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PAULA JOHNSON, and all others similarly situated
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10

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SAN FRANCISCO**
13 **(UNLIMITED JURISDICTION)**
14

15 PAULA JOHNSON, on behalf of herself, all
16 others similarly situated, the general public, and
as an “aggrieved employee” on behalf of other
17 “aggrieved employees” under the Labor Code
Private Attorneys General Act of 2004,

18 *Plaintiff(s),*

19 vs.
20

21 NAN MCKAY & ASSOCIATES, INC., a
California corporation; and DOES 1–50,
22 inclusive,

23 *Defendant(s).*
24

Case No. CGC-20-586796

**DECLARATION OF DAVID G.
SPIVAK IN SUPPORT OF PLAINTIFF
PAULA JOHNSON’S MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Hearing Date: February 27, 2023

Hearing Time: 9:30 a.m.

Hearing Dept.: 302

Action filed: September 24, 2020



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1 **DECLARATION OF DAVID G. SPIVAK IN SUPPORT OF MOTION FOR**
2 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

3 I, DAVID G. SPIVAK, declare as follows:

4 1. I am an attorney duly licensed to practice law in the State of California and am an
5 attorney of record for Plaintiff Paula Johnson (“Plaintiff”) in her lawsuit against Defendant Nan
6 McKay & Associates, Inc. (“Defendant”). Plaintiff and Defendant are collectively referred to as
7 the “Parties.”

8 2. Except as otherwise indicated, I have personal knowledge of all matters set forth
9 herein and, if called as a witness, could and would competently testify thereto under oath.

10 3. The JOINT STIPULATION OF CLASS ACTION SETTLEMENT AND
11 RELEASE OF CLAIMS (the “Settlement”) is attached hereto as **Exhibit 1**.

12 ***Factual and Procedural Background***

13 4. Defendant is a provider of professional services to the affordable housing
14 industry. Defendant employed Plaintiff as a customer service representative from about
15 November 4, 2019 until May 26, 2020.

16 5. On July 24, 2020, Plaintiff notified Defendant and the California Labor and
17 Workforce Development Agency (“LWDA”), pursuant to the California Private Attorneys
18 General Act of 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor
19 Code violations committed by Defendant. A true and correct copy of the letter to the LWDA
20 dated July 24, 2020 is attached hereto as **Exhibit 2**.

21 6. On September 24, 2020, Plaintiff filed a Class Action Complaint in the San
22 Francisco County Superior Court, Case No. CGC-20-586796, against Defendant on behalf of
23 herself and others similarly situated, alleging causes of action on a class-wide basis for: (1)
24 Failure to Pay All Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and
25 1198); (2) Failure to Provide Meal Periods (Lab. Code §§226.7, 512 and 1198); (3) Failure to
26 Provide Rest Breaks (Lab. Code §§226.7 and 1198); (4) Wage Statement Penalties (Lab. Code §
27 226); (5) Waiting Time Penalties (Lab. Code §§ 201-203); and (6) Unfair Competition (Bus. &
28 Prof. Code §§ 17200, *et seq.*). On September 30, 2020, Plaintiff filed her First Amended
Complaint adding a claim under the Labor Code Private Attorneys General Act of 2004, Labor
Code §§ 2698, *et seq.* (“PAGA”). On December 29, 2020, Defendant filed an answer to Plaintiff’s
First Amended Complaint. Defendant denies all of Plaintiff’s allegations and strongly contends



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1 that its wage and hour policies, practices and procedures are fully compliant with all applicable
2 laws. A true and correct copy of the complaint is attached hereto as **Exhibit 3**. A true and correct
3 copy of Plaintiff's First Amended Complaint is attached hereto as **Exhibit 4**. A true and correct
4 copy of Defendant's Answer is attached hereto as **Exhibit 5**.

5 7. The Parties thereafter engaged in an informal, voluntary exchange of information
6 in the context of privileged settlement discussions to facilitate an early mediation. Defendant
7 produced Plaintiff's personnel file, time-keeping records, and paycheck data and records for the
8 putative class, and more detailed time and payroll data for a random sample of putative class
9 members specifically selected by Plaintiff's counsel. Defendant represents that there are
10 approximately 319 Class Members. According to Defendant, the majority of the Class entered
11 into arbitration agreements with Defendant. Defendant presented approximately 263 arbitration
12 agreements as part of confirmatory discovery.

13 8. On January 24, 2022, following much of the foregoing informal discovery and
14 exchange of information, the Parties participated in a mediation session presided over by
15 Mediator Gig Kyriacou, an experienced class action mediator. During the mediation, the Parties
16 had a full day of productive negotiations and reached agreement on a class-wide settlement.
17 During the mediation sessions, each side, represented by her/its respective counsel, recognized
18 the risk of an adverse result in the Action and agreed to settle the Action and all other matters
19 covered by this Agreement pursuant to the terms and conditions of this Agreement.

20 ***Ascertainable and Numerous Class***

21 9. A class is ascertainable when it may be readily identified without unreasonable
22 expense or time by reference to official records. Here, Plaintiff maintains that the above-defined
23 Class is ascertainable because its members may be identified by reference to Defendant's records
24 and Defendant has agreed to share the relevant information from its records to facilitate the
25 settlement process. Therefore, the Settlement Class is ascertainable.

26 10. The Settlement Class has sufficiently numerous members to render joinder
27 impractical. No set number is required as a matter of law to maintain a class action. The California
28 Supreme Court has upheld a class of as few as 10 individuals. Defendant estimates that there are
approximately 319 Class Members. Plaintiff maintains that it would be impractical and
economically inefficient to require each Settlement Class Member to separately maintain an



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individual action or be joined as a named plaintiff in this action. In light of these considerations, the Settlement Class's membership is sufficiently numerous.

Predominant Common Questions

11. A question of law or fact is common to the members of a class if it may be resolved through common proof. In this case, there are many predominant common questions. Plaintiff asserts all class members were subject to the same or similar operations and employment policies, practices, and procedures. The claims arise from Defendant's alleged policy-driven failure to pay wages, unauthorized and unlawful wage deductions, failure to provide meal periods, failure to authorize and permit rest periods, failure to indemnify for business expenses, failure to issue proper wage statements, failure to timely pay wages, failure to maintain required payroll records, and related labor law violations, all of which Plaintiff claims constitute unfair business practices and give rise to PAGA penalties. Plaintiff asserts that common questions include, but are not limited to: (1) Whether Defendant failed to pay all wages earned to class members for all hours worked at the correct rates of pay; (2) Whether Defendant failed to provide the class with all meal and rest periods in compliance with California law; (3) Whether Defendant failed to pay the class one additional hour of pay on workdays it failed to provide the class with one or more meal or rest periods in compliance with California law; (4) Whether Defendant failed to indemnify the class for all necessary business expenditures incurred during the discharge of their duties; (5) Whether Defendant knowingly and intentionally failed to provide the class with accurate wage statements; (6) Whether Defendant willfully failed to provide the class with timely final wages; and (7) Whether Defendant engaged in unfair competition within the meaning of Business and Professions Code section 17200, *et seq.*, with respect to the class.

Typicality

12. Plaintiff contends that her claims are typical for the purposes of certifying the Settlement Class. Plaintiff asserts that she, like absent Class Members was subject to the same relevant policies and procedures governing her compensation, hours of work and meal and rest periods. Because Plaintiff contends that she was subject to the same general course of conduct as absent Class Members, resolving the common questions as they apply to Plaintiff will determine Defendant's *prima facie* liability to all Class Members. Moreover, Plaintiff's claims could potentially be subject to the same primary affirmative defenses as those of absent Class Members. Accordingly, Plaintiff's claims are typical of the Class.



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Adequacy

13. The adequacy requirement is met where the plaintiff is represented by counsel qualified to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to the class' interests. In other words, where the plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling conflicts of interest that might hinder the plaintiff's ability to represent the class.

14. To the best of my knowledge, neither Plaintiff nor I have any conflicts of interest with the absent Settlement Class Members. Plaintiff contends that she is an adequate class representative. Plaintiff and the Class Members have strong and co-extensive interests in this litigation because they all worked for Defendant during the relevant time period, allegedly suffered the same alleged injuries from the same alleged course of conduct, and there is no evidence of any conflict of interest between Plaintiff and the Class Members. Moreover, Plaintiff has demonstrated her commitment to the Settlement Class by, among other things, retaining experienced counsel, providing counsel with documents and extensively speaking with them to assist in identifying the claims asserted in this case, assisting them in identifying witnesses, as well as exposing herself to the risk of attorneys' fees and costs awards against her if this lawsuit had been unsuccessful. Thus, Plaintiff is adequate to serve as settlement class representative.

Background of Class Counsel

15. In 1991, I earned a Bachelor of the Arts degree with a major in Political Science from the University of California at Berkeley. In 1995, I earned a Juris Doctor degree from Southwestern University School of Law.

16. In December of 1995, the Supreme Court for the State of California admitted me as an Attorney and Counselor at Law and licensed me to practice law in all the Courts of this State. On May 11, 2012, I also became admitted to the District of Columbia Bar. In February 2013, I became admitted to the New York State Bar.

17. My law practice has always focused on representation of private and public employees with claims of unpaid wages, wrongful termination, harassment, family and medical leave, whistleblowing, discrimination, benefits, and civil rights violations. One of my websites, FightWrongfulTermination.com, provides a further description of my practice.

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1 18. I have tried many cases before California and federal courts, government agencies
2 and neutral arbitrators. I am a member of the California Employment Lawyers Association
3 (CELA).

4 19. Since I started practicing law, I have tried many cases before courts, arbitrators
5 and government agencies. Some of my cases are:

6 a. *Ricardo Sandoval v. Dept. of Treasury*, United States District Court,
7 Southern District of California (the Honorable Judith Keep presiding), 1998. Plaintiffs Special
8 Agent for the U. S. Customs Service alleged discrimination and retaliation in promotions and
9 discipline. The jury awarded compensatory damages. Court subsequently awarded additional
10 back pay and gave Plaintiffs a retroactive promotion. See "Lawsuit Puts Customs Service on
11 Trial: Agent Alleges Corruption, White Supremacist Cabal" by Valerie Alvord, San Diego
12 Union-Tribune, April 29, 1998; "Customs Agent Is Awarded \$200,000: Jury Says He Faced Bias
And Retaliation" by Valerie Alvord, San Diego Union-Tribune, May 16, 1998.

13 b. *Jorge Guzman v. Department of Justice*, United States District Court,
14 Central District of California (the Honorable Lourdes Baird presiding), 1999. Plaintiffs Special
15 Agent for the Immigration and Naturalization Service alleged racial discrimination, retaliation
16 and police brutality by agents of the Office of the Inspector General. Jury found the Defendants
17 liable. Case settled shortly before the damages phase. See "U.S. to Pay \$400,000 to INS Agent
18 in Bias Suit; Courts: Complaint says he suffered 10 years of harassment on the job because he is
19 Latino, including falsified charges" by Patrick J. McDonnell, Los Angeles Times, January 21,
20 1999.

21 c. *Dr. Perry Crouch v. SHIELDS*, Los Angeles Superior Court, Compton
22 (the Honorable Michael Rutberg presiding), 2001. Plaintiff whistleblower brought civil rights
23 claims and wrongful termination claims against employer in a month-long jury trial. The jury
24 awarded compensatory and punitive damages. See "Activist Says Criticism of Rail Plan Cost His
25 Job" by Dan Weikel, Los Angeles Times, September 28, 2000; "Punitive Damages Awarded to
26 Fired Social Worker" by Dan Weikel, Los Angeles Times, June 10, 2000; "A Whistleblower's
27 Revenge" by Susan Goldsmith, New Times Los Angeles, June 8, 2000.

28 d. *Imagraph, Inc. (Steve Shiffman) v. Mohamed T. Nehmeh*, Orange County
Superior Court, Central Justice Center (the Honorable Kirk H. Nakamura presiding), 2004.
Plaintiff, who I represented pro bono sought the return of \$45,000.00 he paid to an attorney



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1 escrow officer who subsequently absconded with the money. The jury awarded compensatory
2 damages. The Judgment with interest is now far in excess of that amount. Soon after this case
3 was litigated, the State Bar of California awarded me the Wiley W. Manuel Award for Pro Bono
4 Legal Services.

5 e. *Rick Pierce v. Department of Treasury*, Merit Systems Protection Board
6 (1999). Administrative Judge awarded compensatory damages to wrongfully terminated
7 Customs Agent, followed by an award of Attorneys' fees and costs.

8 f. *Richard Wamel v. Ocelot Engineering Co.*, Judicate West before the
9 Honorable Robert Polis (ret.) (2008). In that case, I represented a victim of FMLA violations and
10 wrongful termination against his former employer. The Neutral Arbitrator awarded
11 compensatory and liquidated damages. The claims for damages, attorney's fees and costs were
12 resolved shortly thereafter by means of a confidential settlement.

13 g. *Alina Ghrdilyan v. RJ Financial, Inc., et al.*, LA Superior Court case no.
14 BC430633 (2012), the Honorable Ronald Sohigian presiding. To my knowledge, this case is the
15 first and only case to be successfully prosecuted through trial under the Labor Code Private
16 Attorney Generals Act of 2004, Labor Code §§ 2698, et seq. on behalf of plaintiffs and other
17 aggrieved employees against someone other than an employer for civil penalties including unpaid
18 wages. The case involves claims of unpaid overtime, unprovided rest and meal periods, unpaid
19 vacation, untimely interval and final wages, and unreimbursed expenses. For my work in that
20 case, the Court awarded me an hourly rate of \$600.00 hour based on my skill and experience.

21 20. Since 2007, I have prosecuted several traditional wage & hour class actions as the
22 sole or primary attorney for the plaintiffs, including *Pudelwitts v. Regent Parking, Inc.*, *Singery*
23 *v. Quality Vessel Engineering*, *Tesillo v. LA Executive Towing Service, Inc.*, and *Madison v. The*
24 *Limousine Connection*. One such case is *Jose Tapia v. Mangen Group, Inc.*, LASC case no.
25 BC377114, a garden-variety wage & hour class action with many of the same claims at issue in
26 this case. The Honorable Jane Johnson of the Los Angeles Superior Court, presiding over the
27 motion for final approval of the Settlement Class action settlement in *Tapia*, had no quarrel with
28 an hourly rate of \$525.00 for my services.

21. In my representation of employees, I have prosecuted several lawsuits on behalf
of employees with claims of rest and meal period and overtime violations or other wage claims.



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1 22. I have been involved in the prosecution of numerous wage and hour class actions
2 at various stages of litigation. A small sampling of the wage and hour class action cases in which
3 I have recently been counsel of records is as follows:

4 a. *Alafa v. Custom Built Personal Training, Inc.*, Tulare County Superior
5 Court, Case No. VCU-245496 (appointed Class Counsel and granted final approval class action
6 settlement on behalf of assistant fitness manager employees).

7 b. *Cuellar v. Lovin Oven*, Orange County Superior Court, Case No. 30-2010-
8 000382146 (appointed Class Counsel and granted final approval of class action settlement by the
9 court on behalf of nonexempt employees).

10 c. *Cunningham v. DPI Specialty Foods West, Inc.*, Los Angeles Sup.Ct.,
11 Case No. BC465017 (appointed Class Counsel and granted final approval by this Court of class
12 action settlement on behalf of merchandiser employees).

13 d. *Deckard v. MSL Community Management LLC*, Riverside County
14 Superior Court, Case No. RIC1204182 (appointed Class Counsel and granted final approval of
15 class action settlement on behalf of caregivers and medical technicians).

16 e. *DiCato v. Francesca's Collections, Inc.*, San Diego County Superior
17 Court, Case No. 37-2012-00094401-CU-OE-CTL (appointed Class Counsel and granted final
18 approval of class action settlement on behalf of boutique manager and assistant manager
19 employees).

20 f. *Evans v. Equinox, et al.*, Los Angeles Sup.Ct., Case No. BC440058
21 (appointed Class Counsel and granted final approval by this Court of class action settlement on
22 behalf of personal trainer employees).

23 g. *Huynh v. Carefusion Resources, LLC, et al.*, San Diego Sup.Ct., Case No.
24 37-2009-00103277-CU-OE-CTL (appointed Class Counsel and granted final approval of class
25 action settlement on behalf of medical devices employees).

26 h. *Hidalgo, et al. v. Sun Hill*, Los Angeles Superior Court, Case No.
27 BC480808 (appointed Class Counsel and granted final approval of class action settlement on
28 behalf of hourly employees).

 i. *La Fleur v. Medical Management International, Inc.*, United States
District Court, Central District of California, Case No. EDCV13-00398-VAP (appointed Class
Counsel and granted final approval of class action settlement on behalf of practice managers).



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1 j. *Linder, et al. v. Warehouse Services, Inc.*, San Bernardino Superior Court,
2 Case No. CIVDS1500146 (appointed Class Counsel and granted final approval of class action
3 settlement on behalf of non-exempt hourly employees excluding truck drivers).

4 k. *Lynch, et al. v. American Guard Services*, Los Angeles Superior Court,
5 Case No. BC462681 (appointed Class Counsel and granted final approval of class action
6 settlement on behalf of security guard employees).

7 l. *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court, Case No. S-
8 1500-CV-282679 (appointed Class Counsel and granted final approval of class action settlement
9 on behalf of dairy and agricultural laborers).

10 m. *Montes v. Branam Enterprises, Inc.*, Los Angeles Sup.Ct. Case No.
11 BC442608 (appointed Class Counsel and granted final approval by this Court of class action
12 settlement on behalf of call concert rigging employees). *Nardone v. Sequoia Beverage Company,*
13 *LP*, Tulare County Superior Court, Case No. VCU-248370 (appointed Class Counsel and granted
14 final approval of class action settlement by the court on behalf of hourly employees).

15 n. *Ogbuehi v. Comcast of California/Colorado/Florida/Oregon, Inc.*, United
16 States District Court, Eastern District of California, Case No. EDCV13-00672-KJM-KJN
17 (appointed Class Counsel and granted final approval of class action settlement on behalf of virtual
18 customer account executives).

19 o. *Rosen v. Image Transfer*, Los Angeles Superior Court, Case No.
20 BC511072 (appointed Class Counsel and granted final approval of class action settlement on
21 behalf of bobtail truck drivers).

22 p. *Sandoval v. Rite Aid Corp.*, Los Angeles Superior Court, Case No.
23 BC431249 (granted class certification through contested motion and appointed Class Counsel in
24 case on behalf of former pharmacy employees based on late final wage payments in violation of
25 Labor Code §§ 201–203).

26 q. *Shaw, et al. v. Interthinx, Inc.*, United States District Court for the District
27 of Colorado, Case No. 13-CV-01229-REB-BNB (appointed Class Counsel and granted final
28 approval of class action settlement by the court on behalf of auditor employees).

r. *Stucker v. L'Oreal*, Los Angeles Sup.Ct. Case No. BC456080 (appointed
Class Counsel and granted final approval by this Court of class action settlement involving
alleged misclassification of sales employees and unpaid vacation pay).



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1 s. *Valdez v. Healthcare Services Group, Inc.*, Los Angeles Sup.Ct., Case No.
2 BC462917 (appointed Class Counsel and granted final approval by this Court of class action
3 settlement on behalf of service account manager employees).

4 t. *Valencia v. SCIS Air Security Corp.*, Los Angeles Superior Court, Case
5 No. BC421485 (granted class certification through contested motion and appointed Class
6 Counsel in case on behalf of former security workers based on late final wage payments in
7 violation of Labor Code §§ 201–203).

8 u. *Vang v. Burlington Coat Factory Corporation*, United States District
9 Court Central District of California, Case No. 09-CV-08061-CAS-JCx (appointed Class Counsel
10 and granted final approval of class action settlement by the court on behalf of assistant store
11 manager employees).

12 v. *Volney-Parris v. Southern California Edison Company*, Los Angeles
13 Superior Court, Case No. BC493038 (appointed Class Counsel and granted final approval of
14 class action settlement on behalf of customer specialist employees).

15 w. *White v. 20/20 Communications, Inc.*, San Bernardino County Superior
16 Court, Case No. CIVRS1301718 (appointed Class Counsel and granted final approval of class
17 action settlement on behalf of hourly employees).

18 ***Class Action Treatment Is Superior***

19 23. A class action is also superior to other means adjudicating the issues in this action.
20 The predominance of common legal and factual questions shows that this Court could fairly
21 adjudicate the claims of Class Members through a single class action. In view of the *theoretical*
22 alternatives that proposed class members could potentially utilize—representative PAGA action
23 (where there is less relief available), individual civil lawsuits or wage claims through the Division
24 of Labor Standards Enforcement (where there would be relatively little money at stake, but the
25 claims would be time-consuming to litigate)—a class action is plainly superior to all of them.
26 Thus, this consideration supports conditional class action treatment for purposes of this
27 Settlement only.

28 ***The Settlement is Presumptively Fair***

29 24. The class settlement here satisfies all of the *Kullar* factors. The Settlement
30 resulted from thorough, arms’ length, negotiations between experienced counsel with the
31 assistance of a respected mediator after sufficient discovery was exchanged to assess the relative



1 strengths and weaknesses of their respective cases and Defendant's estimated exposure. Both
2 defense counsel and I are particularly experienced in employment law and wage and hour class
3 actions. We are experienced and qualified to evaluate the class claims, the viability of the
4 defenses, and the risks and benefits of settlement versus trial on a fully informed basis. I have
5 negotiated many wage and hour class settlements, including many involving the same issues
6 presented here. Counsel on both sides share the view that the Settlement is a fair and reasonable
7 settlement in light of the complexities of the case and uncertainties of class certification and
litigation, and a fair result for the Class Members.

8 ***Exposure & Risk Analysis***

9 25. Plaintiff prepared "damages" estimates in advance of the mediation. In advance
10 of the mediation, Plaintiff determined Defendant's maximum exposure for restitution and
11 penalties to be approximately \$4,235,013.43 (consisting of \$13,572.88 in unpaid wages,
12 \$417,078.39 in missed meal period premium wages, \$449,161.34 in missed rest break premium
13 wages, \$220,991.75 for wage statement penalties, \$770,772.18 for waiting time penalties, and
14 \$3,341,627.93 for civil penalties). True and correct copies of the spreadsheets I prepared for
15 mediation of this Action are collectively attached to this declaration as **Exhibit 6**. The estimates
16 are in essence "home run" projections that omit data points that will undoubtedly reduce the
17 maximum possible damages award and do not factor in any of the risks involved in litigating this
18 Action. Plaintiff calculated the damages based on the number of workweeks and pay periods
19 provided by Defendant, Plaintiff's reports, and the sample data. *Id.* Plaintiff also considered the
20 possibility that Defendant could launch a *Pick Up Stix* campaign and pursue individual release
21 agreements from the Class Members. Plaintiff's Counsel applied discounts to the maximum
22 exposure to account for all other risks discussed below. While it is difficult to assign anything
23 but crudely-determined percentages of risk to any of the claims, it is safe to say that the risk that
24 a *Pick Up Stix* campaign would preclude recovery for such employees is substantial and alone
justifies a significant discount because Defendant would likely by trial have gathered releases
from the majority of the Class Members.¹

25
26 ¹ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998)
27 ("[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to
28 be within the targeted range of reasonableness."); *Wise v. Ulta Salon, Cosmetics & Fragrance,*
Inc. 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the
proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*,



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1 26. My initial estimates do not realistically account for the risks outlined below or the
2 risk that a class will not be certified. Therefore, I believe a class settlement for \$280,000.00 is
3 fair and reasonable.

4 27. **Risks Associated with the Arbitration Agreements.** The arbitration agreements
5 entered into between Defendant on the one hand, and the Class Members, on the other, present a
6 significant risk to the success of Plaintiff's class action litigation. Defendant represents that there
7 are approximately 319 Class Members. According to Defendant, the majority of the Class entered
8 into arbitration agreements with Defendant. Defendant presented approximately 263 arbitration
9 agreements in confirmatory discovery. As the arbitration agreements in question restrict potential
10 litigants from bringing class actions against Defendant, Plaintiff would be effectively barred from
11 pursuing claims on behalf of the Class in Court. Thus, there is a significant risk the Court could
12 determine that those Class Members who have not entered into arbitration agreements with
13 Defendant do not constitute a sufficiently numerous class to justify class action treatment. As
14 such, by continuing to trial on class-wide claims, Plaintiff would run the high risk of suffering
15 defeat due to the existence of the arbitration agreement. Moreover, the arbitration agreements
16 would pose danger to any class certification motion brought by Plaintiff. Because different
17 defenses would apply to some Class Members and not others – i.e., the existence of signed
18 arbitration agreements – there is a risk that the Court could determine that Plaintiff's claims
19 present too many individualized inquiries to justify class certification.

20 28. **Risks Associated with Unpaid Wages Claim For Off-The Clock Work.** There
21 is a risk that Plaintiff's recovery for unpaid wages would be extremely limited at best, largely
22 because Defendant's written policies throughout the relevant time-period prohibited off-the-
23 clock work. A true and correct copy of Defendants employee handbook, pages 50-51 is attached
24 hereto as **Exhibit 7**. Off-the-clock claims are difficult where a defendant requires in its written
25 policies that all work must take place while clocked in. *See Jong v. Kaiser Foundation Hospital*
26 (2012) 226 Cal.App.4th 391 (employer must have notice of off-the-clock work for it to be
27 compensable). *Id.* In its written employment policies, Defendant mandates that employees must

28 2017 WL 708766 at * 10 (C.D. Cal. Feb 16, 2017) ("a settlement for fourteen percent recovery
of Plaintiffs' maximum recovery is reasonable"); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d
1036, 1042 (N.D. Cal. 2008) (approving settlement amount that "is just over 9% of the maximum
potential recovery asserted by either party.").



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1 record all time worked accurately on their time records and strictly prohibit employees from
2 performing any work off-the-clock. Moreover, while Defendant disputes that off-the-clock work
3 occurred, it contends that any time spent off the clock was *de minimis*. The California Supreme
4 Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested that irregular and
5 minute periods of time may still be subject to a *de minimis* defense even if compensable. (Stating
6 that “We do not decide whether there are circumstances where compensable time is so minute or
7 irregular that it is unreasonable to expect the time to be recorded.”). Following *Troester*,
8 Defendant contends that the *de minimis* doctrine may apply here because the time spent off the
9 clock were minute and insignificant. Accordingly, a large award of penalties seems unlikely with
10 respect to this claim.

11 29. The difficulty inherent in proving that off-the-clock work occurred poses a
12 significant hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove
13 this claim. Generally, a court will not certify a class unless it can determine an appropriate class-
14 wide methodology. *See, e.g., Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014). Here,
15 Plaintiff may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially
16 given the lack of records indicating when such off-the-clock work may have taken place.
17 Individualized inquiries would need to be conducted person-by-person, day-by-day, to determine
18 if an individual in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there
19 is a significant risk that the Court would consider this evidentiary showing insufficient as a class-
20 wide methodology.

21 30. **Risks Associated with the Meal Period Claims.** There are risks to Plaintiff’s
22 meal period claim. Defendant contends that, to establish a violation for missed meal periods, a
23 plaintiff must do more than show that a meal break was not taken. *Brinker*, 53 Cal. 4th at 1004.
24 So long as an employer provides employees with a “reasonable opportunity” to take a duty-free
25 meal period, it has no further duty to “police meal breaks and ensure no work thereafter is
26 performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff must show the employer impeded, discouraged,
27 or prohibited the employee from taking a proper break, or otherwise failed to release the
28 employee of all control. *Id.* “Thus, the crucial issue with regard to the meal break claim is the
reason that a particular employee may have failed to take a meal break.” *Washington v. Joe’s
Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. *Id.*



1 31. Defendant contends it did not impede or discourage Plaintiff, or any other
2 employees, from taking their meal or rest periods. Defendant's policies mandate that employees
3 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
4 of their meal breaks each day on their time records. The time records that comprise the random
5 sample Defendant produced to Plaintiff for purposes of mediation show that meal periods were
6 taken the vast majority of the time. Of the time records that show a late, short or no lunch,
7 individualized evidence may be necessary to determine whether they occurred due to conduct of
8 the Defendant or each of the employees concerned. Accordingly, there is a significant risk that
9 the value of Plaintiff's meal period claim would be substantially reduced at trial.

10 32. **Risks Associated with the Rest Break Claims.** There are risks to Plaintiff's rest
11 period claim. Employers are not required to record rest periods and such periods are paid.
12 Defendant contends it provided non-exempt employees the opportunity to take rest periods in
13 accordance with California law. Further, Defendant's written policies on meal and rest periods
14 are consistent with the Wage Order. Thus, unlike meal periods, where there are often records
15 showing whether an employee clocked out or not, there is no such evidence to prove a missed
16 rest period or that the employer refused to authorize and permit one. *Id.* Managing such claims
17 at trial has become exceedingly difficult. Plaintiff will depend on sample witness testimony and
18 surveys to prove the claims. While a victory with such evidence is certainly possible, relevant
19 caselaw makes such claims risky from a trial management and due process perspective. *See*
20 *Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1, 31 (explaining "[I]f sufficient common
21 questions exist to support class certification, it may be possible to manage individual issues
22 through the use of surveys and statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo* (2015)
23 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

24 33. **Risks Associated with the Statutory "Wage Statement" Penalty Claims.**
25 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and PAGA
26 penalties. Under Labor Code section 226, wage statements must include various information,
27 including the applicable rates of pay, corresponding hours worked, and gross pay. Here,
28 Plaintiff's wage statement claim has the same underlying risks as the above claims, as it is
derivative of them. On their face, the wage statements issued by Defendant comply with the
requirements of Labor Code section 226.

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1 for egregious, intentional violations of the Labor Code.³

2 38. For instance, on October 24, 2017, the Los Angeles Superior Court awarded a
3 prevailing PAGA plaintiff, represented by very experienced counsel, civil penalties totaling only
4 \$50.00. *Shields v. Security Paving Company, Inc.*, LA Superior Court case no. BC492828.
5 Further, in *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018), the Court of Appeal
6 affirmed judgment which provided for a PAGA penalty of only \$5 per pay period for the
7 defendant's meal period violations. A similar result could occur here.

8 39. The United States Supreme Court announced on December 15, 2021 that, in the
9 near future, it will hear the matter of *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, and
10 decide (likely no later than the end of summer 2022) whether or not to overrule the California
11 Supreme Court's decision in *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348 that a private
12 arbitration agreement cannot deprive an employee of his right to sue under PAGA in a court of
13 law. If the Supreme Court sides with the Petitioner, Plaintiff's PAGA claim may be subject to an
14 arbitration agreement allowing only bilateral arbitration and, consequently, inhibiting the claim
15 altogether. While such an outcome would conflict squarely with *EEOC v. Waffle House* (2002)

16
17 *Bernstein*, who the court noted had received "millions of dollars from the state of California" to
18 train their flight attendants, engaged in glaring violations of the labor code, such as failing to
19 compensate its flight attendants for work performed outside of "block time" (time during which
20 the aircraft is moving), including time spent participating in pre-flight briefings, boarding
21 passengers, and deplaning. *Bernstein v. Virgin Am., Inc.* (N.D. Cal 2017) 227 F. Supp. 3d 1049,
1055-1058. Indeed, the defendant's liability was so clear in *Bernstein* that the case was resolved
on the plaintiffs' motion for summary judgment. *Bernstein v. Virgin Am., Inc.* (N.D. Cal. 2019)
U.S. Dist. LEXIS 13253.

22 In *Robert Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d. 1058, the court
23 awarded approximately \$102 million in damages, primarily based on the Defendant's failures to
comply with the requirements of California Labor Code section 226.

24 ³ In 2012, I tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court case number
25 BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. A true and
26 correct copy of the complaint is attached as **Exhibit 8**. The plaintiff sought in excess of \$9 million
27 in civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M. Sohigian
28 awarded approximately \$325,000 in civil penalties under the PAGA. A true and correct copy of
the statement of decision is attached as **Exhibit 9**, 19:8-20:19. Also, on October 24, 2017, the
Los Angeles Superior Court awarded a prevailing PAGA plaintiff civil, represented by very
experienced counsel, penalties totaling only \$50.00. *Shields v. Security Paving Company, Inc.*,
LA Superior Court case no. BC492828. A similar result could occur here.



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1 534 US 279 (private settlement agreements do not preclude government prosecutions on
2 behalf of employee signatories to such agreements), this potential outcome is a risk.

3 40. **Risks Associated With A Pick-Up Stix Campaign.** An employer enjoys the
4 right to settle a putative class member's disputed wage claims individually, without the consent
5 or involvement of class counsel. (See *Chindarah v. Pick Up Stix, Inc.* 171 Cal. App. 4th 796
6 (2009). As discussed above, Defendant may launch a "pick off" settlement campaign to pursue
7 individual release agreements from the Class Members, thereby potentially narrowing the size of
8 the Settlement Class – approximately 319 members - until it is no longer numerous enough for
9 class certification. *Id.* Plaintiff, then, may not have sufficient number of employees to represent.
10 This led to a significant reduction of claim value in settlement negotiations.

11 41. While the evidence gathered through Plaintiff's discovery supports the merits of
12 the claims asserted in this lawsuit, Plaintiff and her counsel recognize that continued litigation
13 presents significant risks that support a downward departure from Defendant's estimated liability
14 exposure. In view of the risks, the Settlement reflects my estimate of the total amount of damages,
15 monetary penalties or other relief that the Class could reasonably expect to be awarded at trial,
16 taking into account the likelihood of prevailing and other attendant risks. It also represents a fair,
17 adequate, and reasonable compromise amount for these claims and warrants preliminary
18 approval. *Id.*, *Torrissi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1376 (the financial
19 condition of defendant predominated in assessing the reasonableness of settlement); *Spann v.*
20 *J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty concerning
21 defendant's financial stability "strongly supports the reasonableness of the settlement"); See
22 *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014 WL 2465049,
23 * 3.

24 ***Allocation of the PAGA Payment***

25 42. The settlement of PAGA penalties in the sum of \$4,000.00, of which 75%
26 (\$3,000.00) will be paid to the LWDA and 25% (\$1,000.00) will be distributed to the Class, is
27 reasonable and appropriate under the circumstances. The Parties negotiated a good faith amount
28 for PAGA penalties to be paid to the LWDA and to the Class. The portion to be paid to the
LWDA was not the result of self-interest at the expense of other Class Members.

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Attorneys' Fees and Costs

43. I intend to request Class Counsel Attorneys' Fees of \$93,333.32 (one-third of the GSA) and Class Counsel's litigation costs incurred in prosecuting this Action, which I currently estimate to be approximately \$13,000.00 and will be no more than \$15,000.00 at the conclusion of matters related to the Settlement. In view of my efforts and risks in pursuing this case these amounts are well within the range of reasonableness and thus warrant this Court's preliminary approval. In addition, based on my experience in wage and hour class action matters, fee awards of approximately one-third of the settlement fund are routinely approved as reasonable. I have been awarded attorneys' fees equaling approximately one-third of the fund in several recent wage and hour class actions, including: *Alvarez v. Gary Grace Enterprises, LP*, Marin County Superior Court, Case No. CIV1002553 (one-third of fund); *Calderon v. Greatcall, Inc.*, San Diego Superior Court, Case No. 37-2010-00093743-CU-OE-CTL (one-third of fund); *Butler v. Lexxiom, Inc.*, San Bernardino County Superior Court, Case No. CIVRS1001579 (one-third of fund); *Perez v. Southwest Dealer Services, Inc.*, Los Angeles County Superior Court, Case No. BC439253 (one-third of fund); *O'Brien v. Optima Network Services, Inc.*, San Bernardino County Superior Court, Case No. CIVRS1107056 (one-third of fund); *Noyd v. The Cristcat Group, et al.*, Los Angeles County Superior Court, Case No. BC439558 (one-third of fund); *Huynh v. Carefusion Resources, LLC, et al*, San Diego Sup.Ct., Case No. 37-2009-00103277-CU-OE-CTL (one-third of fund); *Cunningham v. DPI Specialty Foods West, Inc.*, Los Angeles Sup.Ct., Case No. BC465017 (one-third of fund); *Stucker v. L'Oreal USA S/D, Inc.*, Los Angeles Sup. Ct., Case No. BC456080 (one-third of fund); *Valdez v. Healthcare Services Group, Inc.*, Los Angeles Sup.Ct., Case No. BC462917 (one-third of fund); *Hernandez, et al v. HSBC*, U.S. District Court, Central District of California, Case No. 10-CV-4753 (one-third of fund); *Sandoval, et al. v. Thrifty Payless, Inc., et al.* Los Angeles Sup.Ct., Case No. BC431249 (one-third of fund); *Alafa v. Custom Built Personal Training, Inc.*, Tulare County Superior Court, Case No. VCU-245496 (one-third of fund); *Nardone v. Sequoia Beverage Company, LP*, Tulare Sup.Ct., Case No. VCU-248370 (one-third of fund); *Rosen v. Image Transfer*, Los Angeles Sup.Ct., Case No. BC511702 (one-third of fund); *Tucker v. Maly's West, Inc.*, Los Angeles Sup.Ct., Case No. BC483920 (one-third of fund); *King v. Build.com*, Butte Sup.Ct., Case No. 159985 (one-third of fund); *Clifford v. Anderson Hay & Grain*, Los Angeles Sup.Ct., Case No. BC517625 (one-third of fund); *Nichols, et al. v. Vitamin Shoppe*, Contra Costa Sup.Ct., Case No.



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1 CIVMSC13-01136 (one-third of fund); *Clarke v. Insight Global*, U.S. District Court, Southern
2 District of California, Case No. 13-CV-0357 (one-third of fund); *Fischer, et al. v. National*
3 *Distribution Centers LP, et al.*, Riverside Sup.Ct., Case No. RIC1114952 (one-third of fund);
4 *Shaw, et al. v. Interthinx, Inc.*, United States District Court for the District of Colorado, Case No.
5 13-CV-01229-REB-BNB (one-third of fund); *Ogbuehi v. Comcast of California/ Colorado/*
6 *Florida/ Oregon, Inc.*, United States District Court, Eastern District of California, Case No.
7 EDCV13-00672-KJM-KJN (one-third of fund); *Lynch, et al. v. American Guard Services*, Los
8 Angeles Superior Court, Case No. BC462681 (one-third of fund); *Volney-Parris v. Southern*
9 *California Edison Company*, Los Angeles Superior Court, Case No. BC493038 (one-third of
10 fund); *Hidalgo, et al. v. Sun Hill*, Los Angeles Superior Court, Case No. BC480808 (one-third
11 of fund); *Martin, et al. v. Aukeman Dairy, et al.*, Kern Superior Court, Case No. S-1500-CV-
12 282679 (one-third of fund); *Linder, et al. v. Warehouse Services, Inc.*, San Bernardino Superior
13 Court, Case No. CIVDS1500146 (one-third of fund).

14 44. The amount of fees and costs requested are commensurate with (1) the risk Class
15 Counsel took in bringing the case, (2) the extensive time, effort and expense dedicated to the
16 case, (3) the skill and determination Class Counsel has shown, (4) the results Class Counsel
17 achieved, (5) the value of the Class Counsel achieved for the class, and (6) the other cases Class
18 Counsel turned down to devote time to this matter. Class Counsel also interviewed and obtained
19 information from putative class members, met and conferred with Defendant's counsel on
20 numerous occasions, reviewed and analyzed hundreds of pages of data and documents provided
21 by Defendant and obtained through other sources, researched applicable law, and estimates of
22 "damages" for purposes of settlement discussions, among other tasks.

23 45. Class Counsel have borne all the risks and costs of litigation and will receive no
24 compensation until recovery is obtained. Class Counsel are well-experienced in wage-and-hour
25 class action litigation and used that experience to obtain a fair result for the Class. Considering
26 the amount of the attorney fees requested, the work performed, and the risks incurred, the
27 requested fees and costs are reasonable and should be awarded.

28 ***Class Representative Payment***

46. The Settlement provides that Plaintiff may seek a Class Representative Payment
of \$7,500.00. This amount is entirely reasonable given Plaintiff's efforts in this Action and the
risks she undertook on behalf of Class Members. Here, Plaintiff has devoted many hours



1 advancing the interests of the Settlement Class. Plaintiff has done this by, among other things,
2 retaining experienced counsel, providing them with information about her work history with
3 Defendant and Defendant's policies and practices with respect to the wage and hour claims at
4 issue, assisting counsel in identifying witnesses, traveling to and participating in mediation, and
5 being actively involved in the settlement process to ensure a fair result for the Settlement Class
6 as a whole. In doing this, Plaintiff has been exposed to significant risks, including the risk of an
7 order to pay Defendant's attorneys' fees and costs if this action had been unsuccessful (*See* Labor
8 Code §§ 218.5-218.6). The efforts and risks that Plaintiff undertook on behalf of the Settlement
9 Class shows that the proposed Class Representative Payment is fair, adequate, and reasonable,
and thus warrant preliminary approval.

10 ***Settlement Share***

11 47. The Settlement Share will be paid to each Class Member based on his or her
12 eligible Pay Periods compared to the total Pay Periods. Settlement § III.D(b). Because this
13 method compensates Class Members based on the extent of their potential injuries, in that Class
14 Members who worked for Defendant longer would have been subject to more alleged violations,
it is fair, adequate, and reasonable.

15 ***Notice By First Class U.S. Mail Only (No Email)***

16 48. The Settlement requires distribution of the Notice by First Class U.S. mail only.
17 Settlement, § IV.B.2. Although there are current employee Class Members, it is uncertain
18 whether Defendant's records of their contact information include email addresses and Class
19 Members, who perform all of their work away from a desk, are not in a position to check their
20 emails. As such, notice by mail alone is fair, adequate, and reasonable. The Notice Packet
21 (attached as Exhibit A to the Settlement) provides Class Members with all pertinent information
22 that they need to fully evaluate their options and exercise their rights under the Settlement.
23 Specifically, it clearly and concisely explains, among other things: (1) what the Settlement is
24 about; (2) who is a Settlement Class Member; (3) how Class Counsel will be paid; (4) how to
25 submit an exclusion request not to be bound by the Settlement; (5) how to object to the
26 Settlement; (6) how the Settlement will be allocated; (7) how payments to Class Members will
27 be calculated; (8) how the disputes will be resolved; and (9) the estimated Individual Settlement
28 Payment for each Class Member. Additionally, the Notice will include the number of Eligible
Workweeks a Class Member had during the Class Period. Accordingly, the Notice should be



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1 approved because it describes the Settlement with sufficient clarity and specificity to explain to
2 Class Members what this action is about, their rights under the Settlement, and how to exercise
3 those rights. As such, the parties' proposed Notice fully complies with California Rules of Court
4 3.766(d) and 3.769(f) and will allow Class Members to make informed responses to the proposed
5 settlement.

6 *Settlement Administration Duties*

7 49. The duties of the Settlement Administrator are spelled out in section III(C) of the
8 Settlement and in the bid provided by CPT Group, Inc. a true and correct copy of which is
9 attached hereto as **Exhibit 10**.

10 *Settlement Administration Costs*

11 50. With regard to the settlement administration costs provision (Settlement § III.C.),
12 it is reasonable. Before agreeing to CPT Group, Inc. the Parties sought and reviewed bids from
13 other reputable third-party administrators: (A) ILYM Group, Inc. = \$9,920.80; and B) Phoenix
14 Class Administration Solutions = \$6,000.00. A true and correct copy of the bid from ILYM is
15 attached hereto as **Exhibit 11**. A true and correct copy of the bid from Phoenix is attached hereto
16 as **Exhibit 12**. The bid provided by CPT Group, Inc. was comparable. Thus, settlement
17 administration costs provision should be given preliminary approval.

18 *Notice of Settlement to the LWDA*

19 51. Pursuant to Labor Code § 2699(l)(2), Plaintiff submitted a copy of the Settlement
20 with the Labor and Workforce Development Agency ("LWDA") at the same time Plaintiff's
21 Motion is being filed with the Court. A true and correct copy of Plaintiff's submission with the
22 LWDA and a confirmation email is attached hereto as **Exhibit 13**.

23 I declare under the penalty of perjury of the laws of the State of California that the
24 foregoing is true and correct to the best of my knowledge.

25 Executed on 01 / 26 / 2023 at Los Angeles, California.

26 

27 DAVID G. SPIVAK,
28 Declarant



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Los Angeles, CA 90069

EXHIBIT 1

1 DAVID G. SPIVAK (SBN 179684)
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7 Attorneys for Plaintiff(s),
8 PAULA JOHNSON, and all others similarly situated
(Additional attorneys for parties on following page)

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN FRANCISCO**
12 **(UNLIMITED JURISDICTION)**

13 PAULA JOHNSON, on behalf of herself and all
14 others similarly situated, and as an “aggrieved
employee” on behalf of other “aggrieved
15 employees” under the Labor Code Private
Attorneys General Act of 2004,

16 *Plaintiff(s),*

17 vs.

18
19 NAN MCKAY & ASSOCIATES, INC., a
California corporation; and DOES 1–50,
20 inclusive,

21 *Defendant(s).*

Case No. CGC-20-586796

**JOINT STIPULATION OF CLASS
ACTION SETTLEMENT AND
RELEASE OF CLAIMS**

Action filed: September 24, 2020
Dept: 206, The Honorable Samuel
K. Feng

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Attorneys for Defendant(s),
NAN MCKAY & ASSOCIATES, INC.

1 This Joint Stipulation of Class Action Settlement and Release of Claims (“Settlement
2 Agreement” or “Agreement”) is made and entered into by and between Plaintiff Paula Johnson
3 (“Plaintiff” or “Class Representative”), individually and on behalf of all putative class members,
4 on the one hand, and Defendant Nan McKay & Associates, Inc. (“Defendant”). Plaintiff and
5 Defendant are collectively referred to herein as the “Parties.”

6
7 **I. DEFINITIONS.**

8 The following definitions are applicable to this Settlement Agreement, in addition to other
9 terms defined elsewhere in the Agreement:

10 **A. “Action”** shall mean: (1) the civil action commenced on September 24, 2020, by
11 Plaintiff against Defendant in the Superior Court of California, County of San Francisco, Case
12 No. CGC-20-586796, entitled: “Paula Johnson, on behalf of herself, and all others similarly
13 situated, and as an ‘aggrieved employee’ on behalf of other ‘aggrieved employees’ under the
14 Labor Code Private Attorneys General Act of 2004, *Plaintiff(s)*, vs. Nan McKay & Associates,
15 Inc., a California corporation; and DOES 1 through 50, inclusive, *Defendant(s)*.”

16
17 **B. “Class,” “Class Members,” or “Settlement Class”** shall mean all persons
18 Defendant employed in California as an hourly or nonexempt employee during the Class Period.
19 Defendant estimates that, as of the earlier of Court preliminary approval of this Settlement or
20 January 19, 2022, there were approximately 314 members.

21
22 **C. “Class Counsel”** shall mean the attorneys representing Plaintiff in the Action:
23 David G. Spivak of The Spivak Law Firm and Walter L. Haines of United Employees Law
24 Group.

25 **D. “Class Counsel Fees Payment” and “Class Counsel Litigation Expenses**
26 **Payment”** shall mean the amounts awarded to Class Counsel by the Court to compensate them
27
28

1 for, respectively, their fees and expenses in connection with the Action, including their pre-filing
2 investigation, their filing of the Action and all related litigation activities, this Settlement, and all
3 post-Settlement compliance procedures.

4 **E. “Class Notice”** shall mean the Notice of Proposed Settlement attached as **Exhibit**
5 **A** and incorporated by reference into this Agreement.

6 **F. “Class Period”** shall mean the period of time from September 25, 2016 through
7 the earlier of Court preliminary approval of this Settlement or June 16, 2022.

8 **G. “Class Representative Payment”** shall mean the special payment made to
9 Plaintiff in her capacity as Class Representative to compensate her for initiating the Action,
10 performing work in support of the Action, and undertaking the risk of liability for attorneys’ fees
11 and expenses in the event she was unsuccessful in the prosecution of the Action.

12 **H. “Court”** shall mean the Superior Court for the County of San Francisco, Civic
13 Center Courthouse, 400 McAllister Street, San Francisco, CA 94102.

14 **I. “Defense Counsel”** shall mean the attorneys representing Defendant in the
15 Action: Debra Ellwood Meppen and Peter Choi of Gordon Rees Scully Mansukhani, LLP.

16 **J. “Effective Date”** is defined as follows: If no objection to this Settlement or to any
17 of the terms and or conditions of the Settlement are filed by Plaintiff, another member of the
18 Settlement class, or any intervenor to this Lawsuit, the Effective Date shall occur on the day that
19 the Court enters an order of final approval of this Settlement; however, if any objection to this
20 Settlement or to any of the terms and or conditions of the Stipulation is filed by a member of the
21 Settlement class, or any intervenor to this Lawsuit, the Effective Date shall occur upon the
22 expiration of the time for the filing any appeal of the order of final approval of this Settlement
23 provided that this Settlement has not been materially modified. If an appeal is filed or any writ
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1 granted, then the Effective Date shall occur after the appeal has been dismissed or the writ
2 dissolved and when there is no further time to appeal the dismissal of the appeal or the dissolution
3 of the writ, provided that this Settlement has not been materially modified.

