all relevant times, Defendants, and each of them, acted within the scope of such agency or employment, or ratified each and every act or omission complained of herein. At all relevant times, Defendants, and each of them, aided and abetted the acts and omissions of each and all the other Defendants in proximately causing the damages herein alleged.

16. Plaintiff is informed and believes, and thereon alleges, that each of said Defendants is in some manner intentionally, negligently or otherwise responsible for the acts, omissions, occurrences and transactions alleged herein.

1 **CLASS ACTION ALLEGATIONS**

2 17. Plaintiff brings this action under Code of Civil Procedure § 382 on behalf of
3 himself and all others similarly situated who were affected by Defendants' Labor Code, Business
4 and Professions Code §§ 17200 and IWC Wage Order violations.

5 18. All claims alleged herein arise under California law for which Plaintiff seeks relief
6 authorized by California law.

7 19. Plaintiff's proposed Class consists of and is defined as follows:

8 Class

9 All current and former employees who worked for Defendants in the State of
10 California from April 6, 2016 to the date the class is certified.¹

11 20. Plaintiff also seeks to certify the following Subclass of employees:

12 Waiting Time Subclass

13 All members of the Class who separated their employment from Defendants from
14 April 6, 2017 to the date the class is certified.

15 21. Members of the Class and Subclass described above will be collectively referred
16 to as "class members." Plaintiff reserves the right to establish other or additional subclasses, or
17 modify any Class or Subclass definition, as appropriate based on investigation, discovery and
18 specific theories of liability.

19 22. This action has been brought and may properly be maintained as a class action
20 under the California Code of Civil Procedure § 382 because there are common questions of law
21 and fact as to the Class that predominate over questions affecting only individual members
22 including, but not limited to:

23 (a) Whether Defendants misclassified Plaintiff and class members, and forced them to
24 work off-the-clock, resulting in a failure to pay all minimum wages and overtime
25 wages;

26 (b) Whether Defendants paid Plaintiff and class members overtime compensation at the
27 proper rates;

28 ¹ The statute of limitations for this matter was tolled pursuant to Cal. Rules of Court, Appendix I,
Emergency Rule No. 9.

- 1 (c) Whether Defendants failed to timely pay all wages earned by Plaintiff and class
2 members;
- 3 (d) Whether Defendants deprived Plaintiff and class members of compliant meal
4 periods or required Plaintiff and class members to work through meal periods
5 without compensation;
- 6 (e) Whether Defendants deprived Plaintiff and class members of compliant rest breaks;
- 7 (f) Whether Defendants failed to timely pay Plaintiff and former class members all
8 wages due upon termination or within 72 hours of resignation;
- 9 (g) Whether Defendants failed to furnish Plaintiff and class members with accurate,
10 itemized wage statements;
- 11 (h) Whether Defendants required Plaintiff and class members to use their personal
12 cellular devices for work-related purposes, without paying a reasonable percentage
13 of their cell phone bills;
- 14 (i) Whether Defendants required Plaintiff and class members to use tablet devices for
15 work-related purposes, without reimbursing Plaintiff and class members for the cost
16 of these devices;
- 17 (j) Whether Defendants failed to reimburse Plaintiff and class members for the work-
18 related cost of their home-internet and other home office expenses; and
- 19 (k) Whether Defendants engaged in unfair business practices in violation of Business
20 & Professions Code §§ 17200, *et seq.*

21 23. There is a well-defined community of interest in this litigation and the Class is
22 readily ascertainable:

- 23 (a) Numerosity: The members of the Class are so numerous that joinder of all
24 members is impractical. Although the members of the Class are unknown
25 to Plaintiff at this time, on information and belief, the Class is estimated to
26 be greater than 100 individuals. The identity of the class members are
27 readily ascertainable by inspection of Defendants' employment and payroll
28 records.

1 (b) Typicality: The claims (or defenses, if any) of Plaintiff are typical of the
2 claims (or defenses, if any) of the Class because Defendants' failure to
3 comply with the provisions of California wage and hour laws entitled each
4 class member to similar pay, benefits and other relief. The injuries sustained
5 by Plaintiff are also typical of the injuries sustained by the Class because
6 they arise out of and are caused by Defendants' common course of conduct
7 as alleged herein.

8 (c) Adequacy: Plaintiff is qualified to, and will fairly and adequately represent
9 and protect the interests of all members of the Class because it is in his best
10 interest to prosecute the claims alleged herein to obtain full compensation
11 and penalties due to him and the Class. Plaintiff's attorneys, as proposed
12 class counsel, are competent and experienced in litigating large employment
13 class actions and are versed in the rules governing class action discovery,
14 certification and settlement. Plaintiff has incurred and, throughout the
15 duration of this action, will continue to incur attorneys' fees and costs that
16 have been and will be necessarily expended for the prosecution of this action
17 for the substantial benefit of each class member.