4 **K. “Final Approval Hearing”** shall mean the hearing to be conducted by the Court
5 to determine whether to approve finally and implement the terms of this Agreement.

6
7 **L. “Gross Settlement Amount”** shall mean the Gross Settlement Amount of
8 Two Hundred Eighty Thousand Dollars and Zero Cents (\$280,000.00) payable by Defendant as
9 provided by this Agreement. The Gross Settlement Amount is non-reversionary; no portion of
10 the Gross Settlement Amount will return to Defendant. Defendant’s employer-side payroll taxes
11 arising from the payments made under this Settlement will be paid by Defendant separate from
12 and in addition to the Gross Settlement Amount. Defendant estimated for purposes of mediation
13 that there are approximately 5,500 Pay Periods by 314 class Members for the period of September
14 25, 2016 through January 19, 2022. These numbers would be expected to increase
15 proportionately for the passage of time between that date and the time of court approval. Before
16 the Parties seek or a Party seeks court approval of the Settlement, the Settlement Administrator
17 will advise Plaintiff’s counsel of Defendant’s report of the total number of Pay Periods and Class
18 Members.
19

20 **M. “Judgment”** shall mean the Order of Final Judgment entered by the Court that
21 the Parties anticipate will be entered following a Final Approval Hearing on the Settlement in
22 this Action.
23

24 **N. “Net Settlement Amount”** shall mean \$280,000.00 payable by Defendant
25 pursuant to this Settlement, less:

26 ///

- 1 1. the Class Representative Payment approved by the Court;
- 2 2. the Class Counsel Fees Payment (one-third or 33 and 1/3% of Gross
- 3 Settlement Amount) and the Class Counsel Litigation Expenses Payment (of not more than
- 4 \$15,000.00) approved by the Court;
- 5 3. the Settlement Administrator's reasonable fees and expenses approved by
- 6 the Court (not to exceed \$10,000.00);
- 7 4. the amount of \$4,000.00 as PAGA Penalties for the PAGA claim, of which
- 8 \$1,000.00 will be paid to the PAGA Members and \$3,000.00 will be paid to the LWDA;
- 9 5. any other fees or expenses (other than attorneys' fees and expenses)
- 10 incurred by Plaintiff in implementing the terms and conditions of this Agreement as approved by
- 11 the Court.
- 12

13 **O. “PAGA”** means the California Labor Code Private Attorneys General Act of

14 2004 (Lab. Code §§ 2698, *et seq.*).

15 **P. “PAGA Members”** means all individuals Defendant employed in California as

16 hourly or nonexempt employees during the PAGA Period.

17 **Q. “PAGA Penalties”** means the portion of the Gross Settlement Amount that the

18 Parties have agreed to allocate as civil penalties in order to settle claims arising under PAGA.

19 The Parties have agreed to allocate Four Thousand Dollars and Zero Cents (\$4,000.00), of which,

20 payment from the Gross Settlement Amount to the LWDA will be made in the amount of Three

21 Thousand Dollars and Zero Cents (\$3,000.00), which is 75% of the PAGA Penalties. One

22 Thousand Dollars and Zero Cents (\$1,000.00), 25% of the PAGA Penalties, will remain in the

23 Net Settlement Amount for distribution pro rate to PAGA Members as described in this

24 agreement. PAGA Members will receive payment from the employee portion of the PAGA

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1 Penalties regardless of whether they submit a request for exclusion if the PAGA Penalties are
2 approved by the Court.

3 **R. “PAGA Period”** shall mean July 24, 2019 through the earlier of Court
4 preliminary approval of this Settlement or June 16, 2022.

5 **S. “Participating Class” or “Participating Class Members”** shall mean all
6 Settlement Class members who do not submit a valid and timely letter requesting to be excluded
7 from the Settlement, consistent with the terms set forth in this Settlement Agreement.

8 **T. “Preliminary Approval of the Settlement”** shall mean the Court’s preliminary
9 approval of the Settlement without material change.

10 **U. “Released Claims”** shall mean all claims, rights, demands, liabilities and causes
11 of action that are alleged, or reasonably could have been alleged based on the facts and claims
12 during the period of September 25, 2016 through the earlier of Court preliminary approval of this
13 Settlement or June 16, 2022 asserted in the Operative Complaint and/or in the letter(s) sent by
14 Plaintiff to the LWDA concerning Defendant and the other Released Parties, whether sounding
15 in law or equity, tort, contract, statute, or other applicable federal, state or local law or regulation,
16 including but not limited to the following claims: failure to pay wages (including minimum,
17 regular, overtime and double time wages), unauthorized and unlawful wage deductions, failure
18 to provide meal periods, failure to authorize and permit rest periods, failure to indemnify for
19 business expenses, failure to issue proper wage statements, failure to timely pay wages, failure
20 to maintain required payroll records, unfair business practices that could have been premised on
21 the claims, causes of action or legal theories of relief described above or any of the claims, causes
22 of action or legal theories of relief pleaded in the Action, all claims under PAGA or for civil
23 penalties that could have been premised on the claims, causes of action or legal theories described
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1 above or any of the claims, causes of action or legal theories of relief pleaded in the Action or
2 Plaintiff's letter(s) to the LWDA, including but not limited to the California Code of Regulations
3 and to Labor Code sections 201, 202, 203, 204, 218.5, 221, 226, 226.3, 226.7, 510, 512, 558,
4 1174, 1194, 1197, 1197.1, 1198, 1199, 2800, and 2698-2699, and any and all damages,
5 restitution, disgorgement, civil penalties, statutory penalties, taxes, interest or attorneys' fees or
6 costs resulting therefrom. Released Claims shall not apply to claims for workers' compensation
7 benefits, unemployment insurance benefits, or any other claim or right that as a matter of law
8 cannot be waived or released. The Parties acknowledge that Released Claims includes any claims
9 for penalties by a PAGA Member resulting from any LWDA investigation. The Parties will meet
10 and confer in good faith if the Court requires changes to the scope of the Released Claims.
11

12 **V. "Released Parties"** shall mean Defendant, and any of its former and present
13 agents, employees, servants, officers, directors, partners, trustees, representatives, shareholders,
14 stockholders, attorneys, parents, subsidiaries, equity sponsors, related corporations, divisions,
15 joint venturers, assigns, predecessors, successors, service providers, insurers, consultants,
16 subcontractors, joint employers, employee benefit plans and fiduciaries thereof, affiliated
17 organizations, and all persons acting under, by, through or in concert with any of them, and each
18 of them.
19

20 **W. "Response Deadline"** shall mean the date 60 days after the Settlement
21 Administrator mails the Class Notice to Class Members, which is the last date on which Class
22 Members may submit Exclusion Requests, written objections to the Settlement, or Pay Period
23 disputes. In the event the 60th day falls on a Sunday or federal holiday, the Response Deadline
24 will be extended to the next day on which the U.S. Postal Service is open. The Response Deadline
25 for Exclusion Requests or Objections will be extended fifteen (15) calendar days for any Class
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1 Member who is re-mailed a Notice Packet by the Settlement Administrator, unless the 15th day
2 falls on a Sunday or federal holiday, in which case the Response Deadline will be extended to
3 the next day on which the U.S. Postal Service is open.

4 **X. “Settlement”** shall mean the disposition of the Action and all related claims
5 effectuated by this Agreement.

6 **Y. “Settlement Account”** shall mean a fund within the meaning of Treasury
7 Regulation § 1.468B-1, 26 CFR § 1.468B-1 *et seq.*, that is established by the Settlement
8 Administrator for the benefit of Participating Class Members and PAGA Members.

9 **Z. “Settlement Administrator”** shall mean CPT Group, Inc. or another
10 administrator proposed by the Parties and appointed by the Court to administer the Settlement.
11 The Parties represent that they do not have any financial interest in the Settlement Administrator
12 or otherwise have a relationship with the Settlement Administrator that could create a conflict of
13 interest.

14 **AA. “Settlement Share”** shall mean each Settlement Class Member’s allocated share
15 of the Net Settlement Amount as provided by this Agreement and any payment a PAGA Member
16 is eligible to receive from the PAGA Penalties per Section III.C.4.

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19 **II. RECITALS**

20 **A.** On or about July 24, 2020, Plaintiff, through her attorneys, sent a letter to the
21 Labor Workforce Development Agency (“LWDA”) alleging the following against Defendant:
22 failure to pay wages, unauthorized and unlawful wage deductions, failure to provide meal
23 periods, failure to authorize and permit rest periods, failure to indemnify for business expenses,
24 failure to issue proper wage statements, failure to timely pay wages, failure to maintain required
25 payroll records, and related allegations (the “PAGA letter”). Plaintiff asserted these
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1 representative claims on behalf of all Class Members who are or were employed during the
2 applicable statutory period.

3 **B.** On September 24, 2020, Plaintiff filed a class action complaint in the San
4 Francisco Superior Court, alleging the same wage and hour claims as set forth in the earlier
5 PAGA letter and adding a cause of action for unfair competition. On October 21, 2020, Plaintiff
6 filed a first amended class action complaint in the San Francisco County Superior Court, adding
7 a cause of action under the Labor Code Private Attorneys General Act of 2004 (“PAGA”). The
8 first amended complaint is the “Operative Complaint.”

9
10 **C.** On December 29, 2020, Defendant answered Plaintiff’s First Amended
11 Complaint and denied, and continues to deny, all of Plaintiff’s material allegations. Specifically,
12 Defendant denies the failure to pay wages, unauthorized and unlawful wage deductions, failure
13 to provide meal periods, failure to authorize and permit rest periods, failure to indemnify for
14 business expenses, failure to issue proper wage statements, failure to timely pay wages, failure
15 to maintain required payroll records and related allegations in the Action. Defendant contends
16 that it has complied with the Labor Code, the Business & Professions Code, and the applicable
17 Wage Order at all times. Defendant further alleges that the Plaintiff’s claims are not amenable to
18 class treatment because common issues do not predominate.

19
20 **D.** The Parties thereafter engaged in an informal, voluntary exchange of information
21 in the context of privileged settlement discussions to facilitate an early mediation. The Parties
22 exchanged discovery requests, documents, information, and data including but not limited to pre-
23 suit evidence request and preservation letters, pre-mediation data and document exchanges, and
24 related activities.

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1 **E.** On January 24, 2022, following much of the foregoing informal discovery and
2 exchange of information, the Parties participated in a mediation session presided over by
3 Mediator Gig Kyriacou, an experienced class action mediator. During the mediation, the Parties
4 had a full day of productive negotiations and reached agreement on a class-wide settlement
5 during the second mediation session. During the mediation sessions, each side, represented by
6 her/its respective counsel, recognized the risk of an adverse result in the Action and agreed to
7 settle the Action and all other matters covered by this Agreement pursuant to the terms and
8 conditions of this Agreement.

10 **F.** Based on their own thorough, independent investigation and evaluation of this
11 case, Class Counsel are of the opinion that the settlement with Defendant for the consideration
12 and on the terms set forth in this Agreement is fair, reasonable, adequate, and in the best interest
13 of the Settlement Class in light of all known facts and circumstances, including the risk of
14 significant costs and delay, the risk of non-certification of the Class, the defenses asserted by
15 Defendant, the risks of adverse determinations on the merits, and numerous potential appellate
16 issues. Although Defendant contends it has no liability in this case, Defendant's counsel shares
17 Class Counsel's belief that the Agreement represents a fair and adequate settlement given the
18 respective risks associated with the case.

20 **G.** This Agreement represents a compromise and settlement of highly disputed
21 claims. Nothing in this Agreement is intended or will be construed as an admission by Defendant
22 that Plaintiff's claims in the Action have merit or that it has any liability to Plaintiff or the Class
23 on those claims or to the State, or as an admission by Plaintiff that Defendant's defenses raised
24 in the Action have merit. This Agreement is intended to fully, finally, and forever compromise,
25 release, resolve, discharge, and settle the released claims subject to the terms and conditions set
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1 forth in this Agreement.

2 Based on the foregoing Recitals, the Parties agree as follows:

3 **III. SETTLEMENT TERMS AND CONDITIONS**

4 **A. Certification for Settlement Purposes.** Solely for the purposes of effectuating
5 this Settlement, and subject to Court approval, the Parties hereby stipulate to the conditional
6 certification of the Settlement Class. The Parties agree that if for any reason the Settlement is not
7 preliminarily and finally approved, the conditional certification of the Settlement Class will be
8 of no force or effect, does not constitute an admission by Defendant that class certification is
9 proper, and will not be deemed admissible in this or any other proceeding, and that the Parties
10 will litigate the issue of class certification.

11
12 **B. Gross Settlement Amount.** Subject to the terms and conditions of this
13 Agreement, the Gross Settlement Amount of Two Hundred Eighty Thousand Dollars and Zero
14 Cents (\$280,000.00), plus Defendant's employer share of employer-side payroll taxes, is the
15 maximum amount payable by Defendant. In no event will Defendant be required to pay more
16 than the Gross Settlement Amount for distribution to the Plaintiff, Class Counsel, Class
17 Members, LWDA, and Settlement Administrator as defined in Section 1.L above. The release
18 provisions of this Settlement will not take effect until Defendant has paid the Gross Settlement
19 Amount in full per this Settlement Agreement.

20
21 **C. Payments to Plaintiff and Class Counsel and Others.** Subject to the terms and
22 conditions of this Agreement, the Settlement Administrator will make the following payments
23 out of the Gross Settlement Amount as follows:
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1 **1. To Plaintiff.**

2 **(a) Class Representative Payment.** In addition to her Settlement
3 Share, Plaintiff will apply to the Court for an award of not more than Seven Thousand Five
4 Hundred Dollars and Zero Cents (\$7,500.00) as her Class Representative Payment. Defendant
5 will not oppose a Class Representative Payment of not more than \$7,500.00. Plaintiff will receive
6 no other payment other than her Settlement Share and Class Representative Payment from this
7 Settlement. The Settlement Administrator will pay the Class Representative Payment approved
8 by the Court out of the Gross Settlement Amount. Payroll taxes, withholdings, and deductions
9 will not be taken from the Class Representative Payment, and instead a Form 1099 will be issued
10 to Plaintiff with respect to that payment. Plaintiff agrees to assume all responsibility and liability
11 for the payment of taxes due on the Class Representative Payment. The Class Representative
12 Payment is in exchange for the release of Released Claims against the Released Parties, the
13 general Release of Claims by Plaintiff, and for Plaintiff's time, effort and risk in bringing and
14 prosecuting the Action. Any adjustments made by the Court to the requested Class
15 Representative Payment shall not be deemed a material modification of this Settlement
16 Agreement. In the event that the Court reduces or does not approve the requested Class
17 Representative Payment, the Settlement Agreement remains in full force and effect, Plaintiff
18 shall not have the right to revoke the Settlement for that reason, it shall remain binding, and any
19 portion of the Class Representative Payment not awarded to Plaintiff will not revert to Defendant,
20 but instead shall be returned to the Net Settlement Amount.
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24 **2. To Class Counsel.** Class Counsel will apply to the Court for an award of
25 not more than Ninety Three Thousand Three Hundred Thirty Three Dollars and Thirty Three
26 Cents (\$93,333.33) (which is 33 and 1/3% of the Gross Settlement Amount) as their Class
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1 Counsel Fees Payment and an amount not more than Fifteen Thousand Dollars and Zero Cents
2 (\$15,000.00) as their Class Counsel Litigation Expenses Payment, and Defendant will not oppose
3 this request. The Settlement Administrator will pay the amount approved by the Court (but not
4 more than Ninety Three Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents
5 (\$93,333.33) in fees and not more than Fifteen Thousand Dollars and Zero Cents (\$15,000.00)
6 in expenses) out of the Gross Settlement Amount. Withholding and deductions will not be taken
7 from the Class Counsel Fees and Litigation Expenses Payment and one or more Forms 1099 will
8 be issued to Class Counsel with respect to those payments.
9

10 **3. To the Settlement Administrator.** The Settlement Administrator will be
11 paid from the Gross Settlement Amount its reasonable fees and expenses as approved by the
12 Court in an amount currently estimated to not exceed Ten Thousand Dollars and Zero Cents
13 (\$10,000.00).
14

15 **4. To the LWDA.** The Parties will jointly apply to the Court for approval of
16 a settlement of claims under the Private Attorneys General Act (“PAGA”), California Labor Code
17 section 2698, *et seq.*, for Four Thousand Dollars and Zero Cents (\$4,000.00), of which, payment
18 from the Gross Settlement Amount to the LWDA will be made in the amount of Three Thousand
19 Dollars and Zero Cents (\$3,000.00), which is 75% of the PAGA settlement. One Thousand
20 Dollars and Zero Cents (\$1,000.00), 25% of the PAGA settlement, will remain in the Net
21 Settlement Amount for distribution and will be distributed to PAGA Members on a *pro rata* basis
22 based on the total number of Individual Pay Periods worked by each PAGA Member during the
23 PAGA Period. PAGA Members shall receive their portion of the PAGA Penalties regardless of
24 their decision to submit a request for exclusion to opt out of the Settlement.
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1 **D. Allocation of Net Settlement Amount and Calculation of Settlement Shares.**

2 Subject to the terms and conditions of this Agreement, the Settlement Administrator will
3 distribute a payment from the Net Settlement Amount to each Participating Class Member. The
4 Settlement Share for each Participating Class Member will be calculated as follows,
5 understanding that the formulas below do not constitute an admission by either party, and are
6 intended only to provide a practical means to simplify and administer the claims process:
7

8 **(a) Participating Class Members' Settlement Shares.** The
9 settlement shares are allocated 33.33% to wages (for which employment taxes will be deducted
10 and W-2s issued) and 66.66% to penalties and interest (for which 1099s will be issued).

11 **(b) Class Portion of Settlement Ratio Calculation.** The Settlement
12 Administrator shall assign to each Class Member a "Settlement Ratio," which shall be a fractional
13 number comprised of (a) that Class Member's Individual Pay Periods as the numerator, and (b)
14 the aggregate total of all Class Members' Individual Pay Periods as the denominator. The
15 Settlement Administrator shall assign to each Class Member the "Settlement Share" which shall
16 be calculated by multiplying that Class Member's Settlement Ratio by amount allocated to Class
17 Members from the Net Settlement Amount.
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19 **(c) PAGA Portion of Settlement Ratio Calculation.** The Settlement
20 Administrator shall assign to each Class Member a "Settlement Ratio," which shall be a fractional
21 number comprised of (a) that PAGA Member's Individual Pay Periods during the PAGA Period
22 as the numerator, and (b) the aggregate total of all PAGA Members' Individual Pay Periods
23 during the PAGA Period as the denominator. The Settlement Administrator shall assign to each
24 PAGA Member the "Settlement Share" which shall be calculated by multiplying that PAGA
25 Member's Settlement Ratio by amount allocated to PAGA Members from the Net Settlement
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1 Amount.

2 **2. Settlement Share Worksheet.** Upon calculation of the Class Members'
3 and PAGA Members' Settlement Share, the Settlement Administrator shall furnish to Class
4 Counsel and Defense counsel a worksheet containing a list unique identifying numbers for each
5 of the Class Members with their corresponding Individual Pay Periods and Settlement Shares.

6 **E. Taxes and Withholdings.** Each Settlement Share is intended, in part, to settle the
7 Class Members' claims for Defendant's failure to pay wages, unauthorized and unlawful wage
8 deductions, failure to provide meal periods, failure to authorize and permit rest periods, failure
9 to indemnify for business expenses, failure to issue proper wage statements, failure to timely pay
10 wages, failure to maintain required payroll records, and related violations of PAGA and the unfair
11 competition law. Each Class Member shall be individually responsible for the employee's share
12 of applicable payroll tax withholdings and deductions. Accordingly, each Settlement Share
13 allocated to wages will be reduced by applicable employee-side payroll tax withholdings and
14 deductions, and the Settlement Administrator will issue a Form W-2 to each Participating Class
15 Member. The remaining non-wage payments will be reported on an IRS Form-1099 by the
16 Settlement Administrator. For PAGA Members who submit a timely and valid request for
17 exclusion to opt out of the class portion of the Settlement, 100% of the individual Settlement
18 Share to that individual shall be allocated as penalties, and not wages, for which the Settlement
19 Administrator will issue to the PAGA Member an IRS Form-1099. Defendant will be responsible
20 for the normal employer's share of any payroll tax attributable to the wage portion of the
21 Settlement Share payments. Defendant's payment of the normal employer's share of payroll
22 taxes attributable to the wage portion of the Settlement Share payments will be in addition to the
23 Gross Settlement Amount or Net Settlement Amount.
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1 **F. Appointment of Settlement Administrator.** The Parties will ask the Court to
2 appoint CPT Group, Inc., a qualified administrator, to serve as the Settlement Administrator,
3 which, as a condition of appointment, will agree to be bound by this Agreement with respect to
4 the performance of its duties and its compensation. The Settlement Administrator's duties will
5 include preparing, printing, and mailing the Class Notice to all Class Members; and using
6 reasonable measures to contact all Class Members, including conducting a National Change of
7 Address search on all Class Members before mailing the Class Notice to each Class Member's
8 address. The Settlement Administrator's duties will also include re-mailing the Class Notice to
9 the Class Member's new address for those Class Members whose address has changed; providing
10 the Parties with weekly status reports about the delivery of Class Notice; calculating Settlement
11 Shares; issuing and distributing checks to effectuate the payments due under the Settlement;
12 reporting to the Court as required; and otherwise administering the Settlement pursuant to this
13 Agreement. The Settlement Administrator's reasonable fees and expenses, including the cost of
14 printing and mailing the Class Notice, will be paid out of the Gross Settlement Amount, as set
15 forth herein, subject to Court approval. Any portion of the of the Settlement Administrator's fees
16 and expenses that are not used or which are not awarded by the Court will not revert to Defendant,
17 but instead will be part of the Net Settlement Amount for distribution to Participating Class
18 Members. If the Settlement Administrator's fees and expenses exceed Ten Thousand Dollars and
19 Zero Cents (\$10,000.00), such cost will be deducted from the Net Settlement Amount.

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23 **IV. PROCEDURES FOR APPROVING SETTLEMENT**

24 **A. Motion for Preliminary Approval of Settlement by the Court.** Class Counsel
25 will move the Court for an order granting Preliminary Approval of the Settlement (the "Motion
26 for Preliminary Approval"), setting a date for the Final Approval Hearing, and approving the
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1 Class Notice (attached as **Exhibit A** to this Agreement),. Any disagreement among the Parties
2 concerning the Class Notice or other documents necessary to implement the Settlement will be
3 referred to the Court.

4 **1.** At the hearing on the Motion for Preliminary Approval, the Parties
5 anticipate that they will appear and support the granting of the motion, and that Class Counsel
6 will submit an Order Granting Preliminary Approval of Settlement, Approval of Notice to Class
7 and Setting Hearing for Final Approval of Settlement.

8 **2.** Should the Court decline to approve the Settlement, the Settlement will be
9 null and void and the Parties will have no further obligations under it.

10 **B. Notice to Class Members.** After the Court enters its order granting Preliminary
11 Approval of the Settlement, every Class Member will be provided with a “Class Notice.”

12 **1. List of Class Members.** Within fourteen (14) days after the Court grants
13 Preliminary Approval of the Settlement, Defendant shall provide to the Settlement
14 Administrator:

15 **(a)** An electronic database of all Class Members, last known mailing
16 address, Social Security number, and Defendant’s employee identification number (“Class
17 Members’ Data”).

18 **(b)** Corresponding to each Class Member’s name, Defendant shall
19 provide a figure indicating the total number of Pay Periods during the Class Period in which that
20 Class Member was employed by Defendant as a Class Member. That number of Pay Periods
21 shall be referred to as that Class Member’s “Individual Pay Periods.”

22 **(c)** If any of the Class Members’ Data are unavailable to Defendant,
23 Defendant will so inform Class Counsel and the Parties will make their best efforts to reconstruct
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1 or otherwise agree upon the Class Members' Data prior to when it must be submitted to the
2 Settlement Administrator. Class Members' Data will otherwise remain confidential and will not
3 be disclosed to anyone, except as necessary to applicable taxing authorities, or pursuant to
4 Defendant's express written authorization or by order of the Court.

5
6 **2. Mailing of Class Notice.** Within fourteen (14) days after receiving the
7 Class Members' Data, or as soon thereafter as it can do so, the Settlement Administrator will
8 mail the Class Notice to all identified Class Members via first-class U.S. mail using the mailing
9 address information provided by Defendant, unless modified by any updated address information
10 that the Settlement Administrator obtains in the course of administration of the Settlement.

11 **3. Returned Class Notice.** If a Class Notice is returned because of an
12 incorrect address, the Settlement Administrator will promptly, and not later than ten (10) days
13 from receipt of the returned Class Notice, search for a more current address for the Class Member
14 and re-mail the Class Notice to the Class Member. The Settlement Administrator will use the
15 Class Members' Data and otherwise work with Defendant's Counsel and Class Counsel to find
16 a more current address. The Settlement Administrator will be responsible for taking reasonable
17 steps, consistent with its agreed-upon job parameters, court orders, and fee, to trace the mailing
18 address of any Class Member for whom a Class Notice is returned as undeliverable by the U.S.
19 Postal Service. These reasonable steps shall include the tracking of all undelivered mail;
20 performing address searches for all mail returned without a forwarding address; and promptly re-
21 mailing to Class Members for whom new addresses are found. If the Class Notice is re-mailed,
22 the Settlement Administrator will note for its own records and notify Class Counsel and
23 Defendant's Counsel of the date and address of each such re-mailing as part of a weekly status
24 report provided to the Parties.
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1 **4. Declaration of Settlement Administrator.** Not later than twenty-one
2 (21) court days prior to the Final Approval Hearing, the Settlement Administrator will provide
3 the Parties for filing with the Court a declaration of due diligence setting forth its compliance
4 with its obligations under this Agreement. Prior to the Final Approval Hearing, the Settlement
5 Administrator will supplement its declaration of due diligence if any material changes occur from
6 the date of the filing of its prior declaration.
7

8 **C. Disputed Class Member Settlement Shares.** If a Class Member disputes his/her
9 estimated Settlement Share, the Class Member may produce evidence to the Settlement
10 Administrator for the Class Period. In order for the dispute to be considered, he/she must follow
11 the directions on the Class Notice. To be valid and timely, all disputes and supporting documents
12 must be postmarked by the Response Deadline. A Class Member may submit any document to
13 the settlement administrator supporting his/her assertion of the number of Pay Periods s/he
14 contends s/he worked in connection with the dispute. Absent evidence rebutting Defendant's
15 records, Defendant's records will be presumed determinative. However, if a Class Member
16 produces evidence contrary to Defendant's records by the Response Deadline, the Settlement
17 Administrator shall notify Class Counsel and Defense Counsel to discuss and resolve the dispute,
18 including providing all available relevant information to all counsel. The Parties will resolve all
19 disputes jointly, which shall be final and binding on any Class Member disputes, and shall
20 thereafter instruct the Settlement Administrator how to proceed in processing the dispute. If the
21 Parties cannot reach an agreement, the dispute shall be submitted to the Court for final
22 determination. All such disputes are to be resolved or submitted to the Court not later than
23 fourteen (14) calendar days after the Response Deadline.
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1 **D. Requests for Exclusion from Settlement; and Objections to Settlement.** Class
2 Members may submit requests to be excluded from the effect of the Settlement, or objections to
3 the Settlement, pursuant to the following procedures:

4 **1. Request for Exclusion from Settlement.** A Class Member may request
5 to be excluded from the effect of this Agreement, and any payment of amounts under this
6 Agreement, by timely mailing a letter to the Settlement Administrator stating that the Class
7 Member wants to be excluded from this Action. This letter must include the Class Member's
8 name, address, telephone number, signature, and a clear statement requesting to be excluded from
9 the settlement of the class claims, as set forth on the Request for Exclusion form or similar to the
10 following: "I wish to exclude myself from the class settlement reached in the matter of *Johnson*
11 *v. Nan McKay & Associates, Inc.*. I understand that by excluding myself, I will not receive money
12 from the settlement of my individual claims." To be valid and timely, the request to be excluded
13 must be postmarked by the Response Deadline and received by the Settlement Administrator. A
14 Class Member who properly submits a valid and timely request to be excluded from the Action
15 shall not receive any payment of any kind in connection with this Agreement or this Action, shall
16 not be bound by or receive any benefit of this Agreement, and shall have no standing to object to
17 the Settlement, except that the request for exclusion shall not be effective as to the release of
18 claims arising under PAGA and shall not preclude the Class Member from receiving their share
19 of the PAGA Penalties. A request for exclusion must be mailed to the Settlement Administrator
20 at the address provided on the Class Notice. The Settlement Administrator shall transmit the
21 request for exclusion to counsel for the Parties as follows:
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To Class Counsel:

David G. Spivak, Esq.
The Spivak Law Firm
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069

To Defense Counsel:

Debra Ellwood Meppen, Esq.
Peter Choi, Esq.
Gordon Rees Scully Mansukhani, LLP
633 West Fifth Street
52nd Floor
Los Angeles, CA 90071

2. Objections to Settlement. The Class Notice will provide that any Class Member who does not request exclusion from the Action and who wishes to object to the Settlement should submit an objection in writing to the Settlement Administrator. To be valid, an objection must be postmarked by the Response Deadline and received by the Settlement Administrator. The written objection to the Settlement should set forth the grounds for the objection and the other information required by this paragraph. The objection should be mailed to the Settlement Administrator at the address provided on the Class Notice. The Settlement Administrator shall transmit the objections to counsel for the Parties as follows:

To Class Counsel:

David G. Spivak, Esq.
The Spivak Law Firm
8605 Santa Monica Bl
PMB 42554
West Hollywood, CA 90069

To Defense Counsel:

Debra Ellwood Meppen, Esq.
Peter Choi, Esq.
Gordon Rees Scully Mansukhani, LLP
633 West Fifth Street
52nd Floor
Los Angeles, CA 90071

Counsel will promptly file such objection with the Court.

The written objection should state the objecting Class Member's full name, address, and the approximate dates of his or her employment with Defendant. The written objection should state the basis for each specific objection and any legal support in clear and concise terms.

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1 Regardless of whether an objecting Class Member complies with the objection procedure
2 encouraged above, the Court will provide a Class Member with the opportunity to speak at the
3 final approval hearing regardless of whether he or she has filed an appearance or submitted a
4 written opposition beforehand. If the Court rejects the Class Member's objection, the Class
5 Member will still be bound by the terms of this Agreement.

6
7 **E. Report.** Not later than fourteen (14) days after the deadline for submission of
8 requests for exclusion, the Settlement Administrator will provide the Parties with a complete and
9 accurate list of all Class Members who sent timely requests to be excluded from the Action and
10 all Class Members who objected to the settlement.

11 **F. No Solicitation of Objection; Right to Void.** Neither the Parties, nor their
12 respective counsel, will directly or indirectly solicit or otherwise encourage any Class Member
13 to seek exclusion from the Settlement, object to the Settlement, or to appeal from the Judgment.
14 If Class Members accounting for more than 5% of the Class submit valid requests to be excluded
15 from the Settlement, then Defendant shall have the unilateral right to void this Settlement.
16 Defendant may do so by giving notice to Class Counsel and the Court of its election to void the
17 Settlement not later than seven (7) days before the Final Approval Hearing. No sums shall be
18 payable by Defendant if this Agreement is voided as provided for herein with one exception:
19 Defendant agrees to pay any fees owing to the Settlement Administrator for services rendered in
20 the event Defendant exercises its right to void the Settlement.

21
22
23 **G. Additional Briefing and Final Approval.** Plaintiff will file with the Court a
24 motion for final approval of the Settlement and payment of the Settlement Administrator's
25 reasonable fees and expenses and a memorandum in support of their motion; and Plaintiff and
26 Class Counsel will serve on Defendant and file with the Court a motion for awards of the Class
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1 Representative Payment, the Class Counsel Fees Payment, and the Class Counsel Litigation
2 Expenses Payment pursuant to this Settlement, and memoranda in support of their motions.

3 Before the Final Approval Hearing, the Parties shall be entitled to file and serve a
4 response to any Class Member's objection to the Settlement and/or reply in support of their
5 motion for final approval of the Settlement, and payment of the Settlement Administrator's
6 reasonable fees and expenses to the extent that any opposition to the motion is filed; and Plaintiff
7 and Class Counsel may file replies in support of their motions for the Class Representative
8 Payment, the Class Counsel Fees Payment, and the Class Counsel Litigation Expenses Payment.
9

10 If the Court ultimately does not grant final approval of the Settlement or grants final
11 approval conditioned on any material change to the Settlement, then either Party will have the
12 unilateral right to void the Settlement in its entirety; if that occurs, the Parties will have no further
13 obligations under the Settlement, including any obligation by Defendant to pay the Gross
14 Settlement Amount or any amounts that otherwise would have been payable under this
15 Agreement, except that Defendant and Plaintiff will jointly and equally pay the Settlement
16 Administrator's reasonable fees and expenses incurred as of the date that the Party exercises the
17 right to void the Settlement under this Paragraph. However, an award by the Court of a lesser
18 amount than that sought by Plaintiff and Class Counsel for the Class Representative Payment,
19 the Class Counsel Fees Payment, or the Class Counsel Litigation Expenses Payment, will not
20 constitute a material modification to the Settlement within the meaning of this Paragraph and
21 shall not render the Settlement voidable. Plaintiff and Class Counsel shall retain the right to
22 appeal awards of attorneys' fees and costs less than requested.
23
24

25 Upon final approval of the Settlement by the Court at or after the Final Approval Hearing,
26 the Parties will present for the Court's approval and entry a Proposed Final Order and Judgment.
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1 The Final Order and Judgment shall permanently bar all Participating Class Members from
2 prosecuting against Defendant any claims within the scope of the Releases contained in this
3 Agreement.

4 After entry of the Judgment, the Court will have continuing jurisdiction over the Action
5 and the Settlement solely for purposes of (i) enforcing this Agreement, (ii) addressing settlement
6 administration matters, and (iii) addressing such post-Judgment matters as may be appropriate
7 under court rules or applicable law.

8
9 **H. Waiver of Right to Appeal.** Provided that the Judgment is consistent with the
10 terms and conditions of this Agreement, and that no Class Member timely objects to the
11 Settlement or files a motion pursuant to Civil Procedure Code section 663, Defendant, and its
12 counsel hereby waive, except as provided for in this Agreement or prohibited by law, any and all
13 rights to appeal from the Judgment, including all rights to any post-judgment proceeding and
14 appellate proceeding, such as a motion to vacate judgment, a motion for new trial, any
15 extraordinary writ, and any appeal, and the Judgment therefore will become non-appealable at
16 the time it is entered. The waiver of appeal does not include any waiver of the right to oppose
17 any appeal, appellate proceedings, or post-judgment proceedings. If an appeal is taken from the
18 Judgment, the time for consummation of the Settlement (including making any payments under
19 the Settlement) will be suspended until the appeal is fully and finally resolved and the Judgment,
20 consistent with the terms of this Agreement, becomes Final.

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22
23 **I. Vacating, Reversal, or Material Modification of Judgment on Appeal or**
24 **Review.** If, after a notice of appeal, a petition for review, or a petition for *certiorari*, or any other
25 motion, petition, writ, application, or appeal, the reviewing court vacates, reverses, or modifies
26 the Judgment such that there is a material modification to the Settlement, and that court's decision
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1 is not completely reversed and the Judgment is not fully affirmed on review by a higher court,
2 then either Plaintiff or Defendant will have the unilateral right to void the Settlement, which the
3 Party must do by giving written notice to the other Parties, the reviewing court, and the Court,
4 not later than fourteen (14) days after the reviewing court's decision vacating, reversing, or
5 materially modifying the Judgment becomes final. The Party exercising her/its right to
6 unilaterally void the Settlement pursuant to this provision agrees to pay any fees owing to the
7 Settlement Administrator for services rendered. An order vacating, reversing or modifying the
8 Court's award of the Class Representative Payment, or the Class Counsel Fees Payment and/or
9 Class Counsel Litigation Expenses Payment will not constitute a vacation, reversal, or material
10 modification of the Judgment within the meaning of this paragraph, and shall not render the
11 Settlement voidable.
12

13 **J. Establishment of Settlement Account.** The Settlement Administrator shall
14 establish a Settlement Account for distributing Settlement Shares and Payments identified in this
15 Agreement. Within ten (10) calendar days of the Effective Date, Defendant shall pay the Gross
16 Settlement Amount into the Settlement Account. Should the 10th calendar day following the
17 Effective Date fall on a weekend or state/federal holiday, Defendant shall remit payment on the
18 following weekday/non-holiday.
19

20 **K. Default on Payment.** In the event Defendant fails to pay any portion of the Gross
21 Settlement Amount, it shall be considered a default. In the event Defendant fails to make any
22 payment on the date it is due, the Settlement Administrator will provide notice to Class Counsel
23 and Defense Counsel within five (5) business days of the missed payment. Thereafter, Defendant
24 will have fifteen (15) days to cure the default and tender payment to the Settlement Administrator.
25 In the event Defendant fails to cure the default within the times set forth herein, Plaintiff may,
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1 among other remedies, elect to enter judgment against Defendant, on an ex parte basis, for the
2 balance of the unpaid Gross Settlement Amount to date, and Plaintiff will be entitled to recover
3 interest at ten percent (10%) per year and reasonable attorneys' fees and costs.

4 **L. Payment of Settlement Shares.** Within ten (10) calendar days of receipt of the
5 Gross Settlement Amount, the Settlement Administrator shall pay Settlement Shares, from the
6 Settlement Account, to all Class Members (who do not submit valid requests to be excluded from
7 the Action) for release of their non-PAGA claims consistent with the terms of this Settlement.
8 Class Members (whether or not they timely request exclusion from the Settlement) will also be
9 paid their Settlement Shares for release of the Released Claims under PAGA consistent with the
10 terms of this Settlement. The Settlement Administrator shall pay each Settlement Share by
11 sending a check in the appropriate amount to the Class Member at the address indicated in the
12 list of Class Member names and addresses provided by Defendant, or as subsequently determined
13 by the Settlement Administrator to be the correct address.

14 **M. Uncashed Settlement Share Checks.** Any check issued by the Settlement
15 Administrator to Class Members who do not timely and validly opt out shall be negotiable for
16 one hundred and eighty (180) calendar days. Those funds represented by checks returned as
17 undeliverable and those checks remaining un-cashed for more than 180 days after issuance
18 (collectively, "Voided Settlement Checks"), plus any interest that has accrued on those funds,
19 will be paid to the California Unclaimed Property Fund.

20 **N.** The Settlement Administrator will mail or wire all required payments no later than
21 fourteen (14) calendar days after receipt of the funds representing the Gross Settlement Amount
22 from Defendant. Proof of payment will be filed with the Court.

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1 **O. Final Report by Settlement Administrator to Court.** Within ten (10) calendar
2 days after final disbursement of all funds from the Settlement Account, the Settlement
3 Administrator will serve on the Parties for filing with the Court a declaration providing a final
4 summary report on the disbursements of all funds from the Settlement Account.

5 **V. RELEASE OF CLAIMS**

6 **A. Plaintiff and Class Members.** The Parties agree that it is their intent that the
7 resolution set forth in this Settlement will release and discharge the Released Claims by way of
8 any further attempt, by lawsuit, administrative claim or action, arbitration, demand, or other
9 action of any kind by each and all of the Settlement Class Members (including participation to
10 any extent in any representative or collective action) against the Released Parties. This release
11 will not take effect until Defendant has paid the Gross Settlement Amount in full per this
12 Settlement Agreement. All PAGA Members, regardless of whether they submit timely and valid
13 requests for exclusion from the Settlement, will release all Released Claims under PAGA against
14 the Released Parties. The State of California will also release all Released Claims under PAGA
15 against the Released Parties.

16 **B. Release of Claims by Plaintiff.** Upon the Effective Date, and only after
17 Defendant pays the entirety of the Gross Settlement Amount, Plaintiff will be deemed to have
18 released the Released Parties of and from all of the Released Claims during the Class Period.
19 These claims include all claims alleged or could have been alleged based on the facts,
20 circumstances, and/or primary rights at issue in the Complaint and any amendments thereto. They
21 include without limitation: (1) all claims for failure to pay wages earned, including minimum
22 wages, and overtime wages; (2) all claims for failure to provide rest periods and claims for rest
23 period premium pay; (3) all claims for failure to provide meal periods and claims for meal period
24 premium pay.

1 premium pay; (4) all claims for failure to provide accurate wage statements and related penalties;
2 (5) all claims for failure to timely pay wages during employment and at termination; (6) all claims
3 for violation of California Business and Professions Code §§ 17200, et seq., to the extent such
4 claims are predicated on the other claims released herein; and (7) all claims for violation of
5 PAGA and all related claims for penalties, to the extent such claims are predicated on the other
6 claims released herein. Plaintiff's release set forth herein shall include a waiver of all rights under
7 California Civil Code §1542, which includes a release of all known and unknown claims against
8 the Released Parties during the Class Period. Civil Code section 1542 provides:

10 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
11 **CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO**
12 **EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE**
13 **RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY**
AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR
RELEASED PARTY

14 Upon the Effective Date, Plaintiff will be deemed to have waived her rights under Civil Code
15 §1542 during the Class Period, as set forth above. However, Plaintiff's release excludes any claim
16 for worker's compensation. It also excludes her claims in the matter of *Paula Johnson v. Nan*
17 *McKay & Associates, Inc.*, San Francisco Superior Court Case No. CGC-21-591646, which has
18 since been dismissed with prejudice. **Class Counsel.** As of the date the Judgment becomes
19 Final, and except as otherwise provided by this Agreement, Class Counsel and any counsel
20 associated with Class Counsel (The Spivak Law Firm and United Employees Law Group),
21 including without limitation David G. Spivak, Esq. and Walter L. Haines, Esq., waive any claim
22 to costs and attorneys' fees and expenses against Defendant or the Released Parties arising from
23 or related to the Action, except those incurred to enforce this Agreement and collect the
24 Judgment.
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1 **C. Tax Liability.** Defendant makes no representation as to the tax treatment or legal
2 effect of the payments called for in this Agreement, and Plaintiff, Settlement Class Members,
3 and PAGA Members are not relying on any statement, representation, or calculation by
4 Defendant or by the Settlement Administrator in this regard. Plaintiff, Settlement Class Members,
5 and PAGA Members understand and agree that except for Defendant's payment of the
6 employer's portion of any payroll taxes, they will be solely responsible for the payment of any
7 taxes and penalties assessed on the payments described herein.
8

9 **D. Circular 230 Disclaimer.** EACH PARTY TO THIS AGREEMENT (FOR
10 PURPOSES OF THIS SECTION, THE "ACKNOWLEDGING PARTY" AND EACH PARTY
11 TO THIS AGREEMENT OTHER THAN THE ACKNOWLEDGING PARTY, AN "OTHER
12 PARTY") ACKNOWLEDGES AND AGREES THAT: (1) NO PROVISION OF THIS
13 AGREEMENT, AND NO WRITTEN COMMUNICATION OR DISCLOSURE BETWEEN
14 OR AMONG THE PARTIES OR THEIR ATTORNEYS AND OTHER ADVISERS, IS OR
15 WAS INTENDED TO BE, NOR WILL ANY SUCH COMMUNICATION OR DISCLOSURE
16 CONSTITUTE OR BE CONSTRUED OR BE RELIED UPON AS, TAX ADVICE WITHIN
17 THE MEANING OF UNITED STATES TREASURY DEPARTMENT CIRCULAR 230
18 (31 CFR PART 10, AS AMENDED); (2) THE ACKNOWLEDGING PARTY (A) HAS
19 RELIED EXCLUSIVELY UPON HIS, HER OR ITS OWN, INDEPENDENT LEGAL AND
20 TAX COUNSEL FOR ADVICE (INCLUDING TAX ADVICE) IN CONNECTION WITH
21 THIS AGREEMENT, (B) HAS NOT ENTERED INTO THIS AGREEMENT BASED UPON
22 THE RECOMMENDATION OF ANY OTHER PARTY OR ANY ATTORNEY OR ADVISOR
23 TO ANY OTHER PARTY, AND (C) IS NOT ENTITLED TO RELY UPON ANY
24 COMMUNICATION OR DISCLOSURE BY ANY ATTORNEY OR ADVISER TO ANY
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1 OTHER PARTY TO AVOID ANY TAX PENALTY THAT MAY BE IMPOSED ON THE
2 ACKNOWLEDGING PARTY; AND (3) NO ATTORNEY OR ADVISER TO ANY OTHER
3 PARTY HAS IMPOSED ANY LIMITATION THAT PROTECTS THE CONFIDENTIALITY
4 OF ANY SUCH ATTORNEY'S OR ADVISER'S TAX STRATEGIES (REGARDLESS OF
5 WHETHER SUCH LIMITATION IS LEGALLY BINDING) UPON DISCLOSURE BY THE
6 ACKNOWLEDGING PARTY OF THE TAX TREATMENT OR TAX STRUCTURE OF ANY
7 TRANSACTION, INCLUDING ANY TRANSACTION CONTEMPLATED BY THIS
8 AGREEMENT.
9

10 **VI. NON-PUBLICITY PROVISION**

11 The Parties and their counsel agree that they will not issue any press releases, initiate any
12 contact with the press, respond to any press inquiry, or have any communication with the press
13 about the fact, amount, or terms of the Settlement. In addition, the Parties and their counsel agree
14 that they will not engage in any advertising or distribute any marketing materials relating to the
15 Settlement of this case in any manner that identifies the Defendant, including but not limited to
16 any postings on any websites maintained by Class Counsel. Neither Plaintiff nor Class Counsel
17 will discuss the terms or the fact of the Settlement with third parties other than (1) their immediate
18 family members, (2) their respective accountants or lawyers as necessary for tax purposes; or (3)
19 other Class Members. Plaintiff and Class Counsel agree not to publish any of the terms or
20 conditions of this Settlement in any manner that identifies the Defendant. However, Class
21 Counsel may identify this Settlement in other matters to demonstrate their adequacy as counsel
22 in such other matters.
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1 **VII. MISCELLANEOUS TERMS**

2 **A. No Effect on Other Benefits.** The Settlement Shares will not result in any
3 additional employee benefit payments (such as pension, ERISA, 401(k), vacation, or bonus) and
4 shall not have any effect on the eligibility for, or calculation of, any employee benefit. Plaintiff
5 and Class Members will be deemed to have waived all such claims, whether known or unknown
6 by them, as part of their release of claims under this Agreement.
7

8 **B. No Admission of Liability.** Defendant denies that it has engaged in any unlawful
9 activity, has failed to comply with the law in any respect, or has any liability to anyone under the
10 claims asserted in the Action. This Agreement is entered into solely for the purpose of
11 compromising highly disputed claims. Nothing in this Agreement is intended or will be construed
12 as an admission of liability or wrongdoing by Defendant, or an admission by Plaintiff that any of
13 her claims was non-meritorious or any defense asserted by Defendant was meritorious. This
14 Settlement and the fact that Plaintiff and Defendant were willing to settle the Action will have
15 no bearing on, and will not be admissible in connection with, any litigation (other than solely in
16 connection with the Settlement).
17

18 **C.** Whether or not the Judgment becomes Final, neither the Settlement, this
19 Agreement, any document, statement, proceeding or conduct related to the Settlement or the
20 Agreement, nor any reports or accounting of those matters, will be (i) construed as, offered or
21 admitted in evidence as, received as, or deemed to be evidence for any purpose adverse to
22 Defendant or any other Released Parties, including, but not limited to, evidence of a presumption,
23 concession, indication or admission by any of the Released Parties of any liability, fault,
24 wrongdoing, omission, concession or damage; or (ii) disclosed, referred to or offered in evidence
25 against any of the Released Parties, in any further proceeding in the Action, or any other civil,
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1 criminal or administrative action or proceeding except for purposes of effectuating the Settlement
2 pursuant to this Agreement.

3 **D. Integrated Agreement.** After this Agreement is signed and delivered by all
4 Parties and their counsel, this Agreement and its exhibits will constitute the entire agreement
5 between the Parties relating to the Settlement, and it will then be deemed that no oral
6 representations, warranties, covenants, or inducements have been made to any Party concerning
7 this Agreement or its exhibits other than the representations, warranties, covenants, and
8 inducements expressly stated in this Agreement and its exhibits.

10 **E. Attorney Authorization.** Class Counsel and Defense Counsel warrant and
11 represent that they are authorized by Plaintiff and Defendant, respectively, to take all appropriate
12 action required or permitted to be taken by such Parties pursuant to this Agreement to effectuate
13 its terms, and to execute any other documents required to effectuate the terms of this Agreement.
14 The Parties and their counsel will cooperate with each other and use their best efforts to effect
15 the implementation of the Settlement. In the event the Parties are unable to reach agreement on
16 the form or content of any document needed to implement the Agreement, or on any supplemental
17 provisions that may become necessary to effectuate the terms of this Agreement, the Parties will
18 seek the assistance of the Court, and in all cases, all such documents, supplemental provisions
19 and assistance of the court will be consistent with this Agreement.