18 (d) Superiority: The nature of this action makes the use of class action
19 adjudication superior to other methods. A class action will achieve
20 economies of time, effort and expense as compared with separate lawsuits,
21 and will avoid inconsistent outcomes because the same issues can be
22 adjudicated in the same manner and at the same time for each Class. If
23 appropriate this Court can, and is empowered to, fashion methods to
24 efficiently manage this case as a class action.

25 (e) Public Policy Considerations: Employers in the State of California and
26 other states violate employment and labor laws every day. Current
27 employees are often afraid to assert their rights out of fear of direct or
28 indirect retaliation. Former employees are fearful of bringing actions

1 because they believe their former employers might damage their future
2 endeavors through negative references and/or other means. Class actions
3 provide the class members who are not named in the complaint with a type
4 of anonymity that allows for the vindication of their rights at the same time
5 as affording them privacy protections.

6 **GENERAL ALLEGATIONS**

7 24. At all relevant times mentioned herein, Defendants employed Plaintiff and other
8 persons as salaried employees throughout California.

9 25. Plaintiff was employed as a Commercial Account Manager or other similar
10 position by Defendants.

11 26. Plaintiff is informed and believes, and thereon alleges, that at all times herein
12 mentioned, Defendants were advised by skilled lawyers, employees and other professionals who
13 were knowledgeable about California's wage and hour laws, employment and personnel
14 practices and the requirements of California law.

15 27. Plaintiff is informed and believe, and thereon alleges, that Defendants knew or
16 should have known that Plaintiff and class members were entitled to receive wages for all hours
17 worked and that they were not receiving all wages earned for work that was required to be
18 performed. In violation of the Labor Code and IWC Wage Orders, Plaintiff and class members
19 were not paid wages (including minimum, regular, and overtime wages) as a result of Defendants
20 misclassifying Plaintiff and class members as exempt. Defendants failed to properly track and
21 pay all overtime hours worked by Plaintiff and class members, including for off-the-clock work
22 which Defendants required its employees to perform during meal periods. Because Plaintiff and
23 class members worked shifts of eight hours or more, this unpaid time qualified for overtime
24 premium payment. Further, Defendants failed to pay Plaintiff and class members all overtime
25 and double-time wages earned at the correct regular rate because they failed to include
26 commissions and other non-discretionary performance-based pay in the regular rate of pay.

27 28. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
28 should have known that Plaintiff and class members were entitled to receive itemized wage

1 statements that accurately showed their gross and net wages earned, total hours worked and all
2 applicable hourly rates in effect and the number of hours worked at each hourly rate in accordance
3 with California law, among the other items required by Labor Code section 226. However,
4 Defendants failed to accurately provide the information required by Labor Code section 226. For
5 example, Defendants simply listed the hours worked on the wage statements of Plaintiff and class
6 members as 86.67; however, this did not reflect the actual hours worked by those employees. In
7 violation of the Labor Code, Plaintiff and class members were not provided with accurate
8 itemized wage statements.

9 29. Plaintiff is informed and believes, and thereon alleges, Defendants failed to
10 provide Plaintiff and class members timely, uninterrupted, off-duty meal periods of no less than
11 thirty minutes before their fifth hour of work. Plaintiff and class members would also often be
12 required to work through meal periods. These policies, among others, have resulted in a denial
13 of these employees' rights to 30-minute meal periods in violation of California law.

14 30. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
15 should have known that Plaintiff and class members were entitled to receive all required meal
16 periods or payment of one (1) additional hour of pay at Plaintiff and class members' regular rate
17 of pay when they did not receive a timely meal period. In violation of the Labor Code and IWC
18 Wage Orders, Plaintiff and class members did not receive all timely meal periods or payment of
19 one (1) additional hour of pay at Plaintiff and class members' regular rate of pay when they did
20 not receive a timely, uninterrupted meal periods.

21 31. Plaintiff is informed and believes, and thereon alleges, Defendants failed to
22 provide Plaintiff and class members timely, uninterrupted, on-the-clock rest period of no less
23 than ten minutes for every four hours worked, or every major fraction thereof. Instead,
24 Defendants would often require Plaintiff and class members to work through their rest periods.
25 These policies, among others, have resulted in a denial of these employees' rights to a ten-minute
26 rest period in violation of California law.