21 **F. Use and Return of Documents and Data.** Upon written request from Defendant,
22 Class Counsel will return or destroy all originals, copies, and summaries of documents and data
23 provided to Class Counsel by Defendant in connection with the settlement negotiations in this
24 matter. Class Counsel will confirm in writing to Defendant the destruction of all such documents
25 and data within fourteen (14) days of such request.
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1 **G. Modification of Agreement.** This Agreement, and all parts of it, may be
2 amended, modified, changed, or waived only by an express written instrument signed by all
3 Parties or their successors-in-interest.

4 **H. Agreement Binding on Successors.** This Agreement will be binding upon, and
5 inure to the benefit of, the successors of each of the Parties.

6 **I. Applicable Law.** All terms and conditions of this Agreement and its exhibits will
7 be governed by and interpreted according to the laws of the State of California, without giving
8 effect to any conflict of law principles or choice of law principles.

9 **J. Cooperation in Drafting.** The Parties have cooperated in the drafting and
10 preparation of this Agreement. This Agreement will not be construed against any Party on the
11 basis that the Party was the drafter or participated in the drafting.

12 **K. Fair Settlement.** The Parties and their respective counsel believe and warrant that
13 this Agreement reflects a fair, reasonable, and adequate settlement of the Action and have arrived
14 at this Agreement through arms-length negotiations, considering all relevant factors, current and
15 potential.

16 **L. Headings.** The descriptive heading of any section or paragraph of this Agreement
17 is inserted for convenience of reference only and does not constitute a part of this Agreement.

18 **M. Notice.** All notices, demands or other communications given under this
19 Agreement will be in writing and deemed to have been duly given as of the third calendar day
20 after mailing by United States mail, addressed as follows:

21 *To Class Counsel:*
22 David G. Spivak, Esq.
23 The Spivak Law Firm
24 8605 Santa Monica Bl
25 PMB 42554
26 West Hollywood, CA 90069

27 *To Defense Counsel:*
28 Debra Ellwood Meppen, Esq.
 Peter Choi, Esq.
 Gordon Rees Scully Mansukhani, LLP
 633 West Fifth Street, 52nd Floor
 Los Angeles, CA 90071

1 **Execution in Counterpart.** This Agreement may be executed in one or more
2 counterparts. All executed counterparts and each of them will be deemed to be one and the same
3 instrument provided that counsel for the Parties will exchange between themselves original signed
4 counterparts. Facsimile signatures will be presumptive evidence of execution of the original,
5 which shall be produced on reasonable request. Any executed counterpart will be admissible to
6 prove the existence and contents of this Agreement.
7

8
9 Dated: 09 / 28 / 2022

By: Paula Johnson
PAULA JOHNSON

11
12 Dated: September 30, 2022

By: Sarah Waitt
Sarah Waitt for
Nan McKay & Associates, Inc.

15 THE SPIVAK LAW FIRM

16
17 Dated: 09 / 28 / 2022

By: David Spivak
DAVID G. SPIVAK
MAYA CHEAITANI, Attorneys for
Plaintiff, PAULA JOHNSON, and all
others similarly situated

21 UNITED EMPLOYEES LAW GROUP

22
23 Dated: 09 / 29 / 2022

By: Walter L. Haines
WALTER L. HAINES, Attorneys for
Plaintiff, PAULA JOHNSON, and all
others similarly situated

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GORDON REES SCULLY MANSUKHANI,
LLP

Dated: October 5, 2022

By: 

PETER CHOI, Attorneys for
Defendant, NAN MCKAY &
ASSOCIATES, INC.

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EXHIBIT A

1 **NOTICE OF PROPOSED CLASS ACTION SETTLEMENT AND**
2 **HEARING DATE FOR COURT APPROVAL**

3 *Paula Johnson v. Nan McKay & Associates, Inc., Case No. CGC-20-586796*

4 **As a current or former hourly or nonexempt employee of Nan McKay & Associates, Inc.**
5 **in California, you may be entitled to receive money from a class action settlement.**

6 CPT ID: <<CPT ID>>

Please provide current address (if different) here:

7 <<Name>>

8 <<Address1>>

9 <<Address2>>

10 <<City>>, <<State>> <<Zip Code>>

11 *The San Francisco County Superior Court has authorized this Class Notice.*
12 *This is not a solicitation from a lawyer.*

13 YOU MAY BE ENTITLED TO RECEIVE MONEY FROM A CLASS ACTION
14 SETTLEMENT IF YOU ARE A CURRENT OR FORMER HOURLY OR NONEXEMPT
15 EMPLOYEE OF NAN MCKAY & ASSOCIATES, INC. IN THE STATE OF CALIFORNIA
16 BETWEEN SEPTEMBER 25, 2016 AND THE EARLIER OF COURT PRELIMINARY
17 APPROVAL OF THIS SETTLEMENT OR JUNE 16, 2022.

- 18 • A proposed settlement of \$280,000.00 (the “Gross Settlement Amount”) will be used to pay
19 claims to: All persons Defendant Nan McKay & Associates, Inc. employed in California as
20 hourly or nonexempt employee during the “Class Period” of September 25, 2016 to the earlier
21 of Court preliminary approval of this Settlement or June 16, 2022 (the “Class Members”).
22 The Gross Settlement Amount includes (a) expenses and fees of the Settlement Administrator
23 up to \$10,000.00; (b) an Class Representative Payment of \$7,500.00 to the Plaintiff Paula
24 Johnson as the class representative; (c) attorneys’ fees of up to \$93,333.33 and litigation
25 expenses of up to \$15,000.00 to Class Counsel; and (d) \$4,000.00 allocated to settle claims
26 brought pursuant to the Private Attorneys General Act, California Labor Code Section 2698,
27 *et seq.* (“PAGA”) (75% of which will go to the California Labor & Workforce Development
28 Agency (“LWDA”) and 25% of which will go to Class Members). The Court must approve
 these payments at the Final Approval Hearing.
- The settlement resolves a lawsuit entitled *Paula Johnson v. Nan McKay & Associates, Inc.*,
 Case No. CGC-20-586796 (the “Action”) for Defendant’s alleged failure to pay wages,
 unauthorized and unlawful wage deductions, failure to provide meal periods, failure to
 authorize and permit rest periods, failure to indemnify for business expenses, failure to issue
 proper wage statements, failure to timely pay wages, failure to maintain required payroll
 records, and other legal consequences that would follow from these failures, including claims
 under California’s Business & Professions Code and PAGA. This settlement avoids the costs

and risks from continuing the Action, pays money to persons like you, and releases Defendant from alleged liability.

- The Court has not made a determination of the validity of the claims in the Action. Defendant denies any and all liability arising from any of the claims and contends that at all relevant times it did not failure to pay wages, unauthorized and unlawful wage deductions, failure to provide meal periods, failure to authorize and permit rest periods, failure to indemnify for business expenses, failure to issue proper wage statements, failure to timely pay wages, failure to maintain required payroll records, or commit related wrongs, and fully complied with all applicable laws.
- Class Members will receive a payment based on the number of Pay Periods, rounded up to the nearest full Pay Period, during the Class Period.

**PLEASE READ THIS ENTIRE CLASS NOTICE CAREFULLY.
YOUR LEGAL RIGHTS ARE AFFECTED BY IT.**

HOW MUCH WILL I GET?

You have a total number of <<number of Pay Periods>> Pay Periods during the Class Period.

It is expected that you will receive approximately <<Individual Settlement Payment amount>> from this Settlement.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT

DO NOTHING	Receive a payment and give up your legal rights to pursue claims released by the settlement of the Action.
OPT OUT	Receive no payment for release of the class claims and retain your legal rights to pursue these claims. However, you may not opt out of the PAGA Released Claims and will be paid for release of these claims even if you opt out of the Settlement.
OBJECT TO THE SETTLEMENT	If you do not opt out, you may write to the Settlement Administrator, CPT Group, Inc., about why you do not like the settlement and they will forward your concerns to counsel which will then be provided to the Court.
DISPUTE THE PAY PERIODS CALCULATION	If you feel that you worked a different amount of Pay Periods as an hourly or nonexempt employee than identified above, you may dispute that calculation by writing to the Settlement Administrator.
ATTEND A HEARING	You have the right to attend a fairness hearing that will be conducted by the Court, but you are not required to attend. If you timely file and serve a written objection, and if you also want to speak about your objection at the hearing, you should send a letter to the Settlement Administrator, CPT Group, Inc., providing notice of your intention to appear and speak at the hearing.

IMPORTANT INFORMATION ABOUT THE PROPOSED SETTLEMENT

1 **1. Why did I get this Class Notice?**

2 You were sent this Class Notice because you have a right to know about the proposed settlement
3 in the Action and about all of your options before the Court rules on whether to finally approve
4 the settlement. If the Court approves the settlement, and after any objections and appeals are
5 resolved, a “Settlement Administrator” appointed by the Court will make the payments that the
6 settlement allows. This Class Notice explains the Action, the proposed settlement, your legal
7 rights, and what benefits are available and how to receive them.

8 The Court in charge of this case is the San Francisco County Superior Court. The person who
9 sued is called “Plaintiff” and the organization she sued is called “Defendant.”

10 **2. What is the Action about?**

11 In the Action, Paula Johnson (“Plaintiff”) alleged multiple violations of the California Labor
12 Code, the California Business & Professions Code, and PAGA, including causes of action for:
13 failure to pay wages, unauthorized and unlawful wage deductions, failure to provide meal
14 periods, failure to authorize and permit rest periods, failure to indemnify for business expenses,
15 failure to issue proper wage statements, failure to timely pay wages, failure to maintain required
16 payroll records, unfair competition under California’s Business & Professions Code, and claims
17 for civil penalties for violations of the PAGA.

18 **3. Why is there a settlement?**

19 The parties disagree on the probable outcome of the case with respect to liability, damages, and
20 how much money could be recovered if the Plaintiff won at trial. Defendant believes the Plaintiff
21 would not prevail if this case went to trial. The Court has not decided in favor of the Plaintiff or
22 Defendant. There has been no trial in this case. Instead, both sides recognize the risks, expenses,
23 and disruption associated with continued litigation and they have therefore chosen to resolve
24 their differences by entering into a settlement. By doing so, the parties can avoid the cost of a
25 trial, yet Class Members are still entitled to receive payments if they comply with the instructions
26 in this Class Notice. The parties entered into this settlement after arms-length negotiations while
27 using the services of an experienced and neutral mediator. The Plaintiff and Class Counsel
28 believe that the proposed settlement is fair and reasonable and is in the best interest of the Class
Members.

4. What is a class action settlement?

The Court must approve the terms of the proposed settlement as fair and reasonable. Once
approved, the settlement will affect all Class Members, except those who have properly opted
out. This Class Notice explains your legal rights, the terms of the settlement, what you must do
to participate, and the amount of money you may receive. Please read this entire Class Notice
carefully.

5. What should I do?

1 You can do nothing, and if you are entitled to a payment, you will be paid. Be mindful, however,
2 that if this Class Notice reaches you and the address where you now live is different, you need
3 to contact the Settlement Administrator and provide updated information so that any future
correspondence or the settlement check itself reaches you and is not returned as an address
unknown.

6. How much will my payment be?

4
5 After all fees, costs, and offsets are taken as set forth under the Settlement Agreement (which is
6 available for review), the remainder will be used to pay Class Members a pro-rata payment based
7 on the number of Pay Periods each Class Member worked during the Class Period and PAGA
8 Members a pro-rata payment based on the number of Pay Periods each PAGA Member worked
during the PAGA Period ("Pro-Rata Share").

9 The Settlement Administrator shall determine by how many Pay Periods each such Class
10 Member has.

11 Your estimated payment is listed above, on page 2 of this document. If you do not dispute your
12 Pay Periods calculation, and do not opt out of the settlement, you will be bound by the settlement
and receive a settlement payment. **In other words, you do not need to take any action to
receive a settlement payment.**

13 If you wish to dispute the number of Pay Periods credited to you or anything else about your
14 employment status, you must write to the Settlement Administrator indicating what you believe
15 is incorrect and return it on or before <<date>> [60 days after initial mailing] via U.S. Mail with
16 proof of the submission date (such as a postmark or delivery service date stamp). If the
17 Settlement Administrator re-mailed your Class Notice to a new address, you will have additional
18 15 days from the date of the re-mailed Class Notice to write to the Settlement Administrator to
19 dispute your Pay Periods information. You must also send any documents or other information
20 that you contend supports your belief that the information set forth above is incorrect. The
Settlement Administrator will resolve any dispute based upon Defendant's records and any
information you provide. Please be advised that the information on this Notice is presumed to be
correct unless the documents you submit are company records from Defendant.

7. When would I get my payment?

21
22 The Court will hold a hearing on <<final approval hearing date>> at <<final approval hearing
23 time>> .m to decide whether to approve the proposed settlement. If the Court approves the
24 settlement and anyone objects, there may be appeals. It is always uncertain when these objections
25 and appeals can be resolved, and resolving them can take time. To check on the progress of the
settlement, call the Settlement Administrator at <<settlement administrator phone number>>, or
contact Class Counsel (see below for Class Counsel's contact information.). Please be patient.

26 You will have 180 days to cash your settlement check. If a mailed individual settlement payment
27 is not cashed by <<check cashing deadline>> (within 180 days of the date printed on the check),
28 all uncashed funds will be paid to the California State Controller's Office Unclaimed Property

1 Fund with the identity of the Class Member to whom the funds belong, to be held for the Class
2 Member.

3 **8. What am I releasing?**

4 If you do not exclude yourself from the settlement (according to the procedures explained below),
5 you will release certain claims as follows:

6 The Parties agree that it is their intent that the resolution set forth in this Settlement will
7 release and discharge the Released Claims by way of any further attempt, by lawsuit,
8 administrative claim or action, arbitration, demand, or other action of any kind by each
9 and all of the Settlement Class Members (including participation to any extent in any
10 representative or collective action) against the Released Parties. This release will not take
11 effect until Defendant has paid the Gross Settlement Amount in full per this Settlement
Agreement. All PAGA Members, regardless of whether they submit timely and valid
requests for exclusion from the Settlement, will release all Released Claims under PAGA
against the Released Parties. The State of California will also release all Released Claims
under PAGA against the Released Parties.

12 **“Released Claims”** shall mean all claims, rights, demands, liabilities and causes of action
13 that are alleged, or reasonably could have been alleged based on the facts and claims
14 during the period of September 25, 2016 through the earlier of Court preliminary approval
15 of this Settlement or June 16, 2022 asserted in the Operative Complaint and/or in the
16 letter(s) sent by Plaintiff to the LWDA concerning Defendant and the other Released
17 Parties, whether sounding in law or equity, tort, contract, statute, or other applicable
18 federal, state or local law or regulation, including but not limited to the following claims:
19 failure to pay wages, unauthorized and unlawful wage deductions, failure to provide meal
20 periods, failure to authorize and permit rest periods, failure to indemnify for business
21 expenses, failure to issue proper wage statements, failure to timely pay wages, failure to
22 maintain required payroll records, unfair business practices that could have been
23 premised on the claims, causes of action or legal theories of relief described above or any
24 of the claims, causes of action or legal theories of relief pleaded in the Action, all claims
25 under PAGA or for civil penalties that could have been premised on the claims, causes of
26 action or legal theories described above or any of the claims, causes of action or legal
27 theories of relief pleaded in the Action or Plaintiff’s letter(s) to the LWDA, including but
28 not limited to the California Code of Regulations and to Labor Code sections 201, 202,
203, 204, 218.5, 221, 226, 226.3, 226.7, 510, 512, 558, 1174, 1194, 1197, 1197.1, 1198,
1199, 2800, and 2699; and any and all damages, restitution, disgorgement, civil penalties,
statutory penalties, taxes, interest or attorneys’ fees or costs resulting therefrom. Released
Claims shall not apply to claims for workers’ compensation benefits, unemployment
insurance benefits, or any other claim or right that as a matter of law cannot be waived or
released. The Parties acknowledge that Released Claims includes any claims for penalties
by a PAGA Member resulting from any LWDA investigation. The Parties will meet and
confer in good faith if the Court requires changes to the scope of the Released Claims.

1 **“Released Parties”** shall mean Defendant, and any of its former and present agents,
2 employees, servants, officers, directors, partners, trustees, representatives, shareholders,
3 stockholders, attorneys, parents, subsidiaries, equity sponsors, related corporations,
4 divisions, joint venturers, assigns, predecessors, successors, service providers, insurers,
5 consultants, subcontractors, joint employers, employee benefit plans and fiduciaries
6 thereof, affiliated organizations, and all persons acting under, by, through or in concert
7 with any of them, and each of them.

8 The release provisions of this Settlement will not take effect until Defendant has paid the Gross
9 Settlement Amount in full per this Settlement Agreement.

10 **9. How can I opt out of this settlement?**

11 You can opt out of this settlement and retain your rights. To do so, you must send a letter by mail
12 to the Settlement Administrator with the following sentence, or something similar, stating: “I
13 request to be excluded from the class action proceedings in the matter of *Paula Johnson v. Nan*
14 *McKay & Associates, Inc.*, Case No. CGC-20-586796.” You will have 60 **days** from the date of
15 mailing of this Class Notice to do so. Your Opt-Out request must be in writing and mailed to the
16 Settlement Administrator, CPT Group, Inc., <<settlement administrator mailing address>> and
be postmarked no later than <<response deadline>>, or it will not be considered and you will be
bound by the settlement. If the Settlement Administrator re-mailed your Class Notice to a new
address, you will have additional 15 days from the date of the re-mailed Class Notice to opt out.
You must include your full name (and former names, if any) and address in your request and you
must sign the written request. However, you cannot opt-out of the PAGA Released Claims and
will receive your pro rata share of the PAGA Penalties whether or not you opt of out of the
settlement.

17 **10. Do I have a lawyer in this case?**

18 The Court has appointed David G. Spivak of the The Spivak Law Firm, 8605 Santa Monica Bl,
19 PMB 42554, West Hollywood, CA 90069, Telephone: (213) 725-9094, david@spivaklaw.com
20 and Walter Haines of United Employees Law Group, to represent you and other Class Members
21 in the Action. These lawyers are called Class Counsel. They will be compensated from the Gross
Settlement Amount as discussed in this Class Notice. If you want to be represented by your own
lawyer, you may hire one at your own expense.

22 **11. How will the lawyers be paid?**

23 Class Counsel will ask the Court to award them fees of approximately 33 and 1/3% (one-third)
24 of the Gross Settlement Amount. Class Counsel will also ask the Court to award them costs of
25 not more than \$15,000.00 incurred in connection with the Action. The Court may choose to
award less than the amount requested by Class Counsel.

26 **12. How do I object to the settlement?**

1 You may object to the proposed settlement in writing or in person. However, you cannot object
2 or opt out of the PAGA Released Claims and will receive your pro rata share of the PAGA
3 Penalties whether or not you object or opt out from the settlement. If you object, the Court will
either sustain your objection or deny it.

4 If the Court sustains your objection, the Court may deny approval of the Settlement, in which
5 case no settlement payments will be sent out and the Action will continue. If the Court overrules
6 your objection, you will still be deemed part of the class and receive a payment for release of the
Class claims. You cannot object and request exclusion from the Settlement.

7 You may also appear at the Final Approval Hearing, either in person or through your own
8 attorney. If you appear through your own attorney, you are responsible for paying that attorney.
9 All written objections and supporting papers should (a) clearly identify the case name and
10 number (*Paula Johnson v. Nan McKay & Associates, Inc.*, Case No. CGC-20-586796), (b) be
11 submitted to the Settlement Administrator by mailing them to the Settlement Administrator, CPT
12 Group, Inc., <<settlement administrator mailing address>>, and (c) be filed or postmarked on or
before <<response deadline>>. If the Settlement Administrator re-mailed your Class Notice to a
new address, you will have additional 15 days from the date of the re-mailed Class Notice to
object. Class Members may appear at the final approval hearing to be heard on their objections,
even if they have not previously served a written objection.

13. When and where will the Court decide whether to approve the settlement?

14 The Court will hold a fairness hearing on <<final approval hearing date>> at <<final approval
15 hearing time>> .m in Department 206 at the San Francisco County Superior Court, Civic Center
16 Courthouse, 400 McAllister Street, San Francisco, CA 94102, (The Honorable Samuel K. Feng
17 presiding). At this hearing, the Court will consider whether the settlement is fair, reasonable, and
18 adequate. If there are objections that were properly made, the Court will consider them. The
19 Court will listen to people who have asked to speak at the hearing. The Court may also decide
20 how much to pay to Class Counsel. At or after the hearing, the Court will decide whether to
approve the settlement. We do not know how long this decision will take.

14. Do I have to come to the hearing?

21 No. Class Counsel will answer any questions that the Court may have. But, you are welcome to
22 come at your own expense. If you sent an objection, you do not have to come to Court to talk
23 about it. As long as you timely mailed your written objection, the Court will consider it. You
24 may also pay your own lawyer to attend, but it is not required.

15. May I speak at the hearing?

25 Regardless of whether you properly objected to the settlement, you may speak at the fairness
26 hearing.
27
28

16. What happens if I do nothing at all?

You will participate in the settlement and receive payment. You will be bound by the release as set forth herein.

GETTING MORE INFORMATION

This Class Notice summarizes the proposed settlement. You may call or contact Class Counsel or the Settlement Administrator if you would like more information about the case. You may call <<settlement administrator phone number>> or write the Settlement Administrator, CPT Group, Inc., located at <<settlement administrator mailing address>>.

You can also access the San Francisco County Superior Court's Online Services at [https://www._____](https://www._____.), or by visiting the Clerk's Office at the San Francisco County Superior Court, Civic Center Courthouse, 400 McAllister Street, San Francisco, CA 94102), between _:_0 a.m. and _:_0 p.m., Monday through Friday, excluding Court holidays.

**PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK'S OFFICE
TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS.**

Signature Certificate

Reference number: M9K7X-QD2KM-VQHOA-TWTPF

Signer	Timestamp	Signature
Sarah Waitt Email: swaitt@nanmckay.com		
Sent:	04 Oct 2022 16:53:30 UTC	
Viewed:	04 Oct 2022 17:26:04 UTC	
Signed:	04 Oct 2022 23:01:19 UTC	
Recipient Verification:		IP address: 184.177.169.66
✓Email verified	04 Oct 2022 17:26:04 UTC	Location: El Cajon, United States

Document completed by all parties on:
04 Oct 2022 23:01:19 UTC

Page 1 of 1



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PandaDoc is a document workflow and certified eSignature solution trusted by 30,000+ companies worldwide.



EXHIBIT 2



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

July 24, 2020

Attn: PAGA Administrator
Labor and Workforce Development Agency
Attn: PAGA Administrator
<http://dir.tflaforms.net>
Via Electronic Submission

RE: *Paula Johnson / Nan McKay and Associates, Inc.*

To Whom It May Concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004, Labor Code § 2698, *et seq.*, Paula Johnson (hereafter “Johnson”) provides notice on behalf of herself and all individuals currently and formerly employed in California as non-exempt hourly employees, including but not limited to customer service representatives and workers employed in comparable positions (hereafter “Aggrieved Employees”) by Nan McKay and Associates, Inc., a California corporation (hereafter “Nan McKay”), of violations of Labor Code §§ 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 1174, 1194, 1197, and 1198.

At all relevant times, Nan McKay has employed persons, conducted business in, and engaged in illegal payroll practices and policies in California. Johnson and the Aggrieved Employees are “employees” within the meaning of Wage Order 4-2001 (hereafter “the Wage Order”) § 2, subdivision (F) and “Aggrieved Employees” within the meaning of Labor Code § 2699, subdivision (c).

16530 VENTURA BLVD., STE 203
ENCINO, CA 91436

TEL (818) 582-3086
FAX (818) 582-2561

SPIVAKLAW.COM

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Statement of Facts

On or about November 4, 2019, Nan McKay first employed Johnson to work in San Francisco, California as a customer service representative. Nan McKay continuously employed Johnson as a customer service representative until on or about May 26, 2020, when her employment ended.

At all relevant times, Nan McKay employed Johnson and the other Aggrieved Employees at an hourly rate of pay and issued their paychecks on a bi-weekly basis. At all relevant times, Nan McKay classified Johnson and the other Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all relevant times, Nan McKay required Johnson and the Aggrieved Employees to perform work while clocked out. Johnson and the Aggrieved Employees regularly received phone calls from customers shortly before the end of their eight-hour shifts. Such calls often lasted beyond the end of their shifts and circumstances did not permit Johnson and the Aggrieved Employees to seek preapproval for overtime hours spent on such calls. However, Nan McKay failed to pay Johnson and the Aggrieved Employees for this time spent working after the end of their shifts, and instead adjusted Johnson's and the Aggrieved Employees' time records to omit this extra time. In approximately April of 2020, Johnson asked her supervisor, Nerissa Abrams, why the time she spent working after the end of her shift was not reflected in her paychecks. In response, Ms. Abrams told Johnson it was because the overtime was "not approved."

At all relevant times, Nan McKay failed to consistently provide Johnson and the Aggrieved Employees with a daily 30-minute meal period within the first five hours of work. Due to the workloads Nan McKay assigned, Johnson and the Aggrieved Employees were frequently unable to take their meal periods within the first five hours of work. Each day, Nan McKay assigned to Johnson and the

Aggrieved Employees a log of phone calls it expected them to complete that day. The volume of calls Nan McKay assigned to Johnson and the Aggrieved Employees was often so great that Johnson and the Aggrieved Employees were unable to take their meal periods until well after the first five hours of work. Nan McKay further failed to authorize and permit Johnson and the Aggrieved Employees to take a ten-minute, paid, duty-free rest break every four hours or major portion thereof. Nan McKay has not requested an exemption from California's rest period law from the Division of Labor Standards Enforcement. Further, neither Johnson nor the aggrieved Employees entered into on duty meal period agreements with Nan McKay.

Nan McKay failed to pay premium wages for days on which it failed to provide Johnson and the Aggrieved Employees with all timely, off-duty meal and rest periods.

For the reasons stated herein, Johnson alleges the following violations of the California Labor Code and the Wage Order on behalf of herself and the Aggrieved Employees:

- a) Nan McKay failed to provide Johnson and the Aggrieved Employees with all meal periods as required by law;
- b) Nan McKay failed to provide Johnson and the Aggrieved Employees with all rest periods as required by law;
- c) Nan McKay failed to compensate Johnson and the Aggrieved Employees at one hour's pay on days when Nan McKay failed to provide them with one or more meal periods in a workday;

- d) Nan McKay failed to compensate Johnson and the Aggrieved Employees at one hour's pay on days when Nan McKay failed to provide them with one or more rest periods in a workday;
- e) Nan McKay failed to pay Johnson and the Aggrieved Employees for all hours worked at the correct rates of pay including, but not limited to, regular and overtime pay due to off-the-clock work;
- f) Nan McKay unlawfully deducted the wages Johnson and the Aggrieved Employees earned, including but not limited to regular and overtime wages;
- g) Nan McKay failed to timely pay Johnson and the Aggrieved Employees all earned and unpaid wages during employment;
- h) Nan McKay failed to provide Johnson and the Aggrieved Employees with accurate and complete wage statements; and
- i) Nan McKay failed to timely pay Johnson and the Aggrieved Employees all earned and unpaid wages at the time of separation of employment.

Accordingly, Johnson now seeks civil penalties on behalf of herself and the other Aggrieved Employees based on Nan McKay's violations of the California Labor Code.

The Wage Order

The Wage Order applies to “all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis[.]” § 1. The Wage Order defines “Professional, Technical, Clerical, Mechanical, and Similar Occupations” to include:

“professional, semiprofessional, managerial, supervisorial, laboratory, research, technical, clerical, office work, and mechanical occupations. Said occupations shall include, but not be limited to, the following: accountants; agents; appraisers; artists; attendants; audio-visual technicians; bookkeepers; bundlers; billposters; canvassers; carriers; cashiers; checkers; clerks; collectors; communications and sound technicians; compilers; copy holders; copy readers; copy writers; computer programmers and operators; demonstrators and display representatives; dispatchers; distributors; door-keepers; drafters; elevator operators; estimators; editors; graphic arts technicians; guards; guides; hosts; inspectors; installers; instructors; interviewers; investigators; librarians; laboratory workers; machine operators; mechanics; mailers; messengers; medical and dental technicians and technologists; models; nurses; packagers; photographers; porters and cleaners; process servers; printers; proof readers; salespersons and sales agents; secretaries; sign erectors; sign painters; social workers; solicitors; statisticians; stenographers; teachers; telephone, radiotelephone, telegraph and call-out operators; tellers; ticket agents; tracers; typists; vehicle operators; x-ray technicians; their assistants and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations ”

§ 2(O).

At all relevant times during the applicable limitations period, Nan McKay employed Johnson and the Aggrieved Employees to provide its customers with information and assistance. Accordingly, Johnson and the Aggrieved Employees are entitled to the protections afforded by the Wage Order.

Failure to Provide Meal Periods
(Lab. Code §§ 226.7, 512, and 1198)

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

In relevant part, Section 11 of the Wage Order states:

Meal Periods:

- (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

...

- (D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall 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.

California Labor Code § 226.7 states:

- (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
- (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

Nan McKay intentionally failed to provide all timely rest breaks and/or meal periods free from any work duties to Johnson and the Aggrieved Employees as required by law. In failing to do so, Nan McKay violated the provisions of California Labor Code §§ 226.7, 512, and 1198. Accordingly, Johnson seeks civil penalties on behalf of herself and the Aggrieved Employees as follows:

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.7, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each aggrieved employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

Failure to Pay All Wages for All Hours Worked at the Correct Rates of Pay

(Lab Code §§ 510, 1194, 1197, and 1198)

Under California Labor Code § 1197, “The minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful.”

In relevant part, section 2(K) of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so[.]

In relevant part, California Labor Code § 1194 states,

- (a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the [...] legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of [...] overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.

In relevant part, Section 3 of the Wage Order states,

(A) Daily Overtime - General Provisions

- (1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in a workweek unless the employee receives one and one-half (1 ½) times such employee’s regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day’s work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

- (a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.
- (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

With respect to overtime wages, the regular rate of pay under California law must include “all remuneration for employment paid to, on behalf of, the employee.” O.L. 2002.06.14 (quoting 29 U.S.C. § 207(e)). This requirement includes, but is not limited, to, non-discretionary bonuses. See, e.g., *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 904–05. Commissions and bonuses must be included in the regular rate whether they are

the sole source of the employee's compensation or are in addition to a guaranteed salary or hourly rate. 29 C.F.R. §§778.117, 778.208. See *Oliver v. Mercy Med. Ctr., Inc.* (9th Cir 1982) 695 F.2d 379.

Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

Employers must compensate non-exempt employees for “off-the-clock” work (before punching in or after punching out on a time clock) if the employers knew or should have known that the employees were working those hours. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.

At all relevant times during the applicable limitations period, Nan McKay knowingly failed to pay Johnson and the Aggrieved Employees for all hours worked at the correct rates of pay, including, but not limited to, all regular and overtime wages for the work they performed after the end of their shifts.

Accordingly, Johnson seeks civil penalties on behalf of herself and the other Aggrieved Employees as follows:

1. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 510, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 558);
2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));

3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1194, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)); and
4. \$100 for each Aggrieved Employee for each initial and intentional violation of California Labor Code § 1197, and \$250 for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were intentionally committed) (penalties set by California Labor Code § 1197.1).

Unlawful Collection of Wages
(Lab. Code § 221)

In relevant part, California Labor Code § 221 states:

It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.

At relevant times during the applicable limitations period, Nan McKay has illegally and arbitrarily deducted several minutes from the records of Johnson and the Aggrieved Employees of their daily time worked and has reported less hours than Johnson's and the Aggrieved Employees' actual hours worked on their wage statements. As a result, Nan McKay collected and received part of Johnson's and the Aggrieved Employees' wages in violation of California Labor Code § 221.

Accordingly, Johnson seeks civil penalties on behalf of herself and the Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 221 (if found to be neither willful nor intentional) and \$200 for each Aggrieved Employee for each initial violation of California Labor Code § 221 (if found to be either willful or intentional) and for each subsequent violation of California Labor Code § 221 (regardless of whether they are found to be either willful or intentional) (penalties set by California Labor Code § 225.5).

Failure to Provide Accurate Written Wage Statements
(Lab. Code § 226)

California Labor Code § 226 requires employers to furnish employees with accurate itemized written wage statements showing:

- 1) Gross wages earned
- 2) Total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission;
- 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 only the last four digits of his or her social security number or an employee identification 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 employee.

At relevant times during the applicable limitations period, Nan McKay violated California Labor Code § 226 because it did not properly and accurately itemize each employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the employee and other requirements of California Labor Code § 226. Nan McKay failed to state in the wage statements it issued to Johnson and the other Aggrieved Employees all their hours worked and wages earned, including, but not limited to, regular and overtime wages for work they performed after the end of their shifts.

Accordingly, Johnson now seeks civil penalties for the Labor Code violations that Nan McKay has committed against her and the other Aggrieved Employees as follows: \$250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

Failure to Timely Pay Wages
(Lab. Code § 204)

California Labor Code § 204 states all wages (other than those mentioned in Labor Code sections 201–202) 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. Labor performed between the 1st and 15th

days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. In addition, all wages for work performed in excess of the normal work period must be paid by no later than the following regular payday.

Because of Nan McKay's failure to pay Johnson and the Aggrieved Employees wages for off-the-clock work and premium wages for unprovided meal periods within the time periods set by California Labor Code § 204, Nan McKay failed to timely pay all wages due during employment. Accordingly, Johnson seeks civil penalties on behalf of herself and Aggrieved Employees as follows:

- (1) \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204; and
- (2) \$200 for each Aggrieved Employee (penalties set by Labor Code § 210).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174, 1198)

Labor Code § 1174, which pertains to recordkeeping, states:

Every person employing labor in this state shall:

...

- (a) Keep a record showing the names and addresses of all employees employed and the ages of all minors.

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case, shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code § 1174.5 states:

Any person employing labor who willfully fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete records required by subdivision (d) of Section 1174, or to allow any member of the commission or employees of the division to inspect records pursuant to subdivision (b) of Section 1174, shall be subject to a civil penalty of five hundred dollars (\$500).

Section 7 of Wage Order 1 states:

(A) Every employer shall keep accurate information with respect to each employee including the following:

- (1) Full name, home address, occupation and social security number.
- (2) Birth date, if under 18 years, and designation as a minor.

- (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
- (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
- (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
- (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

Nan McKay has willfully failed to maintain the records required by § 1174 and the Wage Order, including, but not limited to, the total premium wages earned for late meal periods and missed rest periods, and records pertaining to all unpaid hours worked by Johnson and the Aggrieved Employees. Accordingly, Johnson seeks civil penalties from Nan McKay on behalf of herself and other Aggrieved Employees as follows:

- 1. \$500 for each Aggrieved Employee for each violation of California Labor Code § 1174 (penalties set by Labor Code § 1174.5); and

2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

Conclusion

As noted above, this letter constitutes the required notice under the California Labor Code Private Attorneys General Act of 2004. Please be advised that I will seek both reasonable attorneys' fees and costs under Labor Code § 2699, subdivision (g) (1) in a civil action should the LWDA decline to pursue this matter. This letter also serves as a formal notice under the catalyst theory and Code of Civil Procedure §1021.5 to resolve this matter before litigation.

Sincerely,



David Spivak, Esq.

david@spivaklaw.com

Carl Kaplan, Esq.

carl@spivaklaw.com

cc: Paula Johnson

Walter Haines, Esq.

Nan McKay and Associates, Inc.

c/o Agent for Service of Process

John McKay

1810 Gillespie Way, Suite 202

El Cajon, CA 92020

EXHIBIT 3

ORIGINAL

1 DAVID G. SPIVAK (SBN 179684)

2 david@spivaklaw.com

3 CARL J. KAPLAN (SBN 323019)

4 carl@spivaklaw.com

5 THE SPIVAK LAW FIRM

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8 Telephone (818) 582-3086

9 Facsimile (818) 582-2561

10 Attorneys for Plaintiff,

11 PAULA JOHNSON, and all others similarly situated

12 (Additional attorneys for Plaintiff on following page)

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 FOR THE COUNTY OF SAN FRANCISCO
15 (UNLIMITED JURISDICTION)

16 PAULA JOHNSON, on behalf of herself and
17 all others similarly situated,

18 *Plaintiff(s),*

19 vs.

20 NAN MCKAY AND ASSOCIATES, INC., a
21 California corporation; and DOES 1-50,
22 inclusive,

23 *Defendant(s).*

Case No. **CGC-20-586796**

CLASS ACTION

COMPLAINT FOR:

1. Failure to Provide Meal and Rest Periods (Lab. Code §§ 226.7, 512, and 1198);
2. Failure to Pay All Wages for All Hours Worked at the Correct Rates of Pay (Lab. Code §§ 221, 510, 1194, 1197, and 1198);
3. Failure to Provide Accurate Written Wage Statements (Lab. Code § 226);
4. Waiting Time Penalties (Lab. Code §§ 201-203); and
5. Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*).

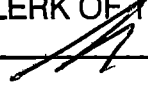
JURY TRIAL DEMANDED

FILED

Superior Court of California
County of San Francisco

SEP 25 2020

CLERK OF THE COURT

BY:  Deputy Clerk

ANGELICA SUNGA

BY FAX



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ADDITIONAL ATTORNEY FOR PLAINTIFF

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1 Plaintiff PAULA JOHNSON (hereafter "Plaintiff"), on behalf of herself and all others
2 similarly situated, complains and alleges as follows:

3 INTRODUCTION

4 1. Plaintiff brings this class action based on alleged violations of the California
5 Labor Code, Industrial Welfare Commission Order No. 4-2001 (hereafter "the Wage Order")
6 and the Business and Professions Code against defendants NAN MCKAY AND
7 ASSOCIATES, INC., a California corporation; and DOES 1 through 50, inclusive (collectively
8 "Defendants").

9 2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to
10 her and other similarly situated current and former employees who worked in California as
11 hourly employees, including but not limited to customer service representatives and other
12 employees of Defendants in comparable positions at any time during the period beginning four
13 years prior to the filing of this action to the present, for unpaid wages, unlawfully deducted
14 wages, unpaid meal and rest break premium wages, statutory wages, and other related relief.
15 These claims are based on Defendants' alleged (1) failure to provide all rest and meal periods;
16 (2) failure to pay all wages earned for all hours worked at the correct rates of pay; (3) failure to
17 provide accurate written wage statements, (4) failure to timely pay wages upon termination of
18 employment, and (5) failure to fairly compete. Accordingly, Plaintiff now seeks to recover
19 unpaid wages, unlawfully deducted wages, unpaid meal and rest break premium wages,
20 statutory penalties, and related relief through this class action.

21 JURISDICTION AND VENUE

22 3. This Court has subject matter jurisdiction because the aggregate claims of
23 Plaintiff and the Class Members, inclusive of all relief, place more than \$25,000 in controversy.

24 4. There is no basis for federal question subject matter jurisdiction in this case.
25 Specifically, Plaintiff asserts claims on behalf of herself and the Class Members that solely
26 arise under California law, rather than federal law.

27 5. There is also no basis for federal diversity jurisdiction in this case.

28 6. Venue is proper in San Francisco County pursuant to California Code of Civil
Procedure § 395(a) and § 395.5 in that liability arose in San Francisco County because at least
some of the transactions that are the subject matter of this Complaint occurred therein and/or
because each defendant is found, maintains offices, transacts business, and/or has an agent



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1 therein.

2 **PARTIES**

3 7. Plaintiff PAULA JOHNSON is a resident of California.

4 8. Defendant NAN MCKAY AND ASSOCIATES, INC. is a corporation
5 organized and existing under the laws of California based on Plaintiff's information and belief.

6 9. Plaintiff is ignorant of the true names, capacities, relationships, and extents of
7 participation in the conduct alleged herein, of the defendants sued as DOES 1-50, inclusive, but
8 is informed and believes and thereon alleges that said defendants are legally responsible for the
9 wrongful conduct alleged herein and therefore sues these defendants by such fictitious names.
10 Plaintiff will amend the Complaint to allege the true names and capacities of the DOE
11 defendants when ascertained.

12 10. Plaintiff is informed and believes and thereon alleges that, at all relevant times
13 herein, all Defendants were the agents, employees and/or servants, masters or employers of the
14 remaining Defendants, and in doing the things hereinafter alleged, were acting within the
15 course and scope of such agency or employment, and with the approval and ratification of each
16 of the other Defendants.

17 11. At all relevant times, in perpetrating the acts and omissions alleged herein,
18 Defendants, and each of them, acted pursuant to and in furtherance of a policy, practice, or a
19 lack of a practice which resulted in Defendants not paying Plaintiff and the Class in accordance
20 with applicable California labor laws as alleged herein.

21 12. Plaintiff is informed and believes and thereon alleges that each and every one of
22 the acts and omissions alleged herein were performed by, and/or are attributable to, all
23 Defendants, each acting as agents and/or employees, and/or under the direction and control of
24 each of the other Defendants, and that said acts and failures to act were within the course and
25 scope of said agency, employment, and/or direction and control.

26 **CLASS ALLEGATIONS**

27 13. This action has been brought and may be maintained as a class action pursuant
28 to California Code of Civil Procedure § 382 because there is a well-defined community of
interest among the persons who comprise the readily ascertainable class defined below and
because Plaintiff is unaware of any difficulties likely to be encountered in managing this case
as a class action.



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1 14. **Class Definition:** The Class is defined as follows: all individuals Defendants
2 employed in California and paid on an hourly basis, including but not limited to customer
3 service representatives and workers employed in comparable positions, at any time during the
4 period beginning four years prior to the filing of this action and ending on the date that final
5 judgment is rendered in this action.

6 15. **Reservation of Rights:** Pursuant to Rule of Court 3.765(b), Plaintiff reserves
7 the right to amend or modify the class definitions with greater specificity, by further division
8 into subclasses and/or by limitation to particular issues.

9 16. **Numerosity:** The Class is so numerous that the joinder of each individual class
10 member is impractical. While Plaintiff does not currently know the exact number of the Class,
11 Plaintiff is informed and believes that the actual number exceeds the minimum required for
12 numerosity under California law.

13 17. **Commonality and Predominance:** Common questions of law and fact exist as
14 to all class members and predominate over any questions which affect only individual class
15 members. These questions include, but are not limited to:

16 A. Whether Defendants failed to provide the Class with all rest periods as
17 required by section 11 of the Wage Order;

18 B. Whether Defendants failed to provide the Class with all off-duty meal
19 periods as required by section 12 of the Wage Order;

20 C. Whether Defendants failed to compensate the Class Members at one
21 hour's pay on days when Defendants failed to provide them with one or more meal periods in a
22 workday.

23 D. Whether Defendants failed to compensate the Class Members at one
24 hour's pay on days when Defendants failed to provide them with one or more off-duty meal
25 periods in a workday;

26 E. Whether Defendants unlawfully collected wages from the Class;

27 F. Whether Defendants failed to pay all wages earned to Class Members
28 for all hours worked at the correct rates of pay;

 G. Whether Defendants knowingly and intentionally failed to provide the
Class Members with accurate wage statements;

 H. Whether Defendants failed to timely pay final wages upon termination



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1 of the Class Members' employment;

2 I. Whether Defendants engaged in unfair competition within the meaning
3 of Business and Professions Code §§ 17200, *et seq.*, with respect to the Class;

4 J. Whether the Class Members are entitled to restitution of money or
5 property that Defendants may have acquired from them through alleged Labor Code violations;

6 K. Whether the Class Members are entitled to prejudgment interest; and

7 L. Are the Class Members entitled to attorneys' fees?

8 18. **Typicality:** Plaintiff's claims are typical of the other Class Members' claims.
9 Plaintiff is informed and believes and thereon alleges that Defendants have a policy, practice,
10 or a lack of a policy which resulted in Defendants failing to comply with the California Labor
11 Code and the Business and Professions Code as alleged herein.

12 19. **Adequacy of Class Representative:** Plaintiff is an adequate class representative
13 in that she has no interests that are adverse to, or otherwise in conflict with, the interests of
14 absent Class Members. Plaintiff is dedicated to vigorously prosecuting this action on behalf of
15 the Class. Plaintiff will fairly and adequately represent and protect the interests of the Class.

16 20. **Adequacy of Class Counsel:** Plaintiff's counsel are adequate class counsel in
17 that they have no known conflicts of interest with Plaintiff or absent Class Members, are
18 experienced in class action litigation and are dedicated to vigorously prosecuting this action on
19 behalf of Plaintiff and the absent Class.

20 21. **Superiority:** A class action is vastly superior to other available means for fair
21 and efficient adjudication of class' claims and would be beneficial to the parties and the Court.
22 Class action treatment will allow a number of similarly situated persons to simultaneously and
23 efficiently prosecute their common claims in a single forum without the unnecessary
24 duplication of effort and expense that numerous individual actions would entail. In addition, the
25 monetary amounts due to many individual class members are likely to be relatively small and
26 would thus make it difficult, if not impossible, for individual class members to both seek and
27 obtain relief. Moreover, a class action will serve an important public interest by permitting
28 class to effectively pursue the recovery of monies owed to them. Further, a class action will
prevent the potential for inconsistent or contradictory judgments inherent in individual
litigation.

///



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STATEMENT OF FACTS

22. On or about November 4, 2019, Defendants first employed Plaintiff to work in San Francisco, California as an hourly customer service representative. Defendants continuously employed Plaintiff in this role until on or about May 26, 2020, when her employment ended.

23. At all relevant times, Defendants employed Plaintiff and the Class at an hourly rate of pay and issued their paychecks on a bi-weekly basis. At all relevant times, Defendants classified Plaintiff and the Class as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

24. At all relevant times, Defendants required Plaintiff and the Class to perform work while signed out from work. Plaintiff and the Class regularly received phone calls from customers shortly before the end of their eight-hour shifts. Such calls often lasted beyond the end of their shifts and circumstances did not permit Plaintiff and the Class to seek preapproval for overtime hours spent on such calls. However, Defendants failed to pay Plaintiff and the Class for this time spent working after the end of their shifts, and instead adjusted Plaintiff's and the Class Members' time records to omit this extra time. In approximately April of 2020, Plaintiff asked her supervisor why the time she spent working after the end of her shift was not reflected in her paychecks. In response, Plaintiff's supervisor told her it was because the overtime was "not approved."

25. At all relevant times, Defendants failed to consistently provide Plaintiff and the Class with a daily 30-minute meal period within the first five hours of work. Due to the workloads Defendants assigned, Plaintiff and the Class were frequently unable to take their meal periods within the first five hours of work. Each day, Defendants assigned to Plaintiff and the Class a log of phone calls it expected them to complete that day. The volume of calls Defendants assigned to Plaintiff and the Class was often so great that Plaintiff and the Class were unable to take their meal periods until well after the first five hours of work. Defendants further failed to authorize and permit Plaintiff and the Class to take a ten-minute, paid, duty-free rest break every four hours or major portion thereof. On information and belief, Defendant has not requested an exemption from California's rest period law from the Division of Labor Standards Enforcement. Further, neither Plaintiff nor the Class Members entered into on duty meal period agreements with Defendants.



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1 26. Defendants failed to pay premium wages to Plaintiff and the Class for days on
2 which Defendants failed to provide them with all timely, off-duty meal and rest periods.

3 27. For the reasons stated herein, Plaintiff alleges the following violations of the
4 California Labor Code and Wage Order:

5 A. Defendants failed to provide Plaintiff and the Class with all off-duty
6 meal periods;

7 B. Defendants failed to provide Plaintiff and the Class with all rest periods
8 as required by law;

9 C. Defendants failed to pay Plaintiff and the Class an additional hour's pay
10 for days on which Defendants failed to provide them with one or more meal periods in a
11 workday;

12 D. Defendants failed to pay Plaintiff and the Class an additional hour's pay
13 for days on which Defendants failed to provide them with one or more rest periods in a
14 workday;

15 E. Defendants unlawfully collected wages due to Plaintiff and the Class;

16 F. Defendants failed to compensate Plaintiff and the Class for all hours
17 worked at the correct rates of pay, including, but not limited to, regular and overtime wages for
18 work they performed while signed out from work;

19 G. Defendants failed to provide Plaintiff and the Class with accurate and
20 complete wage statements;

21 H. Defendants failed to timely pay Plaintiff and the Class all earned and
22 unpaid wages during employment; and

23 I. Defendants failed to timely pay Plaintiff and those Class Members who
24 are former employees all earned and unpaid wages at the time of separation from employment.

25 **FIRST CAUSE OF ACTION**

26 **FAILURE TO PROVIDE REST BREAKS AND MEAL PERIODS**

27 **(Lab. Code §§ 226.7, 512, and 1198)**

28 **(By Plaintiff and the Class against all Defendants)**

29 28. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

30 29. At all relevant times during the applicable limitations period, Plaintiff and the
31 Class Members have been employees of Defendants and entitled to the benefits and protections



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of California Labor Code §§ 226.7, 512, 1198, and the Wage Order.

30. In relevant part, California Labor Code § 1198 states:

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

31. In relevant part, In relevant part, California Labor Code § 512 states:

An employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer shall not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

32. In relevant part, Section 12 of the Wage Order states:

Rest Periods

(A) "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. 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. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages."

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided."

33. In relevant part, Section 11 of the Wage Order states:



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1 **Meal Periods**

2 (A) "No employer shall employ any person for a work period
3 of more than five (5) hours without a meal period of not less than
4 30 minutes, except that when a work period of not more than six
5 (6) hours will complete the day's work the meal period may be
6 waived by mutual consent of the employee and the employee.
7 Unless the employee is relieved of all duty during a 30 minute
8 meal period, the meal period shall be considered an 'on duty'
9 meal period and counted as time worked. An 'on duty' meal
10 period shall be permitted only when the nature of the work
11 prevents an employee from being relieved of all duty and when
12 by written agreement between the parties an on-the-job paid meal
13 period is agreed to. The written agreement shall state that the
14 employee may, in writing, revoke the agreement at any time."

15 (B) If an employer fails to provide an employee a meal period
16 in accordance with the applicable provisions of this Order, the
17 employer shall pay the employee one (1) hour of pay at the
18 employee's regular rate of compensation for each work day that
19 the meal period is not provided."

20 34. In relevant part, California Labor Code § 226.7 states:

21 (b) An employer shall not require an employee to work
22 during a meal or rest period mandated pursuant to an applicable
23 statute, or applicable regulation, standard, or order of the
24 Industrial Welfare Commission, the Occupational Safety and
25 Health Standards Board, or the Division of Occupational Safety
26 and Health.

27 (c) If an employer fails to provide an employee a meal period
28 or rest period in accordance with a state law, including, but not
limited to, an applicable statute or applicable regulation,
standard, or order of the Industrial Welfare Commission, the
Occupational Safety and Health Standards Board, or the Division
of Occupational Safety and Health, the employer shall pay the
employee one additional hour of pay at the employee's regular
rate of compensation for each work day that the meal or rest
period is not provided.

35. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff and the
Class Members were entitled to uninterrupted meal periods of at least 30 minutes for each day
they worked five or more hours. Pursuant to California Labor Code § 512, they were also



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1 entitled to a second 30-minute meal period when they worked more than 10 hours in a
2 workday.

3 36. Pursuant to the Wage Order, Plaintiff and the Class Members were entitled to be
4 provided with net rest breaks of at least ten minutes for each four-hour period of work, or major
5 fraction thereof.

6 37. Defendants intentionally failed to provide Plaintiff and the Class Members with
7 all required 30-minute duty free meal periods and 10-minute rest periods in accordance with the
8 Wage Order.

9 38. Plaintiff is informed and believes and thereon alleges that, at all relevant times
10 within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy
11 which resulted in Defendants not providing the Class with all off-duty meal periods and rest
12 breaks required by California law.

13 39. As a result of Defendants' unlawful conduct, Plaintiff and the Class have
14 suffered damages in an amount, subject to proof, to the extent they were not paid the full
15 amount of wages earned during each pay period during the applicable limitations period.

16 40. By reason of the above, pursuant to California Labor Code § 226.7, Plaintiff and
17 the Class Members are entitled to premium wages for workdays in which one or more off-duty
18 meal periods were not provided to them, and for workdays in which one or more rest breaks
19 were not provided to them.

20 **SECOND CAUSE OF ACTION**

21 **FAILURE TO PAY ALL WAGES EARNED FOR ALL HOURS WORKED**

22 **(Lab. Code §§ 221, 510, 1194, 1197, and 1198)**

23 41. Plaintiff incorporates all paragraphs of the Complaint as if fully alleged herein.

24 42. At all relevant times, Plaintiff and the Class Members have been non-exempt
25 employees of Defendants and entitled to the benefits and protections of California Labor Code §
26 § 221, 510, 1194, 1197, 1198, and the Wage Order.

27 43. Section 2 of the Wage Order defines "hours worked" as "the time during which
28 an employee is subject to the control of an employer, and includes all the time the employee is
suffered or permitted to work, whether or not required to do so."

44. Section 3 of the Wage Order states:

(A) Daily Overtime - General Provisions



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1 (1) The following overtime provisions are applicable to
2 employees 18 years of age or over and to employees 16 or 17
3 years of age who are not required by law to attend school and are
4 not otherwise prohibited by law from engaging in the subject
5 work. Such employees shall not be employed more than eight (8)
6 hours in any workday or more than 40 hours in any workweek
7 unless the employee receives one and one-half (1 ½) times such
8 employee's regular rate of pay for all hours worked over 40 hours
9 in the workweek. Eight (8) hours of labor constitutes a day's
10 work. Employment beyond eight (8) hours in any workday or
11 more than six (6) days in any workweek is permissible provided
12 the employee is compensated for such overtime at not less than:

13 (a) One and one-half (1 ½) times the employee's regular rate of
14 pay for all hours worked in excess of eight (8) hours up to and
15 including 12 hours in any workday, and for the first eight (8)
16 hours worked on the seventh (7th) consecutive day of work in a
17 workweek.

18 (b) Double the employee's regular rate of pay for all hours
19 worked in excess of 12 hours in any workday and for all hours
20 worked in excess of eight (8) hours on the seventh (7th)
21 consecutive day of work in a workweek.

22 (c) The overtime rate of compensation required to be paid to a
23 nonexempt full-time salaried employee shall be computed by
24 using the employee's regular hourly salary as one-fortieth (1/40)
25 of the employee's weekly salary.

26 45. Section 4 of the Wage Order requires an employer to pay non-exempt employees
27 at least the minimum wage set forth therein for all hours worked, which consist of all hours that
28 an employer has actual or constructive knowledge that employees are working.

46. Labor Code section 510 states:

Eight hours of labor constitutes a day's work. Any work in excess
of eight hours in one workday and any work in excess of 40
hours in any one workweek and the first eight hours worked on
the seventh day of work in any one workweek shall be
compensated at the rate of no less than one and one-half times the
regular rate of pay for an employee. Any work in excess of 12
hours in one day shall be compensated at the rate of no less than
twice the regular rate of pay for an employee. In addition, any
work in excess of eight hours on any seventh day of a workweek
shall be compensated at the rate of no less than twice the regular



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1 rate of pay of an employee. Nothing in this section requires an
2 employer to combine more than one rate of overtime
3 compensation in order to calculate the amount to be paid to an
4 employee for any hour of overtime work.

5 47. California Labor Code § 1194 invalidates any agreement between an employer
6 and an employee to work for less than the minimum wage required under the applicable Wage
7 Order.

8 48. California Labor Code § 1197 makes it unlawful for an employer to pay an
9 employee less than the minimum wage required under the applicable Wage Order for all hours
10 worked during a payroll period.

11 49. California Labor Code § 1198 makes it unlawful for an employer to employ an
12 employee under conditions that violate the Wage Order.

13 50. California Labor Code § 221 prohibits an employer from taking deductions from
14 an employee's wages without the employee's express written consent or other legal authority
15 for doing so.

16 51. In conjunction, these provisions of the California Labor Code require employers
17 to pay non-exempt employees no less than their agreed-upon or statutorily mandated wage rates
18 for all hours worked, including unrecorded hours when the employer knew or reasonably should
19 have known that employees were working during those hours. (See *Morillion v. Royal Packing*
20 *Co.* (2000) 22 Cal.4th 575, 585.)

21 52. At all relevant times during the applicable limitations period, Defendants failed
22 to compensate Plaintiff and the Class for all hours worked at the correct rates of pay, including
23 but not limited to all regular and overtime wages for work they performed while signed out
24 from work at the end of their shifts. Further, at all relevant times, Defendants unlawfully
25 collected and received part of Plaintiff's and the Class Members' wages in violation of
26 California Labor Code § 221.

27 53. Plaintiff is informed and believes and thereon alleges that, at all relevant times,
28 Defendants maintained a policy and/or practice, or lack thereof, which resulted in Defendants'
failure to compensate the Class for all hours worked at the correct rates of pay as required by
California law.

54. As a result of Defendants' unlawful conduct, Plaintiff and the Class Members
have suffered damages in an amount, subject to proof, to the extent that they were not paid the



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1 full amount of wages earned during each pay period during the applicable limitations period,
2 including minimum, overtime, and double-time wages.

3 55. Pursuant to California Labor Code § 1194, Plaintiff, on behalf of herself and
4 Class Members, seeks to recover unpaid wages, liquidated damages in amounts equal to the
5 amounts of unpaid wages, interest thereon, and awards of reasonable costs and attorneys' fees,
6 including interest thereon, as permitted by law, all in amounts subject to proof.

7 **THIRD CAUSE OF ACTION**

8 **FAILURE TO PROVIDE ACCURATE WRITTEN WAGE STATEMENTS**

9 **(Lab. Code § 226)**

10 **(By Plaintiff and the Class against all Defendants)**

11 56. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

12 57. Pursuant to California Labor Code § 226(a), Plaintiff and the Class Members
13 were entitled to receive, semimonthly or at the time of each payment of wages, an accurate
14 itemized statement showing, among other items, 1) gross wages earned; 2) total hours worked,
15 except for any employee whose compensation is solely based on a salary and who is exempt
16 from payment of overtime under subdivision (a) of Section 515 or any applicable order of the
17 Industrial Welfare Commission; 3) net wages earned; and 4) all applicable hourly rates in effect
18 during the pay period and the corresponding number of hours worked at each hourly rate by the
19 employee.

20 58. Pursuant to California Labor Code § 226(e), an employee is deemed to suffer
21 injury if the employer fails to provide a wage statement. Additionally, an employee is deemed
22 to suffer injury if the employer fails to provide accurate and complete information as required
23 by California Labor Code § 226(a) and the employee cannot "promptly and easily determine"
24 from the wage statement alone one or more of the following:

25 A. The amount of the gross wages or net wages paid to the employee during
26 the pay period or any of the other information required to be provided on the itemized wage
27 statement pursuant to California Labor Code § 226(a);

28 B. Which deductions the employer made from gross wages to determine the
net wages paid to the employee during the pay period;

C. The name and address of the employer and, if the employer is a farm
labor contractor, as defined in subdivision (b) of Section 1682 of the California Labor Code,



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1 the name and address of the legal entity that secured the services of the employer during the
2 pay period; and

3 D. The name of the employee and only the last four digits of his or her
4 social security number or an employee identification number other than a social security
5 number.

6 59. "Promptly and easily determine," as stated in California Labor Code § 226(e),
7 means a reasonable person would be able to readily ascertain the information without reference
8 to other documents or information.

9 60. At all relevant times during the applicable limitations period, Defendants
10 violated Labor Code § 226 because they did not properly and accurately itemize each Class
11 Member's gross wages earned, net wages earned, the total hours worked, the corresponding
12 number of hours worked at each rate by the employee, and other requirements of California
13 Labor Code § 226. Defendants failed to state in the wage statements they issued to Plaintiff and
14 the Class all their hours worked and wages earned, including but not limited to regular and
15 overtime wages for work they performed after signing out at the end of their shifts.

16 61. As alleged herein, Defendants failed to provide Plaintiff and the Class Members
17 all wages owed, including but not limited to, regular and overtime wages for work performed
18 after signing out at the end of their shifts. As is further alleged herein, Defendants adjusted
19 Plaintiff's and the Class' time records to omit time Plaintiff and the Class spent working after
20 the end of their shifts.

21 62. As a result, Defendants have failed to properly and accurately itemize each
22 employee's gross wages earned, net wages earned, the total hours worked, the corresponding
23 number of hours worked by employees, and other requirements of California Labor Code §
24 226. As a result, Defendants have violated California Labor Code § 226.

25 63. Defendants' failure to provide Plaintiff and the Class Members with accurate
26 wage statements was knowing and intentional. Defendants had the ability to provide Plaintiff
27 and the Class with accurate wage statements but intentionally provided wage statements that
28 Defendants knew were not accurate.

64. As a result of being provided with inaccurate wage statements by Defendants,
Plaintiff and the Class have suffered injury. Their legal rights to receive accurate wage
statements were violated and they were misled about the amount of wages they had actually



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1 earned and were owed. In addition, the absence of accurate information on their wage
2 statements prevented immediate challenges to Defendants' unlawful pay practices, has required
3 discovery and mathematical computations to determine the amounts of wages owed, has caused
4 difficulty and expense in attempting to reconstruct time and pay records and/or has led to the
5 submission of inaccurate information about wages to state and federal government agencies.
6 Further, Plaintiff and the Class Members were not able to ascertain from the wage statements
7 whether Defendants complied with their obligations under California Labor Code § 226(a).

8 **FOURTH CAUSE OF ACTION**

9 **WAITING TIME PENALTIES**

10 **(Lab. Code §§ 201-203)**

11 **(By Plaintiff and the Class against all Defendants)**

12 65. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

13 66. At all relevant times during the applicable limitations period, Plaintiff and the
14 Class Members have been non-exempt employees of Defendants and entitled to the benefits
15 and protections of California Labor Code §§ 201-203 and the Wage Order.

16 67. California Labor Code § 201 provides that all earned and unpaid wages of an
17 employee who is discharged are due and payable immediately at the time of discharge.

18 68. California Labor Code § 202 provides that all earned and unpaid wages of an
19 employee who quits after providing at least 72-hours notice before quitting are due and payable
20 at the time of quitting and that all earned and unpaid wages of an employee who quits without
21 providing at least 72-hours notice before quitting are due and payable within 72 hours.

22 69. By failing to pay all earned regular and overtime wages to Plaintiff and the Class
23 Members, Defendants failed to timely pay them all earned and unpaid wages in violation of
24 California Labor Code § 201 or § 202.

25 70. Plaintiff is informed and believes that Defendants' failures to timely pay all final
26 wages to her and the Class Members have been willful in that Defendants have the ability to
27 pay final wages in accordance with California Labor Code §§ 201 and 202 but have
28 intentionally adopted policies or practice that are incompatible with those requirements.

71. California Labor Code § 203 provides that the wages of an employee continue
on a daily basis as a penalty for up to 30 days where an employer willfully fails to timely pay
earned and unpaid wages to the employee in accordance with California Labor Code § 201 or §



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202.

72. Plaintiff is informed and believes that Defendants' failures to timely pay Plaintiff and the Class Members all of their earned and unpaid wages have been willful in that, at all relevant times, Defendants have deliberately maintained policies and practices that violate the requirements of the Labor Code and the Wage Order even though, at all relevant times, they have had the ability to comply with those legal requirements.

73. Pursuant to California Labor Code § 203, Plaintiff seeks waiting time penalties on behalf of herself and the Class, in amounts subject to proof not to exceed 30 days of waiting time penalties for each Class Member.

FIFTH CAUSE OF ACTION

UNFAIR COMPETITION

(Bus. & Prof. Code §§ 17200, *et seq.*)

(By Plaintiff and the Class against all Defendants)

74. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

75. At all relevant times, Plaintiff and the Class Members have been employees of Defendants and entitled to the benefits and protections of the Business and Professions Code §§ 17200, *et seq.*

76. The unlawful conduct of Defendants alleged herein amounts to and constitutes unfair competition within the meaning of California Business & Professions Code §§ 17200, *et seq.* Due to their unfair and unlawful business practices alleged herein, Defendants have unfairly gained a competitive advantage over other comparable companies doing business in California that comply with their legal obligations to, among other things, pay their employees premium wages for workdays in which they did not provide employees with one or more meal and rest period, and pay them all wages earned for all hours worked at the correct rates of pay.

77. As a result of Defendants' unfair competition as alleged herein, Plaintiff and the Class Members have suffered injuries in fact and have lost money or property. Defendants deprived Plaintiff and the Class Members of regular wages, overtime wages, premium wages for all workdays one or more meal periods was not provided, and premium wages for all workdays a rest period was not provided.

78. Pursuant to California Business & Professions Code § 17203, Plaintiff and the Class Members are entitled to restitution of all monies rightfully belonging to them that



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1 Defendants did not pay them or otherwise retained by means of their unlawful and unfair
2 business practices.

3 79. Plaintiff and the Class are entitled to reasonable attorneys' fees in connection
4 with their unfair competition claims pursuant to California Code of Civil Procedure § 1021.5,
5 the substantial benefit doctrine and/or the common fund doctrine.

6 80. Accordingly, with respect to this cause of action, on behalf of herself and the
7 Class, Plaintiff prays for the herein stated relief, and an award of all reasonable costs and
8 attorneys' fees, including interest thereon, as permitted by law, all in amounts subject to proof.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff, on behalf of herself and the Class, prays for relief and
11 judgment against Defendants as follows:

- 12 A. An order that the action be certified as a class action;
- 13 B. An order that Plaintiff be appointed class representative;
- 14 C. An order that counsel for Plaintiff be appointed class counsel;
- 15 D. Unpaid wages;
- 16 E. Actual damages;
- 17 F. Statutory damages;
- 18 G. Liquidated damages;
- 19 H. Restitution;
- 20 I. Declaratory relief;
- 21 J. Equitable relief;
- 22 K. Statutory penalties;
- 23 L. Pre-judgment and post-judgment interest;
- 24 M. Costs of suit;
- 25 N. Interest;
- 26 O. Reasonable attorneys' fees; and
- 27 P. Such other relief as the Court deems just and proper.

28 ///

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DEMAND FOR JURY TRIAL

Plaintiff, on behalf of herself and all others similarly situated, hereby demands a jury trial on all issues so triable.

Respectfully submitted,

THE SPIVAK LAW FIRM



Dated: September 24, 2020

By: _____

DAVID SPIVAK

CARL KAPLAN

Attorneys for Plaintiff, PAULA JOHNSON
and all others similarly situated



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EXHIBIT 4

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10 Attorneys for Plaintiff,

11 PAULA JOHNSON, and all others similarly situated

12 (Additional attorneys for Plaintiff on following page)

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **FOR THE COUNTY OF SAN FRANCISCO**

15 **(UNLIMITED JURISDICTION)**

16 PAULA JOHNSON, on behalf of herself and
17 all others similarly situated, and as an
18 "aggrieved employee" on behalf of other
19 "aggrieved employees" under the Labor Code
20 Private Attorneys General Act of 2004,

21 *Plaintiff(s),*

22 vs.

23 NAN MCKAY AND ASSOCIATES, INC., a
24 California corporation; and DOES 1-50,
25 inclusive,

26 *Defendant(s).*

Case No.: CGC-20-586796

CLASS ACTION

FIRST AMENDED COMPLAINT FOR:

1. Failure to Provide Meal and Rest Periods (Lab. Code §§ 226.7, 512, and 1198);
2. Failure to Pay All Wages for All Hours Worked at the Correct Rates of Pay (Lab. Code §§ 221, 510, 1194, 1197, and 1198);
3. Failure to Provide Accurate Written Wage Statements (Lab. Code § 226);
4. Waiting Time Penalties (Lab. Code §§ 201-203);
5. Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*); and
6. Civil Penalties (Lab. Code §§ 2698, *et seq.*).

JURY TRIAL DEMANDED

ELECTRONICALLY

FILED

Superior Court of California,
County of San Francisco

09/30/2020

Clerk of the Court

BY: BOWMAN LIU

Deputy Clerk



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1 Plaintiff PAULA JOHNSON (hereafter “Plaintiff”), on behalf of herself and all others
2 similarly situated, complains and alleges as follows:

3 **INTRODUCTION**

4 1. Plaintiff brings this class and representative action based on alleged violations of
5 the California Labor Code, Industrial Welfare Commission Order No. 4-2001 (hereafter “the
6 Wage Order”) and the Business and Professions Code against defendants NAN MCKAY AND
7 ASSOCIATES, INC., a California corporation; and DOES 1 through 50, inclusive (collectively
8 “Defendants”).

9 2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to her
10 and other similarly situated current and former employees who worked in California as hourly
11 employees, including but not limited to customer service representatives and other employees of
12 Defendants in comparable positions at any time during the period beginning four years prior to
13 the filing of this action to the present, for unpaid wages, unlawfully deducted wages, unpaid meal
14 and rest break premium wages, statutory wages, civil penalties and other related relief. These
15 claims are based on Defendants’ alleged (1) failure to provide all rest and meal periods; (2) failure
16 to pay all wages earned for all hours worked at the correct rates of pay; (3) failure to provide
17 accurate written wage statements, (4) failure to timely pay wages upon termination of
18 employment, and (5) failure to fairly compete. Additionally, Plaintiff seeks civil penalties under
19 the California Labor Code Private Attorneys General Act, Labor Code §§ 2698, *et seq.* (“PAGA”).
20 Accordingly, Plaintiff now seeks to recover unpaid wages, unlawfully deducted wages, unpaid
21 meal and rest break premium wages, statutory penalties, civil penalties, and related relief through
22 this class action.

23 **JURISDICTION AND VENUE**

24 3. This Court has subject matter jurisdiction because the aggregate claims of Plaintiff
25 and the Class Members, inclusive of all relief, place more than \$25,000 in controversy.

26 4. There is no basis for federal question subject matter jurisdiction in this case.
27 Specifically, Plaintiff asserts claims on behalf of herself and the Class Members that solely arise
28 under California law, rather than federal law.

5. There is also no basis for federal diversity jurisdiction in this case.

6. Venue is proper in San Francisco County pursuant to California Code of Civil
Procedure § 395(a) and § 395.5 in that liability arose in San Francisco County because at least



1 some of the transactions that are the subject matter of this Complaint occurred therein and/or
2 because each defendant is found, maintains offices, transacts business, and/or has an agent
3 therein.

4 **PARTIES**

5 7. Plaintiff PAULA JOHNSON is a resident of California. At all relevant times,
6 Plaintiff was an “employee” within the meaning of Title 8 California Code of Regulations Section
7 11160 and an “aggrieved employee” within the meaning of Labor Code Section 2699(c).

8 8. Defendant NAN MCKAY AND ASSOCIATES, INC. is a corporation organized
9 and existing under the laws of California based on Plaintiff’s information and belief.

10 9. Plaintiff is ignorant of the true names, capacities, relationships, and extents of
11 participation in the conduct alleged herein, of the defendants sued as DOES 1-50, inclusive, but
12 is informed and believes and thereon alleges that said defendants are legally responsible for the
13 wrongful conduct alleged herein and therefore sues these defendants by such fictitious names.
14 Plaintiff will amend the Complaint to allege the true names and capacities of the DOE defendants
15 when ascertained.

16 10. Plaintiff is informed and believes and thereon alleges that, at all relevant times
17 herein, all Defendants were the agents, employees and/or servants, masters or employers of the
18 remaining Defendants, and in doing the things hereinafter alleged, were acting within the course
19 and scope of such agency or employment, and with the approval and ratification of each of the
20 other Defendants.

21 11. At all relevant times, in perpetrating the acts and omissions alleged herein,
22 Defendants, and each of them, acted pursuant to and in furtherance of a policy, practice, or a lack
23 of a practice which resulted in Defendants not paying Plaintiff and the Class in accordance with
24 applicable California labor laws as alleged herein.

25 12. Plaintiff is informed and believes and thereon alleges that each and every one of
26 the acts and omissions alleged herein were performed by, and/or are attributable to, all
27 Defendants, each acting as agents and/or employees, and/or under the direction and control of
28 each of the other Defendants, and that said acts and failures to act were within the course and
scope of said agency, employment, and/or direction and control.

CLASS ALLEGATIONS

13. This action has been brought and may be maintained as a class action pursuant to



California Code of Civil Procedure § 382 because there is a well-defined community of interest among the persons who comprise the readily ascertainable class defined below and because Plaintiff is unaware of any difficulties likely to be encountered in managing this case as a class action.

14. **Class Definition:** The Class is defined as follows: all individuals Defendants employed in California and paid on an hourly basis, including but not limited to customer service representatives and workers employed in comparable positions, at any time during the period beginning four years prior to the filing of this action and ending on the date that final judgment is rendered in this action.

15. **Reservation of Rights:** Pursuant to Rule of Court 3.765(b), Plaintiff reserves the right to amend or modify the class definitions with greater specificity, by further division into subclasses and/or by limitation to particular issues.

16. **Numerosity:** The Class is so numerous that the joinder of each individual class member is impractical. While Plaintiff does not currently know the exact number of the Class, Plaintiff is informed and believes that the actual number exceeds the minimum required for numerosity under California law.

17. **Commonality and Predominance:** Common questions of law and fact exist as to all class members and predominate over any questions which affect only individual class members. These questions include, but are not limited to:

A. Whether Defendants failed to provide the Class with all rest periods as required by section 11 of the Wage Order;

B. Whether Defendants failed to provide the Class with all off-duty meal periods as required by section 12 of the Wage Order;

C. Whether Defendants failed to compensate the Class Members at one hour's pay on days when Defendants failed to provide them with one or more meal periods in a workday.

D. Whether Defendants failed to compensate the Class Members at one hour's pay on days when Defendants failed to provide them with one or more off-duty meal periods in a workday;

E. Whether Defendants unlawfully collected wages from the Class;

F. Whether Defendants failed to pay all wages earned to Class Members for



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1 all hours worked at the correct rates of pay;

2 G. Whether Defendants knowingly and intentionally failed to provide the
3 Class Members with accurate wage statements;

4 H. Whether Defendants failed to timely pay final wages upon termination of
5 the Class Members' employment;

6 I. Whether Defendants engaged in unfair competition within the meaning of
7 Business and Professions Code §§ 17200, *et seq.*, with respect to the Class;

8 J. Whether the Class Members are entitled to restitution of money or
9 property that Defendants may have acquired from them through alleged Labor Code violations;

10 K. Whether the Class Members are entitled to prejudgment interest; and

11 L. Are the Class Members entitled to attorneys' fees?

12 18. **Typicality:** Plaintiff's claims are typical of the other Class Members' claims.
13 Plaintiff is informed and believes and thereon alleges that Defendants have a policy, practice, or
14 a lack of a policy which resulted in Defendants failing to comply with the California Labor Code
15 and the Business and Professions Code as alleged herein.

16 19. **Adequacy of Class Representative:** Plaintiff is an adequate class representative
17 in that she has no interests that are adverse to, or otherwise in conflict with, the interests of absent
18 Class Members. Plaintiff is dedicated to vigorously prosecuting this action on behalf of the Class.
19 Plaintiff will fairly and adequately represent and protect the interests of the Class.

20 20. **Adequacy of Class Counsel:** Plaintiff's counsel are adequate class counsel in
21 that they have no known conflicts of interest with Plaintiff or absent Class Members, are
22 experienced in class action litigation and are dedicated to vigorously prosecuting this action on
23 behalf of Plaintiff and the absent Class.

24 21. **Superiority:** A class action is vastly superior to other available means for fair and
25 efficient adjudication of class' claims and would be beneficial to the parties and the Court. Class
26 action treatment will allow a number of similarly situated persons to simultaneously and
27 efficiently prosecute their common claims in a single forum without the unnecessary duplication
28 of effort and expense that numerous individual actions would entail. In addition, the monetary
amounts due to many individual class members are likely to be relatively small and would thus
make it difficult, if not impossible, for individual class members to both seek and obtain relief.
Moreover, a class action will serve an important public interest by permitting class to effectively



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1 pursue the recovery of monies owed to them. Further, a class action will prevent the potential for
2 inconsistent or contradictory judgments inherent in individual litigation.

3 **STATEMENT OF FACTS**

4 22. On or about November 4, 2019, Defendants first employed Plaintiff to work in
5 San Francisco, California as an hourly customer service representative. Defendants continuously
6 employed Plaintiff in this role until on or about May 26, 2020, when her employment ended.

7 23. At all relevant times, Defendants employed Plaintiff and the Class at an hourly
8 rate of pay and issued their paychecks on a bi-weekly basis. At all relevant times, Defendants
9 classified Plaintiff and the Class as non-exempt employees entitled to the protections of both the
10 Labor Code and the Wage Order.

11 24. At all relevant times, Defendants required Plaintiff and the Class to perform work
12 while signed out from work. Plaintiff and the Class regularly received phone calls from customers
13 shortly before the end of their eight-hour shifts. Such calls often lasted beyond the end of their
14 shifts and circumstances did not permit Plaintiff and the Class to seek preapproval for overtime
15 hours spent on such calls. However, Defendants failed to pay Plaintiff and the Class for this time
16 spent working after the end of their shifts, and instead adjusted Plaintiff's and the Class Members'
17 time records to omit this extra time. In approximately April of 2020, Plaintiff asked her
18 supervisor why the time she spent working after the end of her shift was not reflected in her
19 paychecks. In response, Plaintiff's supervisor told her it was because the overtime was "not
20 approved."

21 25. At all relevant times, Defendants failed to consistently provide Plaintiff and the
22 Class with a daily 30-minute meal period within the first five hours of work. Due to the workloads
23 Defendants assigned, Plaintiff and the Class were frequently unable to take their meal periods
24 within the first five hours of work. Each day, Defendants assigned to Plaintiff and the Class a log
25 of phone calls it expected them to complete that day. The volume of calls Defendants assigned
26 to Plaintiff and the Class was often so great that Plaintiff and the Class were unable to take their
27 meal periods until well after the first five hours of work. Defendants further failed to authorize
28 and permit Plaintiff and the Class to take a ten-minute, paid, duty-free rest break every four hours
or major portion thereof. On information and belief, Defendant has not requested an exemption
from California's rest period law from the Division of Labor Standards Enforcement. Further,
neither Plaintiff nor the Class Members entered into on duty meal period agreements with



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Defendants.

26. Defendants failed to pay premium wages to Plaintiff and the Class for days on which Defendants failed to provide them with all timely, off-duty meal and rest periods.

27. For the reasons stated herein, Plaintiff alleges the following violations of the California Labor Code and Wage Order:

A. Defendants failed to provide Plaintiff and the Class with all off-duty meal periods;

B. Defendants failed to provide Plaintiff and the Class with all rest periods as required by law;

C. Defendants failed to pay Plaintiff and the Class an additional hour's pay for days on which Defendants failed to provide them with one or more meal periods in a workday;

D. Defendants failed to pay Plaintiff and the Class an additional hour's pay for days on which Defendants failed to provide them with one or more rest periods in a workday;

E. Defendants unlawfully collected wages due to Plaintiff and the Class;

F. Defendants failed to compensate Plaintiff and the Class for all hours worked at the correct rates of pay, including, but not limited to, regular and overtime wages for work they performed while signed out from work;

G. Defendants failed to provide Plaintiff and the Class with accurate and complete wage statements;

H. Defendants failed to timely pay Plaintiff and the Class all earned and unpaid wages during employment; and

I. Defendants failed to timely pay Plaintiff and those Class Members who are former employees all earned and unpaid wages at the time of separation from employment.

FIRST CAUSE OF ACTION

FAILURE TO PROVIDE REST BREAKS AND MEAL PERIODS

(Lab. Code §§ 226.7, 512, and 1198)

(By Plaintiff and the Class against all Defendants)

28. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

29. At all relevant times during the applicable limitations period, Plaintiff and the Class Members have been employees of Defendants and entitled to the benefits and protections of California Labor Code §§ 226.7, 512, 1198, and the Wage Order.



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1 30. In relevant part, California Labor Code § 1198 states:

2 The maximum hours of work and the standard conditions of labor
3 fixed by the commission shall be the maximum hours of work and
4 the standard conditions of labor for employees. The employment
5 of any employee for longer hours than those fixed by the order or
6 under conditions of labor prohibited by the order is unlawful.

7 31. In relevant part, In relevant part, California Labor Code § 512 states:

8 An employer shall not employ an employee for a work period of
9 more than five hours per day without providing the employee with
10 a meal period of not less than 30 minutes, except that if the total
11 work period per day of the employee is no more than six hours, the
12 meal period may be waived by mutual consent of both the
13 employer and employee.

14 An employer shall not employ an employee for a work period of
15 more than 10 hours per day without providing the employee with
16 a second meal period of not less than 30 minutes, except that if the
17 total hours worked is no more than 12 hours, the second meal
18 period may be waived by mutual consent of the employer and the
19 employee only if the first meal period was not waived.

20 32. In relevant part, Section 12 of the Wage Order states:

21 **Rest Periods**

22 (A) “Every employer shall authorize and permit all employees
23 to take rest periods, which insofar as practicable shall be in the
24 middle of each work period. The authorized rest period time shall
25 be based on the total hours worked daily at the rate of ten (10)
26 minutes net rest time per four (4) hours or major fraction thereof.
27 However, a rest period need not be authorized for employees
28 whose total daily work time is less than three and one-half (3 1/2)
hours. Authorized rest period time shall be counted as hours
worked for which there shall be no deduction from wages.”

(B) If an employer fails to provide an employee a rest period in
accordance with the applicable provisions of this Order, the
employer shall pay the employee one (1) hour of pay at the
employee’s regular rate of compensation for each work day that
the rest period is not provided.”

33. In relevant part, Section 11 of the Wage Order states:

Meal Periods



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(A) “No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by mutual consent of the employee and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an ‘on duty’ meal period and counted as time worked. An ‘on duty’ meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.”

(B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each work day that the meal period is not provided.”

34. In relevant part, California Labor Code § 226.7 states:

(b) An employer shall not require an employee to work during a meal or rest period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

(c) If an employer fails to provide an employee a meal period or rest period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each work day that the meal or rest period is not provided.

35. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff and the Class Members were entitled to uninterrupted meal periods of at least 30 minutes for each day they worked five or more hours. Pursuant to California Labor Code § 512, they were also entitled to a second 30-minute meal period when they worked more than 10 hours in a workday.

36. Pursuant to the Wage Order, Plaintiff and the Class Members were entitled to be

provided with net rest breaks of at least ten minutes for each four-hour period of work, or major fraction thereof.

37. Defendants intentionally failed to provide Plaintiff and the Class Members with all required 30-minute duty free meal periods and 10-minute rest periods in accordance with the Wage Order.

38. Plaintiff is informed and believes and thereon alleges that, at all relevant times within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy which resulted in Defendants not providing the Class with all off-duty meal periods and rest breaks required by California law.

39. As a result of Defendants' unlawful conduct, Plaintiff and the Class have suffered damages in an amount, subject to proof, to the extent they were not paid the full amount of wages earned during each pay period during the applicable limitations period.

40. By reason of the above, pursuant to California Labor Code § 226.7, Plaintiff and the Class Members are entitled to premium wages for workdays in which one or more off-duty meal periods were not provided to them, and for workdays in which one or more rest breaks were not provided to them.

SECOND CAUSE OF ACTION

FAILURE TO PAY ALL WAGES EARNED FOR ALL HOURS WORKED

(Lab. Code §§ 221, 510, 1194, 1197, and 1198)

41. Plaintiff incorporates all paragraphs of the Complaint as if fully alleged herein.

42. At all relevant times, Plaintiff and the Class Members have been non-exempt employees of Defendants and entitled to the benefits and protections of California Labor Code § 221, 510, 1194, 1197, 1198, and the Wage Order.

43. Section 2 of the Wage Order defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."

44. Section 3 of the Wage Order states:

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such



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employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.

(b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

(c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one-fortieth (1/40) of the employee's weekly salary.

45. Section 4 of the Wage Order requires an employer to pay non-exempt employees at least the minimum wage set forth therein for all hours worked, which consist of all hours that an employer has actual or constructive knowledge that employees are working.

46. Labor Code section 510 states:

Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work.



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1 47. California Labor Code § 1194 invalidates any agreement between an employer and
2 an employee to work for less than the minimum wage required under the applicable Wage Order.

3 48. California Labor Code § 1197 makes it unlawful for an employer to pay an
4 employee less than the minimum wage required under the applicable Wage Order for all hours
5 worked during a payroll period.

6 49. California Labor Code § 1198 makes it unlawful for an employer to employ an
7 employee under conditions that violate the Wage Order.

8 50. California Labor Code § 221 prohibits an employer from taking deductions from
9 an employee's wages without the employee's express written consent or other legal authority for
10 doing so.

11 51. In conjunction, these provisions of the California Labor Code require employers
12 to pay non-exempt employees no less than their agreed-upon or statutorily mandated wage rates
13 for all hours worked, including unrecorded hours when the employer knew or reasonably should
14 have known that employees were working during those hours. (See *Morillion v. Royal Packing*
15 *Co.* (2000) 22 Cal.4th 575, 585.)

16 52. At all relevant times during the applicable limitations period, Defendants failed to
17 compensate Plaintiff and the Class for all hours worked at the correct rates of pay, including but
18 not limited to all regular and overtime wages for work they performed while signed out from work
19 at the end of their shifts. Further, at all relevant times, Defendants unlawfully collected and
20 received part of Plaintiff's and the Class Members' wages in violation of California Labor Code
21 § 221.

22 53. Plaintiff is informed and believes and thereon alleges that, at all relevant times,
23 Defendants maintained a policy and/or practice, or lack thereof, which resulted in Defendants'
24 failure to compensate the Class for all hours worked at the correct rates of pay as required by
25 California law.

26 54. As a result of Defendants' unlawful conduct, Plaintiff and the Class Members have
27 suffered damages in an amount, subject to proof, to the extent that they were not paid the full
28 amount of wages earned during each pay period during the applicable limitations period,
including minimum, overtime, and double-time wages.

 55. Pursuant to California Labor Code § 1194, Plaintiff, on behalf of herself and Class
Members, seeks to recover unpaid wages, liquidated damages in amounts equal to the amounts of



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1 unpaid wages, interest thereon, and awards of reasonable costs and attorneys' fees, including
2 interest thereon, as permitted by law, all in amounts subject to proof.

3 **THIRD CAUSE OF ACTION**

4 **FAILURE TO PROVIDE ACCURATE WRITTEN WAGE STATEMENTS**

5 **(Lab. Code § 226)**

6 **(By Plaintiff and the Class against all Defendants)**

7 56. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

8 57. Pursuant to California Labor Code § 226(a), Plaintiff and the Class Members were
9 entitled to receive, semimonthly or at the time of each payment of wages, an accurate itemized
10 statement showing, among other items, 1) gross wages earned; 2) total hours worked, except for
11 any employee whose compensation is solely based on a salary and who is exempt from payment
12 of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare
13 Commission; 3) net wages earned; and 4) all applicable hourly rates in effect during the pay
14 period and the corresponding number of hours worked at each hourly rate by the employee.

15 58. Pursuant to California Labor Code § 226(e), an employee is deemed to suffer
16 injury if the employer fails to provide a wage statement. Additionally, an employee is deemed to
17 suffer injury if the employer fails to provide accurate and complete information as required by
18 California Labor Code § 226(a) and the employee cannot "promptly and easily determine" from
19 the wage statement alone one or more of the following:

20 A. The amount of the gross wages or net wages paid to the employee during
21 the pay period or any of the other information required to be provided on the itemized wage
22 statement pursuant to California Labor Code § 226(a);

23 B. Which deductions the employer made from gross wages to determine the
24 net wages paid to the employee during the pay period;

25 C. The name and address of the employer and, if the employer is a farm labor
26 contractor, as defined in subdivision (b) of Section 1682 of the California Labor Code, the name
27 and address of the legal entity that secured the services of the employer during the pay period;
28 and

D. 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.

59. "Promptly and easily determine," as stated in California Labor Code § 226(e),



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1 means a reasonable person would be able to readily ascertain the information without reference
2 to other documents or information.

3 60. At all relevant times during the applicable limitations period, Defendants violated
4 Labor Code § 226 because they did not properly and accurately itemize each Class Member's
5 gross wages earned, net wages earned, the total hours worked, the corresponding number of hours
6 worked at each rate by the employee, and other requirements of California Labor Code § 226.
7 Defendants failed to state in the wage statements they issued to Plaintiff and the Class all their
8 hours worked and wages earned, including but not limited to regular and overtime wages for
9 work they performed after signing out at the end of their shifts.

10 61. As alleged herein, Defendants failed to provide Plaintiff and the Class Members
11 all wages owed, including but not limited to, regular and overtime wages for work performed
12 after signing out at the end of their shifts. As is further alleged herein, Defendants adjusted
13 Plaintiff's and the Class' time records to omit time Plaintiff and the Class spent working after the
14 end of their shifts.

15 62. As a result, Defendants have failed to properly and accurately itemize each
16 employee's gross wages earned, net wages earned, the total hours worked, the corresponding
17 number of hours worked by employees, and other requirements of California Labor Code § 226.
18 As a result, Defendants have violated California Labor Code § 226.

19 63. Defendants' failure to provide Plaintiff and the Class Members with accurate
20 wage statements was knowing and intentional. Defendants had the ability to provide Plaintiff and
21 the Class with accurate wage statements but intentionally provided wage statements that
22 Defendants knew were not accurate.

23 64. As a result of being provided with inaccurate wage statements by Defendants,
24 Plaintiff and the Class have suffered injury. Their legal rights to receive accurate wage statements
25 were violated and they were misled about the amount of wages they had actually earned and were
26 owed. In addition, the absence of accurate information on their wage statements prevented
27 immediate challenges to Defendants' unlawful pay practices, has required discovery and
28 mathematical computations to determine the amounts of wages owed, has caused difficulty and
expense in attempting to reconstruct time and pay records and/or has led to the submission of
inaccurate information about wages to state and federal government agencies. Further, Plaintiff
and the Class Members were not able to ascertain from the wage statements whether Defendants



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1 complied with their obligations under California Labor Code § 226(a).

2 **FOURTH CAUSE OF ACTION**

3 **WAITING TIME PENALTIES**

4 **(Lab. Code §§ 201-203)**

5 **(By Plaintiff and the Class against all Defendants)**

6 65. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

7 66. At all relevant times during the applicable limitations period, Plaintiff and the
8 Class Members have been non-exempt employees of Defendants and entitled to the benefits and
9 protections of California Labor Code §§ 201-203 and the Wage Order.

10 67. California Labor Code § 201 provides that all earned and unpaid wages of an
11 employee who is discharged are due and payable immediately at the time of discharge.

12 68. California Labor Code § 202 provides that all earned and unpaid wages of an
13 employee who quits after providing at least 72-hours notice before quitting are due and payable
14 at the time of quitting and that all earned and unpaid wages of an employee who quits without
15 providing at least 72-hours notice before quitting are due and payable within 72 hours.

16 69. By failing to pay all earned regular and overtime wages to Plaintiff and the Class
17 Members, Defendants failed to timely pay them all earned and unpaid wages in violation of
18 California Labor Code § 201 or § 202.

19 70. Plaintiff is informed and believes that Defendants' failures to timely pay all final
20 wages to her and the Class Members have been willful in that Defendants have the ability to pay
21 final wages in accordance with California Labor Code §§ 201 and 202 but have intentionally
22 adopted policies or practice that are incompatible with those requirements.

23 71. California Labor Code § 203 provides that the wages of an employee continue on
24 a daily basis as a penalty for up to 30 days where an employer willfully fails to timely pay earned
25 and unpaid wages to the employee in accordance with California Labor Code § 201 or § 202.

26 72. Plaintiff is informed and believes that Defendants' failures to timely pay Plaintiff
27 and the Class Members all of their earned and unpaid wages have been willful in that, at all
28 relevant times, Defendants have deliberately maintained policies and practices that violate the
requirements of the Labor Code and the Wage Order even though, at all relevant times, they have
had the ability to comply with those legal requirements.

73. Pursuant to California Labor Code § 203, Plaintiff seeks waiting time penalties



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1 on behalf of herself and the Class, in amounts subject to proof not to exceed 30 days of waiting
2 time penalties for each Class Member.

3 **FIFTH CAUSE OF ACTION**

4 **UNFAIR COMPETITION**

5 **(Bus. & Prof. Code §§ 17200, *et seq.*)**

6 **(By Plaintiff and the Class against all Defendants)**

7 74. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

8 75. At all relevant times, Plaintiff and the Class Members have been employees of
9 Defendants and entitled to the benefits and protections of the Business and Professions Code §§
10 17200, *et seq.*

11 76. The unlawful conduct of Defendants alleged herein amounts to and constitutes
12 unfair competition within the meaning of California Business & Professions Code §§ 17200, *et*
13 *seq.* Due to their unfair and unlawful business practices alleged herein, Defendants have unfairly
14 gained a competitive advantage over other comparable companies doing business in California
15 that comply with their legal obligations to, among other things, pay their employees premium
16 wages for workdays in which they did not provide employees with one or more meal and rest
17 period, and pay them all wages earned for all hours worked at the correct rates of pay.

18 77. As a result of Defendants' unfair competition as alleged herein, Plaintiff and the
19 Class Members have suffered injuries in fact and have lost money or property. Defendants
20 deprived Plaintiff and the Class Members of regular wages, overtime wages, premium wages for
21 all workdays one or more meal periods was not provided, and premium wages for all workdays
22 a rest period was not provided.

23 78. Pursuant to California Business & Professions Code § 17203, Plaintiff and the
24 Class Members are entitled to restitution of all monies rightfully belonging to them that
25 Defendants did not pay them or otherwise retained by means of their unlawful and unfair business
26 practices.

27 79. Plaintiff and the Class are entitled to reasonable attorneys' fees in connection with
28 their unfair competition claims pursuant to California Code of Civil Procedure § 1021.5, the
substantial benefit doctrine and/or the common fund doctrine.

80. Accordingly, with respect to this cause of action, on behalf of herself and the
Class, Plaintiff prays for the herein stated relief, and an award of all reasonable costs and



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attorneys' fees, including interest thereon, as permitted by law, all in amounts subject to proof.

SIXTH CAUSE OF ACTION

CIVIL PENALTIES

(By Plaintiff and the Class against all Defendants)

81. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

82. The "Aggrieved Employees" are all members of the above-defined Class whom Defendants employed during the period beginning July 24, 2019 and ending on the date that final judgment is entered in this action.

83. Labor Code § 204 states

(a) All wages, other than those mentioned in Section 201, 201.3, 201.4, or 204.2, 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. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and 26th day of the month during which the labor was performed, and labor performed between the 16th and last day, inclusive, of any calendar month, shall be paid between the 1st and 10th day of the following month. . . .

(b) (1) Notwithstanding any other provision of this section, all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period.

(2) An employer is in compliance with the requirements of subdivision (a) of Section 226 relating to total hours worked by the employee, if hours worked in excess of the normal work period during the current pay period are itemized as corrections on the paystub for the next regular pay period. Any corrections set out in a subsequently issued paystub shall state the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked.

(c) However, when employees are covered by a collective bargaining agreement that provides different pay arrangements, those arrangements shall apply to the covered employees.

(d) The requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period.

84. Defendants paid wages to employees on weekly intervals. Defendants failed to pay Plaintiff on such intervals for all wages earned and all hours worked. On information and belief, Plaintiff alleges that Defendants also failed to pay the Aggrieved Employees on such



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1 intervals for all wages earned and all hours worked.

2 85. During the applicable time period, Defendants violated California Labor Code §§
3 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 1174, 1194, 1197, and 1198.

4 86. California Labor Code §§ 2699(a) and (g) authorize an aggrieved employee, on
5 behalf of themselves and other current or former employees, to bring a civil action to recover
6 civil penalties pursuant to the procedures specified in California Labor Code § 2699.3.

7 87. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff and the Class are
8 entitled to recover civil penalties for each of Defendants' violations of California Labor Code §§
9 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 1174, 1194, 1197, and 1198 during the applicable
10 limitations period in the following amounts: For violations of California Labor Code § 204, one
11 hundred dollars (\$100.00) for each aggrieved employee for each initial violation and two hundred
12 dollars (\$200.00) for each aggrieved employee for each subsequent, willful or intentional
13 violation (penalty amounts established by California Labor Code § 210).

14 A. For violations of California Labor Code § 204, one hundred dollars
15 (\$100.00) for each aggrieved employee for each initial violation and two hundred dollars
16 (\$200.00) for each aggrieved employee for each subsequent, willful or intentional violation
17 (penalty amounts established by California Labor Code § 210).

18 B. For violations of California Labor Code § 221, one hundred dollars
19 (\$100.00) for each aggrieved employee for each initial violation of California Labor Code § 221
20 (if found to be neither willful nor intentional) and two hundred dollars (\$200.00) for each
21 aggrieved employee (if found to be either willful or intentional) and for each subsequent violation
22 of California Labor Code § 221 (regardless of whether they are found to be willful or intentional)
23 (penalties set by California Labor Code § 225.5).

24 C. For violations of California Labor Code § 226(a), two hundred fifty dollars
25 (\$250.00) for each aggrieved employee for initial violations and one thousand dollars (\$1,000.00)
26 for each aggrieved employee for each subsequent violation (penalty amounts established by
27 California Labor Code § 226.3).

28 D. For violations of California Labor Code §§ 510 and 512, fifty dollars
(\$50.00) for each aggrieved employee for initial violations and one hundred dollars (\$100.00)
for each aggrieved employee for each subsequent violation, per pay period (penalty amounts
established by California Labor Code § 558).



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1 E. For violations of California Labor Code § 1174, five hundred dollars
2 (\$500.00) for each aggrieved employee for each violation (penalty amounts established by
3 California Labor Code § 1174.5).

4 F. For violations of California Labor Code § 1197, one hundred dollars
5 (\$100.00) for each aggrieved employee per pay period for each initial and intentional violation
6 and two hundred fifty dollars (\$250.00) for each aggrieved employee per pay period for each
7 subsequent violation (regardless of whether the initial violations were intentionally committed)
8 (penalty amounts established by California Labor Code § 1197.1).