27 32. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
28 should have known that Plaintiff and class members were entitled to receive all rest breaks or

1 payment of one (1) additional hour of pay at Plaintiff and class members' regular rate of pay
2 when a rest break was missed. In violation of the Labor Code and IWC Wage Orders, Plaintiff
3 and class members did not receive all rest breaks or payment of one (1) additional hour of pay at
4 Plaintiff and class members' regular rate of pay when a rest break was missed.

5 33. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
6 should have known that Plaintiff and Waiting Time Subclass members were entitled to timely
7 payment of wages due upon separation of employment. In violation of the Labor Code, Plaintiff
8 and Waiting Time Subclass members did not receive payment of all wages within permissible
9 time periods.

10 34. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
11 should have known that Plaintiff and class members were entitled to reimbursement for necessary
12 expenditures incurred in connection with the performance and execution of their job duties. In
13 violation of the California Labor Code, Plaintiff and class members did not receive adequate
14 reimbursement for necessary business expenses, including but not limited to reimbursement for
15 use of their personal cellular devices to communicate with customers and other employees,
16 expenses related to their use of a tablet device for work, home office expenses, and home internet
17 expenses as they related to employment.

18 35. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
19 should have known they had a duty to compensate Plaintiff and class members, and Defendants
20 had the financial ability to pay such compensation but willfully, knowingly and intentionally
21 failed to do so all in order to increase Defendants' profits.

22 **FIRST CAUSE OF ACTION**

23 **FAILURE TO PAY MINIMUM WAGES**

24 **(Violation of Labor Code §§ 1182.12, 1194, 1194.2, 1197; Violation of IWC Wage Order § 3)**

25 36. Plaintiff hereby re-allege and incorporate by reference all paragraphs above as
26 though fully set forth herein.

27 ///

28 ///

37. Labor Code §§ 1194 and 1197 provide that the minimum wage for employees fixed by the IWC is the minimum wage to be paid to employees, and the payment of a lesser wage than the minimum so fixed is unlawful.

38. During the relevant time period, Defendants paid Plaintiff and class members less than minimum wages due to Defendants classifying Plaintiff and class members as exempt, and when, for example, Plaintiff and class members were forced to work off-the-clock during meal breaks.

39. During the relevant time period, Defendants regularly failed to pay at least minimum wage to Plaintiff and class members for all hours worked pursuant to Labor Code §§ 1194 and 1197.

40. Defendants' failure to pay Plaintiff and class members the minimum wage as required violates Labor Code §§ 1194 and 1197. Pursuant to these sections, Plaintiff and class members are entitled to recover the unpaid balance of their minimum wage compensation as well as interest, costs and attorney's fees.

41. Pursuant to Labor Code § 1194.2, Plaintiff and class members are entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon.

SECOND CAUSE OF ACTION

FAILURE TO PAY OVERTIME WAGES

(Violation of Labor Code §§ 510, 1194 and 1198; Violation of IWC Wage Order)

42. Plaintiff hereby re-alleges and incorporates by reference all paragraphs above as though fully set forth herein.

43. Labor Code § 1198 and the applicable IWC Wage Order provide that it is unlawful to employ persons without compensating them at a rate of pay either one and one-half or two times the person's regular rate of pay, depending on the number of hours worked by the person on a daily or weekly basis.

44. Pursuant to California Labor Code §§ 510 and 1194, during the relevant time period, Defendants were required to compensate Plaintiff and class members for all overtime

1 hours worked, calculated at one and one-half (1½) times the regular rate of pay for hours worked
2 in excess of eight (8) hours per day and/or forty (40) hours per week and for the first eight (8)
3 hours of the seventh consecutive work day, with double time after eight (8) hours on the seventh
4 day of any work week, or after twelve (12) hours in any work day.

5 45. Plaintiff and class members were non-exempt employees entitled to the
6 protections of California Labor Code §§ 510 and 1194.

7 46. During the relevant time period, Defendants failed to pay Plaintiff and class
8 members overtime wages at the correct rate due to Defendants classifying of Plaintiff and class
9 members as exempt. Defendants failed to properly track and pay all overtime hours worked by
10 Plaintiff and class members, including for off-the-clock work which Defendants required its
11 employees to perform during meal periods. Because Plaintiff and class members worked shifts
12 of eight hours or more, this unpaid time qualified for overtime premium payment. Further,
13 Defendants failed to pay Plaintiff and class members all overtime and double-time wages earned
14 at the correct regular rate because they failed to include commissions and other non-discretionary
15 performance-based pay in the regular rate of pay.