9 G. For violations of California Labor Code §§ 201, 202, 203, 226.7, 1194,
10 and 1198, one hundred dollars (\$100.00) for each aggrieved employee per pay period for each
11 initial violation and two hundred dollars (\$200.00) for each aggrieved employee per pay period
12 for each subsequent violation (penalty amounts established by California Labor Code §
13 2699(f)(2)).

14 88. Plaintiff has complied with the procedures for bringing suit specified in California
15 Labor Code § 2699.3. By letter dated July 24, 2020, Plaintiff filed written notice online with the
16 Labor and Workforce Development Agency (“LWDA”) and gave written notice by certified mail
17 to Defendants of the specific provisions of the California Labor Code alleged to have been
18 violated, including the facts and theories to support the alleged violations. Plaintiff accompanied
19 her individual letter with a fee in the amount of \$75.00. A true and correct copy of Plaintiff’s
20 written notice to the LWDA, dated July 24, 2020, is attached hereto as **Exhibit A**. The LWDA
21 has not responded to Plaintiff’s letter.

22 89. Pursuant to California Labor Code § 2699(g), Plaintiff and the Aggrieved
23 Employees are entitled to an award of civil penalties, reasonable attorneys’ fees, and costs in
24 connection with their claims for civil penalties.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiff, on behalf of herself and the Class, prays for relief and judgment
27 against Defendants as follows:

- 28 A. An order that the action be certified as a class action;
- B. An order that Plaintiff be appointed class representative;
- C. An order that counsel for Plaintiff be appointed class counsel;
- D. Unpaid wages;



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- E. Actual damages;
- F. Statutory damages;
- G. Liquidated damages;
- H. Restitution;
- I. Declaratory relief;
- J. Equitable relief;
- K. Statutory penalties;
- L. Civil Penalties;
- M. Pre-judgment and post-judgment interest;
- N. Costs of suit;
- O. Interest;
- P. Reasonable attorneys' fees; and
- Q. Such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff, on behalf of herself and all others similarly situated, hereby demands a jury trial on all issues so triable.

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: September 30, 2020

By: 

DAVID SPIVAK
CARL KAPLAN
Attorneys for Plaintiff, PAULA JOHNSON
and all others similarly situated

EXHIBIT A



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

July 24, 2020

Attn: PAGA Administrator
Labor and Workforce Development Agency
Attn: PAGA Administrator
<http://dir.tflaforms.net>
Via Electronic Submission

RE: *Paula Johnson / Nan McKay and Associates, Inc.*

To Whom It May Concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004, Labor Code § 2698, *et seq.*, Paula Johnson (hereafter “Johnson”) provides notice on behalf of herself and all individuals currently and formerly employed in California as non-exempt hourly employees, including but not limited to customer service representatives and workers employed in comparable positions (hereafter “Aggrieved Employees”) by Nan McKay and Associates, Inc., a California corporation (hereafter “Nan McKay”), of violations of Labor Code §§ 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 1174, 1194, 1197, and 1198.

At all relevant times, Nan McKay has employed persons, conducted business in, and engaged in illegal payroll practices and policies in California. Johnson and the Aggrieved Employees are “employees” within the meaning of Wage Order 4-2001 (hereafter “the Wage Order”) § 2, subdivision (F) and “Aggrieved Employees” within the meaning of Labor Code § 2699, subdivision (c).

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Doc ID: bf10995ffde0c79ff47776a48bd05f8417dc2f31

Statement of Facts

On or about November 4, 2019, Nan McKay first employed Johnson to work in San Francisco, California as a customer service representative. Nan McKay continuously employed Johnson as a customer service representative until on or about May 26, 2020, when her employment ended.

At all relevant times, Nan McKay employed Johnson and the other Aggrieved Employees at an hourly rate of pay and issued their paychecks on a bi-weekly basis. At all relevant times, Nan McKay classified Johnson and the other Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all relevant times, Nan McKay required Johnson and the Aggrieved Employees to perform work while clocked out. Johnson and the Aggrieved Employees regularly received phone calls from customers shortly before the end of their eight-hour shifts. Such calls often lasted beyond the end of their shifts and circumstances did not permit Johnson and the Aggrieved Employees to seek preapproval for overtime hours spent on such calls. However, Nan McKay failed to pay Johnson and the Aggrieved Employees for this time spent working after the end of their shifts, and instead adjusted Johnson's and the Aggrieved Employees' time records to omit this extra time. In approximately April of 2020, Johnson asked her supervisor, Nerissa Abrams, why the time she spent working after the end of her shift was not reflected in her paychecks. In response, Ms. Abrams told Johnson it was because the overtime was "not approved."

At all relevant times, Nan McKay failed to consistently provide Johnson and the Aggrieved Employees with a daily 30-minute meal period within the first five hours of work. Due to the workloads Nan McKay assigned, Johnson and the Aggrieved Employees were frequently unable to take their meal periods within the first five hours of work. Each day, Nan McKay assigned to Johnson and the

Aggrieved Employees a log of phone calls it expected them to complete that day. The volume of calls Nan McKay assigned to Johnson and the Aggrieved Employees was often so great that Johnson and the Aggrieved Employees were unable to take their meal periods until well after the first five hours of work. Nan McKay further failed to authorize and permit Johnson and the Aggrieved Employees to take a ten-minute, paid, duty-free rest break every four hours or major portion thereof. Nan McKay has not requested an exemption from California's rest period law from the Division of Labor Standards Enforcement. Further, neither Johnson nor the aggrieved Employees entered into on duty meal period agreements with Nan McKay.

Nan McKay failed to pay premium wages for days on which it failed to provide Johnson and the Aggrieved Employees with all timely, off-duty meal and rest periods.

For the reasons stated herein, Johnson alleges the following violations of the California Labor Code and the Wage Order on behalf of herself and the Aggrieved Employees:

- a) Nan McKay failed to provide Johnson and the Aggrieved Employees with all meal periods as required by law;
- b) Nan McKay failed to provide Johnson and the Aggrieved Employees with all rest periods as required by law;
- c) Nan McKay failed to compensate Johnson and the Aggrieved Employees at one hour's pay on days when Nan McKay failed to provide them with one or more meal periods in a workday;

- d) Nan McKay failed to compensate Johnson and the Aggrieved Employees at one hour's pay on days when Nan McKay failed to provide them with one or more rest periods in a workday;
- e) Nan McKay failed to pay Johnson and the Aggrieved Employees for all hours worked at the correct rates of pay including, but not limited to, regular and overtime pay due to off-the-clock work;
- f) Nan McKay unlawfully deducted the wages Johnson and the Aggrieved Employees earned, including but not limited to regular and overtime wages;
- g) Nan McKay failed to timely pay Johnson and the Aggrieved Employees all earned and unpaid wages during employment;
- h) Nan McKay failed to provide Johnson and the Aggrieved Employees with accurate and complete wage statements; and
- i) Nan McKay failed to timely pay Johnson and the Aggrieved Employees all earned and unpaid wages at the time of separation of employment.

Accordingly, Johnson now seeks civil penalties on behalf of herself and the other Aggrieved Employees based on Nan McKay's violations of the California Labor Code.

The Wage Order

The Wage Order applies to “all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis[.]” § 1. The Wage Order defines “Professional, Technical, Clerical, Mechanical, and Similar Occupations” to include:

“professional, semiprofessional, managerial, supervisorial, laboratory, research, technical, clerical, office work, and mechanical occupations. Said occupations shall include, but not be limited to, the following: accountants; agents; appraisers; artists; attendants; audio-visual technicians; bookkeepers; bundlers; billposters; canvassers; carriers; cashiers; checkers; clerks; collectors; communications and sound technicians; compilers; copy holders; copy readers; copy writers; computer programmers and operators; demonstrators and display representatives; dispatchers; distributors; door-keepers; drafters; elevator operators; estimators; editors; graphic arts technicians; guards; guides; hosts; inspectors; installers; instructors; interviewers; investigators; librarians; laboratory workers; machine operators; mechanics; mailers; messengers; medical and dental technicians and technologists; models; nurses; packagers; photographers; porters and cleaners; process servers; printers; proof readers; salespersons and sales agents; secretaries; sign erectors; sign painters; social workers; solicitors; statisticians; stenographers; teachers; telephone, radiotelephone, telegraph and call-out operators; tellers; ticket agents; tracers; typists; vehicle operators; x-ray technicians; their assistants and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations ”

§ 2(O).

At all relevant times during the applicable limitations period, Nan McKay employed Johnson and the Aggrieved Employees to provide its customers with information and assistance. Accordingly, Johnson and the Aggrieved Employees are entitled to the protections afforded by the Wage Order.

Failure to Provide Meal Periods
(Lab. Code §§ 226.7, 512, and 1198)

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

In relevant part, Section 11 of the Wage Order states:

Meal Periods:

- (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

...

- (D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall 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.

California Labor Code § 226.7 states:

- (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
- (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

Nan McKay intentionally failed to provide all timely rest breaks and/or meal periods free from any work duties to Johnson and the Aggrieved Employees as required by law. In failing to do so, Nan McKay violated the provisions of California Labor Code §§ 226.7, 512, and 1198. Accordingly, Johnson seeks civil penalties on behalf of herself and the Aggrieved Employees as follows:

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.7, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each aggrieved employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

Failure to Pay All Wages for All Hours Worked at the Correct Rates of Pay

(Lab Code §§ 510, 1194, 1197, and 1198)

Under California Labor Code § 1197, “The minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful.”

In relevant part, section 2(K) of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so[.]

In relevant part, California Labor Code § 1194 states,

- (a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the [...] legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of [...] overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.

In relevant part, Section 3 of the Wage Order states,

(A) Daily Overtime - General Provisions

- (1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in a workweek unless the employee receives one and one-half (1 ½) times such employee’s regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day’s work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

- (a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.
- (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

With respect to overtime wages, the regular rate of pay under California law must include “all remuneration for employment paid to, on behalf of, the employee.” O.L. 2002.06.14 (quoting 29 U.S.C. § 207(e)). This requirement includes, but is not limited, to, non-discretionary bonuses. See, e.g., *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 904–05. Commissions and bonuses must be included in the regular rate whether they are

the sole source of the employee's compensation or are in addition to a guaranteed salary or hourly rate. 29 C.F.R. §§778.117, 778.208. See *Oliver v. Mercy Med. Ctr., Inc.* (9th Cir 1982) 695 F.2d 379.

Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

Employers must compensate non-exempt employees for “off-the-clock” work (before punching in or after punching out on a time clock) if the employers knew or should have known that the employees were working those hours. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.

At all relevant times during the applicable limitations period, Nan McKay knowingly failed to pay Johnson and the Aggrieved Employees for all hours worked at the correct rates of pay, including, but not limited to, all regular and overtime wages for the work they performed after the end of their shifts.

Accordingly, Johnson seeks civil penalties on behalf of herself and the other Aggrieved Employees as follows:

1. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 510, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 558);
2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));

3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1194, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)); and
4. \$100 for each Aggrieved Employee for each initial and intentional violation of California Labor Code § 1197, and \$250 for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were intentionally committed) (penalties set by California Labor Code § 1197.1).

Unlawful Collection of Wages
(Lab. Code § 221)

In relevant part, California Labor Code § 221 states:

It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.

At relevant times during the applicable limitations period, Nan McKay has illegally and arbitrarily deducted several minutes from the records of Johnson and the Aggrieved Employees of their daily time worked and has reported less hours than Johnson's and the Aggrieved Employees' actual hours worked on their wage statements. As a result, Nan McKay collected and received part of Johnson's and the Aggrieved Employees' wages in violation of California Labor Code § 221.

Accordingly, Johnson seeks civil penalties on behalf of herself and the Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 221 (if found to be neither willful nor intentional) and \$200 for each Aggrieved Employee for each initial violation of California Labor Code § 221 (if found to be either willful or intentional) and for each subsequent violation of California Labor Code § 221 (regardless of whether they are found to be either willful or intentional) (penalties set by California Labor Code § 225.5).

Failure to Provide Accurate Written Wage Statements
(Lab. Code § 226)

California Labor Code § 226 requires employers to furnish employees with accurate itemized written wage statements showing:

- 1) Gross wages earned
- 2) Total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission;
- 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 only the last four digits of his or her social security number or an employee identification 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 employee.

At relevant times during the applicable limitations period, Nan McKay violated California Labor Code § 226 because it did not properly and accurately itemize each employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the employee and other requirements of California Labor Code § 226. Nan McKay failed to state in the wage statements it issued to Johnson and the other Aggrieved Employees all their hours worked and wages earned, including, but not limited to, regular and overtime wages for work they performed after the end of their shifts.

Accordingly, Johnson now seeks civil penalties for the Labor Code violations that Nan McKay has committed against her and the other Aggrieved Employees as follows: \$250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

Failure to Timely Pay Wages
(Lab. Code § 204)

California Labor Code § 204 states all wages (other than those mentioned in Labor Code sections 201–202) 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. Labor performed between the 1st and 15th

days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. In addition, all wages for work performed in excess of the normal work period must be paid by no later than the following regular payday.

Because of Nan McKay's failure to pay Johnson and the Aggrieved Employees wages for off-the-clock work and premium wages for unprovided meal periods within the time periods set by California Labor Code § 204, Nan McKay failed to timely pay all wages due during employment. Accordingly, Johnson seeks civil penalties on behalf of herself and Aggrieved Employees as follows:

- (1) \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204; and
- (2) \$200 for each Aggrieved Employee (penalties set by Labor Code § 210).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174, 1198)

Labor Code § 1174, which pertains to recordkeeping, states:

Every person employing labor in this state shall:

...

- (a) Keep a record showing the names and addresses of all employees employed and the ages of all minors.

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case, shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code § 1174.5 states:

Any person employing labor who willfully fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete records required by subdivision (d) of Section 1174, or to allow any member of the commission or employees of the division to inspect records pursuant to subdivision (b) of Section 1174, shall be subject to a civil penalty of five hundred dollars (\$500).

Section 7 of Wage Order 1 states:

(A) Every employer shall keep accurate information with respect to each employee including the following:

- (1) Full name, home address, occupation and social security number.
- (2) Birth date, if under 18 years, and designation as a minor.

- (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
- (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
- (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
- (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

Nan McKay has willfully failed to maintain the records required by § 1174 and the Wage Order, including, but not limited to, the total premium wages earned for late meal periods and missed rest periods, and records pertaining to all unpaid hours worked by Johnson and the Aggrieved Employees. Accordingly, Johnson seeks civil penalties from Nan McKay on behalf of herself and other Aggrieved Employees as follows:

- 1. \$500 for each Aggrieved Employee for each violation of California Labor Code § 1174 (penalties set by Labor Code § 1174.5); and

2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

Conclusion

As noted above, this letter constitutes the required notice under the California Labor Code Private Attorneys General Act of 2004. Please be advised that I will seek both reasonable attorneys' fees and costs under Labor Code § 2699, subdivision (g) (1) in a civil action should the LWDA decline to pursue this matter. This letter also serves as a formal notice under the catalyst theory and Code of Civil Procedure §1021.5 to resolve this matter before litigation.

Sincerely,



David Spivak, Esq.

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Carl Kaplan, Esq.

carl@spivaklaw.com

cc: Paula Johnson

Walter Haines, Esq.

Nan McKay and Associates, Inc.

c/o Agent for Service of Process

John McKay

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EXHIBIT 5

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Attorneys for Defendant,
NAN MCKAY AND ASSOCIATES, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

PAULA JOHNSON, on behalf of herself and
all others similarly situated, and as an
“aggrieved employee” on behalf of other
“aggrieved employees” under the Labor Code
Private Attorneys General Act of 2004,

Plaintiff,

vs.

NAN MCKAY & ASSOCIATES, INC., a
California Corporation; and DOES 1 through
50, inclusive,

Defendant(s)

CASE NO. CGC-20-586769
Hon. Samuel K. Feng
Dept. 610

**DEFENDANT NAN MCKAY &
ASSOCIATES, INC.’S ANSWER TO
PLAINTIFF’S FIRST AMENDED
COMPLAINT**

*Complaint Filed: 09/25/2020
First Amended Complaint: 09/30/20
Trial Date: None Set*

Defendant, NAN MCKAY & ASSOCIATES, INC., a California Corporation (hereinafter
“Defendant” or “NAN MCKAY”), hereby answers Plaintiff PAULA JOHNSON’S (hereinafter
“Plaintiff’s”) First Amended Complaint (hereinafter “Complaint”) as follows:

GENERAL DENIAL

Pursuant to the provisions of the California Code of Civil Procedure section 431.30(d),
Defendant denies generally and specifically each and every allegation contained in Plaintiff’s
Complaint and further deny that Plaintiff has been damaged in any sum by reason of any act or
omission on the part of Defendant.

AFFIRMATIVE DEFENSES

Defendant asserts the following affirmative and other defenses, which it designates, collectively, as “affirmative defenses.” Defendant’s designation of its defenses as “affirmative” is not intended in any way to alter Plaintiff’s burden of proof with regard to any element of his cause(s) of action. Defendant also expressly denies the existence of any alleged group of persons or aggrieved employees that Plaintiff purports to represent in this lawsuit. Defendant incorporates (as if fully set forth therein) this express denial each and every time it references “Plaintiff” herein.

FIRST AFFIRMATIVE DEFENSE

**(Arbitration Agreement – Exclusive Remedy, Federal Arbitration Act Preemption and
Mandatory Stay Pursuant to FAA and CCP §1281.4)**

1. Defendant is informed and believes, and based thereon alleges, that Plaintiff’s Complaint and each purported cause of action and/or claim set forth therein, or some of them, are barred on the ground that Plaintiff, and/or the group of persons or aggrieved employees she seeks to represent, or any of them, entered into an arbitration agreement and, therefore, their exclusive remedy for their claims is through final and binding arbitration. To that end, Plaintiff’s Complaint and each purported cause of action and/or claim for relief alleged therein, or some of them, are preempted by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (“FAA”); and likewise must be stayed pursuant to Section 3 of the FAA (9 U.S.C. § 3) and/or California Code of Civil Procedure § 1281.4. (See AT&T Mobility, LLC v. Concepcion 563 U.S. 333 (2011); 131 S. Ct. 1740.)

SECOND AFFIRMATIVE DEFENSE

(Not the Employer; No Joint Employment Relationship)

2. Defendant is informed and believes, and based thereon alleges, that Plaintiff’s Complaint and each purported cause of action and/or claim set forth therein, or some of them, are barred as to Defendant on the grounds that Defendant was not the employer of any member of the group or aggrieved employees she seeks to represent, and at relevant times, no joint employment relationship existed between Defendant and any other purported joint employer,

thereby barring Plaintiff's claims to the extent they are predicated on a joint employment relationship.

THIRD AFFIRMATIVE DEFENSE

(Failure to State Cause of Action)

3. Defendant alleges that the Complaint, and each and every purported cause of action contained therein, fails to state facts sufficient to constitute a cause of action against Defendant.

FOURTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

4. Any claims and/or causes of action purportedly asserted in Plaintiff's Complaint are barred by the provisions of all applicable statutes of limitations, including without limitation, Code of Civil Procedure §§335.1, 338(a), 338.1 340(a), 340(b), Business and Professions Code §17208, and Labor Code §203(b) to the extent they seek relief for conduct occurring outside of the relevant statute of limitations period.

FIFTH AFFIRMATIVE DEFENSE

(Laches)

5. Plaintiff, and/or the group of persons or any alleged aggrieved employees she seeks to represent, may not seek relief from this Court as Plaintiff's claims, or any of them, are subject to the doctrine of laches.

SIXTH AFFIRMATIVE DEFENSE

(Unclean Hands)

6. Plaintiff, and/or the group of persons or any alleged aggrieved employees she seeks to represent, may not seek relief from this Court in that they come before this Court with unclean hands.

SEVENTH AFFIRMATIVE DEFENSE

(Waiver)

7. Plaintiff, and/or the group of persons or any alleged aggrieved employees she seeks to represent, may not seek relief from this Court as Plaintiff's claims, or any of them, are

subject to the doctrine of waiver.

EIGHTH AFFIRMATIVE DEFENSE

(Estoppel)

8. Plaintiff, and/or the group of persons or any alleged aggrieved employees she seeks to represent, may not seek relief from this Court as Plaintiff's claims, or any of them, are subject to the doctrine of estoppel.

NINTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

9. Defendant is informed and believes that a reasonable opportunity for investigation and discovery will reveal, and on that basis alleges, that Plaintiff, and/or the group of persons or any of the alleged aggrieved employees she seeks to represent, failed to exercise reasonable care to mitigate their damages, if any were suffered, and that their right to recover against Defendant should be reduced and/or eliminated by such a failure.

TENTH AFFIRMATIVE DEFENSE

(Failure to State a Claim for Attorneys' Fees and Costs)

10. Plaintiff fails to state facts and/or causes of action sufficient to constitute a claim for which attorneys' fees and costs may be awarded. Defendant also contends that any claim for attorneys' fees predicated upon non-payment of "premium penalties" for alleged non-compliant meal and rest breaks is barred because "premium penalties" are not "wages" so as to support an award of attorneys' fees pursuant to Labor Code §218.5.

ELEVENTH AFFIRMATIVE DEFENSE

(Failure to State a Claim for Prejudgment Interest)

11. The Complaint fails to properly state a claim upon which prejudgment interest may be awarded, as the damages and/or penalties claimed are not sufficiently certain to allow an award of prejudgment interest. Defendant also contends that any "premium penalties" for alleged non-compliant meal and rest breaks are not "wages" so to support a basis for pre-judgment interest.

TWELFTH AFFIRMATIVE DEFENSE

(Accord and Satisfaction)

12. The claims alleged in Plaintiff's Complaint are barred by the doctrine of accord and satisfaction.

THIRTEENTH AFFIRMATIVE DEFENSE

(Assumption of Risk)

13. Plaintiff's Complaint fails to state facts sufficient to constitute any cause of action in that Plaintiff, and/or the group of persons or any alleged aggrieved employees she seeks to represent, assumed the risk of the occurrences and damages alleged.

FOURTEENTH AFFIRMATIVE DEFENSE

(Proximate Cause)

14. Plaintiff, and/or the group of persons or any alleged aggrieved employees she seeks to represent, by their own acts and conduct, proximately caused the damages complained of, and, therefore, Defendant has no liability for the purported damages suffered by Plaintiff and/or by the group of employees or any alleged aggrieved employees whom he seeks to represent.

FIFTEENTH AFFIRMATIVE DEFENSE

(Comparative Fault)

15. Plaintiff, and/or the group of persons or any alleged aggrieved employees she seeks to represent, by their own acts and conduct, contributed to the damages complained of, and the liability of Defendant, if any, for the purported damages suffered by Plaintiff, and/or any group of persons or alleged aggrieved employees, must be reduced by an amount proportionate to their comparative fault.

SIXTEENTH AFFIRMATIVE DEFENSE

(Good Faith Belief of Compliance with Obligations and/or Good Faith Dispute)

16. Defendant alleges it acted with a reasonable and good faith belief that it complied with its obligations, if any, under the California Labor Code, as to Plaintiff and the group of persons or aggrieved employees he seeks to represent; and/or at all relevant times, there exists

1 and/or existed a bona fide good faith factual and/or legal dispute as to the existence and/or extent
2 of Defendant's obligations to Plaintiff and/or the group of persons or alleged aggrieved
3 employees she seeks to represent, under any applicable Labor Code provision. Defendant
4 alleges it did not willfully and/or intentionally fail to pay wages to Plaintiff, and/or the group of
5 persons or the alleged aggrieved employees he seeks to represent, to the extent that any wages
6 are even owed, and which is disputed.

7 **SEVENTEENTH AFFIRMATIVE DEFENSE**

8 **(Obligations Satisfied)**

9 17. Defendant is informed and believes that further investigation and discovery will
10 reveal, and on that basis alleges, that any obligations and/or monies owed to Plaintiff, and/or the
11 group of persons or the alleged aggrieved employees she seeks to represent, have been paid in
12 full, and any obligations it may have owed to any of them have been paid or otherwise satisfied
13 in full.

14 **EIGHTEENTH AFFIRMATIVE DEFENSE**

15 **(Failure to Comply with Directions/Breach of Duty)**

16 18. Defendant is informed and believes that a reasonable opportunity for investigation
17 and discovery will reveal, and on that basis alleges, that any recovery on Plaintiff's Complaint,
18 or on each purported cause of action alleged therein, is barred by California Labor Code Sections
19 2854, 2856, 2857, 2858 and/or 2859, in that Plaintiff and/or the group of persons or the alleged
20 aggrieved employees she seeks to represent, or any of them, failed to use ordinary care and
21 diligence in the performance of their duties and/or breached their duties to Defendant, and that
22 failure to perform and/or breach on their part was a condition precedent to the performance of
23 Defendant's obligations.

24 **NINETEENTH AFFIRMATIVE DEFENSE**

25 **(Failure to Use Preventative Opportunities/Avoidable Consequences)**

26 19. Defendant exercised reasonable care to prevent and correct promptly any
27 improper behavior allegedly reported to it, and Plaintiff, and/or the group of persons or any
28 alleged aggrieved employees she seeks to represent, unreasonably failed to take advantage of the

1 preventative and corrective opportunities provided by Defendant.

2 **TWENTIETH AFFIRMATIVE DEFENSE**

3 **(Legitimate Business Judgment)**

4 20. Defendant alleges that any and all conduct of which Plaintiff and/or the group of
5 persons or the alleged aggrieved employees she seeks to represent, complain of and that they
6 attributed to Defendant and/or which Defendant undertook, was a just and proper exercise of
7 discretion and business judgment, undertaken for a fair and honest reason and regulated by good
8 faith under the circumstances then existing.

9 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

10 **(Failure to Accurately Report Hours Worked)**

11 21. Defendant alleges that Plaintiff, and/or the group of persons or the alleged
12 aggrieved employees she seeks to represent, or any of them, did not accurately report the hours
13 for which they seek unpaid wages, overtime and penalties; therefore, Plaintiff, and/or the alleged
14 aggrieved employees he seeks to represent, are barred from seeking to recover any such amounts
15 from Defendant.

16 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

17 **(Right to Set Off)**

18 22. Defendant alleges that it is entitled to a set-off for amounts Plaintiff, and/or the
19 group of persons or alleged aggrieved employees she seeks to represent, or any of them, owe
20 Defendant for receipt of any wages and other benefits to which they were not entitled and/or did
21 not earn. Defendant also contends that it is entitled to a set-off for any damages, penalties or
22 interest that may be owed in this Action, to the extent that any member of the group of persons or
23 alleged aggrieved employees whom Plaintiff seeks to represent, was already paid for any
24 damages, penalties or interest, including by way of executing a release/settlement agreement.

25 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

26 **(Timely Receipt of All Sums and Benefits)**

27 23. Plaintiff, and/or the group of persons or alleged aggrieved employees she seeks to
28 represent, or any of them, have been timely paid and/or received all sums, wages, and benefits

1 due by virtue of their employment, and therefore Defendant is released from any and all
2 continuing obligations to them.

3 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

4 **(Lawful Rounding, CFR 785.48)**

5 24. Defendant alleges that it properly paid Plaintiff, and/or the group of persons or
6 alleged aggrieved employees she seeks to represent were properly paid all wages due based on
7 neutral and lawful rounding of time.

8 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

9 **(De Minimis Claims Barred)**

10 25. Defendant alleges Plaintiff, and/or the group of persons or alleged aggrieved
11 employees she seeks to represent are barred from relief because some or all of the disputed time
12 for which they seek to recover wages purportedly owed is not compensable pursuant to the *de*
13 *minimus* and *non curat lax* doctrines as limited by Troester v. Starbucks Corporation, 5 Cal. 5th
14 829 (2018).

15 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

16 **(Isolated and Unintentional Payroll Error)**

17 26. Any itemized wage statement provided to Plaintiff and/or the group of persons or
18 the alleged aggrieved employees she seeks to represent, that was allegedly inaccurate was as a
19 result of an isolated and unintentional payroll error due to a clerical or inadvertent mistake
20 (Labor Code §226(e)(3)).

21 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

22 **(Labor Code Section 203- Wages Timely Paid)**

23 27. Plaintiff, and/or the group of persons and any alleged aggrieved employees she
24 seeks to represent, who no longer work for Defendant, are barred from any recovery under Labor
25 Code §203 because, at all times relevant to this action, Defendant properly paid them all wages
26 due and owing within the time required by Labor Code §§201 and/or 202.

27 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

28 **(Labor Code Section 203 – Avoidance of Payment)**

28. Plaintiff, and/or the group of persons or any alleged aggrieved employees who no longer work for Defendant, are barred from any recovery under Labor Code §203 because, at all times relevant to this action, Plaintiff, and any alleged aggrieved employees, or any of them, secreted or absented themselves to avoid payment from Defendant, and/or refused to receive the payment when fully tendered to them, and thus are not entitled to recover under Labor Code §203 for the time during which they so avoided payment.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Unconstitutionality of Wage Orders)

29. Defendant alleges that the Complaint, and each cause of action and/or claim alleged therein, or some of them, are barred because the applicable wage orders of the Industrial Welfare Commission are unconstitutionally vague and ambiguous and violate Defendant's rights under the United States Constitution and the California Constitution as to, among other things, due process of law.

THIRTIETH AFFIRMATIVE DEFENSE

(Plaintiff Failed to Exercise Right to Take Meal and/or Rest Breaks/Waiver)

30. Defendant alleges that it made Plaintiff, and/or the group of persons or alleged aggrieved employees she seeks to represent, aware of, and authorized and provided the opportunity for Plaintiff, and the group of persons or alleged aggrieved employees she seeks to represent, to take meal periods, and otherwise authorized and provided rest breaks, and accordingly is not liable if Plaintiff, and/or the group of persons or the alleged aggrieved employees she seeks to represent, or any of them, where the failure to take such meal periods and/or rest breaks was due to voluntary waiver. Defendant also contends that to the extent any employees executed waivers of their rights to take meal periods in accordance with California law, any meal periods not taken within the scope of those waivers were lawfully waived.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(Lack of Standing)

31. Defendant alleges Plaintiff lacks standing to sue on behalf of herself, and/or the group of persons or the alleged aggrieved employees she seeks to represent, with respect to her

representative claims pursuant to the California Business and Professions Code §17200 *et seq.* and Labor Code §2698, *et seq.*

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Failure to Exhaust Administrative Remedies)

32. Defendant alleges that Plaintiff failed to properly exhaust any and all administrative remedies with any government and/or administrative agency as a pre-requisite to sue for any and all causes of action, including by failing to properly comply with Labor Code §2699.3 for violations of PAGA, Labor Code §2698, *et seq.*

THIRTY-THIRD AFFIRMATIVE DEFENSE

(Representative Action- Excessive Fines)

33. Defendant alleges that any statutory or excessive fines sought by Plaintiff, and/or the group of persons or alleged aggrieved employees she seeks to represent, cannot be recovered and/or limited by the excessive fines clauses of the California and United States Constitutions.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

(Bus. & Prof. Code § 17200 – Compliance with Obligations)

34. Defendant alleges that Plaintiffs' claim for unlawful or unfair business practices on behalf of himself, and or the group of persons or allegedly aggrieved employees she seeks to represent, is barred, in whole or in part, because of Defendant's compliance with all applicable laws, statutes, and regulations.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

(Bus. & Prof. Code § 17200 – No Impact on General Public)

35. Defendant alleges that Plaintiffs' claim for unlawful or unfair business practices on behalf of himself, and or the group of persons or allegedly aggrieved employees she seeks to represent, is barred, in whole or in part, due to Plaintiff's failure to meet the burden of

demonstrating a nexus between Defendant's alleged acts, conduct or statements and any impact on the general public that Plaintiff purports to represent.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

(Prior Settlement and Release/Res Judicata/Collateral Estoppel)

36. Defendant alleges that each cause of action and/or claim alleged in Plaintiff's Complaint, or some of them, are barred on the grounds of res judicata and/or collateral estoppel, to the extent that such claims were released as part of a prior settlement which included Defendant's employees and/or to the extent the issues and/or claims set forth in the Complaint have already been litigated and decided.

THIRTY-SEVENTH AFFIRMATIVE DEFENSE

(Labor Code § 2699 – Manageability)

37. Defendant alleges that Plaintiff's and/or any allegedly aggrieved employee's purported claims are such that they cannot be tried on a representative basis because they require determination of substantial individual liability and penalty assessments. (See Williams v. Superior Court, 3 Ca1.5th 531, 559 (2017) (recognizing the requirement of manageability in PAGA cases).

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

(Labor Code § 2699(a) – Duplicative Civil Penalties)

38. Defendant alleges that Plaintiff and/or any allegedly aggrieved employees are not entitled to recovery of civil penalties under the PAGA, to the extent that such penalties are sought in addition to other civil penalties for the same claims, as such double recovery is prohibited and would constitute unjust enrichment.

THIRTY-NINTH AFFIRMATIVE DEFENSE

(Labor Code § 2699(f) – Initial Violation)

39. Defendant alleges that, insofar as Defendant has never been cited by the Labor Commissioner, or received a judgment against it in a court of law, with respect to any of Plaintiff's and/or any allegedly aggrieved employee's underlying California Labor Code claims,

any civil penalties awarded to Plaintiff on behalf of himself or any other allegedly aggrieved employees under the PAGA must be limited to those penalties applicable to an initial violation.

FORTIETH AFFIRMATIVE DEFENSE

(Non-Certifiable Class)

40. Defendant alleges that that Complaint does not state facts or theories sufficient to certify a class pursuant to California Code of Civil Procedure § 382.

FORTY-FIRST AFFIRMATIVE DEFENSE

(No Common Issues)

41. Defendant alleges that individual questions of fact and law predominate within Plaintiff's Complaint, and there is a lack of common issues of fact or law.

FORTY-SECOND AFFIRMATIVE DEFENSE

(Inadequacy of Class Representative)

42. Defendant alleges Plaintiff is inadequate to represent the Class.

FORTY-THIRD AFFIRMATIVE DEFENSE

(Lack of Typicality)

43. Defendant alleges that Plaintiff's claims are not typical of the claims of the Class, whom he seeks to represent.

FORTY-FOURTH AFFIRMATIVE DEFENSE

(Inadequacy of Plaintiff's Counsel)

44. Defendant alleges that Plaintiff's counsel is inadequate to act as Class Counsel, including because of potential and actual conflicts between them, Plaintiff and the group of employees whom they seek to represent.

FORTY-FIFTH AFFIRMATIVE DEFENSE

(Lack of Numerosity)

45. Defendant alleges that the number of persons in the purported Class are not sufficiently numerous.

FORTY-SIXTH AFFIRMATIVE DEFENSE

(Lack of Superiority)

46. Defendant alleges that common questions of fact and law do not predominate, and thus, this matter should not proceed as a class action.

FORTY-SEVENTH AFFIRMATIVE DEFENSE

(Lack of Manageability)

47. Defendant alleges that if this matter were to proceed as a class action to trial, any trial would be unmanageable.

FORTY-EIGHTH AFFIRMATIVE DEFENSE

(Additional Affirmative Defenses)

48. Defendant is informed and believes, and thereon alleges, that certain additional affirmative defenses are available to Defendant. Said affirmative defenses will require further discovery and/or investigation before they can be properly alleged. Defendant will move to amend the answer to allege such affirmative defenses once they have been fully ascertained and can be properly alleged.

PRAYER

WHEREFORE, Defendant requests that judgment be entered as follows:

1. That Plaintiff take nothing by way of his Complaint;
2. That the Complaint be dismissed in its entirety with prejudice;
3. For costs of suit incurred in defense of this action;
4. For recovery of attorneys' fees expended in the defense of this action; and
5. For such other and further relief as the Court deems just and proper.

Dated: December 29, 2020

GORDON REES SCULLY MANSUKHANI, LLP

By: 

Debra Ellwood Meppen
Peter Choi
Attorneys for Defendant
NAN MCKAY & ASSOCIATES, INC.

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon Rees Scully Mansukhani, LLP 633 West Fifth Street, 52nd floor, Los Angeles, CA 90071. On **December 29, 2020**, I served the within documents:

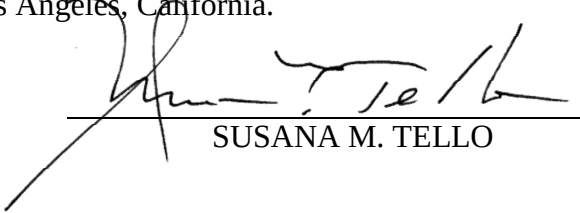
DEFENDANT NAN MCKAY & ASSOCIATES, INC.'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☒ **ELECTRONIC SERVICE** (C.C.P. 1010.6(a) – Pursuant to Governor Newsom's Executive Order of 3/27/20 and the Emergency Orders of the Court and Coronavirus (Covid-19) emergency pandemic and on Emergency Rule 12, effective April 17, 2020, this document is served only by emailing the document(s) to the person(s) at the email address(es) listed which were the last known emails provided.
- ☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in United States mail in the State of California at Los Angeles, addressed as set forth below.

David Spivak
Carl J. Kaplan
THE SPIVAK LAW FIRM
16530 Ventura Blvd., Suite 203
Encino, California 91436
(818) 582-3086; (818) 582-2561 facsimile
david@spivaklaw.com
carl@spivaklaw.com
Attorneys for Plaintiff PAULA JOHNSON

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

Executed on **December 29, 2020** at Los Angeles, California.



SUSANA M. TELLO

EXHIBIT 6

Case title:	Paula Johnson v. Nan McKay & Associates, Inc.
Case no.:	CGC-20-586796
Court:	San Francisco
Judge:	Samuel K. Feng, Dept. 206
Page subject:	Data

Important Dates

Unfair Competition, Bus.&Prof. § 17200 ("UCL") period begins:	Sunday, September 25, 2016
Lab.Code § 203 (waiting time penalties) period begins:	Monday, September 25, 2017
Lab.Code § 2699 (civil penalties) period begins:	Thursday, July 25, 2019
Lab.Code § 226 (pay stub penalties) period begins:	Wednesday, September 25, 2019
LWDA Notice:	Friday, July 24, 2020
Lawsuit:	Thursday, September 24, 2020
Sample begin:	Friday, September 1, 2017
Sample end:	Friday, July 31, 2020
Sample calendar days:	1,064
Mediation:	Monday, January 24, 2022
Anticipated Settlement Period end date:	Tuesday, May 24, 2022
Settlement Period to Sample Period:	194.27%

Classes / Groups sizes	Sample	Ratio	Class
UCL Class Members:	16	19.63	314
UCL Workweeks:	505	15.48	7,817
UCL Wage Statements:	253	15.48	3,916
UCL Workdays:	3,263	15.48	50,500
UCL Calendar days:		15.48	-
UCL Months:	64	15.48	991

Waiting Time Penalties Class Members:	170
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PAGA Aggrieved Employees:	13	19.63	255
PAGA Wage Statements:	253	15.48	3,916

Wage Statement Class Members:	13	19.63	255
Wage Statement Class Wage Statements:	151	15.48	2,337

Averages

Average Hourly Rate:	\$	19.73
Average Overtime Rate:	\$	29.60
Average Doubletime Rate:	\$	39.46
Average Work Hours Per Day:		7.66
Average Work Hours Per Week:	\$	33.78
Average Workdays Per Week:		4.41
Workdays to Calendar Days (%):		63.00%
Paycycle:		Biweekly (26 / year)
Paychecks Per Year:		

Case title:	Paula Johnson v. Nan McKay & Associates, Inc.
Case no.:	CGC-20-586796
Court:	San Francisco
Judge:	Samuel K. Feng, Dept. 206
Page subject:	Unpaid wages
Authority:	Lab.Code §§ 510, 1194, 1194.2, and 1198

Average Hourly Rate:	\$	19.73
Unpaid hours per pay week:		0.08
Actionable workweeks:		7,817
Interest:		10%

Unpaid wages:	\$	13,572.88
Liquidated damages:	\$	13,572.88

Case title:	Paula Johnson v. Nan McKay & Associates, Inc.
Case no.:	CGC-20-586796
Court:	San Francisco
Judge:	Samuel K. Feng, Dept. 206
Page subject:	Unprovided Meal Periods
Authority:	Lab.Code §§ 226.7, 512, and 1198

Average Hourly Rate:	\$	19.73
Actionable workdays:		50,500
>>Percentage qualifying for meal periods:		91%
Violation rate (%)		46%

Meal period premium wages:	\$	417,078.39
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Case title:	Paula Johnson v. Nan McKay & Associates, Inc.
Case no.:	CGC-20-586796
Court:	San Francisco
Judge:	Samuel K. Feng, Dept. 206
Page subject:	Unprovided Rest Periods
Authority:	Lab.Code §§ 226.7 and 1198

Average Hourly Rate:	\$	19.73
Actionable workdays:		50,500
>>Percentage qualifying for rest periods:		98%
Violation rate (%)		46%

Rest period premium wages:	\$	449,161.34
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Case title:	Paula Johnson v. Nan McKay & Associates, Inc.
Case no.:	CGC-20-586796
Court:	San Francisco
Judge:	Samuel K. Feng, Dept. 206
Page subject:	Itemized Wage Statements
Authority:	Lab.Code § 226

Wage Statement Class Members:		255
Wage Statement Class Wage Statements:		2,337
Initial penalty:	\$	50.00
Subsequent penalty:	\$	100.00
Statutory wage statement penalties:	\$	220,991.75

Case title:	Paula Johnson v. Nan McKay & Associates, Inc.
Case no.:	CGC-20-586796
Court:	San Francisco
Judge:	Samuel K. Feng, Dept. 206
Page subject:	Waiting Time / Final Wages
Authority:	Lab.Code § 203

Waiting Time Penalties Class Members:		170
Days waiting:		30
Average Hourly Rate:	\$	19.73
Average Overtime Rate:	\$	29.60
Average Doubletime Rate:	\$	39.46
Average Work Hours Per Day:		7.66
Regular Hours Per Day:		7.66
Overtime Hours Per Day:		-
Doubletime Hours Per Day:		-
Waiting time penalties:	\$	770,772.18

Case title:	Paula Johnson v. Nan McKay & Associates, Inc.
Case no.:	CGC-20-586796
Court:	San Francisco

Judge:
Page subject:
Authority:

Samuel K. Feng, Dept. 206
PAGA Civil Penalties
Lab.Code §§ 2698, *et seq.*

Labor Code violation	Labor Code Civil	Initial penalty	Subsequent	Pay periods	Total
Minimum wages (Lab.Code § 1197):	Lab.Code § 1197	\$ 100.00	\$ 250.00	3,916 \$	391,644.00
Meal periods Lab.Code § 512):	Lab.Code § 558	\$ 50.00	\$ 100.00	3,916 \$	195,822.00
Rest periods (Lab.Code § 1198):	Lab.Code § 2699	\$ 100.00	\$ 200.00	3,916 \$	391,644.00
Vacation pay (Lab.Code § 227.3):	Lab.Code § 2699	\$ 100.00	\$ 200.00	3,916 \$	391,644.00
Improper pay stubs (Lab.Code § 226):	Lab.Code § 226.3	\$ 250.00	\$ 1,000.00	3,916 \$	979,110.00
Untimely wages (Lab.Code §§ 201-204):	Lab.Code § 2699	\$ 100.00	\$ 200.00	3,916 \$	391,644.00
Total:				\$	2,741,508.00

Case title: Paula Johnson v. Nan McKay & Associates, Inc.
Case no.: CGC-20-586796
Court: San Francisco
Judge: Samuel K. Feng, Dept. 206
Page subject: **Totals**
Authority: Various

Restitution	Reduction to	Demand
Unpaid wages:	\$ 13,572.88 90% \$	12,215.59
Liquidated damages:	\$ 13,572.88 90% \$	12,215.59
Meal period premium wages:	\$ 417,078.39 90% \$	375,370.55
Rest period premium wages:	\$ 449,161.34 90% \$	404,245.21
Restitution subtotal:	\$ 893,385.50	\$ 804,046.95

Penalties		
Statutory wage statement penalties:	\$ 220,991.75 10% \$	22,099.18
Waiting time penalties:	\$ 770,772.18 10% \$	77,077.22
Minimum wages (Lab.Code § 1197):civil penalties:	\$ 391,644.00 10% \$	39,164.40
Meal periods Lab.Code § 512):civil penalties:	\$ 195,822.00 10% \$	19,582.20
Rest periods (Lab.Code § 1198):civil penalties:	\$ 391,644.00 10% \$	39,164.40
Improper pay stubs (Lab.Code § 226):civil penalties:	\$ 979,110.00 10% \$	97,911.00
Untimely wages (Lab.Code §§ 201-204):civil penalties:	\$ 391,644.00 10% \$	39,164.40
Penalties subtotal:	\$ 3,341,627.93	\$ 334,162.79

Grand total: \$ **4,235,013.43** \$ **1,138,209.74**

0.127388535
\$ 539,492.16

EXHIBIT 7

RECORDING YOUR TIME

Non-Exempt Employees

All non-exempt employees are required to use the time clock for recording work time. Non-exempt employees should report to work no more than five minutes prior to their scheduled starting time nor stay more than five minutes after their scheduled stop time without express, prior authorization from their immediate supervisor. Non-exempt employees who punch in seven minutes or less before the beginning of their work period or punch out seven minutes or less after their work period will not be paid over time. Non-exempt employees shall not work overtime unless the authorization to work overtime has been given by their supervisor in writing. Non-exempt employees must also clock out when they start their meal period(s) and clock in when they return to work.

Regular punctuality is expected of all employees. Repeated tardiness will result in disciplinary action.

No employee is allowed to punch or tamper with any other employee's time card. Violation of these rules will result in discipline up to and including discharge.

In order to correctly allocate costs to product lines, a computer time keeping system is provided for all employees. All employees must use the computer time keeping system to record time worked on projects according to procedures as established by the Company. Employees are responsible for clocking in and out for their shifts and appropriate break times. If an employee forgets to clock in/out, they should inform their supervisor immediately. It is the responsibility of the employee to review and approve their timecard by the end of every pay period, at the deadline indicated by the payroll department. Repeated failures to complete, review, and approve timecards in a timely manner may result in disciplinary action.

Exempt Employees

In order to correctly allocate costs to product lines, a computer time keeping system is provided for exempt employees. Exempt employees must use the computer time keeping system to record time worked on projects according to the procedures as established by the Company.

Since exempt employees are paid a fixed salary that is intended to cover all of the compensation to which they are entitled, compensation is not based on hours recorded in the time keeping system. However, exempt employees are required to accurately track their time and review and approve their timecards at the end of every pay period, at the deadline indicated by the payroll department. Repeated failures to complete, review, and approve timecards in a timely manner may result in disciplinary action.

OVERTIME AND MAKE-UP TIME

Non-Exempt Employees

Due to the workload throughout the Company, your supervisor may ask you to work beyond your normal work period. Although an attempt will be made to give you advance notice where it is feasible to do so, this is not always possible.

The Company will pay non-exempt employees overtime as required by law including one-and-one-half their regular rate of pay for all hours worked over eight (8) hours in one workday, 40 hours in any single workweek and for the first eight (8) hours worked on the seventh (7th) consecutive work day in a work week. Overtime at the rate of two times the employee's regular rate of pay will be paid for all hours worked in excess of twelve (12) in one (1) work day and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive work day in a work week. The 24-hour workday shall begin and end at 12 midnight and the workweek shall begin on Sunday and end on Saturday.

You must have your supervisor's prior approval in writing before any overtime can be worked. If you work overtime without authorization, you may be subject to discipline, up to and including termination.

Sick time, holiday, and paid personal leave hours paid are not hours worked and therefore are not counted in calculating overtime. Overtime is based only on actual hours worked as required by law.

An employee may submit a written request to their supervisor to be allowed to work a shorter shift on a specific day in order to meet a personal obligation. This request may include a request for approval to make up the time off at straight pay. A supervisor may approve the request under the following conditions:

- The written request must be submitted within 4 weeks of the requested time off.
- Make up hours must be made up in the same week.
- The employee may work no more than eleven (11) hours on any single work day and no more than forty (40) hours in any single work week to make up the time off.

Exempt Employees

Exempt employees are not covered by the overtime provisions and do not receive overtime pay. Exempt employees are paid a fixed salary that is intended to cover all of the compensation to which they are entitled. Because they are exempt, such employees are not entitled to additional compensation for extra hours of work or time off in lieu of additional compensation. The Company does not maintain any compensatory time off plan or arrangement.

EXHIBIT 8

1 DAVID G. SPIVAK, State Bar # 179684

2 THE SPIVAK LAW FIRM

3 9454 Wilshire Blvd.

4 Suite 303

5 Beverly Hills, CA 90212

6 Telephone (310) 499-4730

7 Facsimile (310) 499-4739

8 Email david@spivaklaw.com

9 Attorney for Plaintiffs,

10 ALINA GHRDILYAN, EVGENIA SULTANIAN, and all others similarly situated

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

12 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

13 **(UNLIMITED JURISDICTION)**

14 ALINA GHRDILYAN; EVGENIA
15 SULTANIAN; and all others similarly situated,

16 *Plaintiffs,*

17 vs.

18 RJ FINANCIAL, INC., a California
19 corporation; RAMIL ABALKHAD, an
20 individual; and DOES 1 through 50, inclusive,

21 *Defendants.*

Case No.: BC430633

CLASS ACTION

FIRST AMENDED COMPLAINT FOR:

1. Failure To Compensate Employees For All Hours Worked;
2. Failure To Provide Rest And Meal Periods;
3. Forfeiture of Vested Vacation Benefits;
4. Failure To Provide Accurate Written Wage Statements;
5. Failure To Timely Pay All Final Wages
6. Unauthorized Deductions;
7. Failure to Indemnify;
8. Unfair Competition; And
9. Civil Penalties

Action filed: 01/28/2010
CMC: 05/10/2010, 8:30 a.m.
FSC: Not set
Trial: Not set
Dept: 36, Hon. Gregory Alarcon

22 On behalf of both himself and all other persons similarly situated, plaintiff ALINA
23 GHRDILYAN and EVGENIA SULTANIAN ("Plaintiffs") bring this action against defendants
24 RJ FINANCIAL, INC., RAMIL ABALKHAD, and the other defendants, (collectively

25
26
27
THE
SPIVAK
LAW FIRM

CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court
FEB 24 2010

John A. Clarke, Executive Officer/Clerk
BY MARY GARCIA, Deputy

1 “Defendants”) for violations of the California Labor Code, the applicable Industrial Welfare
2 Commission Order(s) (“Wage Order(s)”), and the California Business and Professions Code,
3 and as grounds therefore alleges:

4 INTRODUCTION

5 1. This action arises out of the allegedly unlawful labor practices of Defendants in
6 California. Through this class and collective action, Plaintiffs seek to represent the below-
7 defined classes and subclasses of persons who Defendants have allegedly committed labor law
8 violations against including, but not limited to, wage underpayments. As a result of the
9 allegedly unlawful labor conduct described herein, Plaintiffs now seek declaratory and
10 injunctive relief, damages, restitution, penalties, and other proper relief on behalf of himself and
11 other similarly situated persons.

12 PARTIES AND CONDUCT

13 A. Plaintiffs and Class Members

14 2. During the applicable time period, Plaintiff ALINA GHRDILYAN, an
15 individual, was employed in a position that she alleges Defendants have classified as non-
16 exempt from the overtime requirements of the California Labor Code and the applicable wage
17 order(s).

18 3. During the applicable time period, Plaintiff EVGENIA SULTANIAN, an
19 individual, was employed in a position that she alleges Defendants have classified as non-
20 exempt from the overtime requirements of the California Labor Code and the applicable wage
21 order(s).

22 4. At relevant times during the applicable limitations periods, Plaintiffs allege that
23 Defendants have failed to compensate them and Defendants’ other California employees for all
24 of the hours that they have worked, failed to compensate them for all of the overtime hours that
25 they have worked at overtime rates, failed to provide them with all required rest and meal
26 periods, failed to pay them additional required wages for rest and meal periods, improperly
27 denied earned wages that Defendants without authorization deducted from paychecks or
required reimbursement for, failed to indemnify for necessary expenditures, failed to timely pay

1 all final wages owed, caused them to forfeit vested vacation pay, and/or intentionally failed to
2 provide them with accurate written wage statements.

3 **B. Defendants**

4 5. Defendant RJ FINANCIAL, INC. is a corporation organized under the laws of
5 California. It was at all relevant times a “person” under Labor Code § 18.

6 6. Defendant RAMIL ABALKHAD (also known as Randy Abalkhad), an
7 individual residing in the County of Los Angeles, State of California, was at all relevant times
8 the chief executive officer of Defendant RJ FINANCIAL, INC. At all relevant times,
9 ABALKHAD acted on behalf of RJ FINANCIAL, INC. and oversaw RJ FINANCIAL, INC.’s
10 accounting and bookkeeping and all administrative functions, including payroll. The company
11 maintained books and records by staff members under his direction. At all relevant times,
12 ABALKHAD was a “person acting on behalf of an employer” (RJ FINANCIAL, INC. and the
13 Doe Defendants) who caused to be violated the provisions of the Labor Code regulating hours
14 and days of work in orders of the Industrial Welfare Commission as described below under
15 Labor Code § 558. Also, he was at all relevant times a “person” under Labor Code § 18.

16 7. Plaintiffs are ignorant of the true names, capacities, relationships, and extents of
17 participation in the conduct alleged herein, of the defendants sued as DOES 1-50, inclusive, but
18 are informed and believe and thereon allege that said defendants are legally responsible for the
19 wrongful conduct alleged herein and therefore sue these defendants by such fictitious names.
20 Plaintiffs will amend the complaint to allege the true names and capacities of the DOE
21 defendants when ascertained.

22 8. Plaintiffs are informed and believe and thereon allege that, at all relevant times
23 herein, all defendants were the agents, employees and/or servants, masters or employers of the
24 remaining defendants, and in doing the things hereinafter alleged, were acting within the course
25 and scope of such agency or employment, and with the approval and ratification of each of the
26 other defendants.

27 9. At all relevant times, in perpetrating the acts and omissions alleged herein,
defendants, and each of them, acted pursuant to and in furtherance of a policy and practice of

1 not paying Plaintiffs and other members of the below-described classes in accordance with
2 applicable California labor laws as alleged herein.

3 10. Plaintiffs are informed and believe and thereon allege that each and every one of
4 the acts and omissions alleged herein were performed by, and/or attributable to, all defendants,
5 each acting as agents and/or employees, and/or under the direction and control of each of the
6 other defendants, and that said acts and failures to act were within the course and scope of said
7 agency, employment and/or direction and control.

8 CLASS ACTION ALLEGATIONS

9 11. Plaintiffs incorporate paragraphs 1 through 10 of this Complaint as if fully
10 alleged herein.

11 12. Plaintiffs bring this action on behalf of themselves and all others similarly
12 situated as a class action pursuant to California Code of Civil Procedure § 382. Plaintiffs seek to
13 represent the following classes and subclasses of current, future, and/or former employees of
14 Defendants defined below:

15 **Wages Class:** All persons employed by Defendants in California who
16 have not been paid for all hours worked during the period beginning four
17 (4) years prior to the filing of this action and ending on the date that final
18 judgment is entered in this action.

19 **Overtime Class:** All persons employed by Defendants in California who
20 have not been paid at the legally required overtime rates for all hours
21 worked in excess of eight (8) hours in one (1) day and/or forty (40) hours
22 in one (1) week during the period beginning four (4) years prior to the
23 filing of this action and ending on the date that final judgment is entered in
24 this action.

25 **Rest Periods Class:** All persons employed by Defendants in California
26 who were not provided with a net rest period of at least ten (10) minutes
27 per each four (4) hour work period, or major portion thereof, during the
28 period beginning four (4) years prior to the filing of this action and ending
29 on the date that final judgment is entered in this action.

30 **Meal Periods Class:** All persons employed by Defendants in California
31 who were not provided with uninterrupted thirty (30) minute meal periods
32 during each work period of five (5) or more hours during the period
33 beginning four (4) years prior to the filing of this action and ending on the

1 date that final judgment is entered in this action.

2 **Vacation Pay Class:** All persons employed by Defendants in California
3 who earned vested paid vacation days without receiving
4 compensation for each vested paid vacation day during the
5 period beginning four (4) years prior to the filing of this action
6 and ending on the date that final judgment is entered in this
7 action.

8 **Unauthorized Deduction Class:** All persons employed by Defendants in
9 California whose wages were deducted by Defendants without statutory
10 authority or written consent during the period beginning four (4) years
11 prior to the filing of this action and ending on the date that final judgment
12 is entered in this action.

13 **Inaccurate Wage Statement Class:** All persons employed by Defendants
14 in California, including but not limited to members of the **Wages Class,**
15 **Overtime Class, Rest Period Class, Meal Period Class, and/or**
16 **Unauthorized Deduction Class** during the period beginning four (4)
17 years prior to the filing of this action and ending on the date that judgment
18 is entered in this action.

19 **Former Employee Class:** All persons employed by Defendants in
20 California, including, but not limited to, members of the **Wages Class,**
21 **Overtime Class, Rest Period Class, Meal Period Class, Unauthorized**
22 **Deduction Class, and/or Inaccurate Wage Statement Class** whose
23 employment with Defendants ended during the period beginning four (4)
24 years prior to the filing of this action and ending on the date that final
25 judgment is entered in this action, who either: a) were discharged and not
26 paid all wages owed on or before the day of termination; or b) resigned
27 without notice and were not paid all wages owed within 72 hours of
resignation; or c) resigned with 72 hours notice and were not paid all
wages owed on or before the day of quitting.

Indemnification Class: All persons employed by Defendants in
California, including, but not limited to, members of the **Wages Class,**
Overtime Class, Rest Period Class, Meal Period Class, Unauthorized
Deduction Class, and/or Inaccurate Wage Statement Class, who
Defendants failed to indemnify for all necessary expenditures incurred by
such employees in direct consequence of the discharge of their duties
during the period beginning four (4) years prior to the filing of this action
and ending on the date that final judgment is entered in this action.

UCL Class: All persons who are members of the **Wages Class, Rest**
Period Class, Meal Period Class, Overtime Class, Inaccurate Wage
Statement Class, Former Employee Class, Unauthorized Deduction

1 **Class**, and/or **Indemnification Class**, who have been employed by
2 Defendants in California at any time during the period beginning four (4)
3 years prior to the filing of this action and ending on the date that final
4 judgment is entered in this action.

5 **All-Inclusive Class**: All members of the **Wages Class**, **Overtime Class**,
6 **Rest Periods Class**, **Meal Periods Class**, **Inaccurate Wage Statement**
7 **Class**, **Unauthorized Deduction Class**, **Former Employee Class**, and/or
8 **Indemnification Class**.

9 13. This action has been brought and may be maintained as a class action pursuant to
10 California Code of Civil Procedure § 382 because there is a well-defined community of interest
11 among the persons who comprise readily ascertainable class.

12 14. Plaintiffs are unaware of any difficulties that are likely to be encountered in the
13 management of this case as a class action.

14 15. The class members are so numerous that the individual joinder of each individual
15 class member is impractical. While Plaintiffs do not currently know the exact number of class
16 members, Plaintiffs are informed and believe and thereon allege that the actual number of class
17 members exceeds the minimum number required for numerosity purposes under California law.

18 16. Common questions of law and fact exist as to all class members and predominate
19 over any questions which affect only individual class members. These questions include, but are
20 not limited to:

21 A. Do Defendants maintain policies or practices that systematically cause
22 the **Wages Class** not to be paid for all hours worked?

23 B. Have members of the **Overtime Class** been paid at the legally required
24 overtime rates for all hours worked in excess of eight (8) hours in one (1) day?

25 C. Do Defendants maintain policies or practices that systematically cause
26 the **Overtime Class** not to be paid at overtime rates for all overtime hours worked?

27 D. Did Defendants fail to provide members of the **Rest Period Class** with
all legally required rest periods in violation of California law?

 E. Did Defendants fail to provide members of the **Meal Period Class** with
all legally required meal periods in violation of California law?

 F. Did Defendants fail to pay members of the **Rest Period Class** the

1 additional wages required for rest periods that were not provided?

2 G. Did Defendants fail to pay members of the **Meal Period Class** the
3 additional wages required for meal periods that were not provided?

4 H. Did Defendants deduct wages from the paychecks of members of the
5 **Unauthorized Deduction Class** without written consent?

6 I. Did Defendants intentionally fail to provide members of the **Inaccurate**
7 **Wage Statement Class** with accurate written wage statements?

8 J. Did Defendants intentionally fail to indemnify members of the
9 **Indemnification Class** for all necessary expenditures incurred by the members of the class in
10 direct consequence of the discharge of their duties?

11 K. Are the vacation days received by members of the **Vacation Pay Class**
12 subject to forfeiture?

13 L. Did Defendants fail to timely pay **Former Employee Class** all final
14 wages owed following termination or discharge?

15 M. Are Defendants liable to members of the **Former Employee Class** for
16 continuation wages under California Labor Code § 203?

17 N. Did Defendants engage in unfair competition within the meaning of
18 California Business & Professions Code §§ 17200, *et seq.*, with respect to members of the **UCL**
19 **Class**?

20 O. Are class members entitled to prejudgment interest?

21 P. Are class members entitled to attorneys' fees?

22 17. Plaintiffs' claims are typical of the other class members' claims. Plaintiffs are
23 informed and believe and thereon allege that Defendants have a policy or practice of failing to
24 comply with the California Labor Code and the California Business and Professions Code as
25 alleged herein.

26 18. Plaintiffs will fairly and adequately represent and protect the interests of the
27 other class members. Plaintiffs have no interests adverse to the interests of the other class
members. In addition, Plaintiffs are represented by counsel experienced in wage and hour class

1 action cases.

2 19. A class action is vastly superior to other available means for fair and efficient
3 adjudication of the class members' claims and would be beneficial to the parties and the Court.
4 Class action treatment will allow a number of similarly situated persons to simultaneously and
5 efficiently prosecute their common claims in a single forum without the unnecessary duplication
6 of effort and expense that numerous individual actions would entail. In addition, the monetary
7 amounts due to many individual class members are likely to be relatively small and would thus
8 make it difficult, if not impossible, for individual class members to both seek and obtain relief.
9 Moreover, a class action will serve an important public interest by permitting class members to
10 effectively pursue the recovery of moneys owed to them. Further, a class action will prevent the
11 potential for inconsistent or contradictory judgments inherent in individual litigation.

12 **FIRST CLAIM FOR RELIEF**

13 **FAILURE TO PAY ALL EARNED HOURLY WAGES IN VIOLATION OF THE**
14 **CALIFORNIA LABOR CODE**

15 **(By Plaintiffs, the Wages Class, and the Overtime Class)**

16 20. Plaintiffs incorporate paragraphs 1 through 19 of the Complaint as if fully
17 alleged herein.

18 21. At all relevant times, Plaintiffs and the other members of the **Wages Class** and
19 the **Overtime Class** have been entitled to the protections of the California Labor Code,
20 including California Labor Code §§ 204, 510, and applicable Wage order(s). These protections
21 include the rights to be timely paid all wages earned at the legally required rates for all hours
22 worked.

23 22. California Labor Code § 510(a) requires employers to compensate employees at
24 one and one-half times their regular rates of pay for:

- 25 A. All hours worked in excess of eight hours in one workday;
26 B. All hours worked in excess of forty hours in one workweek; and,
27 C. The first eight hours worked on a seventh consecutive workday during a
workweek.

1 226.7 and 512, and Wage order 11.

2 29. Pursuant to the applicable wage order(s), Defendants are required to provide
3 Plaintiffs and the other members of the **Rest Period Class** with net rest periods of a least ten
4 (10) minutes for each four (4) hour work period, or major portion thereof, during any given
5 workday.

6 30. Pursuant to California Labor Code § 226.7, Defendants are required to pay
7 Plaintiffs and the other members of the **Rest Period Class** one (1) additional hour of wages for
8 each rest period not provided in accordance with the applicable wage order(s).

9 31. During the applicable limitations period, Defendants failed to provide Plaintiffs
10 with net rest periods of at least ten (10) minutes for every four (4) hours work period, or major
11 portion thereof, and failed to pay them the required additional wages for rest periods not
12 provided to her.

13 32. Plaintiffs are informed and believe and thereon allege that Defendants maintain a
14 policy or practice of failing to provide other members of the **Rest Period Class** with net rest
15 periods of at least ten (10) minutes for every four (4) hours worked and of failing to pay them
16 the required additional wages for rest periods not provided to them.

17 33. Pursuant to California Labor Code § 512 and Industrial Welfare Commission
18 Order 7-2001, Defendants are required to provide Plaintiffs and the other members of the **Meal**
19 **Period Class** with an uninterrupted thirty (30) minute meal period for each five (5) hour work
20 period during any given workday.

21 34. Pursuant to California Labor Code § 226.7, Defendants are required to pay
22 Plaintiffs and the other members of the **Meal Period Class** one (1) additional hour of wages for
23 each meal period not provided in accordance with Wage order 11.

24 35. During the applicable limitations period, Defendants failed to provide Plaintiff
25 with an uninterrupted thirty (30) minute meal period for each five (5) hour work period,
26 including a second uninterrupted thirty (30) minute meal period on days he worked more than
27 ten (10) hours, and failed to pay him the required additional wages for rest periods not provided
to her.

1 36. Plaintiffs are informed and believe and thereon allege that Defendants maintain a
2 policy or practice of failing to provide other members of the **Meal Period Class** with
3 uninterrupted thirty (30) minute meal periods for each five (5) hour work period, including
4 second uninterrupted thirty (30) minute meal periods on days they worked more than ten (10)
5 hours, and failed to pay him the required additional wages for meal periods not provided to her.

6 37. Plaintiffs on behalf of themselves and the other members of the **Rest Period**
7 **Class** and the **Meal Period Class**, seeks declaratory and injunctive relief, damages for unpaid
8 wages owed, interest thereon and costs of suit pursuant to California Labor Code § 218.6, and
9 reasonable attorney's fees pursuant to California Code of Civil Procedure § 1021.5.

10 **THIRD CLAIM FOR RELIEF**

11 **FORFEITURE OF VACATION PAY**

12 **(By Plaintiffs and the Vacation Pay Class)**

13 38. Plaintiffs incorporate paragraphs 1 through 37 of the Complaint as if fully
14 alleged herein.

15 39. Under California Labor Code § 227.3 and applicable case law, vested paid
16 vacation benefits and other similar forms of paid time off that earned based on labor performed
17 are considered wages and cannot be subject to forfeiture without providing compensation for
18 forfeited days at the applicable rates required by law.

19 40. Pursuant to written company policies, members of the **California Vacation Pay**
20 **Class** have earned vested paid vacation days, including, but not limited to, "Personal Holidays"
21 and/or "Management Recognition Days," that are explicitly subject to unpaid forfeiture
22 pursuant to written company policies if they are not used within specified time periods.

23 41. During the applicable limitations period, Plaintiff has earned vested paid
24 vacation days, including, but not limited to, "Personal Holidays" and "Management Recognition
25 Days," without being compensated by Defendants for each vested paid vacation day.

26 42. Plaintiff is informed and believes and thereon alleges that Defendants have
27 maintained policies or practices of causing members of the **California Vacation Pay Class** to
forfeit vested paid vacation days, including, but not limited to, "Personal Holidays" and/or

1 "Management Recognition Days," without compensating them for each vested paid vacation
2 day.

3 43. As a result of the above, Plaintiff seeks declaratory and injunctive relief,
4 damages for unpaid wages owed, interest thereon and costs of suit pursuant to California Labor
5 Code § 218.6, and reasonable attorney's fees pursuant to California Code of Civil Procedure §
6 1021.5.

7 **FOURTH CLAIM FOR RELIEF**

8 **FAILURE TO PROVIDE ACCURATE, WRITTEN WAGE STATEMENTS**

9 **(By Plaintiffs and the All-Inclusive Class)**

10 44. Plaintiffs incorporate paragraphs 1 through 43 of the Complaint as if fully
11 alleged herein.

12 45. At all relevant times, Plaintiffs and the other members of the **All-Inclusive Class**
13 have been employees of Defendants entitled to the benefits and protections of California Labor
14 Code § 226. Pursuant to California Labor Code § 226(a), Plaintiffs and the other class members
15 were entitled to receive, semimonthly or at the time of each payment of wages, an accurate
16 itemized statement showing: a) gross wages earned; b) net wages earned; c) all applicable
17 hourly rates in effect during the pay period; and d) the corresponding number of hours worked
18 at each hourly rate by the employee.

19 46. Defendants failed to provide Plaintiffs accurate itemized statements in
20 accordance with California Labor Code § 226(a) because Plaintiffs' wage statements did not,
21 among other things, accurately reflect all of the hours that they actually worked, the descriptions
22 for all of the hours they actually worked, and the corresponding rates of pay for all of the hours
23 they actually worked.

24 47. Plaintiffs are informed and believe and thereon allege that, at all relevant times
25 during the applicable limitations period, Defendants maintained a policy or practice of not
26 providing the other members of the **All-Inclusive Class** wage statements did not, among other
27 things, accurately reflect all of the hours that they actually worked, the descriptions for all of the
hours they actually worked, and the corresponding rates of pay for all of the hours they actually

1 worked.

2 48. Defendants' failure to provide Plaintiffs and the other members of the **All-**
3 **Inclusive Class** with accurate wage statements was knowing and intentional. Defendants had
4 the ability to provide Plaintiffs and the other class members with accurate wage statements but
5 intentionally provided wage statements that Defendants knew were not accurate.

6 49. As a result of being provided with inaccurate wage statements by Defendants,
7 Plaintiffs and the other members of the **All-Inclusive Class** have suffered an injury. Their legal
8 rights to receive accurate wage statements were violated and they were misled about the amount
9 of wages they had actually earned and were owed. In addition, the absence of accurate
10 information on their wage statements prevented immediate challenges to Defendants' unlawful
11 pay practices, has required discovery and mathematical computations to determine the amounts
12 of wages owed, has caused difficulty and expense in attempting to reconstruct time and pay
13 records, and/or has led to the submission of inaccurate information about wages and amounts
14 deducted from wages to state and federal government agencies.

15 50. Pursuant to California Labor Code § 226(e), Plaintiffs and the other members of
16 the **All-Inclusive Class** are entitled to recover the greater of actual damages, or penalties of fifty
17 dollars (\$50) for the initial pay period in which a violation of California Labor Code § 226(a)
18 occurred and one hundred dollars for each violation of California Labor Code § 226(a) in a
19 subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000) per
20 class member, and are also entitled to an award of costs and reasonable attorney's fees.

21 **FIFTH CAUSE OF ACTION**

22 **FAILURE TO TIMELY PAY ALL FINAL WAGES**

23 **(Cal. Lab. Code §§ 201-203)**

24 **(By Plaintiffs and the Former Employee Class)**

25 51. Plaintiffs incorporate paragraphs 1 through 50 of the Complaint as if fully
26 alleged herein.

27 52. At all relevant times, Plaintiffs and the members of the **Former Employee Class**
were employees of Defendants covered by California Labor Code § 201 or California Labor

1 Code § 202. Pursuant to California Labor Code § 201 or California Labor Code § 202, Plaintiffs
2 and the members of the **Former Employee Class** were entitled to payment of all wages earned
3 and unpaid prior to the termination of their employment. Members of the **Former Employee**
4 **Class** who are discharged employees were entitled to payment of their earned and unpaid wages
5 no later than the day on which their employment was terminated. Members of the **Former**
6 **Employee Class** who resigned were entitled to payment of their earned and unpaid wages
7 within 72 hours after giving notice of resignation or, if they had given at least 72 hours previous
8 notice, no later than the day their employment terminated.

9 53. Defendants failed to timely pay Plaintiffs all final wages earned and unpaid prior
10 to the termination of his employment with Defendants, including, but not limited to, additional
11 earned wages for rest and meal periods not provided to them, and earned wages in the forms of
12 vested paid vacation time and unlawfully deducted wages, in accordance with California Labor
13 Code § 201. Plaintiffs are informed and believe and thereon allege that, at relevant times during
14 the applicable limitations period, Defendants maintained a policy or practice of not providing
15 members of the **Former Employee Class** with a final paycheck encompassing all wages owed
16 upon termination or discharge of employment, including, but not limited to, additional earned
17 wages for rest and meal periods not provided to them, and/or earned wages in the forms of
18 vested paid vacation time and/or unlawfully deducted wages, in accordance with California
19 Labor Code § 201 or California Labor Code § 202.

20 54. Defendants' failure to pay Plaintiffs and members of the **Former Employee**
21 **Class** all wages earned prior to termination in accordance with California Labor Code § 201 or
22 California Labor Code § 202 was willful. Plaintiffs are informed and believe and thereon allege
23 that Defendants had the ability to pay all wages earned by members of the **Former Employee**
24 **Class** prior to termination in accordance with California Labor Code § 201 or California Labor
25 Code § 202, but intentionally adopted policies or practices incompatible with the requirements
26 of California Labor Code § 201 or California Labor Code § 202.

27 55. Pursuant to California Labor Code § 201 or California Labor Code § 202,
Plaintiffs and the members of the **Former Employee Class** are entitled to all wages earned

1 prior to the termination of their employment that Defendants did not pay them as well as
2 continuations of their wages, from the days they earned and unpaid wages were due upon the
3 termination of their employment until paid, up to a maximum of thirty (30) days, in amounts
4 subject to proof.

5 56. Accordingly, Plaintiffs and the members of the **Former Employee Class** are
6 entitled to recover the full amount of their unpaid wages and interest thereon pursuant to
7 California Labor Code § 218.6, continuation wages under California Labor Code § 203,
8 reasonable attorney's fees, and costs of suit.

9 **SIXTH CLAIM FOR RELIEF**

10 **UNAUTHORIZED DEDUCTIONS**

11 **(By Plaintiffs and the Unauthorized Deductions Class)**

12 57. Plaintiffs incorporate paragraphs 1 through 56 of the Complaint as if fully
13 alleged herein.

14 58. California Labor Code §§ 221 and 224 prohibit an employer from taking
15 deductions from an employee's wages without the employee's express written consent or other
16 legal authority for doing so.

17 59. At relevant times during the applicable limitations period, Defendants deducted
18 wages from Plaintiffs' paychecks without their express written consent or other legal authority
19 for doing so. Plaintiffs are informed and believe and thereon allege that, at relevant times during
20 the applicable limitations period, Defendants deducted wages from the paychecks of members
21 of the **Unauthorized Deduction Class** without their express written consent or other legal
22 authority for doing so.

23 60. By reason of the above, Plaintiffs and the members of the **Unauthorized**
24 **Deductions Class** are entitled to restitution for all unpaid amounts due and owing to within four
25 years (4) of the date of the filing of the Complaint until the date of entry of judgment. Further,
26 Plaintiffs, on behalf of themselves and the members of the **Unauthorized Deductions Class**,
27 seek interest thereon pursuant to California Labor Code § 218.6, costs pursuant to California
Labor Code § 218.6, and reasonable attorney's fees pursuant to California Code of Civil

1 Procedure § 1021.5.

2 **SEVENTH CLAIM FOR RELIEF**

3 **FAILURE TO INDEMNIFY**

4 **(By Plaintiffs and the Indemnification Class)**

5 61. Plaintiffs incorporate paragraphs 1 through 60 of the Complaint as if fully
6 alleged herein.

7 62. In pertinent part, California Labor Code § 2802(a) states, "An employer shall
8 indemnify his or her employee[s] for all necessary expenditures incurred by the employee in
9 direct consequence of the discharge of his or her duties." California Labor Code § 452 of the
10 Labor Code authorizes employers to prescribe the weight, color, quality, texture, style, form,
11 and make of uniforms required to be worn by their employees. However, the Wage Orders
12 impose an obligation on an employer that requires uniforms to be worn by its nonexempt
13 employees as a condition of employment to provide and maintain such uniforms, regardless of
14 the amount of the employees' compensation. The applicable wage order states, "When uniforms
15 are required by the employer to be worn by the employee as a condition of employment, such
16 uniforms shall be provided and maintained by the employer. The term "uniform" includes
17 wearing apparel and accessories of distinctive design or color." If the employer does not choose
18 to maintain employees' uniforms itself where it is required to do so, the Division of Labor
19 Standards Enforcement takes the position that the employer may pay each affected employee a
20 weekly maintenance allowance of an hour's pay at the state minimum wage rate (\$7.50 as of
21 January 1, 2007, and \$8.00 as of January 1, 2008) in lieu of maintaining the uniforms, assuming
22 that an hour is a realistic estimate of the time involved in maintaining the uniforms. The term
23 "uniform" is defined to include wearing apparel and accessories of distinctive design or color.

24 63. At relevant times during the applicable limitations period, Defendants required
25 Plaintiffs and the members of the **Indemnification Class** to purchase and maintain uniforms
26 and apparel unique to Defendants at their expense. Defendants failed to indemnify Plaintiffs and
27 the members of the **Indemnification Class** for such expenditures.

64. By reason of the above, Plaintiffs and the members of the **Indemnification Class**

1 are entitled to restitution for all unpaid amounts due and owing to within four years (4) of the
2 date of the filing of the Complaint until the date of entry of judgment. Further, Plaintiffs, on
3 behalf of themselves and the members of the **Indemnification Class**, seeks interest thereon
4 pursuant to California Labor Code § 218.6, costs pursuant to California Labor Code § 218.6,
5 and reasonable attorney's fees pursuant to California Code of Civil Procedure § 1021.5.

6 **EIGHTH CLAIM FOR RELIEF**

7 **UNFAIR COMPETITION**

8 **(By Plaintiffs and the California All-Inclusive Class)**

9 65. Plaintiffs incorporate paragraphs 1 through 64 of the Complaint as if fully
10 alleged herein.

11 66. The unlawful conduct of Defendants alleged herein amounts to and constitutes
12 unfair competition within the meaning of California Business & Professions Code §§ 17200, *et*
13 *seq.* California Business & Professions Code §§ 17200, *et seq.*, protects against unfair
14 competition and allows a person who has suffered an injury-in-fact and has lost money or
15 property as a result of an unfair, unlawful, or fraudulent business practice to seek restitution on
16 her own behalf and on behalf of other similarly situated persons in a class action proceeding.

17 67. As a result of Defendants' violations of the California Labor Code as during the
18 applicable limitations period as alleged herein, Plaintiffs have suffered an injury-in-fact and
19 have lost money or property in the form of earned wages. Specifically, Plaintiffs have lost
20 money or property as a result of not being paid for hours worked, not being paid at legal
21 overtime rates for all overtime hours worked, not being paid additional required wages for rest
22 and meal periods not provided to them, being provided with inaccurate written wage statements
23 that have had the effect of concealing other wage underpayments, Defendants' improper
24 deductions, and Defendants' failure to reimburse for necessary expenditures, and Defendants'
25 failure to timely pay all wages due or owed upon termination or resignation.

26 68. Plaintiffs are informed and believe that other similarly situated persons have
27 been subject to the same unlawful policies or practices of Defendants, including not being paid
for all wages earned, not being paid at overtime rates for all overtime hours worked, not being

1 paid additional required wages for rest and meal periods not provided to them, being provided
2 with inaccurate written wage statements that have had the effect of concealing other wage
3 underpayments, Defendants' improper deductions, and Defendants' failure to reimburse for
4 necessary expenditures, and/or Defendants' failure to timely pay all wages due or owed upon
5 termination or resignation.

6 69. Due to its unfair and unlawful business practices in violation of the California
7 Labor Code as alleged herein, Defendants have gained a competitive advantage over other
8 comparable companies doing business in the State of California that comply with their legal
9 obligations to compensate employees for all earned wages and to provide them with reasonable
10 means of verifying that they have been paid all earned wages with accurate written wage
11 statements.

12 70. Pursuant to California Business & Professions Code § 17203, Plaintiffs, on
13 behalf of themselves and the other members of the **All-Inclusive Class**, seek declaratory and
14 injunctive relief, and restitution of all monies rightfully belonging to them that Defendants did
15 not pay them or otherwise retained by means of its unlawful and unfair business practices.

16 71. Plaintiffs and the other members of the **All-Inclusive Class** are entitled to
17 recover reasonable attorney's fees in connection with their unfair competition claims pursuant
18 to California Code of Civil Procedure § 1021.5, the substantial benefit doctrine and/or the
19 common fund doctrine.

20 **NINTH CLAIM FOR RELIEF**

21 **CIVIL PENALTIES**

22 **(By Plaintiffs and the All-Inclusive Class)**

23 72. Plaintiffs incorporate paragraphs 1 through 71 of the Complaint as if fully
24 alleged herein.

25 73. During the applicable time period, Defendants violated California Labor Code §§
26 204, 223, 226(a), 226.7, 227.3, 510, 512, and 1194.

27 74. California Labor Code §§ 2699(a) and (g) authorize an aggrieved employee, on
behalf of himself and other current or former employees, to bring a civil action to recover civil

1 penalties pursuant to the procedures specified in California Labor Code § 2699.3.

2 75. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiffs and the other
3 aggrieved employees of Defendants are entitled to recover civil penalties for Defendants'
4 violations of California Labor Code §§ 200, 201, 202, 203, 204, 224, 226(a), 226.7, 227.3, 510,
5 512, 1194 and 2802 during the applicable limitations period in the following amounts:

6 A. For violations of California Labor Code §§ 200, 201, 202, 203, 224,
7 226.7, 1194, and 2802, one hundred dollars (\$100.00) for each aggrieved employee per pay
8 period for each initial violation and two hundred dollars (\$200.00) for each aggrieved employee
9 per pay period for each subsequent violation (penalty amounts established by California Labor
10 Code § 2699(f)(2));

11 B. For violations of California Labor Code § 204, one hundred dollars
12 (\$100.00) for each aggrieved employee for each initial violation and two hundred dollars
13 (\$200.00) for each aggrieved employee plus twenty-five percent (25%) of the amount
14 unlawfully withheld from each aggrieved employee for each subsequent, willful or intentional
15 violation (penalty amounts established by California Labor Code § 210);

16 C. For violations of California Labor Code § 226(a), two hundred fifty
17 dollars (\$250.00) per employee for initial violation and one thousand dollars (\$1,000.00) per
18 employee for each subsequent violation (penalty amounts established by California Labor Code
19 § 226.3); and,

20 D. For violations of California Labor Code §§ 510 and 512, fifty dollars
21 (\$50.00) for each aggrieved employee for each initial violation for pay period for which the
22 employee was underpaid in addition to an amount sufficient to recover unpaid wages and one
23 hundred dollars (\$100.00) for each underpaid employee for each pay period for which the
24 employee was underpaid in addition to an amount sufficient to recover unpaid wages (penalty
25 amounts established by California Labor Code § 558).

26 76. Plaintiffs have complied with the procedures for bringing suit specified in
27 California Labor Code § 2699.3. By letters dated January 8 and February 19, 2010, Plaintiffs
gave written notice by certified mail to the Labor and Workforce Development Agency

1 (“LWDA”) and Defendants of the specific provisions of the California Labor Code alleged to
2 have been violated, including the facts and theories to support the alleged violations. Plaintiffs
3 anticipate that the LWDA will soon provide Plaintiffs with written notice that it does not intend
4 to investigate the violations of the California Labor Code alleged herein.

5 77. Pursuant to California Labor Code § 2699(g), Plaintiffs and the other members of
6 the **All-Inclusive Class** are entitled to an award of reasonable attorney’s fees and costs in
7 connection with their claims for civil penalties.

8 **PRAYER FOR RELIEF**

9 78. WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly
10 situated, prays for relief and judgment against Defendants as follows:

11 A. An order that the action be certified as a class action with respect to
12 Plaintiffs’ claims for violations of California law;

13 B. An order that Plaintiffs be appointed class representatives;

14 C. An order that counsel for Plaintiffs be appointed class counsel;

15 D. Declaratory relief;

16 E. Injunctive relief;

17 F. Actual damages;

18 G. Liquidated damages;

19 H. Restitution;

20 I. Civil penalties;

21 J. Statutory penalties;

22 K. Pre-judgment interest;

23 L. Costs of suit;

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- M. Reasonable attorney's fees; and
- N. Such other relief as the Court deems just and proper.

Respectfully submitted,

THE SPIVAK LAW FIRM

Date: February 23, 2010

By:



DAVID G. SPIVAK, Attorney for
Plaintiff, ALINA GHRDILYAN,
EVGENIA SULTANIAN, and all others
similarly situated

THE
SPIVAK
LAW FIRM

EXHIBIT 9

1 CASE NUMBER: BC430633
2 CASE NAME: ALINA GHRDILYAN, ET AL., VERSUS
3 RJ FINANCIAL, ET AL.,
4 LOS ANGELES, CALIFORNIA MONDAY, APRIL 23, 2012
5 DEPARTMENT 41 HON. RONALD M. SOHIGIAN, JUDGE
6 APPEARANCES: (SEE TITLE PAGE.)
7 REPORTER: ANGELA Z. PARADELA, CSR NO. 9659
8 TIME: A.M. SESSION
9

10 (THE FOLLOWING PROCEEDINGS WERE HELD IN
11 OPEN COURT:)

12
13 THE COURT: OKAY. THANK YOU VERY MUCH. I'M GOING
14 TO ASK YOU LAWYERS TO WAIT FOR JUST A MOMENT.

15 AS YOU CAN PROBABLY TELL, FROM THE QUESTIONS
16 AND THE WAY I'VE BEEN TAKING NOTES, SO FORTH, I HAVE A CASE
17 IN MIND AND I HAVE BEEN WORKING ON IT BOTH WHILE YOU'VE BEEN
18 WITH ME AND DURING THE RECESSES LIKE WEEKENDS AND NIGHTS.
19 JUST A SECOND. I HAVE TWO MORE THINGS I HAVE TO BRING OUT.
20 I WILL DO SOME MORE WORK WITH YOU.

21 (A PAUSE IN THE PROCEEDINGS.)

22 THE COURT: OKAY. YOU PROBABLY ALREADY GOT THE
23 IMPRESSION THAT I AM A JUDGE WHO TRIES TO DOCUMENT AND SHOW
24 THE LEGAL PREMISES FOR PROCEDURAL STEPS WE TAKE, AND I INTEND
25 TO DO THAT. I JUST WANT TO TELL YOU WHAT I'M GOING TO DO
26 HERE AND I GUESS I WILL START THIS WAY.

27 I SAID I AM GOING TO BRING OUT TWO THINGS. I
28 BROUGHT OUT ONLY ONE.

1 (A PAUSE IN THE PROCEEDINGS.)

2 THE COURT: THE -- I'M GOING TO CALL YOUR ATTENTION
3 TO SOME CASES THAT HAVEN'T BEEN CITED. I'M GOING TO DEAL
4 WITH THE MERITS OF YOUR CLIENTS'S CASE. SO HERE WE GO.

5 UNDER CALIFORNIA CONSTITUTION ARTICLE VI,
6 SECTION 6 AND GOVERNMENT CODE 68070(B) AND 68603(A), THE
7 CALIFORNIA JUDICIAL COUNCIL HAS CONSTITUTIONALLY GRANTED AND
8 LEGISLATIVELY AFFIRMED POWER TO ADOPT RULES, REPORT
9 ADMINISTRATION PRACTICE AND PROCEDURE THAT ARE CONSISTENT
10 WITH STATUTES. THE CALIFORNIA RULES OF COURT HAVE THE FORCE
11 OF LAW AND BINDING AS PROCEDURAL STATUTES AS LONG AS THEY ARE
12 CONSISTENT WITH LEGISLATIVE ENACTMENTS AND CONSTITUTIONAL
13 GUARANTEES.

14 I WILL CITE YOU THREE CASES WHERE THAT POINT
15 IS MADE. THEY ARE IN RE JUAN -- THAT'S J-U-A-N -- C.,
16 (1993), 20 CALIFORNIA APPELLATE 4TH, 748, PARTICULARLY AT
17 PAGES 752 TO 753; ALICIA T. VERSUS COUNTY OF LOS ANGELES,
18 (1990), 222 CALIFORNIA APPELLATE 3D 869 AT 884, AND OATS
19 VERSUS OATS. OATS IS SPELLED O-A-T-S, (1983) 14 CALIFORNIA
20 APPELLATE 3D 416 AT 420. THIS IS HOW THE OATS VERSUS OATS
21 COURT EXPRESSED THIS VIEW.

22 RULES OF COURT HAVE THE FORCE OF POSITIVE LAW.
23 THEY ARE AS BINDING ON THIS COURT AS PROCEDURAL STATUTES
24 UNLESS THEY TRANSCEND LEGISLATIVE ENACTMENTS OR
25 CONSTITUTIONAL GUARANTEES.

26 SO THE HIERARCHY THEN WOULD BE CONSTITUTION,
27 STATUTES AND CALIFORNIA RULES OF COURT, AND THEN CASE LAW.

28 I SAY THAT BECAUSE THE CASE OF WHITTINGTON

1 VERSUS MCKINNEY -- WHITTINGTON IS SPELLED

2 W-H-I-T-I-N-G-T-O-N, VERSUS MCKINNEY, CAPITAL M, C, CAPITAL
3 K, I-N-N-E-Y, (1991), 234 CALIFORNIA APPELLATE 3D 123 --
4 CRITICIZED THE CONDUCT OF A NOW FORMER JUDGE, I BELIEVE, AT
5 THE ORANGE COUNTY SUPERIOR COURT, WHO ANNOUNCED A DECISION,
6 GAVE A STATEMENT OF DECISION ORALLY AND SAID IF YOU WANTED A
7 WRITTEN STATEMENT OF DECISION, YOU COULD MAKE REFERENCE TO
8 THE COURT TRANSCRIPT. THAT CASE, WHITTINGTON VERSUS MCKINNEY
9 WAS, AS I SAY, DECIDED IN 1991.

10 IN 2010, EFFECTIVE JANUARY 1, 2010, THE
11 CALIFORNIA RULES OF COURT WERE AMENDED WITH RESPECT TO, AMONG
12 OTHER PROVISIONS OF THE CALIFORNIA RULES OF COURT, RULE
13 3.1590 HAVING TO DO WITH ANNOUNCEMENT OF TENTATIVE DECISION
14 AND STATEMENT DECISION AND JUDGMENT.

15 THE (C) SUBSECTION OF RULE 15 -- RULE 3.1590
16 WAS AMENDED BY THE ELIMINATION OF SOME PROVISIONS AND BY
17 BEING INSERTION OF OTHER PROVISIONS. I'M GOING TO REFER TO
18 THE (C) SUBSECTION.

19 IT READS NOW, (READING:)

20 THE COURT IN ITS TENTATIVE DECISION MAY:
21 STATE THAT IT IS THE COURT'S PROPOSED
22 STATEMENT OF DECISION, SUBJECT TO A PARTY'S
23 OBJECTION UNDER SUBSECTION (G);

24 (2) INDICATE THAT THE COURT WILL PREPARE
25 A STATEMENT OF DECISION;

26 (3) ORDER A PARTY TO PREPARE A STATEMENT
27 OF DECISION; OR

28 (4) DIRECT THAT THE TENTATIVE DECISION

1 WILL BECOME THE STATEMENT OF DECISION UNLESS,
2 WITHIN 10 DAYS AFTER ANNOUNCEMENT OR SERVICE
3 OF THE TENTATIVE DECISION, A PARTY SPECIFIES
4 THOSE PRINCIPAL CONTROVERTED ISSUES AS TO
5 WHICH THE PARTY IS REQUESTING A STATEMENT OF
6 DECISION OR MAKES PROPOSALS NOT INCLUDED IN
7 THE TENTATIVE DECISION.

8 NOW, I WILL NOT USE METHOD TWO. THAT'S THE
9 COURT WILL PREPARE A STATEMENT OF DECISION. I WILL USE
10 EITHER (1), (3), OR (4) EITHER SAYING THAT THIS IS A PROPOSED
11 STATEMENT OF DECISION SUBJECT TO OBJECTIONS UNDER SUBSECTION
12 (G), OR ORDER A PARTY TO PREPARE A STATEMENT OF DECISION, OR
13 DIRECT THAT THE TENTATIVE DECISION WILL BECOME THE STATEMENT
14 OF DECISION UNLESS WITHIN TEN DAYS A PARTY SPECIFIES
15 PRINCIPAL CONTROVERTED ISSUES AS TO WHICH THE PARTY IS
16 REQUESTING A STATEMENT OF DECISION OR MAKES PROPOSALS NOT
17 INCLUDED IN THE TENTATIVE DECISION.

18 I WOULD LIKE TO HEAR FROM BOTH SIDES NOW
19 CONCERNING WHICH OF THREE ALTERNATIVES WHICH I PROPOSED THEY
20 PREFER, AND THEN I WILL MAKE THE DECISION CONCERNING THAT
21 THAT IS PROPER. LET'S START WITH THE DEFENSE. DEFENDANT?

22 MR. SABZEVAR: YOUR HONOR, I PREFER THAT THE COURT
23 ISSUES A STATEMENT OF DECISION ITSELF AND NOT LEAVE IT TO THE
24 PARTIES OR TEN DAYS.

25 THE COURT: I TOLD YOU I'M NOT GOING TO PREPARE A
26 STATEMENT OF DECISION. I'M GOING TO USE EITHER METHOD (1),
27 (3), OR (4). (1) IS THIS IS THE PROPOSED STATEMENT OF
28 DECISION SUBJECT TO OBJECTIONS UNDER (D). (3) IS ORDER A

1 PARTY TO PREPARE A STATEMENT OF DECISION; OR (4), DIRECT THAT
2 THE TENTATIVE DECISION WILL BECOME THE STATEMENT OF DECISION
3 UNLESS WITHIN TEN DAYS AFTER ANNOUNCEMENT OR SERVICE OF THE
4 TENTATIVE DECISION, THE PARTY SPECIFIES THOSE PRINCIPAL
5 CONTROVERTED ISSUES AS TO WHICH THE PARTY IS REQUESTING A
6 STATEMENT OF DECISION OR MAKES PROPOSALS NOT INCLUDED IN THE
7 TENTATIVE DECISION.

8 MR. SABZEVAR: DEFENSE PREFERENCE IS NUMBER ONE.

9 THE COURT: STATE THAT THIS IS THE COURT'S
10 STATEMENT OF DECISION SUBJECT TO A PARTY'S OBJECTION UNDER
11 (G)?

12 MR. SABZEVAR: YES, YOUR HONOR.

13 THE COURT: PLAINTIFF?

14 MR. SPIVAK: WE PREFER TO WRITE THE DECISION, YOUR
15 HONOR, ONCE THE COURT HAS MADE ITS POSITION KNOWN.

16 THE COURT: ALL RIGHT.

17 MR. SPIVAK: BY "WE" I MEAN WE BELIEVE IT SHOULD BE
18 PREVAILING PARTY.

19 THE COURT: UH-HUH. I'M GOING TO USE -- I
20 APPRECIATE -- I'M GOING TO USE METHOD (4). THIS TENTATIVE
21 DECISION WILL BECOME THE STATEMENT OF DECISION UNLESS WITHIN
22 TEN DAYS AFTER ANNOUNCEMENT, AND SO FORTH. THAT'S
23 3.1590(C)(4).

24 SO WHAT I'M GOING TO DO NOW IS ANNOUNCE A
25 TENTATIVE WHICH, AS YOU CAN SEE, IS ALSO A CONDITIONAL
26 STATEMENT OF DECISION.

27 THIS CASE CAME BEFORE ME PRESIDING IN THIS
28 DEPARTMENT 41 ON THE 10TH OF APRIL, 2012, FOR TRIAL WITHOUT

1 JURY. DAVID G. SPIVAK, STATE BAR 179684, APPEARED AS
2 ATTORNEY FOR PLAINTIFFS ALINA GHRDILYAN AND EVGENIA
3 SULTANIAN, AND F. MICHAEL SABZEVAR, STATE BAR 172312 APPEARED
4 AS ATTORNEY FOR DEFENDANT, RAMIL ABALKHAD.

5 THE CASE WAS SUBMITTED FOR DECISION TODAY, THE
6 23RD OF APRIL, 2012.

7 IN THIS CASE, TWO PLAINTIFFS CLAIM THAT
8 DEFENDANT ABALKHAD IS LIABLE TO THEM ON VARIOUS
9 EMPLOYMENT-DERIVED THEORIES INCLUDING AND ESPECIALLY FOR
10 PENALTIES AND THAT THEY CAN ENFORCE VARIOUS REMEDIES AGAINST
11 THEM UNDER THE LABOR CODE PRIVATE ATTORNEY GENERAL ACT, WHICH
12 IS AT LABOR CODE 2698, AND FOLLOWING.

13 IN OPEN COURT ON THE 10TH OF APRIL, 2012, THE
14 ATTORNEYS CONFIRMED THAT THE OPERATIVE PLEADINGS ARE THE
15 PLAINTIFFS'S FIRST AMENDED COMPLAINT, ET CETERA, FILED
16 FEBRUARY 24, 2010, AND THE DEFENDANT'S ANSWER TO THEIR FIRST
17 AMENDED COMPLAINT FILED SEPTEMBER 13, 2010. I WILL MAKE A
18 COUPLE OF QUICK COMMENTS ABOUT THOSE TWO DOCUMENTS NOW.

19 THE FULL NAME OF THE PLAINTIFFS'S OPERATIVE
20 PLEADING IS FIRST AMENDED COMPLAINT FOR -- AND THEN THERE ARE
21 NINE THEORIES LISTED: FAILURE TO COMPENSATE EMPLOYEES FOR
22 ALL HOURS WORKED; NUMBER TWO IS FAILURE TO PROVIDE BOTH REST
23 AND MEAL PERIODS; NUMBER THREE IS FORFEITURE OF VESTED
24 VACATION BENEFITS; NUMBER FOUR IS FAILURE TO PROVIDE ACCURATE
25 WRITTEN WAGE STATEMENTS; NUMBER FIVE IS FAILURE TO TIMELY PAY
26 ALL FINAL WAGES; NUMBER SIX IS UNAUTHORIZED DEDUCTIONS;
27 NUMBER SEVEN IS FAILURE TO INDEMNIFY; NUMBER EIGHT IS UNFAIR
28 COMPETITION; AND NUMBER NINE IS CIVIL PENALTIES.