16 47. In violation of state law, Defendants have knowingly and willfully refused to
17 perform their obligations and compensate Plaintiff and class members for all wages earned as
18 alleged above.

19 48. Defendants' failure to pay Plaintiff and class members the unpaid balance of
20 overtime compensation, as required by California law, violates the provisions of Labor Code §§
21 510 and 1198, and is therefore unlawful.

22 49. Pursuant to Labor Code § 1194, Plaintiff and class members are entitled to
23 recover their unpaid overtime compensation as well as interest, costs and attorneys' fees.

24 **THIRD CAUSE OF ACTION**

25 **FAILURE TO TIMELY PAY ALL EARNED WAGES**

26 **(Violation of Labor Code §§ 204 and 210; Violation of IWC Wage Order)**

27 50. Plaintiff hereby re-alleges and incorporates by reference all paragraphs above as
28 though fully set forth herein.

1 51. Labor Code § 204 provides that all wages earned by an employee are due and
2 payable twice during each calendar month.

3 52. Defendants failed to timely pay Plaintiff and class members all of their earned
4 wages as required by Labor Code Section 204.

5 53. Plaintiff and class members have been deprived of their rightfully earned wages
6 as a direct and proximate result of Defendants' failure to pay said compensation. Plaintiff and
7 class members are entitled to recover such amounts, plus interest thereon, attorney's fees and
8 costs.

9 54. In addition, Plaintiff and class members are entitled to penalties pursuant to Labor
10 Code § 210 as follows: (1) for Defendants' initial violation, \$100 for each failure to pay each
11 Class Member; and (2) for each of Defendants' subsequent violations, or any willful or intentional
12 violation, \$200 for each failure to pay each class member, plus 25 percent of the amount
13 unlawfully held.

14 **FOURTH CAUSE OF ACTION**

15 **FAILURE TO PROVIDE MEAL PERIODS**

16 **(Violation of Labor Code §§ 226.7 and 512; Violation of IWC Wage Order)**

17 55. Plaintiff hereby re-alleges and incorporates by reference all paragraphs above as
18 though fully set forth herein.

19 56. Labor Code § 226.7 provides that no employer shall require an employee to work
20 during any meal period mandated by the IWC Wage Orders.

21 57. Section 11 of the applicable IWC Wage Order states, "no employer shall employ
22 any person for a work period of more than five (5) hours without a meal period of not less than
23 30 minutes, except that when a work period of not more than six (6) hours will complete the day's
24 work the meal period may be waived by mutual consent of the employer and the employee."

25 58. Labor Code § 512(a) provides that an employer may not require, cause or permit
26 an employee to work for a period of more than five (5) hours per day without providing the
27 employee with an uninterrupted meal period of not less than thirty (30) minutes, except that if the
28 total work period per day of the employee is not more than six (6) hours, the meal period may be

1 waived by mutual consent of both the employer and the employee.

2 59. Labor Code § 512(a) also provides that an employer may not employ an employee
3 for a work period of more than ten (10) hours per day without providing the employee with a
4 second meal period of not less than thirty (30) minutes, except that if the total hours worked is no
5 more than twelve (12) hours, the second meal period may be waived by mutual consent of the
6 employer and the employee only if the first meal period was not waived.

7 60. During the relevant time period, Plaintiff and class members did not receive
8 compliant meal periods for each five (5) hours worked because their meal periods were missed,
9 late, short, interrupted, and/or they were required to work through their meal period.

10 61. Labor Code § 226.7(b) and section 11 of the applicable IWC Wage Order require
11 an employer to pay an employee one additional hour of pay at the employee's regular rate of
12 compensation for each work day that a meal period is not provided.

13 62. At all relevant times, Defendants failed to pay Plaintiff and class members all meal
14 period premiums due for meal period violations pursuant to Labor Code § 226.7(b) and section
15 11 of the applicable IWC Wage Order.

16 63. As a result of Defendants' failure to pay Plaintiff and class members an additional
17 hour of pay for each day a meal period was not provided, Plaintiff and class members suffered
18 and continue to suffer a loss of wages and compensation.

19 **FIFTH CAUSE OF ACTION**

20 **FAILURE TO PERMIT REST BREAKS**

21 **(Violation of Labor Code §§ 226.7; Violation of IWC Wage Order)**

22 64. Plaintiff hereby re-alleges and incorporates by reference all paragraphs above as
23 though fully set forth herein.

24 65. Labor Code § 226.7(a) provides that no employer shall require an employee to
25 work during any rest period mandated by the IWC Wage Orders.

26 66. Section 12 of the applicable IWC Wage Order states "every employer shall
27 authorize and permit all employees to take rest periods, which insofar as practicable shall be in
28 the middle of each work period" and the "authorized rest period time shall be based on the total

hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof” unless the total daily work time is less than three and one-half (3½) hours.

67. During the relevant time period, Plaintiff and class members did not receive a ten (10) minute rest period for every four (4) hours or major fraction thereof worked.

68. Labor Code § 226.7(b) and section 12 of the applicable IWC Wage Order requires an employer to pay an employee one additional hour of pay at the employee’s regular rate of compensation for each workday that the rest period is not provided.

69. At all relevant times, Defendants failed to pay Plaintiff and class members all rest period premiums due for rest period violations pursuant to Labor Code § 226.7(b) and section 12 of the applicable IWC Wage Order.

70. As a result of Defendants’ failure to pay Plaintiff and class members an additional hour of pay for each day a rest period was not provided, Plaintiff and class members suffered and continue to suffer a loss of wages and compensation.

SIXTH CAUSE OF ACTION

FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS

(Violation of Labor Code § 226; Violation of IWC Wage Order)

71. Plaintiff hereby re-alleges and incorporates by reference all paragraphs above as though fully set forth herein.

72. Labor Code § 226(a) requires Defendants to provide each employee with an accurate wage statement in writing showing nine pieces of information, including: (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 basis, (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 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, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the

1 employee.

2 73. During the relevant time period, Defendants have knowingly and intentionally
3 failed to comply with Labor Code § 226(a) on wage statements that were provided to Plaintiff
4 and class members. The deficiencies include, among other things, the failure to correctly state
5 the gross and net wages earned, accurate inclusive dates of the pay period, and all applicable
6 hourly rates in effect and the number of hours worked at each hourly rate by Plaintiff and class
7 members.

8 74. As a result of Defendants' violation of California Labor Code § 226(a), Plaintiff
9 and class members have suffered injury and damage to their statutorily protected rights.
10 Specifically, Plaintiff and class members have been injured by Defendants' intentional violation
11 of California Labor Code § 226(a) because they were denied both their legal right to receive, and
12 their protected interest in receiving, accurate itemized wage statements under California Labor
13 Code § 226(a). Plaintiff has had to file this lawsuit in order to determine the extent of the
14 underpayment of wages, thereby causing Plaintiff to incur expenses and lost time. Plaintiff would
15 not have had to engage in these efforts and incur these costs had Defendants provided the accurate
16 wages earned. This has also delayed Plaintiff's ability to demand and recover the underpayment
17 of wages from Defendants.

18 75. California Labor Code § 226(a) requires an employer to pay the greater of all
19 actual damages or fifty dollars (\$50.00) for the initial pay period in which a violation occurred,
20 and one hundred dollars (\$100.00) per employee for each violation in subsequent pay periods,
21 plus attorney's fees and costs, to each employee who was injured by the employer's failure to
22 comply with California Labor Code § 226(a).

23 76. Defendants' violations of California Labor Code § 226(a) prevented Plaintiff and
24 class members from knowing, understanding and disputing the wages paid to them, and resulted
25 in an unjustified economic enrichment to Defendants. As a result of Defendants' knowing and
26 intentional failure to comply with California Labor Code § 226(a), Plaintiff and class members
27 have suffered an injury, and the exact amount of damages and/or penalties is all in an amount to
28 be shown according to proof at trial.

1 77. Plaintiff and class members are also entitled to injunctive relief under California
2 Labor Code § 226(h), compelling Defendants to comply with California Labor Code § 226, and
3 seek the recovery of attorneys' fees and costs incurred in obtaining this injunctive relief.

4 **SEVENTH CAUSE OF ACTION**

5 **FAILURE TO PAY ALL WAGES DUE UPON SEPARATION OF EMPLOYMENT AND**

6 **WITHIN THE REQUIRED TIME**

7 **(Violation of Labor Code §§ 201, 202 and 203; Violation of IWC Wage Order)**

8 78. Plaintiff hereby re-alleges and incorporates by reference all paragraphs above as
9 though fully set forth herein.

10 79. California Labor Code §§ 201 and 202 provide that if an employer discharges an
11 employee, the wages earned and unpaid at the time of discharge are due and payable immediately,
12 and that if an employee voluntarily leaves his employment, his wages shall become due and
13 payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-
14 two (72) hours previous notice of his intention to quit, in which case the employee is entitled to
15 his wages at the time of quitting.

16 80. During the relevant time period, Defendants willfully failed to pay Plaintiff and
17 Waiting Time Subclass members all their earned wages upon termination including, but not
18 limited to, proper minimum wages and overtime compensation, either at the time of discharge or
19 within seventy-two (72) hours of their leaving Defendants' employ.