1 THE DEFENDANT'S ANSWER TO THE FIRST AMENDED
2 COMPLAINT WAS ON A JUDICIAL COUNCIL FORM PLEADING.

3 INSOFAR AS IT'S PERTINENT TO THIS PORTION OF
4 MY ANALYSIS, LABOR CODE 2699 READS, (READING:)

5 SUBSECTION (A), NOTWITHSTANDING ANY OTHER
6 PROVISION OF LAW, ANY PROVISION OF THIS CODE
7 THAT PROVIDES FOR A CIVIL PENALTY TO BE
8 ASSESSED AND COLLECTED BY THE LABOR AND
9 WORKFORCE DEVELOPMENT AGENCY OR ANY OF ITS
10 DEPARTMENTS, DIVISIONS, COMMISSIONS, BOARDS,
11 AGENCIES, OR EMPLOYEES FOR A VIOLATION OF THIS
12 CODE MAY, AS AN ALTERNATIVE, BE RECOVERED
13 THROUGH A CIVIL ACTION BROUGHT BY AN AGGRIEVED
14 EMPLOYEE ON BEHALF OF HIMSELF OR HERSELF AND
15 OTHER CURRENT OR FORMER EMPLOYEES PURSUANT TO
16 THE PROCEDURES SPECIFIED IN SECTION 2699.3.

17 THE PLAINTIFFS HAD ORIGINALLY DENOMINATED THIS
18 CASE AS A CLASS ACTION AND THEY CONTINUED THAT DESIGNATION
19 THROUGH VARIOUS OTHER FILINGS, BUT THEY HAVE NEVER OBTAINED
20 AN ORDER CERTIFYING THE CLASS. THEY CLAIM, THOUGH, THAT THEY
21 ARE ENTITLED TO PROCEED ON BEHALF OF OTHERS PURSUANT TO THE
22 CALIFORNIA LABOR CODE PRIVATE ATTORNEY GENERAL ACT AS TO
23 DEFENDANT ABALKHAD.

24 THE PLAINTIFFS HAD TRIED THIS CASE BEFORE ME
25 SOLELY AS TO CAUSE OF ACTION NINE. THEY CONCEDE THAT THIS
26 CASE IS STAYED IN THIS COURT IN PART BECAUSE OF THE FACT THAT
27 DEFENDANT RJ FINANCIAL, INC., ORIGINALLY THE ONLY NAMED
28 DEFENDANT, BUT BY VIRTUE OF THE FIRST AMENDED PLEADING, A

1 CODEFENDANT, THAT CORPORATION IS A DEBTOR IN CHAPTER 11
2 PROCEEDING, WHICH IS STILL PENDING.

3 PURSUANT TO 11 U.S.C. 362, THIS CASE WOULD BE
4 STAYED AS TO THAT PARTY. BUT MR. ABALKHAD HAS NOT BEEN SHOWN
5 TO BE A DEBTOR IN A BANKRUPTCY PROCEEDING AND DURING CLOSING
6 ARGUMENT OF THE 17TH OF APRIL, 2012, MR. SPIVAK CONFIRMED HIS
7 CLIENTS HAVE CLAIMS PENDING IN THE BANKRUPTCY CASE. THAT
8 WILL MEAN THAT THE CASE CAN PROCEED AND HAS PROCEEDED ON THE
9 BASIS PLEADED AGAINST MR. ABALKHAD AS AN INDIVIDUAL.

10 ALTHOUGH BECAUSE OF 11 U.S.C. 362, IT IS STAYED AS TO THE
11 CORPORATION.

12 THE PERSONS WHO GAVE TESTIMONY AT THE TRIAL
13 WERE JOSEPH HARSANY, H-A-R-S-A-N-Y, AN EMPLOYEE OF PAYROLL
14 CHECK WRITING SERVICE USED BY THE DEFENDANTS; BREK OYAMA --
15 BREK IS SPELLED B-R-E-K; AND OYAMA IS O-Y-A-M-A, MR. SPIVAK'S
16 PARALEGAL; RAMIL ABALKHAD, ONE OF THE DEFENDANTS, THE
17 PRESIDENT AND CHIEF EXECUTIVE OFFICER OF DEFENDANT RJ
18 FINANCIAL AND, INDEED, THAT -- APPARENTLY THAT COMPANY'S ONLY
19 OFFICER AND ONLY DIRECTOR. THE FOURTH WITNESS WAS ALINA
20 GHRDILYAN, ONE OF THE PLAINTIFFS, AND THE FIFTH WAS EVGENIA
21 SULTANIAN, ONE OF THE PLAINTIFFS, THE OTHER PLAINTIFF.

22 I'M GOING TO REFER TO THE LABOR CODE PRIVATE
23 ATTORNEY GENERAL ACT IN THE WAY THE ATTORNEYS HAVE -- IT
24 SEEMS TO ME TO BE SERVICEABLE -- AND I'M GOING TO REFER --
25 I'M GOING TO USE THE ACRONYM PAGA, P-A-G-A.

26 PAGA ACTIONS DO NOT HAVE BEEN MAINTAINED AS
27 CLASS ACTIONS. THEY CAN BE, BUT THEY ARE NOT REQUIRED TO BE.
28 THE AUTHORITY ON THAT IS ARIAS VERSUS SUPERIOR COURT, (2009),

1 46 CALIFORNIA 4TH, 969, 981 TO 982.

2 WE WILL GO INTO RECESS NOW. COME BACK AT
3 1:30, PLEASE.

4 (AT 11:58 A.M., A LUNCH RECESS WAS TAKEN.)

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1 (THE FOLLOWING PROCEEDINGS WERE HELD AT 1:47 P.M.)
2 THE COURT: NOW, WE WILL GO BACK TO THE GHRDILYAN
3 AGAINST RJ CASE.

4 OKAY. WHEN WE LEFT, I HAD, I THINK, TALKED
5 ABOUT SOME GENERAL POINTS OF LAW HAVING TO DO WITH PAGA
6 ACTIONS, AND I WILL JUST OVERLAP SLIGHTLY.

7 I WAS SAYING THAT PAGA ACTIONS DO NOT HAVE TO
8 BE HAVE MAINTAINED AS CLASS ACTIONS. THEY CAN BE, BUT ARE
9 NOT REQUIRED TO BE. AND ONE OF AUTHORITIES ON THAT IS ARIAS,
10 A-R-I-A-S, VERSUS SUPERIOR COURT, (2009) 46 CALIFORNIA 4TH
11 969 FROM PAGES 981 TO 982. PAGA IS NOT THE EMPLOYEE'S
12 EXCLUSIVE REMEDY. THEY MAY SEPARATELY OR CONCURRENTLY SEEK
13 OTHER REMEDIES. LABOR CODE 2699(G) AND CALIBER BODY WORKS
14 VERSUS SUPERIOR COURT, (2005) 134 CALIFORNIA APPELLATE 4TH
15 365 AT 375.

16 THE KINDS OF PENALTIES THAT PAGA PLAINTIFFS
17 CAN SEEK TO RECOVER, ASSUMING THAT THE FACTS SUPPORT IT, ARE
18 THOSE FOR FAILURE TO PAY STATUTORILY PRESCRIBED WAGES --
19 THAT'S LABOR CODE 210 -- UNLAWFULLY WITHHELD WAGES -- THAT'S
20 LABOR CODE 225.5 -- OR FOR VIOLATING, FOR EXAMPLE, AN
21 INDUSTRIAL WELFARE COMMISSION ORDER -- THAT'S LABOR CODE 558.
22 AN AGGRIEVED EMPLOYEE -- THAT WOULD MEAN ANYONE EMPLOYED BY
23 THE ALLEGED VIOLATOR AND AGAINST WHOM ONE OR MORE VIOLATIONS
24 WAS COMMITTED -- AND I PICKED UP THAT DEFINITION FROM LABOR
25 CODE 2699(C) AND FROM THE COMMENTS IN AMALGAMATED TRANSIT
26 UNION VERSUS SUPERIOR COURT, (2009) 46 CALIFORNIA 4TH 993 AT
27 1004 TO 1005 -- AN AGGRIEVED EMPLOYEE CAN SUE TO RECOVER
28 CIVIL PENALTIES FOR VIOLATIONS OF THE LABOR CODE ON BEHALF OF

1 HIMSELF, OR HERSELF, AND OTHER CURRENT OR FORMER EMPLOYEES
2 AGAINST WHOM ONE OR MORE OF THE ALLEGED VIOLATIONS WAS
3 COMMITTED. THAT'S LABOR CODE 2699(G)(1).

4 THE ATTORNEYS HAVE FROM TIME TO TIME REFERRED
5 TO WHAT THEY HAVE CALLED THE BRINKER CASE.

6 NOW, WHAT THEY ARE REFERRING TO IS THE CASE
7 ENTITLED BRINKER RESTAURANT CORPORATION VERSUS SUPERIOR
8 COURT, REAL PARTY IN INTEREST, HOHNBAUM H-O-H-N-B-A-U-M. THE
9 VERSION OF THAT THAT I HAVE USED IN MY ANALYSIS AND
10 PREPARATION IS THE VERSION THAT WAS PRINTED AT 2012 DAILY
11 JOURNAL, DAILY APPELLATE REPORT, PAGE 4615, AND FOLLOWING.

12 I HAVE BEEN REQUIRED TO EVALUATE THE TESTIMONY
13 OF THE PARTY WITNESSES IN THIS CASE, THAT IS, MS. GHRDILYAN,
14 MS. SULTANIAN, AND MR. ABALKHAD WITH SOME CAUTION AND
15 RESERVATIONS. THOSE THREE PERSONS IN THEIR CAPACITIES AS
16 WITNESSES ARGUED AND WRANGLLED WITH THE QUESTIONERS DURING
17 TRIAL, AND SOME OF THAT WAS PROVOKED BY THE QUESTIONERS; SOME
18 OF IT WAS NOT. THAT BECOMES AN IMPORTANT FACTOR IN
19 EVALUATING RELATIVE CREDIBILITIES UNDER EVIDENCE CODE 780(A).
20 THOSE THREE PARTIES ALL HAVE AN INTEREST, BIAS, AND OTHER
21 MOTIVE FOR SLANTING THEIR TESTIMONY, OBVIOUSLY, AND THAT
22 BECOMES SIGNIFICANT UNDER EVIDENCE CODE 780(F) AND EVIDENCE
23 CODE 780(J).

24 MR. ABALKHAD HAS SUFFERED FELONY CONVICTIONS
25 ON HIS PLEA OF NOLO CONTENDERE AS TO PERJURY AND TAX EVASION
26 AND DID NOT OWN UP TO THAT COMPLETELY IN DISCOVERY. THAT'S
27 EVIDENCE -- THAT BECOMES PERTINENT UNDER EVIDENCE CODE 780(E)
28 AND EVIDENCE CODE 780(H), AND EVIDENCE CODE 780(I) AND IS

1 COMMENTED ON IN THE CASE OF RUSHEEN, R-U-S-H-E-E-N, VERSUS
2 DREWS, D-R-E-W-S, (2002) 99 CALIFORNIA APPELLATE 4TH 279 AT
3 PAGES 283 TO 284.

4 ASPECTS OF THE TESTIMONY OF THESE WITNESSES,
5 THESE THREE PEOPLE AS WITNESSES, WERE EXAGGERATED AND
6 OVERSTATED. THAT BECOMES PERTINENT UNDER EVIDENCE CODE
7 780(B).

8 FURTHERMORE, EVIDENCE CODE SECTION 412
9 PROVIDES THAT IF WEAKER AND LESS SATISFACTORY EVIDENCE IS
10 OFFERED WHEN IT WAS IN -- WHEN IT WAS WITHIN THE POWER OF THE
11 PARTY TO PRODUCE STRONGER AND MORE SATISFACTORY EVIDENCE, THE
12 EVIDENCE ACTUALLY OFFERED SHOULD BE VIEWED WITH DISTRUST.
13 THIS, OF COURSE, IS A PERMISSIBLE INFERENCE AND NOT A
14 MANDATORY ONE, BUT THIS COURT HAS, AS THE LAW INDICATES,
15 TAKEN THIS INTO CONSIDERATION.

16 BUT ALL THAT HAVING BEEN SAID, THE COURT DOES
17 NOT ACCEPT MR. SABZEVAR'S INVITATION TO REJECT THE ENTIRETY
18 OF THE PLAINTIFFS'S TESTIMONY. INSTEAD, THIS COURT HAS HAD
19 TO ACCEPT THE PART OF THE TESTIMONY OF THE WITNESSES WHICH
20 THIS COURT FOUND -- HAS FOUND TO BELIEVE TRUE AND -- AND WILL
21 REJECT THE REST. THIS IS PRECISELY WHAT THE COURT -- PARDON
22 ME -- IS AUTHORIZED TO DO OR ANY FINDER OF FACT WOULD BE
23 AUTHORIZED TO DO. ONE MODEL FOR THAT IS CACI INSTRUCTION
24 107, FOURTH PARAGRAPH.

25 THE DATES INVOLVED IN THIS CASE -- AND THE
26 DATES BECOME SIGNIFICANT -- ARE AS FOLLOWS. MS. SULTANIAN
27 WAS HIRED ON -- IN NOVEMBER, 2007, AND WAS FIRED ON NOVEMBER
28 19, 2009. MS. GHRDILYAN WAS HIRED IN AUGUST, 2008, AND WAS

1 FIRED ON DECEMBER 3, 2009. ONE OF THE QUESTIONS WHICH I HAVE
2 BEEN CALLED UPON TO ANSWER IS WHETHER MR. ABALKHAD AS AN
3 INDIVIDUAL WAS AN EMPLOYER OF PLAINTIFFS AND -- UNDER WAGE
4 ORDER 7. I FIND THAT HE WAS NOT. BUT I FIND THAT THE
5 THEORIES OF LIABILITY UNDER -- I SHOULD BACK OFF. BUT I FIND
6 THAT THE OTHER BASES FOR ASSERTING LIABILITY ON THE PART OF
7 MR. ABALKHAD DO HAVE MERIT, AND LIABILITY DOES ATTACH TO HIM
8 UNDER THOSE THEORIES.

9 THE THEORIES I'M REFERRING TO ARE LABOR CODE
10 558 TO WHICH LABOR CODE 510 AND 512 ARE APPENDED OR INCLUDED
11 SUBSTANTIVE PROVISIONS AND LABOR CODE 1197.1 TO WHICH THE
12 SUBSTANTIVE PROVISIONS OF LABOR CODE 1198 AND THE WAGE ORDER
13 ARE ASSOCIATED THEORIES OF LIABILITY.

14 IN OTHER WORDS, I AM FINDING THAT UNDER 558
15 LABOR CODE AND 1197.1 LABOR CODE FOR THE SUBSTANTIVE REASONS
16 REFERRED TO IN THE OTHER TWO SOURCES AS TO EACH OF THOSE
17 SECTIONS, THAT IS 510 AND 512 LABOR CODE, AND 1193 AND WAGE
18 ORDER, LIABILITY CAN ATTACH TO MR. ABALKHAD AND UNDER THE
19 CIRCUMSTANCES OF THIS CASE, WILL ATTACH.

20 I'M GOING TO MAKE A FINDING ON THAT, AS YOU
21 WILL SEE, IN FAVOR OF -- PARDON ME -- OF THE PLAINTIFFS'S
22 POSITION.

23 NOW, I SAY IN FAVOR OF THE PLAINTIFFS'S
24 POSITION BECAUSE THAT MEANS NOT JUST IN FAVOR OF THE
25 PLAINTIFFS BUT SINCE WE HAVE A PAGA ACTION, I AM REFERRING TO
26 THE PLAINTIFFS'S POSITION.

27 NOW -- PARDON ME. I WILL SAY THIS.

28 AS YOU CAN TELL, I AM AT SOME PAINS TO GO

1 THROUGH THE LEGAL REASONING AND STEPS PREPARATORY TO REACHING
2 A DECISION IN THIS CASE WITH SOME CARE BECAUSE IT MAY VERY
3 WELL BE THAT THIS CASE WILL REACH ITS WAY INTO THE APPELLATE
4 COURTS AND THAT IT IS ALSO POSSIBLE THAT THE APPELLATE COURTS
5 MAY DECIDE THIS CASE IN A PUBLISHED OPINION, AND I WILL SAY
6 THAT THE DETERMINATION I HAVE MADE ABOUT ABALKHAD AS AN
7 EMPLOYER -- I SAID THAT HE'S NOT -- OR ABALKHAD AS A
8 POTENTIALLY LIABLE PARTY UNDER LIABILITY-ENHANCING STATUTES
9 OTHER THAN LABOR CODE 558 AND LABOR CODE 1197.1, THAT IS, THE
10 ABALKHAD-FAVORING DETERMINATIONS I HAVE MADE ON THOSE POINTS,
11 ARE NOT BEYOND REASONABLE ARGUMENT.

12 MY DECISION IS, AS I HAVE EXPRESSED IT, AND I
13 BELIEVE THAT I AM CORRECT -- BUT I -- BUT I DO RECOGNIZE THAT
14 THERE ARE ARGUMENTS THAT CAN BE MADE -- AND THEY HAVE BEEN
15 MADE HERE IN THIS COURTROOM -- ON THOSE POINTS.

16 I HAVE COMPARED THE EMPLOYEE HANDBOOKS,
17 EXHIBIT 3 AND EXHIBIT D. IT APPEARS TO ME THAT EXHIBIT D
18 FROM THE EVIDENCE IN THIS CASE WAS NOT SUPPLIED BY ABALKHAD
19 DURING THE DISCOVERY PHASE OF THIS CASE. THE PARTICULAR
20 PROVISIONS THAT I AM DEALING WITH ARE THOSE HAVING TO DO WITH
21 OVERTIME AND LUNCH AND EXHIBIT 3 IS COMMENTED ON BY THE
22 PLAINTIFFS AS BEING DEFICIENT BECAUSE THEY SAY THAT A LUNCH
23 PERIOD MUST BE PROVIDED AFTER FIVE HOURS OF WORK, NOT SIX
24 HOURS OF WORK, AND THE PLAINTIFFS'S POSITION IS THAT THAT WAS
25 THE ONLY PERTINENT EMPLOYEE HANDBOOK.

26 I THINK THE PLAINTIFFS ARE RIGHT AS TO BOTH
27 THOSE CONTENTIONS. EXHIBIT 3 BEARS THE DATE OF JANUARY,
28 2003. PLAINTIFFS ADMIT THAT THIS IS THE CORRECT DATE. THAT

1 IS, IT SEEMS TO ME, THE OPERATIVE EMPLOYEE HANDBOOK. EXHIBIT
2 D WHICH HAS DIFFERENT PROVISIONS IN IT CONCERNING THE SAME
3 TOPICS WAS, IN MY VIEW, FIRST NOT PRODUCED DURING DISCOVERY;
4 SECOND, A WRITING THAT CAME INTO EXISTENCE IN AUGUST, 2010,
5 SUBSTANTIAL PERIOD OF TIME AFTER THE PLAINTIFFS HAD ALREADY
6 HAD THEIR EMPLOYMENT TERMINATED AND INDEED AUGUST, 2010, IS
7 EVEN AFTER THE PRESENT SUIT WAS FILED. THIS CAN BE SEEN FROM
8 EXHIBIT D PAGE 17, SECOND FULL PARAGRAPH.

9 AS I HAVE SAID, THIS SUIT WAS FILED ON THE
10 28TH OF JANUARY, 2010.

11 ONE OF THE COMPLICATING FACTORS IN THIS
12 CASE -- AND THE LAWYERS HAVE RECOGNIZED IT, AND IT'S OBVIOUS
13 TO ANYONE WITH ANY LEGAL EXPERIENCE -- IS THAT ALTHOUGH THE
14 LAWSUIT ORIGINALLY NAMED RJ FINANCIAL, INC., THAT DEFENDANT
15 IS A DEBTOR IN A CHAPTER 11 BANKRUPTCY. AS I HAVE SAID, THE
16 CASE IS OBVIOUSLY STAYED AS TO THAT PARTY, BUT THE PLAINTIFFS
17 HAVE HAD TO REORGANIZE THEIR CASE TO PRESS IT AGAINST
18 MR. ABALKHAD WHO IS NOT IN BANKRUPTCY AND IT SEEMS TO ME THEY
19 HAVE DONE SO SUCCESSFULLY.

20 THERE IS NO SERIOUS QUESTION BETWEEN THE SIDES
21 CONCERNING THE FOLLOWING PROPOSITIONS OF LAW. AN EMPLOYEE IS
22 ENTITLED TO OVERTIME COMPENSATION FOR WORK IN EXCESS OF EIGHT
23 HOURS IN ONE WORKDAY, FOR WORKING IN EXCESS OF 40 HOURS IN
24 ONE WORKWEEK, AND FOR WORK ON THE SEVENTH DAY IN ONE WORK
25 WEEK. THE OVERTIME COMPENSATION DIFFERS, BUT THOSE ARE
26 OVERTIME ITEMS.

27 IT IS ALSO TRUE -- BY THE WAY, THIS IS
28 PROVIDED FOR UNDER LABOR CODE 510(A). IT'S ALSO TRUE THAT

1 EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES WHO ARE
2 SPECIFICALLY EXEMPTED BY THE CALIFORNIA INDUSTRIAL WELFARE
3 AND COMMISSION ARE EXEMPT FROM THE HOURS WORKED AND DAYS
4 WORKED PER WEEK LIMITATIONS AS PROVIDED FOR IN LABOR CODE 515
5 BUT -- PARDON ME -- THE PLAINTIFFS IN THIS CASE DO NOT FALL
6 INTO THAT EXEMPTED CATEGORY AND INDEED THE DEFENDANT DOES NOT
7 CLAIM THAT THEY DO.

8 FOR THE REASONS THAT I HAVE MENTIONED EARLIER
9 ABOUT THE RESERVATIONS WITH WHICH THE TESTIMONY OF THE
10 WITNESSES HAVE TO BE INTERPRETED WITH, I DO NOT ATTEMPT TO
11 SUMMARIZE ALL THE TESTIMONY OF ALL THE WITNESSES.

12 IT IS ALSO TRUE THAT SUCCESSFUL EMPLOYEE
13 PLAINTIFFS WHO ARE AWARDED UNPAID OVERTIME ARE ENTITLED TO
14 INTEREST ACCRUING FROM THE DATE ON WHICH THE RIGHT TO RECOVER
15 THEIR OVERTIME VESTS. THIS WOULD BE ON THE MODEL INDICATED
16 IN CIVIL CODE 3287(A) COMPUTED TO THE DATE OF ENTRY OF
17 JUDGMENT. THIS IS LABOR CODE 1194(A), AND IT'S ALSO
18 DISCUSSED IN ESPINOSA VERSUS CLASSIC PIZZA, WHICH IS A CASE
19 THAT APPEARS IN 114 CALIFORNIA APPELLATE 4TH. THE PARTICULAR
20 PASSAGE THAT I'M MAKING REFERENCE TO IS AT PAGE 975.

21 THE TERM "WILLFUL" UNDER THE LABOR CODE --
22 THIS APPEARS IN LABOR CODE 203 -- IT MEANS ONLY THAT AN
23 EMPLOYER INTENTIONALLY FAILED OR REFUSED TO PERFORM AN ACT
24 THAT WAS REQUIRED TO BE DONE. THAT POINT IS MADE IN BARNHILL
25 VERSUS ROBERT SAUNDERS & COMPANY, (1981) 125 CALIFORNIA
26 APPELLATE 3D 1 AT PAGES 7 AND 8.

27 OBVIOUSLY, IN THE CURRENT CASE, UNLIKE THE
28 SITUATION IN BARNHILL, THERE'S NO EVIDENCE OF OFFSET. I'M

1 CITING BARNHILL JUST FOR THE PURPOSE OF THE DEFINITION OF THE
2 WORD "WILLFUL."

3 I WILL MAKE A COUPLE OF OTHER POINTS.

4 I RECOGNIZE THE INTENSITY WITH WHICH THE
5 DEFENSE HAS MAINTAINED THAT THIS IS A CASE DRIVEN BY
6 ATTORNEYS AND ATTORNEY'S FEES ON THE PLAINTIFFS'S SIDE. FOR
7 THE REASONS THAT I HAVE MENTIONED PREVIOUSLY, THAT IS, THAT
8 ONE OF THE PURPOSES OF PAGA IS PRECISELY TO INCENTIVIZE
9 ATTORNEYS TO -- TO FILE AND TO PROSECUTE SUCH CASES -- THAT
10 ARGUMENT EXISTS AND IT DOES HAVE A CERTAIN AMOUNT OF
11 OCCURRENCE, BUT I DO NOT REGARD IT AS BEING A STRONG
12 ARGUMENT. IT IS THE PURPOSE OF THE LAW PRECISELY TO PROVIDE
13 AN INCENTIVE FOR ATTORNEYS WHO MIGHT OTHERWISE BE UNABLE TO
14 HANDLE CASES OF THIS TYPE TO BE ABLE TO HANDLE CASES OF THIS
15 TYPE.

16 I WILL SAY THAT APPLICATIONS FOR ATTORNEYS'S
17 FEES, IF ANYBODY CLAIMS ENTITLEMENT TO ANY, CAN BE MADE BY
18 POST-JUDGMENT MOTION FOR ALLOWANCE OF ATTORNEY'S FEES AS
19 PARTS OF COSTS UNDER CIVIL CODE 1717(A), IF THAT'S WHAT
20 APPLIES, OR UNDER THE CORRESPONDING STATUTE IN THE LABOR
21 CODE. AND THE METHOD OF MAKING A POST-JUDGMENT MOTION FOR
22 ALLOWANCE IS REFERRED TO IN SUCH CASES AS ALLSTATE INSURANCE
23 VERSUS LEW, (1996) 46 CALIFORNIA APPELLATE 4TH 174 -- 1794 AT
24 1797, AND BANKES VERSUS LUCAS -- BANKES IS SPELLED
25 B-A-N-K-E-S, VERSUS LUCAS -- (1992) 9 CALIFORNIA --
26 9 CALIFORNIA APPELLATE 4TH, 365 AT 370.

27 I CITE THOSE TWO CASES NOT FOR THE PROPOSITION
28 THAT THEY APPLY IN LABOR CASES OR THAT THEY ARE DISPOSITIVE

1 ON THE ISSUE OF THE AMOUNT OF LEGAL FEES BUT JUST TO SHOW
2 THAT THAT IS AN APPROPRIATE TIME TO MAKE APPLICATIONS FOR
3 FEES.

4 IN THE PREMISES OF THIS CASE, THOUGH, FOR
5 REASONS THAT I WILL EXPLAIN IN JUST A SECOND, THE APPLICATION
6 FOR ATTORNEY'S FEES, IF THERE IS GOING TO BE ONE ON THE PART
7 OF THE PLAINTIFFS'S ATTORNEY, SHOULD BE, IT SEEMS TO ME, MADE
8 AFTER DISTRIBUTION OF ALL THE FUNDS THAT WILL BE DISTRIBUTED
9 UNDER MY AWARD WHICH I'M GOING TO MAKE UNDER PAGA SO THAT WE
10 DON'T HAVE THE SITUATION WHERE THE ATTORNEY IS PAID,
11 PLAINTIFFS'S ATTORNEY IS PAID FIRST OR SEEKS PAYMENT FIRST
12 WITHOUT ALSO DOING ALL THE, IT SEEMS TO ME, RATHER LABORIOUS
13 WORK THAT'S GOING TO BE REQUIRED UNDER PAGA, AND IT'S 25
14 PERCENT, 75 PERCENT SHARING ARRANGEMENT WITH THE PLAINTIFFS
15 TO GET 25 PERCENT AND WITH THE STATE OF CALIFORNIA TO GET THE
16 75 PERCENT.

17 SO I'M GOING TO TREAT THAT ASPECT OF THIS CASE
18 AS CALLING FOR ATTORNEY FEE MOTIONS, IF ANY ARE TO BE MADE,
19 AT A TIME AFTER THAT STEP OF CONCURSUS OF CLAIMS AND
20 DISTRIBUTION OF FUNDS HAS EITHER BEEN COMPLETELY FINISHED OR
21 HAS BEEN FINISHED WITH THE EXCEPTION OF A FEW SMALL
22 MINISTERIAL ACTS.

23 PARDON ME.

24 WITH RESPECT TO THE -- TO THE REMEDIES, IT
25 SEEMS TO ME THAT THE EVIDENCE STRONGLY SUPPORTS THE
26 PLAINTIFFS'S ARGUMENTS AS TO WHAT I WILL CALL THE 558-510-512
27 THEORY AND THE 1197.1-1198-WORK ORDER THEORY.

28 I THINK THAT THE EVIDENCE ESTABLISHES

1 VIOLATIONS OF THOSE SUBSTANTIVE PROVISIONS AND THAT THE
2 EVIDENCE ESTABLISHES A RIGHT TO RECOVER ON BEHALF OF THE
3 PAGA-AGGRIEVED EMPLOYEES AND ON BEHALF OF THE PLAINTIFFS BUT
4 IN AMOUNTS THAT ARE DIFFERENT FROM THOSE -- THE THEORIES ARE
5 THOSE ADVOCATED BY MR. SPIVAK AND HIS CLIENTS. THE AMOUNTS
6 ARE AMOUNTS THAT I AM GOING TO ALTER, THOUGH, AS WILL BE
7 CLEAR.

8 WITH RESPECT TO THE GHRDILYAN 558-510-512
9 LABOR CODE RECOVERY, I AM GOING TO AWARD \$7,654.60 -- THAT'S
10 EXACTLY AS CALCULATED BY MR. SPIVAK AND THOSE ARE -- THAT'S
11 IN FAVOR OF MS. GHRDILYAN AND AGAINST MR. ABALKHAD.

12 WITH RESPECT TO THE 1197.1 THEORY, WITH 1198
13 AND WORK ORDER BEING THE SUBSTANTIVE BASES, I AGREE WITH
14 MR. SPIVAK THAT MS. GHRDILYAN'S RECOVERY SHOULD BE \$14,218
15 AND THAT COMES OUT TO A TOTAL OF 21,872.60 FOR GHRDILYAN.

16 WITH RESPECT TO SULTANIAN, MY DETERMINATION IS
17 THAT REGARDING THE LABOR CODE 558-510-512 THEORY,
18 MS. SULTANIAN IS ENTITLED TO RECOVERY AGAINST MR. ABALKHAD OF
19 \$5,264.19, AND WITH RESPECT TO HER THEORY UNDER 1197.1 LABOR
20 CODE, MS. SULTANIAN IS ENTITLED TO RECOVER AGAINST
21 MR. ABALKHAD \$13,936.50. TOTAL IS \$19,200.69, AND THAT'S THE
22 AMOUNT THAT SULTANIAN IS ENTITLED TO RECOVER ON HER ACCOUNT
23 AGAINST MR. ABALKHAD.

24 THIS NOW BRINGS US TO THE AWARD IN FAVOR OF
25 THE SO-CALLED AGGRIEVED EMPLOYEES.

26 MY DETERMINATION IS THAT THE AGGRIEVED
27 EMPLOYEES'S CLAIMS ARE VALID AND MERITORIOUS CLAIMS; THAT
28 THEY CAN BE AND HAVE BEEN VALIDLY ASSERTED BY, PROSECUTED BY

1 THE TWO PLAINTIFFS IN OUR CASE.

2 I AM GOING, HOWEVER, NOT TO ACCEPT THE DOLLAR
3 FIGURES IN THE ULTIMATE SENSE THAT MR. SPIVAK AND HIS CLIENTS
4 HAVE ADVOCATED. IN DOING THIS, I AM GOING TO SPECIFICALLY
5 EXERCISE MY POWERS, WHICH IT SEEMS TO ME ARE IN THE NATURE OF
6 JUDICIAL DISCRETION, TO REDUCE THE AMOUNT OF RECOVERY FROM
7 THE AMOUNTS ADVOCATED BY MR. SPIVAK AND HIS CLIENTS.

8 WITH RESPECT TO THE LABOR CODE 558, 510, AND
9 512 THEORIES, AS TO THE AGGRIEVED EMPLOYEES, MY DETERMINATION
10 IS THAT THE AMOUNT WHICH MR. ABALKHAD MUST PAY IS NOT THE
11 \$2,164,278 AMOUNT THAT MR. SPIVAK ARGUED FOR BUT RATHER
12 \$125,000.

13 WITH RESPECT TO THE 1197.1-1198-WAGE-ORDER
14 CLAIM, MY DETERMINATION IS THAT THE AMOUNT THAT MR. ABALKHAD
15 WILL BE REQUIRED TO PAY IS NOT \$3,269,490, WHICH WAS THE
16 AMOUNT ADVOCATED BY MR. SPIVAK ON BEHALF OF HIS CLIENTS BUT
17 RATHER \$200,000.

18 NOW, THAT COMES OUT TO A TOTAL THEN OF
19 \$325,000.

20 NOW, IN DOING THIS, I HAVE EXERCISED MY
21 DISCRETION TAKING INTO CONSIDERATION THE FOLLOWING POINTS. I
22 AGREE WITH MR. SPIVAK'S CHARACTERIZATION OF MR. ABALKHAD AS A
23 PERSON WHO WAS INADEQUATELY OBSERVANT OF CALIFORNIA LAW.
24 MR. SPIVAK REFERS TO HIM AS A "SCOFFLAW." THAT'S A
25 JOURNALISTIC RATHER THAN A -- A LEGAL TERM. BUT I THINK HE
26 DID HAVE THE INTENTION SIMPLY OF TRYING TO RUN THINGS THROUGH
27 AND GET OFF AS CHEAPLY AS HE COULD WHILE HE WAS RUNNING HIS
28 BUSINESSES.

1 BUT I ALSO FIND THAT ONE OF THE PROBLEMS IN
2 THE OPERATION OF HIS BUSINESS WAS THAT HE GOT IN WAY OVER HIS
3 HEAD. HE SIMPLY EXPANDED BEYOND HIS OR HIS CORPORATION'S
4 CAPACITY PROPERLY TO RUN THESE BUSINESSES. HE RAN THEM AS
5 THOUGH HE WERE RUNNING A KIND OF SMALL OPERATIONS OUT OF HIS
6 HIP POCKET, AND I RECOGNIZE THAT THAT IS NOT A PRAISEWORTHY
7 BEHAVIOR, BUT IT SEEMS TO ME THAT IT IS NOT BEHAVIOR OF A
8 HIGHLY BLAMEWORTHY SENSE AND THAT IT IS BEHAVIOR WHICH MERITS
9 A REDUCTION OR SOFTENING OF THE PENALTIES.

10 NOW, I WILL ALSO SAY THE FOLLOWING. IF ON
11 APPEAL, THE APPELLATE COURT DETERMINES THAT I AM MISTAKEN
12 CONCERNING THE POTENTIAL OTHER THEORIES OF LIABILITY ASSERTED
13 BY MR. SPIVAK AND HIS CLIENTS AGAINST MR. ABALKHAD, I WILL
14 TELL YOU WHAT I WOULD HAVE AWARDED ON THOSE THEORIES SO THAT
15 IT MAY BE THAT THE APPELLATE COURT CAN SIMPLY TAKE WHAT I
16 HAVE SAID HERE AND RATHER THAN MAKING A DISPOSITION WHICH
17 REMANDS THE CASE FOR FURTHER CALCULATION OF DAMAGES, THE
18 APPELLATE COURT CAN SIMPLY INSERT THE MONETARY REMEDY THAT I
19 WOULD HAVE INSERTED MYSELF HAD I NOT BEEN PERSUADED THAT
20 MR. ABALKHAD WAS NOT LIABLE EXCEPT UNDER THE THEORIES THAT I
21 HAVE MADE REFERENCE TO.

22 HAD THAT BEEN DONE, I WOULD HAVE AWARDED AN
23 ADDITIONAL \$200,000 AS TO THE AGGRIEVED EMPLOYEES.

24 NOW, I WILL SAY THAT THESE AMOUNTS ARE, I
25 RECOGNIZE, EXTREMELY LENIENT AND PERMISSIVE TO MR. ABALKHAD.
26 IN OTHER WORDS, THIS IS NOT A CASE WHERE THE COURT HAS TRIED
27 TO SOCK IT TO HIM. IT IS, RATHER, A CASE IN WHICH I HAVE
28 TREATED IT AS A SERIES OF OFFENSES BUT ONE AS TO WHICH

1 MR. ABALKHAD SHOULD BE GIVEN AT LEAST SOME LENIENCY IN THE
2 FASHIONING OF A REMEDY. I THINK THAT'S IT. LET ME ASK THE
3 LAWYERS.

4 FIRST OF ALL, PLAINTIFFS'S LAWYER. ARE THERE
5 OTHER MATTERS AS TO WHICH YOUR CLIENTS CONTEND I SHOULD MAKE
6 A STATEMENT OF SOME KIND OR A FINDING OF SOME KIND?

7 MR. SPIVAK: WAS THERE SOME FINDING AS TO THE
8 ADDITIONAL \$200,000 WITH RESPECT TO THE INDIVIDUAL
9 PLAINTIFFS, YOUR HONOR?

10 YOU SPOKE TO THE OTHER CLAIMS WHICH PERHAPS
11 WOULD AFFECT THE APPELLATE COURT SHOULD IT SEND BACK FOR
12 CALCULATION.

13 THE COURT: YEAH.

14 MR. SPIVAK: I KNOW YOU GAVE AN AGGRIEVED EMPLOYEE
15 NUMBER BUT NOT FOR THE TWO PLAINTIFFS.

16 THE COURT: SHOW ME -- JUST A SECOND. COULD YOU,
17 PLEASE, TURN BACK TO -- OH, I GUESS I OUGHT TO SAY THAT. LET
18 ME DO THAT NOW.

19 THE PLAINTIFFS CONTEND THAT THERE WERE THESE
20 WRONGS AS TO BOTH THEMSELVES AND AS TO THE AGGRIEVED
21 EMPLOYEES, AND I WILL JUST REFER TO THEM IN SHORT, COMPRESSED
22 TERMS. AND ESSENTIALLY IT BOILS DOWN TO I THINK NINE
23 THEORIES AND I WILL ENUMERATE THEM NOW: OVERTIME, REST AND
24 MEAL PERIODS, WAGE STATEMENT, IN OTHER WORDS, LABOR CODE 226,
25 UNPAID TRAVEL EXPENSES AND MILEAGE -- THAT'S FOUR --
26 OFF-THE-CLOCK WORK, UNTIMELY PAYMENT OF WAGES, VACATION PAY
27 AT TERMINATION, AND FAILURE FAIRLY TO ADVISE THE EMPLOYEES OF
28 CHANGE IN THE COMMISSION STRUCTURE SO THAT WHAT HAPPENED WAS

1 THAT THEY WERE MADE TO DO WORK WITHOUT KNOWING -- WITHOUT, AS
2 IT TURNED OUT, WHAT THE ULTIMATE PAYMENT FOR IT WAS GOING TO
3 BE.

4 EACH OF THOSE CONTENTIONS -- EACH OF THOSE
5 THEORIES IS A THEORY THAT WOULD BE DECIDED IN FAVOR OF THE
6 PLAINTIFFS AND AGAINST THE -- AND AGAINST THE DEFENDANT
7 ABALKHAD EXCEPT FOR MY DETERMINATION THAT HE INDIVIDUALLY IS
8 NOT LIABLE. BUT IF HE IS LIABLE, THAT IS, IF THE APPELLATE
9 COURT DECIDES THAT I HAVE MADE AN ERROR REGARDING EXCESSIVELY
10 NARROW INTERPRETATION OF THE LABOR CODE PROVISIONS, I WOULD
11 AWARD EACH OF THE PLAINTIFFS AS PENALTIES \$60,000 EACH; 60
12 PLUS 60 IS 120.

13 NOW, I WILL SAY, AGAIN, I RECOGNIZE THAT THIS
14 IS WAY BELOW THE PLAINTIFFS'S TARGET NUMBER, BUT IT IS A
15 NUMBER THAT I THINK IS APPROPRIATE.

16 NOW, I WANT TO SAY SOMETHING ELSE ABOUT THIS,
17 AND THIS IS A COMPLICATION CREATED BY FACTORS THAT I HAD
18 REFERRED TO PREVIOUSLY. THIS IS THE BANKRUPTCY OF THE
19 CORPORATION.

20 WHAT I AM SAYING CONCERNING THESE OTHER
21 PENALTIES AND OTHER AMOUNTS, THAT IS, AMOUNTS I AM NOT
22 ACTUALLY AWARDED ARE FOR THE BENEFIT OF THE APPELLATE COURT
23 IN ASSISTING IT TO FRAME A DISPOSITIONAL ORDER IF THE CASE IS
24 SENT BACK TO THE SUPERIOR COURT UPON A REVERSAL IN PART OR IN
25 WHOLE.

26 I WANT TO PUT THESE PEOPLE IN A POSITION SO
27 THEY WILL HAVE A REMEDY ON BOTH SIDES WITHOUT THE NECESSITY
28 OF THE SUPERIOR COURT HAVING TO REVISIT THIS AND BY THE

1 SUPERIOR COURT TELLING THE APPELLATE COURT WHAT THE SUPERIOR
2 COURT WOULD HAVE DONE HAD THE SUPERIOR COURT'S REASONING NOT
3 FORECLOSED IT.

4 I AM EXTREMELY CONCERNED TO STATE THIS IN THAT
5 WAY SO THAT THE BANKRUPTCY PROCEEDINGS ARE NOT IN SOME WAY
6 SPOILED OR IMPROPERLY AFFECTED BY THE WORK DONE HERE IN THE
7 -- IN THE TRIAL COURT. AND I AM TRYING TO SUPPLY ALL OF THE
8 INFORMATION THAT I CAN WHILE STILL BEING TRUE TO AND
9 OBSERVANT OF THE NECESSITY FOR TRYING TO ACHIEVE AS MUCH
10 FINALITY AS I CAN WHILE STILL ASSISTING IN THE LITIGATION
11 PROCESS AS MUCH AS THIS COURT CAN.

12 NOW, I HAVE PREVIOUSLY DISCUSSED AND I WILL
13 MAKE A PART OF MY STATEMENT OF DECISION HERE THE SET OF DATES
14 THAT PIVOT AROUND THE APPEAL. AS I HAVE SAID PREVIOUSLY, THE
15 CASE THAT I HAVE BEEN TRYING, THIS CASE, WAS FILED ON THE
16 26TH OF JANUARY, 2010. THE DEFENDANT WAS AT THAT TIME ONLY
17 RJ FINANCIAL, AND THE CASE WAS DENOMINATED A CLASS ACTION. A
18 LITTLE LESS THAN MONTH AFTER THAT, ON THE 24TH OF FEBRUARY,
19 2010, THE PLAINTIFFS FILED A FIRST AMENDED COMPLAINT. THEY
20 ADDED MR. ABALKHAD AS A NAMED DEFENDANT. THEY CONTINUED WITH
21 THE DESIGNATION OF THIS CASE AS A CLASS ACTION.

22 ON THE 8TH OF MARCH, 2010, THE PLAINTIFFS
23 FILED A 170.6 AS TO JUDGE WILLIAM FAHEY OF THIS COURT.

24 ON THE 22ND OF MARCH, 2010, THE LAWYER WHO THE
25 TESTIMONY HAS IDENTIFIED AS MR. SANFORD FREY, F-R-E-Y -- THAT
26 NAME ALSO APPEARS ON THE DOCUMENT I'M GOING TO DESCRIBE --
27 FILED A NOTICE OF STAY AS TO THE CORPORATE DEFENDANT,
28 REFERRING TO THE CHAPTER 11 BANKRUPTCY. THAT BANKRUPTCY

1 PETITION APPEARS TO HAVE BEEN FILED ON THE 7TH OF JANUARY,
2 2010, THAT IS, BEFORE THE CASE WAS EVER FILED.

3 THAT ACCOUNTS FOR THE MODIFICATION OF THE NAME
4 OF THE PARTIES TO INCLUDE ABALKHAD AS AN INDIVIDUAL. I THINK
5 IT IS THAT OBVIOUS THAT -- BUT I WANT TO MAKE IT VERY, VERY
6 CLEAR THAT THIS IS NOT ONLY OBVIOUS, BUT IT IS A FACT THAT --
7 THIS CASE IS STAYED AS TO THE RJ FINANCIAL CORPORATION UNDER
8 THE STATUTORY CITATION I HAVE GIVEN, 11 U.S.C. 362.

9 MR. ABALKHAD'S DEFAULT WAS TAKEN IN THIS CASE
10 AND IN AUGUST OF 2010, HE MOVED TO SET ASIDE THE DEFAULT. IN
11 THAT SET OF PAPERS, THERE WAS THE CLAIM MADE THAT PLAINTIFFS
12 ADDED ABALKHAD ON THE 26TH OF MARCH, 2010. AS I HAVE
13 INDICATED, THAT WAS NOT TRUE. IT WAS ON THE 26TH -- 24TH OF
14 FEBRUARY, 2010, BUT THAT WAS NOT A SIGNIFICANT INACCURACY
15 BECAUSE IN THE COURT'S VIEW, ABALKHAD WAS ENTITLED TO HAVE
16 THE DEFAULT SET ASIDE.

17 NOW IS THERE ANYTHING THAT I AM SUPPOSED TO
18 SAY?

19 MR. SPIVAK: I DON'T THINK SO, YOUR HONOR.

20 THE COURT: OKAY. HOW ABOUT YOU, MR. SABZEVAR?

21 MR. SABZEVAR: NO, YOUR HONOR.

22 THE COURT: ALL RIGHT. HERE'S WHAT I'M GOING TO DO
23 THEN.

24 I'M GOING TO SET A HEARING OUT IN THE FUTURE.
25 FIRST OF ALL, THE STATEMENT OF DECISION IS SUFFICIENT IF IT
26 STATES ALL THE FACTS. IT NEED NOT STATE EVIDENTIARY FACTS.
27 I THINK THE STATEMENT OF DECISION I HAVE MADE DOES THAT.

28 SECONDLY, I'M GOING TO ORDER THE PLAINTIFFS

1 THROUGH COUNSEL TO PREPARE, SERVE, OBTAIN APPROVAL AS TO FORM
2 FROM DEFENDANT ABALKHAD. THIS MAY REQUIRE A MEET AND CONFER
3 AND COURT EXPECTS COUNSEL TO BE ATTENTIVE AND COOPERATIVE IN
4 THIS REGARD. SO SUBMIT THAT TO DEFENSE COUNSEL AND LODGE
5 WITH THE COURT A JUDGMENT SUITABLE FOR COURT'S SIGNATURE IN
6 CONFORMITY WITH THE FOREGOING.

7 I AM GOING TO ORDER ALSO THAT THE PARTIES
8 AND/OR COUNSEL PICK UP ALL EXHIBITS LODGED WITH THE CLERK AND
9 ALL EXHIBITS MARKED AND/OR RECEIVED IN EVIDENCE, EACH SIDE TO
10 PICK UP THE ITEM PROFFERED BY THAT SIDE FOR RECEIPT INTO
11 EVIDENCE WITHIN FIVE DAYS FROM THE COURT'S SIGNING OF THE
12 JUDGMENT.

13 NOW, TODAY IS THE 23RD OF APRIL, 2010 -- 2012,
14 I SHOULD SAY. I WANT TO HAVE A HEARING AT WHICH THE JUDGMENT
15 IS PRESENTED TO ME FOR SIGNATURE AND I WANT TO DO THESE
16 THINGS AT THAT HEARING. I WANT TO SETTLE THE FORM AND
17 SUBSTANCE OF THE DECISION -- OF THE JUDGMENT. IF THERE'S ANY
18 OTHER WORK THAT NEEDS TO BE DONE, I WANT TO DO THAT AT THIS
19 HEARING. I WANT TO DETERMINE WHAT, IF ANYTHING, REMAINS TO
20 BE DONE REGARDING FUTURE PROCEEDINGS IN THIS CASE, AND I WANT
21 TO DETERMINE WHAT THE STATUS OF THIS CASE IS AND I WANT TO
22 HAVE THE LAWYERS FOR THE PARTIES PERSONALLY PRESENT.

23 MY IDEA WOULD BE THE JUDGMENT SHOULD BE
24 SUBMITTED BEFORE THE HEARING BUT THAT PLAINTIFFS'S COUNSEL
25 SHOULD BRING WITH HIM A DUPLICATE ORIGINAL OF THE JUDGMENT IN
26 CASE THE PAPERWORK HANDLING PRODUCES A SITUATION WHERE I
27 CAN'T LAY MY HANDS ON THE JUDGMENT THAT I AM SUPPOSED TO SIGN
28 IMMEDIATELY. I LOOK TO THE ATTORNEYS NOW FOR SOME

1 SUGGESTIONS AS TO THE DATE WHEN THAT HEARING SHOULD BE
2 SCHEDULED.

3 MR. SABZEVAR, DO YOU HAVE ANY IDEAS ABOUT WHEN
4 I SHOULD SCHEDULE IT?

5 MR. SABZEVAR: FORTY-FIVE DAYS, YOUR HONOR?

6 THE COURT: FORTY-FIVE DAYS.

7 MR. SPIVAK: THAT'S FINE FOR PLAINTIFFS.

8 THE COURT: SO TODAY IS THE 23RD. LET'S SET IT FOR
9 HEARING ON THE -- LET'S GO OUT MORE THAN 45 DAYS.

10 AS YOU CAN SEE, FROM THE 4TH TO THE 8TH, I
11 WON'T BE ABLE TO WORK WITH YOU -- OF JUNE. I WON'T BE ABLE
12 TO WORK WITH YOU. SO WOULD IT ALL RIGHT WITH YOU LAWYERS IF
13 I PICK THE 21ST OF JUNE, 2012, 8:30, THIS DEPARTMENT?