20 81. Defendants' failure to pay Plaintiff and Waiting Time Subclass members all their
21 earned wages at the time of discharge or within seventy-two (72) hours of their leaving
22 Defendants' employ is in violation of Labor Code §§ 201 and 202.

23 82. California Labor Code § 203 provides that if an employer willfully fails to pay
24 wages owed immediately upon discharge or resignation in accordance with Labor Code §§ 201
25 and 202, then the wages of the employee shall continue as a penalty from the due date at the same
26 rate until paid or until an action is commenced; but the wages shall not continue for more than
27 thirty (30) days.

1 83. Plaintiff and Waiting Time Subclass members are entitled to recover from
2 Defendants the statutory penalty which is defined as Plaintiff's and Waiting Time Subclass
3 members' regular daily wages for each day they were not paid, at their regular hourly rate of pay,
4 up to a thirty (30) day maximum pursuant to Labor Code § 203.

5 **EIGHTH CAUSE OF ACTION**

6 **FAILURE TO REIMBURSE ALL BUSINESS EXPENSES**

7 **(Violation of Labor Code §§ 2800, 2802)**

8 84. Plaintiff hereby re-alleges and incorporates by reference all paragraphs above as
9 though fully set forth herein.

10 85. Labor Code § 2800 provides, in pertinent part, "[a]n employer shall in all cases
11 indemnify his employee for losses caused by the employer's want of ordinary care."

12 86. Labor Code § 2802 provides, in pertinent part, "[a]n employer shall indemnify his
13 or her employee for all necessary expenditures or losses incurred by the employee in direct
14 consequence of the discharge of his or her duties..."

15 87. Further, Labor Code § 2802 additionally provides, in pertinent part: "(c)...the term
16 'necessary expenditures or losses' shall include all reasonable costs, including but not limited to,
17 attorney's fees incurred by the employee enforcing the rights granted by this section."

18 88. During the relevant time period, Defendants were required to indemnify and
19 reimburse Plaintiffs and class members for all expenditures or losses caused by the employer's
20 want of ordinary care and/or incurred in direct consequent of the discharge of their duties, but failed
21 to indemnify and reimburse Plaintiffs and class members in violation of Labor Codes §§ 2800 and
22 2802.

23 89. During the relevant time period, Plaintiff and class members did not receive
24 adequate reimbursement for necessary business expenses, including but not limited to
25 reimbursement for use of their personal cellular devices to communicate with customers and other
26 employees, expenses related to their use of a tablet device for work, home office expenses, and
27 home internet expenses as they related to employment.

28 90. As a direct and proximate result, Plaintiffs and class members have suffered, and

1 continue to suffer, substantial losses, related to the use and enjoyment of such monies to be
2 reimbursed, lost interest on such monies, and expenses and attorney's fees in seeking to compel
3 Defendants to fully perform their obligations under California law, all to their damage in amounts
4 according to proof at the time of trial.

5 **NINTH CAUSE OF ACTION**

6 **VIOLATION OF BUSINESS AND PROFESSIONS CODE §§ 17200, ET SEQ.**

7 91. Plaintiff hereby re-alleges and incorporates by reference all paragraphs above as
8 though fully set forth herein.

9 92. Defendants' conduct, as alleged herein, has been and continues to be unfair,
10 unlawful and harmful to Plaintiff and class members. Plaintiff seeks to enforce important rights
11 affecting the public interest within the meaning of Code of Civil Procedure § 1021.5.

12 93. Defendants' activities, as alleged herein, violate California law and constitute
13 unlawful business acts or practices in violation of California Business and Professions Code
14 §§ 17200, *et seq.*

15 94. A violation of Business and Professions Code §§ 17200, *et seq.* may be predicated
16 on the violation of any state or federal law.

17 95. Defendants' policies and practices have violated state law in at least the following
18 respects:

- 19 (a) Failing to pay all minimum wages to Plaintiff and class members in
20 violation of Labor Code §§ 1182.12, 1194, 1194.2, and 1197;
- 21 (b) Failing to pay all overtime wages to Plaintiff and class members in
22 violation of Labor Code §§ 510, 1194 and 1198;
- 23 (c) Failing to timely pay all wages earned by Plaintiff and class members in
24 violation of Labor Code §§ 204, and 210;
- 25 (d) Failing to provide timely meal periods without paying Plaintiff and class
26 members premium wages for every day said meal periods were not
27 provided in violation of Labor Code §§ 226.7 and 512;
- 28 (e) Failing to authorize or permit rest breaks without paying Plaintiff and class

members premium wages for every day said rest breaks were not authorized or permitted in violation of Labor Code § 226.7;

(f) Failing to provide Plaintiff and class members with accurate itemized wage statements in violation of Labor Code § 226;

(g) Failing to timely pay all earned wages to Plaintiff and Waiting Time Subclass members upon separation of employment in violation of Labor Code §§ 201, 202 and 203; and

(h) Failing to reimburse all necessary business expenses incurred by Plaintiff and class members in violation of Labor Code §§ 2800, and 2802.

96. Defendants intentionally avoided paying Plaintiff and class members' wages and monies, thereby creating for Defendants an artificially lower cost of doing business in order to undercut their competitors and establish and gain a greater foothold in the marketplace.

97. Pursuant to Business and Professions Code §§ 17200, *et seq.* Plaintiff and class members are entitled to restitution of the wages unlawfully withheld and retained by Defendants during a period that commences four years prior to the filing of the Complaint; an award of attorneys' fees pursuant to Code of Civil Procedure § 1021.5 and other applicable laws; and an award of costs.

TENTH CAUSE OF ACTION

ENFORCEMENT OF LABOR CODE § 2698 ET SEQ. ("PAGA")

98. Plaintiff hereby re-alleges and incorporate by reference all paragraphs above as though fully set forth herein.

99. Pursuant to Labor Code § 2699(a), any provision of the Labor Code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency ("LWDA") or any of its departments, divisions, commissions, boards, agencies or employees for violation of the code may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself and other current or former employees pursuant to the procedures specified in Labor Code § 2699.3.

1 100. Defendants' conduct violates numerous Labor Code sections including, but not
2 limited to, the following:

3 (a) Violation of Labor Code §§ 201, 202, 203, 204, 210, 510, 558, 1182.12,
4 1194, 1197 and 1198 for failure to timely pay all earned wages (including minimum wages
5 and overtime wages) owed to Plaintiff and other aggrieved employees during employment
6 and upon separation of employment as herein alleged;

7 (b) Violation of Labor Code §§ 226.7 and 512 for failure to provide meal
8 periods to Plaintiff and other aggrieved employees and failure to pay premium wages for
9 missed meal periods as herein alleged;

10 (c) Violation of Labor Code § 226.7 for failure to permit rest breaks to Plaintiff
11 and other aggrieved employees and failure to pay premium wages for missed rest periods
12 as herein alleged;

13 (d) Violation of Labor Code §§ 226 and 226.3 for failure to provide accurate
14 itemized wage statements to Plaintiff and other aggrieved employees as herein alleged;

15 (e) Violation of Labor Code §§ 2800 and 2802 for failure to reimburse
16 reasonable and necessary business expenses of Plaintiff and other aggrieved employees as
17 herein alleged; and

18 (f) Violation of Labor Code §§ 1174 and 1174.5 for failure to maintain
19 accurate records.

20 101. Plaintiff is an "aggrieved employee" because he was employed by the alleged
21 violator and had one or more of the alleged violations committed against him, and therefore is
22 properly suited to represent the interests of all other aggrieved employees.

23 102. Plaintiff has exhausted the procedural requirements under Labor Code § 2699.3 as
24 to Defendants and is therefore able to pursue a claim for penalties on behalf of himself and all
25 other aggrieved employees under PAGA.

26 103. PAGA imposes a penalty of one hundred dollars (\$100.00) for each aggrieved
27 employee per pay period for the initial violation and two hundred dollars (\$200.00) for each
28 aggrieved employee per pay period for each subsequent violation.

104. Pursuant to Labor Code §§ 2699(a), 2699.3 and 2699.5, Plaintiffs are entitled to recover civil penalties, in addition to other remedies, for violations of the Labor Code sections cited above.

105. For bringing this action, Plaintiff is entitled to attorney's fees and costs incurred herein.

PRAYER FOR RELIEF

Plaintiff, on his own behalf and on behalf of all others similarly situated, pray for relief and judgment against Defendants, jointly and severally, as follows:

1. For certification of this action as a class action, including certifying the Class and Subclass alleged by Plaintiff;

2. For appointment of Craig Russell as the class representative;

3. For appointment of Lebe Law, APLC, and Aegis Law Firm, PC as class counsel for all purposes;

4. For compensatory damages in an amount according to proof with interest thereon;

5. For economic and/or special damages in an amount according to proof with interest thereon;

6. For reasonable attorneys' fees, costs of suit and interest to the extent permitted by law, including pursuant to Code of Civil Procedure § 1021.5, Labor Code §§ 226(e) and 1194;

7. For statutory penalties to the extent permitted by law, including those pursuant to the Labor Code and IWC Wage Orders;

8. For restitution as provided by Business and Professions Code §§ 17200, *et seq.*;

9. For an order requiring Defendants to restore and disgorge all funds to each employee acquired by means of any act or practice declared by this Court to be unlawful, unfair or fraudulent and, therefore, constituting unfair competition under Business and Professions Code §§ 17200, *et seq.*;

10. For an award of damages in the amount of unpaid compensation including, but not limited to, unpaid wages, benefits and penalties, including interest thereon;

11. For pre-judgment interest;

12. For civil penalties; and

13. For such other relief as the Court deems just and proper.

Dated: October 9, 2020

LEBE LAW, APLC

By: _____



Jonathan M. Lebe

Attorney for Plaintiff Craig Russell,
Individually and on behalf of all others similarly
situated

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial with respect to all issues triable of right by jury.

Dated: October 9, 2020

LEBE LAW, APLC

By: _____



Jonathan M. Lebe

Attorney for Plaintiff Craig Russell,
Individually and on behalf of all others similarly
situated

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, am employed in the County of Orange, State of California. I am over
3 the age of 18 and not a party to the within action; am employed with Aegis Law Firm PC and
my business address is 9811 Irvine Center Drive, Suite 100, Irvine, California 92618.

4 On October 9, 2020, I served the foregoing document entitled:

5 • **FIRST AMENDED CLASS ACTION AND REPRESENTATIVE ACTION
COMPLAINT**

6 on all the appearing and/or interested parties in this action by delivering ☐ *the original*
7 ☒ *a true copy* thereof on the party(ies) addressed below as follows:

8 Elizabeth Staggs-Wilson Elisa Nadeau
9 LITTLER MENDELSON, P.C. LITTLER MENDELSON, P.C.
633 West 5th Street, 63rd Floor 50 West Fernando Street, Fl. 7
Los Angeles, CA 90071 San Jose, CA 95113
Telephone: 213.443.4300 enadeau@littler.com
Facsimile: 213.443.4299
10 Estaggs-wilson@littler.com

11 Courtney O. Chambers
LITTLER MENDELSON, P.C.
12 333 Bush Street, 34th Floor
San Francisco, CA 94104
13 cchambers@littler.com

14 *Attorneys for Defendant:*
15 NUTANIX, INC.

16 ☐ **(BY MAIL)** I am readily familiar with the firm's practice of collection and processing
17 correspondence for mailing. Under that practice it would be deposited with the U.S.
Postal Service on that same day with postage thereon fully prepaid at Irvine, California
18 in the ordinary course of business. I am aware that on motion of the party served, service
is presumed invalid if postage cancellation date or postage meter date is more than one
19 day after date of deposit for mailing this affidavit. (*Cal Code Civ. Proc.* § 1013(a); *Fed.*
R. Civ. Proc. 5(a); *Fed. R. Civ. Proc.* 5(c).)

20 ☐ **(BY OVERNIGHT MAIL)** I am personally and readily familiar with the business
21 practice of Aegis Law Firm PC for collection and processing correspondence for
overnight delivery, and I caused such document(s) described herein to be deposited for
22 delivery to a facility regularly maintained Federal Express for overnight delivery. (*Cal*
Code Civ. Proc. § 1013(c); *Fed. R. Civ. Proc.* 5(c).)

23 ☒ **(BY ELECTRONIC TRANSMISSION)** I caused said document(s) to be served via
24 electronic transmission via the above listed email addresses on the date below. (*Cal.*
Code Civ. Proc. § 1010.6(6); *Fed. R. Civ. Proc.* 5(b)(2)(E); *Fed. R. Civ. Proc.* 5(b)(3).)

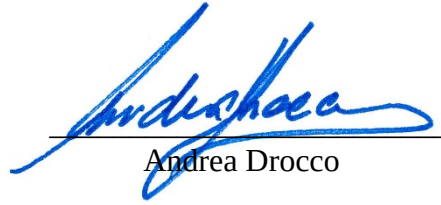
25 ☐ **(BY PERSONAL SERVICE)** I delivered the foregoing document by hand delivery to
26 the addressed named above. (*Cal Code Civ. Proc.* § 1011; *Fed. R. Civ. Proc.*
5(b)(2)(A).)

27 ///

28 ///

1 I declare under penalty of perjury under the laws of the State of California that the
2 foregoing is true and correct.

3 Executed on October 9, 2020, at Irvine, California.

4
5 
6 Andrea Drocco