14 MR. SABZEVAR: THAT'S FINE, YOUR HONOR.

15 THE COURT: ARE YOU GOING TO BE AVAILABLE ON THOSE
16 DATES?

17 MR. SPIVAK: YES, YOUR HONOR.

18 THE COURT: ARE YOU GOING TO BE ABLE TO DO THE
19 THINGS I TALKED ABOUT, SETTLING THE FORM AND SUBSTANCE OF THE
20 JUDGMENT?

21 MR. SPIVAK: YES, YOUR HONOR.

22 MR. SABZEVAR: THAT'S FINE.

23 THE COURT: THANK YOU VERY MUCH. I APPRECIATE YOUR
24 PARTICIPATION AND -- AND YOUR ADVOCACY, AND I WILL SEE YOU
25 WHEN WE NEXT HAVE TO WORK ON THE CASE.

26 NOW, I WILL TELL YOU SOMETHING ELSE. PLEASE
27 STAY ALERT AND PLEASE LOOK IN ADVISES TO ATTORNEYS, OR
28 NOTICES, OR WHATEVER WE ARE GOING TO DO IN THE NEXT THREE OR

1 FOUR WEEKS. HERE'S OUR SITUATION.

2 AS OF 15TH OF MAY, WE WON'T HAVE REPORTERS IN
3 THESE DEPARTMENTS ANYMORE FOR TRIAL MATTERS -- THEY WILL HAVE
4 TO BE SUPPLIED BY THE PARTIES -- AND WE WON'T HAVE THE
5 REPORTERS EXCEPT TWO LAW AND MOTION SESSIONS A WEEK. THE
6 IDEA IS IT WILL BE ONE MORNING AND ONE AFTERNOON. THAT WILL
7 BE ALL THE REPORTERS WE ARE GOING TO HAVE SUPPLIED BY THE
8 COURT.

9 MOREOVER, THEY ARE GOING TO, AS I MENTIONED TO
10 YOU PREVIOUSLY, THEY ARE GOING TO REDUCE THE STAFF.

11 SO I HAD GIVEN YOU DATE, BUT I AM NOT ONE
12 HUNDRED PERCENT CERTAIN ABOUT HOW THAT DATE IS GOING TO WORK.
13 PLEASE KEEP YOUR EYES AND EARS OPEN. IF THERE'S SOME FOUL UP
14 OR SOMETHING, DO WHATEVER YOU NEED TO DO TO MAKE IT RIGHT. I
15 MEAN, WE ARE -- I WISH I COULD SAY SOMETHING THAT SOUNDED
16 MORE EMPHATIC AND MORE DEFINITIVE, BUT I CAN'T. I JUST DON'T
17 KNOW WHAT'S GOING TO HAPPEN.

18 WHAT I WANT TO DO IS TO FINISH UP YOUR CASE
19 AND GET YOU ALONG FOR THE NEXT STEP FOR OBVIOUS REASONS. AND
20 I DON'T WANT THE COLLAPSE OF THE SYSTEM'S ABILITY TO HANDLE
21 MATTERS TIMELY TO REDOUND TO YOUR DISADVANTAGE OR TO
22 ADDITIONAL EXPENSE ON THE PART OF EITHER SIDE THAT MIGHT
23 OTHERWISE BE AVOIDED IF YOU LAWYERS KEPT YOUR EYES PEELED FOR
24 WHAT'S HAPPENING IN THE COURTS AND IF I WERE ABLE TO PREDICT
25 A LITTLE BIT, I JUST CAN'T PREDICT THAT. I DON'T EVEN KNOW.
26 BUT KEEP YOUR EYES OPEN. TRY TO DO WHAT'S RIGHT, AND I WILL
27 TRY TO DO WHAT'S RIGHT. IT'S ABOUT THE BEST I CAN DO FOR
28 YOU.

1 ALL RIGHT. THANK YOU ALL VERY MUCH.

2 MR. SPIVAK: THANK YOU, YOUR HONOR.

3 MR. SABZEVAR: THANK YOU, YOUR HONOR.

4 THE COURT: SEE YOU WHEN WE NEXT HAVE TO WORK ON
5 THE CASE.

6 (PROCEEDINGS CONCLUDED.)

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EXHIBIT 10



Class Action Administrators

www.cptgroup.com

Contact Name: Timothy N. Phillips, Jr.

Randi Martz

Corporate Headquarters

50 Corporate Park, Irvine CA 92606

Tim@cptgroup.com

Main Number: (800) 542-0900

Direct Number: (818) 415-2703

Fax Number: (949) 428-1074

Case Name: Johnson v. Nan McKay & Associates, Inc.

Date: May 3, 2022

All-In Settlement

Requesting Attorney: **David Spivak**

* Class Members: 314

Plaintiff or Defense: **Plaintiff**

** Opt-Out Rate: 1.5%

Firm Name: **The Spivak Law Firm**

Opt-Outs Received: 5

Telephone: (818) 582-3086

Postage Total: \$494.55

Email: david@spivaklaw.com

Grand Total: \$13,554.28

***** DISCOUNTED FLAT FEE: \$10,000.00**

* This number is an estimate provided by counsel. If the actual number is different, our cost estimate will change accordingly.

** For ease of comparison, in the event competing estimates use an alternate filing rate to calculate estimated cost, please advise us so that we may modify the estimate accordingly.

*** This price is valid for administration of a maximum of 5 opt-out's filed. Any additional opt-out's filed above 5 will be billed at the rate of \$8.00 per member.

Case Setup

Case Setup / Data Management / Create a Unified Mailing List / TFN Establish & Setup / Static Website

Administrative Tasks:	Unit Price	Pieces/Hours	Cost Estimate
Project Manager	\$95.00	3	\$285.00
System Programming/Data Base Setup	\$150.00	3	\$450.00
Toll-Free Number Establish/Setup*	\$150.00	2	\$300.00
Static Website	\$500.00	1	\$500.00
Total			\$1,535.00

* Up to 120 days after disbursement

Notification Procedures

National Change of Address (NCOA) / Notice, Dispute Form & Opt-Out Form / Postage (up to 1 oz.)

Administrative Tasks:	Unit Price	Pieces/Hours	Cost Estimate
NCOA	\$150.00	1	\$150.00
Project Manager-Opt-Out/Notice Format	\$95.00	2	\$190.00
Merged Data	\$0.35	314	\$109.90
Mailing of Notice Pack	\$1.00	314	\$314.00
Estimated Postage (up to 1 oz.)*	\$0.58	314	\$182.12
Total			\$946.02

*Additional charges will apply if the postage exceeds 1 oz. The final rate will be determined at the time of mailing.

Returned Mail

Notices Returned as Undeliverable / Skip Traces / Remail Notice Packets / Postage

Administrative Tasks:	Unit Price	Pieces/Hours	Cost Estimate
Update Undeliverable	\$0.50	31	\$15.50
Skip Traces	\$1.25	27	\$33.75
Remail Packs	\$1.35	23	\$31.05
Estimated Postage (up to 1 oz.)	\$0.58	23	\$13.34
Clerical Staff	\$60.00	1	\$60.00
Total			\$153.64

Opt-Out Processing

Process Opt-Outs, Deficiencies & Other Requests from Class Members / Call Center Support

Administrative Tasks:	Unit Price	Pieces/Hours	Cost Estimate
Programming of Opt-Out Data Base	\$150.00	4	\$600.00
Opt-Out Processing	\$10.00	5	\$50.00
Clerical Staff	\$60.00	1	\$60.00
Deficiency/Dispute Letters	\$20.00	1	\$20.00
Estimated Postage (up to 1 oz.)	\$0.58	1	\$0.58
Project Manager	\$95.00	1	\$95.00
Call Center Support	\$3.00	63	\$189.00
Total			\$1,014.58

SSN Verification

Verify SSN for Validity with IRS / IRS Backup Withholdings

Administrative Tasks:	Unit Price	Pieces/Hours	Cost Estimate
Programming for SSN Selection	\$150.00	1	\$150.00
Project Manager	\$95.00	3	\$285.00
SSN Verification	\$0.20	309	\$61.80
Total			\$496.80

Disbursement

Calculations / Data Management / Create & Manage QSF / Print & Mail Checks, 1099/W-2 / Check Reminder Postcard

Administrative Tasks:	Unit Price	Pieces/Hours	Cost Estimate
Programming Database-Calculate Totals	\$150.00	3	\$450.00
Project Supervisor Review of Distribution	\$150.00	3	\$450.00
Project Manager-Correspond w/ Attorney	\$95.00	2	\$190.00
Obtain EIN, Setup QSF/Bank Account	\$150.00	3	\$450.00
Programming/Setup & Printing of Checks	\$150.00	3	\$450.00
Print Mail Checks, W-2/1099 (8x10 sheet)	\$2.50	309	\$772.50
Estimated Postage (up to 1 oz.)	\$0.58	309	\$179.22
Check Reminder Postcard	\$0.30	204	\$61.23
Postage for Reminder Postcard	\$0.40	204	\$81.64
Total			\$3,084.59

Post-Disbursement & Tax Reporting

Account Recons / Skip Trace / Reissue Checks / Annual Tax Reporting / Final Reporting & Declaration

Administrative Tasks:	Unit Price	Pieces/Hours	Cost Estimate
Re-Issue Checks as Required	\$5.00	4	\$20.00
Project Supervisor -Account Recons	\$150.00	6	\$900.00
Skip Trace	\$1.25	25	\$31.25
Remail Undeliverable Checks	\$2.50	25	\$62.50
Estimated Postage (up to 1 oz.)	\$0.58	29	\$16.82
Project Supervisor-Reconcile Uncashed Chk	\$150.00	1	\$150.00
Programming- Final Reports	\$150.00	2	\$300.00
Project Manager - Acnt Files Sent to Atty	\$150.00	2	\$300.00
Project Supervisor - Final Declaration	\$150.00	2	\$300.00
CA Tax Preparation*	\$600.00	1	\$600.00
Annual Tax Reporting to IRS*	\$1,000.00	1	\$1,000.00
QSF Annual Tax Reporting	\$500.00	1	\$500.00
Total			\$4,180.57

*CPT will file Federal and California taxes in accordance to current state and federal regulations. Additional charges will apply if the Settlement / Order / parties require(s) multiple state tax filings.

Escheat Processing

Escheatment Processing to the State Controller Unclaimed Property Division / Uncashed Check Rate 21%			
Administrative Tasks:	Unit Price	Pieces/Hours	Cost Estimate
UPEnterprise Reporting Services	\$0.15	65	\$9.75
Project Manager - Fall Reporting	\$95.00	2	\$190.00
Project Supervisor-Fall Reporting	\$150.00	1	\$150.00
Certified Mail Report to SCO	\$8.53	1	\$8.53
Check Reissues - Winter/Spring QTR	\$5.00	7	\$32.50
Estimated Postage (up to 1 oz.) for Reissue	\$0.58	7	\$3.77
Project Manager - June Remittance	\$95.00	2	\$190.00
Project Supervisor- June Remittance	\$150.00	1	\$150.00
Certified Mail Report to SCO	\$8.53	1	\$8.53
Add'l Account Recons	\$150.00	6	\$900.00
Add'l QSF Annual Tax Reporting	\$500.00	1	\$500.00
Total			\$2,143.08
Grand Total:			\$13,554.28

TERMS AND CONDITIONS

These Terms and Conditions are made a part of and incorporated by reference into the CPT Group, Inc. Terms and Conditions Agreement by and between Client and CPT Group, Inc., 50 Corporate Park, Irvine, CA 92606 ("CPT").

1. Definitions.

- a) **"Affiliate"** means a party that partially (at least 50%) or fully controls, is partially or fully controlled by, or is under partial (at least 50%) or full common control with, another party.
- b) **"Approved Bank"** means a financial institution insured by the Federal Deposit Insurance Corporation with capital exceeding \$1 billion.
- c) **"Case"** means the particular judicial matter identified by the name of plaintiff(s) and defendant(s) on the applicable Order.
- d) **"Claims Administrator"** means CPT Group, Inc. a reputable third-party Claims Administrator selected by all the Parties (Plaintiff and Defense Counsel) to administer the Settlement or Notification Mailing.
- e) **"Client"** means collectively Plaintiff Counsel and Defense Counsel.
- f) **"Client Content"** means all Class Member written document communications relating to the Case, including claim forms, opt-out forms, objections, and the like which contain Client Data.
- g) **"Client Data"** means proprietary or personal data regarding Client or any of its Class Members under this Agreement, as provided by Client.
- h) **"Class Member"** means an individual who is eligible under the Settlement Agreement to receive a designated amount of the Settlement, including the named Plaintiff(s) in the Case and all other putative persons so designated or addressed therein.
- i) **"Confidential Information"** means any non-public information of CPT or Client disclosed by either party to the other party, either directly or indirectly, in writing, orally or by inspection of tangible objects, or to which the other party may have access, which a reasonable person would consider confidential and/or which is marked "confidential" or "proprietary" or some similar designation by the disclosing party. Confidential Information shall also include the terms of this Agreement, except where this Agreement specifically provides for disclosure of certain items. Confidential Information shall not, however, include the existence of the Agreement or any information which the recipient can establish: (i) was or has become generally known or available or is part of the public domain without direct or indirect fault, action, or omission of the recipient; (ii) was known by the recipient prior to the time of disclosure, according to the recipient's prior written documentation; (iii) was received by the recipient from a source other than the discloser, rightfully having possession of and the right to disclose such information; or (iv) was independently developed by the recipient, where such independent development has been documented by the recipient.
- j) **"Court Order"** means a legal command or direction issued by a court, judicial office, or applicable administrative body requiring one or more parties to the Case to carry out a legal obligation pursuant to the Case.
- k) **"Defendant"** means the named party and/or parties in the Case against whom action is brought.
- l) **"Defense Counsel"** means the attorney of record for the defendant(s) in the Case.
- m) **"Intellectual Property Right"** means any patent, copyright, trade or service mark, trade dress, trade name, database right, goodwill, logo, trade secret right, or any other intellectual property right or proprietary information right, in each case whether registered or unregistered, and whether arising in any jurisdiction, including without limitation all rights of registrations, applications, and renewals thereof and causes of action for infringement or misappropriation related to any of the foregoing.
- n) **"Order"** means a Product purchase in a schedule, statement of work, addendum, exhibit, or amendment signed by Client and CPT.
- o) **"Parties"** shall mean collectively Defendants, Defense and Plaintiff as defined in the Settlement Agreement or Court Order.
- p) **"Plaintiff"** means the named party and/or parties in the Case who are bringing the action.
- q) **"Plaintiff Counsel"** means the attorney of record for plaintiff Class Members in the Case.
- r) **"Products"** means any and all CPT Services, and work product resulting from Services.
- s) **"Qualified Settlement Fund"** means the entity as defined by Treasury Regulation section 4686-1 under which a bank account is established to receive settlement funds from the Defendant in the Case, which such funds

are then disbursed by CPT according to the Settlement Agreement and pursuant to Court Order.

- t) **"Service"** means any service rendered by CPT specifically to Client, including, but not limited to: (i) notifications to Class Members; (ii) setting up a Qualified Settlement Fund with a financial institution; (iii) management of disbursement of funds from the Qualified Settlement Fund to applicable parties pursuant to the Settlement Agreement; (iv) provision of customer support relating to the Case; (v) management of Case claim forms and correspondence; and/or (vi) any administrative or consulting service.
 - u) **"Software"** means any and all of CPT's proprietary applications, including, without limitation, all updates, revisions, bug-fixes, upgrades, and enhancements thereto.
 - v) **"Settlement"** means the total dollar amount agreed to between parties to the Case, as negotiated by Plaintiff Counsel and Defense Counsel, to resolve the Case to mutual satisfaction.
 - w) **"Settlement Agreement"** means the contract between parties to the Case to resolve the same, which specifies amounts to be disbursed from the Qualified Settlement Fund to attorneys, CPT, and individual Class Members.
 - x) **"Term"** means the term of the Agreement, as set forth in the Order.
 - y) **"Transmission Methods"** means the secure authorized manner to send Client Data and/or Wire Information as specified on a schedule or Order hereto.
 - z) **"Wire Information"** means instructions for (i) Defense Counsel to transfer funds from Defendant to the Qualified Settlement Fund or (ii) CPT to transfer funds from the Qualified Settlement Fund to applicable parties pursuant to the Settlement Agreement.
2. **Client Obligations.** Client will ensure that it has obtained all necessary consents and approvals for CPT to access Client Data for the purposes permitted under this Agreement, and shall only transmit Client Data and/or Wire Instructions to CPT via the Transmission Methods. Client shall use and maintain appropriate administrative, technical, and physical safeguards designed to protect Client Data provided under this Agreement. Client shall not send, or attempt to send, Client Data and/or Wire Instructions via email, facsimile, unprotected spreadsheet, USB flash drive or other external or removable storage device, cloud storage provider, or any other method not specified in the Transmission Methods. Notwithstanding the foregoing, Client acknowledges and understands that the electronic transmission of information cannot be guaranteed to be secure or error free, and such information could be intercepted, corrupted, lost, and/or destroyed. Client further warrants that any Client Data and/or Wire Instructions it transmits shall be free of viruses, worms, Trojan horses, or other harmful or disabling codes which could adversely affect the Client Data and/or CPT. If Client is in breach of this section, CPT may suspend Services, in addition to any other rights and remedies CPT may have at law or in equity.
3. **Security.** The Parties and CPT shall each use reasonable administrative, technical, and physical safeguards that are reasonably designed to: (a) protect the security and confidentiality of any personally identifiable information provided by Class Members and/or Client under this Agreement; (b) protect against any anticipated threats or hazards to the security or integrity of such personally identifiable information; (c) protect against unauthorized access to or use of such personally identifiable information that could result in substantial harm or inconvenience to any individual; and (d) protect against unauthorized access to or use of such personally identifiable information in connection with its disposal. Each Party will respond promptly to remedy any known security breach involving the personally identifiable information provided by you and/or Client under this Agreement, and shall promptly inform the other Parties of such breaches.
4. **CPT Obligations.** Provided that Client complies with all provisions of Section "Client Obligations", CPT will (i) maintain appropriate safeguards for the protection of Client Data, including regular back-ups, security and incident response protocols, and (ii) not access or disclose Client Data except (A) as compelled by law, (B) to prevent or address service or technical issues, (C) in accordance with this Agreement or the provisions of the Settlement Agreement, or (D) if otherwise permitted by Client.
5. **Mutual Obligations.**
- a) **Resources.** Each party agrees to: (i) provide the resources reasonably necessary to enable the performance of the Services; (ii) manage its project staffing, milestones, and attendance at status meetings; and (iii) ensure completion of its project deliverables and active participation during all phases of a Service project. The parties acknowledge that failure to cooperate during a Service project may delay delivery of the Service. If there

is a delay, the party experiencing the delay will notify the other party as soon as reasonably practicable, and representatives of each party will meet to discuss the reason for the delay and applicable consequences. Changes beyond the scope of an Order and/or a party's delay in performing its obligations may require an amended Order.

- b.) Incident Notification. Each party will promptly inform the other parties in the event of a breach of Client Data in their possession and shall utilize best efforts to assist the other parties to mitigate the effects of such incident.
6. Qualified Settlement Fund Account. At Client's request, CPT shall be authorized to establish one or more bank accounts at an Approved Bank. The amounts held at the Approved Bank under this Agreement are at the sole risk of Client. Without limiting the generality of the foregoing, CPT shall have no responsibility or liability for any diminution of the funds that may result from the deposit thereof at the Approved Bank, including deposit losses, credit losses, or other claims made against the Approved Bank. It is acknowledged and agreed that CPT has acted reasonably and prudently in depositing funds at an Approved Bank, and CPT is not required to conduct diligence or make any further inquiries regarding such Approved Bank.
7. Fees and Payment. Pricing stated within the proposal is good for 90 Days. All postage charges and 50% of the final administration charges are due at the commencement of the case and will be billed immediately upon receipt of the Client data and/or notice documents. Client will be invoiced for any remaining fees according to the applicable Order. Pricing stated within any proposal from CPT to Client is for illustrative purposes only, and is only binding upon an Order executed by CPT and Client. Payment of fees will be due within 30 days after the date of the invoice, except where this Agreement expressly prescribes other payment dates. All fees set forth in an Order are in U.S. dollars, must be paid in U.S. dollars, and are exclusive of taxes and applicable transaction processing fees. Late payments hereunder will incur a late charge of 1.5% (or the highest rate allowable by law, whichever is lower) per month on the outstanding balance from the date due until the date of actual payment. In addition, Services are subject to suspension for failure to timely remit payment therefor. If travel is required to effect Services, Client shall reimburse CPT for pre-approved, reasonable expenses arising from and/or relating to such travel, including, but not limited to, airfare, lodging, meals, and ground transportation.
8. Term and Termination.
- a.) Term. The Term is set forth in the Order. The Agreement may be renewed by mutual written agreement of the parties.
- b.) Termination for Cause. Either party may immediately terminate this Agreement if the other party materially breaches its obligations hereunder, and, where capable of remedy, such breach has not been materially cured within forty-five (45) days of the breaching party's receipt of written notice describing the breach in reasonable detail.
- c.) Bankruptcy Events. A party may immediately terminate this Agreement if the other party: (i) has a receiver appointed over it or over any part of its undertakings or assets; (ii) passes a resolution for winding up (other than for a bona fide scheme of solvent amalgamation or reconstruction), or a court of competent jurisdiction makes an order to that effect and such order is not discharged or stayed within ninety (90) days; or (iii) makes a general assignment for the benefit of its creditors.
- d.) Effect of Termination. Immediately following termination of this Agreement, upon Client's written request, Client may retrieve Client Data via Client's secure FTP site in the same format in which the Client Data was originally inputted into the Software, at no additional charge. Alternatively, Client Data can be returned in a mutually agreed format at a scope and price to be agreed. CPT will maintain a copy of Client Data and Client Content for no more than four (4) years following the date of the final check cashing deadline for Class Members under the Settlement Agreement, after which time any Client Data and Client Content not retrieved will be destroyed.
- e.) Final Payment. If Client terminates this Agreement due to Section "Termination", Client shall pay CPT all fees owed through the termination date. If CPT terminates the Agreement in accordance with Section "Termination," Client shall pay CPT all fees invoiced through the termination date, plus all fees remaining to be invoiced during the Term, less any costs CPT would have incurred had the Agreement not been terminated.
- Confidentiality. Each of the parties agrees: (i) not to disclose any Confidential Information to any third parties except as mandated by law and except to those subcontractors of CPT providing Products hereunder who agree to be bound by confidentiality obligations no less stringent than those set forth in this Agreement; (ii) not to use any Confidential Information for any purposes except carrying out such party's rights and responsibilities under this Agreement; and (iii) to keep the Confidential Information confidential using the same degree of care such party uses to protect its own confidential information; provided, however, that such party shall use at least reasonable care. These obligations shall survive termination of this Agreement.
- a. Compelled Disclosure. If receiving party is compelled to disclose any Confidential Information by judicial or administrative process or by other requirements of law, such party shall (i) promptly notify the

other party, (ii) reasonably cooperate with the other party in such party's efforts to prevent or limit such compelled disclosure and/or obtain confidential treatment of the items requested to be disclosed, and (iii) shall disclose only that portion of such information which each party is advised by its counsel in writing is legally required to be disclosed.

- b. Remedies. If either party breaches any of its obligations with respect to confidentiality or the unauthorized use of Confidential Information hereunder, the other party shall be entitled to seek equitable relief to protect its interest therein, including but not limited to, injunctive relief, as well as money damages.
10. Intellectual Property. As between the parties, CPT will and does retain all right, title and interest (including, without limitation, all Intellectual Property Rights) in and to the Products. Client retains all ownership rights to Client Data.
11. Indemnification. Client agrees to indemnify, defend, and hold harmless CPT, its Affiliates, and the respective officer, directors, consultants, employees, and agents of each (collectively, Covered CPT Parties") from and against any and all third party claims and causes of action, as well as related losses, liabilities, judgments, awards, settlements, damages, expenses and costs (including reasonable attorney's fees and related court costs and expenses) (collectively, "Damages") incurred or suffered by CPT which directly relate to or directly arise out of (i) Client's breach of this Agreement; (ii) CPT's performance of Services hereunder; (iii) the processing and/or handling of any payment by CPT; (iv) any content, instructions, information or Client Data provided by Client to CPT in connection with the Services provided by CPT hereunder. The foregoing provisions of this section shall not apply to the extent the Damages relate to or arise out of CPT's willful misconduct. To obtain indemnification, indemnitee shall: (i) give written notice of any claim promptly to indemnitor; (ii) give indemnitor, at indemnitor's option, sole control of the defense and settlement of such claim, provided that indemnitor may not, without the prior consent of indemnitee (not to be unreasonably withheld), settle any claim unless it unconditionally releases indemnitee of all liability; (iii) provide to indemnitor all available information and assistance; and (iv) not take any action that might compromise or settle such claim.
12. Warranties. Each party represents and warrants to the other party that, as of the date hereof: (i) it has full power and authority to execute and deliver the Agreement; (ii) the Agreement has been duly authorized and executed by an appropriate employee of such party; (iii) the Agreement is a legally valid and binding obligation of such party; and (iv) its execution, delivery and/or performance of the Agreement does not conflict with any agreement, understanding or document to which it is a party. CPT WARRANTS THAT ANY AND ALL SERVICES PROVIDED BY IT HEREUNDER SHALL BE PERFORMED IN A PROFESSIONAL MANNER CONSISTENT WITH PREVAILING INDUSTRY STANDARDS. TO THE EXTENT PERMITTED BY APPLICABLE LAW, CPT DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT AND ANY WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE OR TRADE PRACTICE.
13. Liability.
- a. Liability Cap. EXCEPT FOR A PARTY'S WILLFUL MISCONDUCT, EACH PARTY'S MAXIMUM AGGREGATE LIABILITY ARISING OUT OF OR RELATING TO THIS AGREEMENT, REGARDLESS OF THE THEORY OF LIABILITY, WILL BE LIMITED TO THE TOTAL CLAIMS ADMINISTRATOR FEES PAID OR PAYABLE BY CLIENT TO CPT HEREUNDER. THE EXISTENCE OF MORE THAN ONE CLAIM SHALL NOT EXPAND SUCH LIMIT. THE PARTIES ACKNOWLEDGE THAT THE FEES AGREED UPON BETWEEN CLIENT AND CPT ARE BASED IN PART ON THESE LIMITATIONS, AND THAT THESE LIMITATIONS WILL APPLY NOTWITHSTANDING ANY FAILURE OF ANY ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. THE FOREGOING LIMITATION SHALL NOT APPLY TO A PARTY'S PAYMENT OBLIGATIONS UNDER THE AGREEMENT.
- b. Exclusion of Consequential Damages. NEITHER PARTY WILL BE LIABLE FOR LOST PROFITS, LOST REVENUE, LOST BUSINESS OPPORTUNITIES, LOSS OF DATA, INTERRUPTION OF BUSINESS, OR ANY OTHER INDIRECT, SPECIAL, PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATING TO THIS AGREEMENT, REGARDLESS OF THE THEORY OF LIABILITY, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.
14. Communications. CPT may list Client's name and logo alongside CPT's other clients on the CPT website and in marketing materials, unless and until Client revokes such permission. CPT may also list the Case name and/or number, and certain Qualified Settlement Fund information, on the CPT website and in marketing materials, unless stated otherwise in the Settlement Agreement.
15. Miscellaneous Provisions.
- a. Governing Law; Jurisdiction. This Agreement will be governed by and construed in accordance with the laws of the State of California and

the federal laws of the United States of America, without regard to conflict of law principles. CPT and Client agree that any suit, action or proceeding arising out of, or with respect to, this Agreement or any judgment entered by any court in respect thereof shall be brought exclusively in the state or federal courts of the State of California located in the County of Orange, and each of CPT and Client hereby irrevocably accepts the exclusive personal jurisdiction and venue of those courts for the purpose of any suit, action or proceeding.

- b. Force Majeure. Neither party will be liable for any failure or delay in its performance under this Agreement due to any cause beyond its reasonable control, including without limitation acts of war, acts of God, earthquake, flood, weather conditions, embargo, riot, epidemic, acts of terrorism, acts or omissions of vendors or suppliers, equipment failures, sabotage, labor shortage or dispute, governmental act, failure of the Internet or other acts beyond such party's reasonable control, provided that the delayed party: (i) gives the other party prompt notice of such cause; and (ii) uses reasonable commercial efforts to correct promptly such failure or delay in performance.
- c. Counterparts. This Agreement may be executed in any number of counterparts and electronically, each of which shall be an original but all of which together shall constitute one and the same instrument.
- d. Entire Agreement. This Agreement contains the entire understanding of the parties in respect of its subject matter and supersedes all prior agreements and understandings (oral or written) between the parties with respect to such subject matter. The schedules and exhibits hereto constitute a part hereof as though set forth in full herein.
- e. Modifications. Any modification, amendment, or addendum to this Agreement must be in writing and signed by both parties.
- f. Assignment. Neither party may assign this Agreement or any of its rights, obligations, or benefits hereunder, by operation of law or otherwise, without the other party's prior written consent; provided, however, either party, without the consent of the other party, may assign this Agreement to an Affiliate or to a successor (whether direct or indirect, by operation of law, and/or by way of purchase, merger, consolidation or otherwise) to all or substantially all of the business or assets of such party, where the responsibilities or obligations of the other party are not increased by such assignment and the rights and remedies available to the other party are not adversely affected by such assignment. Subject to that restriction, this Agreement will be binding on, inure to the benefit of, and be enforceable against the parties and their respective successors and permitted assigns.
- g. No Third Party Beneficiaries. The representations, warranties and other terms contained herein are for the sole benefit of the parties hereto and their respective successors and permitted assigns, and shall not be construed as conferring any rights on any other persons.
- h. Statistical Data. Without limiting the confidentiality rights and Intellectual Property Rights protections set forth in this Agreement, CPT has the perpetual right to use aggregated, anonymized, and statistical data ("Statistical Data") derived from the operation of the Software, and nothing herein shall be construed as prohibiting CPT

from utilizing the Statistical Data for business and/or operating purposes, provided that CPT does not share with any third party Statistical Data which reveals the identity of Client, Client's Class Members, or Client's Confidential Information.

- i. Export Controls. Client understands that the use of CPT's Products is subject to U.S. export controls and trade and economic sanctions laws and agrees to comply with all such applicable laws and regulations, including the Export Administration Regulations maintained by the U.S. Department of Commerce, and the trade and economic sanctions maintained by the Treasury Department's Office of Foreign Assets Control.
- j. Severability. If any provision of this Agreement is held by a court or arbitrator of competent jurisdiction to be contrary to law, such provision shall be changed by the court or by the arbitrator and interpreted so as to best accomplish the objectives of the original provision to the fullest extent allowed by law, and the remaining provisions of this Agreement shall remain in full force and effect.
- k. Notices. Any notice or communication required or permitted to be given hereunder may be delivered by hand, deposited with an overnight courier, sent by electronic delivery, or mailed by registered or certified mail, return receipt requested and postage prepaid to the address for the other party first written above or at such other address as may hereafter be furnished in writing by either party hereto to the other party. Such notice will be deemed to have been given as of the date it is delivered, if by personal delivery; the next business day, if deposited with an overnight courier; upon receipt of confirmation of electronic delivery (if followed up by such registered or certified mail); and five days after being so mailed.
- l. Independent Contractors. Client and CPT are independent contractors, and nothing in this Agreement shall create any partnership, joint venture, agency, franchise, sales representative or employment relationship between Client and CPT. Each party understands that it does not have authority to make or accept any offers or make any representations on behalf of the other. Neither party may make any statement that would contradict anything in this section.
- m. Subcontractors. CPT shall notify Client of its use of any subcontractors to perform Client-specific Services. CPT shall be responsible for its subcontractors' performance of Services under this Agreement.
- n. Headings. The headings of the sections of this Agreement are for convenience only, do not form a part hereof, and in no way limit, define, describe, modify, interpret or construe its meaning, scope or intent.
- o. Waiver. No failure or delay on the part of either party in exercising any right, power or remedy under this Agreement shall operate as a waiver, nor shall any single or partial exercise of any such right, power or remedy preclude any other or further exercise or the exercise of any other right, power or remedy.
- p. Survival. Sections of the Agreement intended by their nature and content to survive termination of the Agreement shall so survive.

EXHIBIT 11

Case Name: Johnson v. Nan McKay & Associates, Inc.

Wednesday, May 4, 2022

Requesting Law Firm

Contact

E-Mail

ILYM Contact

E-Mail

Contact Number

The Spivak Law Firm

David Spivak

david@spivaklaw.com

Sean Hartranft

Sean@ilymgroupclassaction.com

949.690.2564

ESTIMATE FOR ADMINISTRATION SOLUTIONS

Opt-Out

ASSUMPTIONS	
Total Number of Class Members	314
Estimated Percentage of Undeliverable Mail	20%
NCOA	Yes
One-Page Notice Posted to ILYM Group Website	Yes
Certified Spanish Translations	No

Activity	Rate Type	Unit Cost	Volume	Amount
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CASE STARTUP

Initial Setup - Import and Formatting of Data*	Hourly	\$150.00	2	\$300.00
Programming of Class Database	Hourly	\$175.00	2	\$350.00

**ILYM assumes that data will be in a standard format. Client will be notified immediately if not in standard format to correct data or ILYM can convert to standard format @ \$150.00 per hour.*

Subtotal \$650.00

PROJECT MANAGEMENT

Project Manager (Case notification and maintenance)	Hourly	\$120.00	5	\$600.00
Staff Hours for Processing Opt-Outs, Disputes & Objections	Hourly	\$70.00	1	\$70.00
Staff Hours for Processing Returned Mailed	Hourly	\$70.00	2	\$140.00
Report Processing	Hourly	\$70.00	3	\$210.00
NCOA	Per Piece	\$75.00	1	\$75.00
Toll-Free Call Center	Flat Fee	\$100.00	1	\$100.00
ILYM Group Static Website, Includes Hosting	Flat Fee	\$750.00	1	\$750.00
Weekly Reports	Flat Fee	\$500.00	1	Waived

Subtotal \$1,945.00

ILYM | GROUP, Inc.

SETTLEMENT ADMINISTRATION EXPERTS

Activity	Rate Type	Unit Cost	Volume	Amount
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NOTIFICATION/MAILING				
Fulfillment Notice	Per Piece	\$1.50	314	\$471.00
USPS First Class Postage	Per Piece	\$0.55	314	\$172.70
Remails (Forward/Skip Trace Undeliverables)	Per Piece	\$2.00	63	\$125.60
Storage, Photocopies, Deliveries	Flat Fee	\$300.00	1	\$300.00

Subtotal \$1,069.30

DISTRIBUTION (Includes EIN, Bank Acct * /QSF Setup)				
Distribution Setup & Management	Hourly	\$150.00	3	\$450.00
Account Reconciliation & Distribution Reporting	Hourly	\$125.00	3	\$375.00
Check, Print & Mail (Including W2/1099 Stub & Release)	Per Check	\$1.50	314	\$471.00
USPS First Class Postage	Per Piece	\$0.55	314	\$172.70
Remails (Forward/Skip Trace Undeliverables)	Per Piece	\$2.00	31	\$62.80
Preparation of Taxes	Hourly	\$120.00	12	\$1,440.00
Annual Filing of Tax Return	Per Year	\$1,500.00	1	\$1,500.00

***Additional Bank fees may apply*

Subtotal \$4,471.50

CASE CONCLUSION				
Data Manager Final Reporting	Hourly	\$100.00	3	\$300.00
Project Manager Final Reporting	Hourly	\$120.00	3	\$360.00
Process Unclaimed Funds to State Controller's Office	Flat Fee	\$750.00	1	\$750.00
Declaration	Hourly	\$125.00	3	\$375.00

Subtotal \$1,785.00

Total Case Estimate: \$9,920.80

Terms and Conditions

All services to be provided by ILYM Group, Inc. (hereinafter, "ILYM") to Client shall be subject to the following terms and conditions:

Services: Subject to the terms hereof, ILYM agrees to provide the Client with Administration Services (hereinafter, "services") as specified in the Proposal provided to Client to which these Terms and Conditions are attached. The estimate is in good faith and does not cover any applicable taxes and fees. The estimate does not make provision for any services or class members/size not delineated in the request for proposal or stipulations. Such services do not in any way constitute legal services or advice. ILYM is performing its services as an Independent Contractor and neither it nor its employees shall be deemed to be employees of the Client.

Mailing and Data Conversion: ILYM's database administration assumes the Client will provide complete data that includes all information required to send notifications and complete the administration process. Data must be provided in a complete, consistent, standardized electronic format. ILYM's standard format is Microsoft Excel, however, ILYM may accept other formats at its discretion. Further developments or enhancements to non-standardized data will be billed to Client by ILYM on a time and materials basis, according to ILYM's Standard Rates.

Charges for Services: Charges to the Client for services shall be on a time and materials basis at our prevailing rates, as the same may change from time to time. Any fee estimates set forth in the proposal are estimates only, based on information provided by Client to ILYM. Actual fees charged by ILYM to Client may be greater or less than such estimate, and Client shall be responsible for the payment of all such charges and expenses in accordance with Section 5 hereof. Charges incurred related to resolving post distribution withholdings and related corrective files due to voids and re-issues of payments and related correspondence with state and federal taxing authorities will not be charged to the Client to the extent that funds are received from the taxing authorities offset these charges. ILYM may derive financial benefits from financial institutions in connection with the deposit and investment of settlement funds with such institutions, including without limitation, discounts on eligible banking services and fees, and loans at favorable rates.

Indemnification: Client will indemnify and hold ILYM (and the officers, employees, affiliates and agents harmless against any Losses incurred by ILYM, arising out of, in connection with, or related to (i) any breach of the terms by Client; (ii) the processing and handling of any payment by ILYM in accordance with Client's instructions, including without limitation, the imposition of any stop payment or void payment on any check or the wrongful dishonor of a check by ILYM pursuant to Client's instructions.

Payment of Charges: ILYM reserves the right to request payment of postage charges and 50% of the final administration charges at the start of the case. ILYM bills are due upon receipt unless otherwise negotiated and agreed to with the Client. In the event settlement terms provide that ILYM is to be paid out of the Settlement Fund, ILYM will request that Counsel endeavor to make alternate payment arrangements for ILYM charges that are due at the onset of the case. The entire remaining balance is due and payable at the time the Settlement Account is funded by, or no later than the time of disbursement. Decisions of the court and actions of the parties, including disapproval or withdrawal of a settlement, do not affect the Client's liability to ILYM for payment of services. Services are not provided on a contingency fee basis.

Confidentiality: ILYM maintain reasonable and appropriate security measures and safeguards to protect the security and confidentiality of Client data provided to ILYM by Client in connection herewith. Should ILYM ever be notified of any judicial order or other proceedings in which a third party seeks to obtain access to the confidential data created by or for the Client, ILYM will promptly notify the Client, unless prohibited by applicable law. The Client shall have the option to (1) provide legal representation at the Client's expense to avoid such access or (2) promptly reimburse ILYM for any of its costs, including attorneys' fees, reasonably incurred in avoiding, attempting to avoid or providing such access and not paid by the entity seeking the data. If ILYM is required, pursuant to a court order, to produce documents, disclose data, or otherwise act in contravention of the obligations imposed by this Agreement, or otherwise, with respect to maintaining the confidentiality, proprietary nature and secrecy of the produced documents or disclosed data, ILYM will not be liable for breach of said obligation.

Data Rights: ILYM does not convey nor does the Client obtain any right in the programs, system data, or materials utilized or provided by ILYM in the ordinary course of business in the performance of this Agreement.

Document Retention: Unless directed otherwise in writing by Client, ILYM will destroy undeliverable mail on the effective date of the settlement or the date that the disposition of the case is no longer subject to appeal or review, whichever is later. ILYM will maintain claim forms and other correspondence for one year after final distribution of funds or benefits, or until the date that the disposition of the case is no longer subject to appeal or review, whichever is later.

Limitation of damages: ILYM is not responsible to the Client for any special, consequential or incidental damages incurred by Client. Any liability of ILYM to the Client shall not exceed the total amount billed to the Client for the particular services that give rise to any loss.

Termination: The services to be provided under this Agreement may be terminated, at will by the Client upon at least 30 calendar days' prior written notice to ILYM. The Client's obligation to pay for services or projects in progress at the time of notice of withdrawal shall continue throughout that 30 day period. ILYM may terminate this Agreement (i) with 10 calendar days' prior written notice, if the Client is not current in payment of charges or (ii) in any event, upon at least 3 months' prior written notice to the Client.

Notice: Any notice required or permitted hereunder shall be in writing and shall be delivered personally, or sent by registered mail, postage prepaid, or overnight courier service to the responsible officer or principal of ILYM or the Client, as applicable, and shall be deemed given when so delivered personally, or, if mailed, five days after the date of deposit in United States mail, or, if sent by courier, one business day after delivery to such courier service.

Force Majeure: To the extent performance by ILYM of any of its obligations hereunder is substantially prevented by reason of any act of God or by reason of any other matter beyond ILYM's reasonable control, then such performance shall be excused and this Agreement, at ILYM's option, be deemed suspended during the continuation of such condition and for a reasonable time thereafter.

Waiver of Rights: No failure or delay on the part of a party in exercising any right hereunder will operate as a waiver of, or impair, any such right. No single or partial exercise of any such right will preclude any other or further exercise thereof or the exercise of any other right. No waiver of any such right will be effective unless given in a signed writing.

Jurisdiction: The parties hereto submit to the jurisdiction of the Court of the applicable case for purposes of any suit, action or proceeding to enforce any provision of, or based on any right arising out of, this Agreement. The parties hereto hereby waive any objection to the laying of venue of any such suit, action or proceeding in the Court.

Entire Agreement: These terms and conditions and the proposal embody the entire agreement between the parties with respect to the subject matter hereof, and cancels and supersedes all prior negotiations, representations, and agreements related thereto, either written or oral, except to the extent they are expressly incorporated herein. No changes in, additions to, or waivers of, the terms and conditions set forth herein will be binding upon any party, unless approved in writing by such party's authorized representative.

EXHIBIT 12



PHOENIX

CLASS ACTION ADMINISTRATION SOLUTIONS

May 4, 2022

CASE ASSUMPTIONS

Class Members	314
Opt Out Rate	1%
Opt Outs Received	3
Total Class Claimants	311
Subtotal Admin Only	\$8,879.80

Not-to-Exceed Total \$6,000.00

For 314 Class Members

Pricing Good for Scope of Estimate Only

All Aspects of Escheating to the State of CA Included

Case: Johnson v. Nan McKay & Associates, Inc, Opt-Out Administration

Phoenix Contact: Michael E. Moore
Contact Number: 949.331.0131
Email: mike@phoenixclassaction.com

Requesting Attorney: David Spivak
Firm: The Spivak Law Firm
Contact Number: (818) 582-3073
Email: david@spivaklaw.com

Assumptions and Estimate are based on information provided by counsel. If class size changes, PSA will need to adjust this Estimate accordingly. Estimate is based on **314** Class Members. PSA assumes class data will be sent in Microsoft Excel or other usable format with no or reasonable additional formatting needed. A rate of \$150 per hour will be charged for any additional analysis or programming.

Case & Database Setup / Toll Free Setup & Call Center / NCOA (USPS)

Administrative Tasks:	Rate	Hours/Units	Line Item	Estimate
Programming Manager	\$100.00	2		\$200.00
Programming Database & Setup	\$100.00	2		\$200.00
Toll Free Setup*	\$150.00	1		\$150.00
Call Center & Long Distance	\$2.00	32		\$64.00
NCOA (USPS)	\$78.50	1		\$78.50
		Total		\$692.50

* Up to 120 days after disbursement

Data Merger & Scrub / Notice Packet, Opt-Out Form & Postage / Website / Reminder Postcard

Project Action	Rate	Hours/Units	Line Item	Estimate
Notice Packet Formatting	\$100.00	2		\$200.00
Data Merge & Duplication Scrub	\$0.10	314		\$31.40
Notice Packet & Opt-Out Form	\$1.25	314		\$392.50
Estimated Postage (up to 2 oz.)*	\$0.53	314		\$166.42
Static Website	\$100.00	1		Included
Check Cashing Reminder Postcard	\$0.60	65		\$39.19
Postage Included				
		Total		\$829.51

* Prices good for 90 days. Subject to change with the USPS Rate or change in Notice pages or Translation, if any.



PHOENIX

CLASS ACTION ADMINISTRATION SOLUTIONS

Skip Tracing & Remailing Notice Packets / Tracking & Programming Undeliverables				
Project Action:	Rate	Hours/Units	Line Item	Estimate
Case Associate	\$55.00	4		\$220.00
Skip Tracing Undeliverables	\$0.85	79		\$66.73
Remail Notice Packets	\$0.75	76		\$56.63
Estimated Postage	\$0.53	76		\$40.02
Programming Undeliverables	\$50.00	1		\$50.00
Total				\$433.37

Database Programming / Processing Opt-Outs, Deficiencies or Disputes				
Project Action:	Rate	Hours/Units	Line Item	Estimate
Programming Claims Database	\$150.00	2		\$300.00
Non Opt-Out Processing	\$200.00	1		\$200.00
Case Associate	\$55.00	6		\$330.00
Opt-Outs/Deficiency/Dispute Letters	\$10.00	9		\$90.00
Case Manager	\$85.00	5		\$425.00
Total				\$1,345.00

Calculation & Disbursement Programming/ Create & Manage QSF/ Mail Checks				
Project Action:	Rate	Hours/Units	Line Item	Estimate
Programming Calculations	\$135.00	2		\$270.00
Disbursement Review	\$135.00	1		\$135.00
Programming Manager	\$95.00	1		\$95.00
QSF Bank Account & EIN	\$135.00	2		\$270.00
Check Run Setup & Printing	\$135.00	2		\$270.00
Mail Class Checks *	\$1.10	311		\$342.10
Estimated Postage	\$0.53	311		\$164.83
Total				\$1,546.93

* Checks are printed on 8.5 x 11 in. sheets with W2/1099 Tax Filing



PHOENIX

CLASS ACTION ADMINISTRATION SOLUTIONS

Tax Reporting & Reconciliation / Re-Issuance of Checks / Conclusion Reports and Declarations				
Project Action:	Rate	Hours/Units	Line Item	Estimate
Case Supervisor	\$115.00	4		\$460.00
Remail Checks and Tax Forms (Postage Included)	\$1.50	75		\$112.50
Case Associate	\$55.00	4		\$220.00
Reconcile Uncashed Checks	\$85.00	8		\$680.00
Conclusion Reports	\$115.00	4		\$460.00
Case Manager Conclusion	\$85.00	4		\$340.00
Final Reporting & Declarations	\$115.00	4		\$460.00
IRS & QSF Annual Tax Reporting * (1 State Tax Reporting Included)	\$1,000.00	1		\$1,000.00
Check to Cy-Pres	\$150.00	1		Included
Uncashed Checks to the State of California Controllers Office	\$300.00	1		\$300.00
Estimated <u>19</u> Total Class Members				
Total				\$4,032.50

* All applicable California State & Federal taxes, which include SUI, ETT, and SDI, and FUTA filings. Additional taxes are Defendant's responsibility.

Estimate Total: \$8,879.80



PHOENIX

CLASS ACTION ADMINISTRATION SOLUTIONS

TERMS AND CONDITIONS

Provisions: The case estimate is in good faith and does not cover any applicable taxes and fees. The estimate does not make any provision for any services or class size not delineated in the request for proposal or stipulations. Proposal rates and amounts are subject to change upon further review, with Counsel/Client, of the Settlement Agreement. Only pre-approved changes will be charged when applicable. No modifications may be made to this estimate without the approval of PSA (Phoenix Settlement Administrators). All notifications are mailed in English language only unless otherwise specified. Additional costs will apply if translation into other language(s) is required. Rates to prepare and file taxes are for Federal and California State taxes only. Additional charges will apply if multiple state tax filing(s) is required. **Pricing is good for ninety (90) days.**

Data Conversion and Mailing: The proposal assumes that data provided will be in ready-to-use condition and that all data is provided in a single, comprehensive Excel spreadsheet. PSA cannot be liable for any errors or omissions arising due to additional work required for analyzing and processing the original database. A minimum of two (2) business days is required for processing prior to the anticipated mailing date with an additional two (2) business days for a National Change of Address (NCOA) update. Additional time may be required depending on the class size, necessary translation of the documents, or other factors. PSA will keep counsel apprised of the estimated mailing date.

Claims: PSA's general policy is to not accept claims via facsimile. However, in the event that facsimile filing of claims must be accepted, PSA will not be held responsible for any issues and/or errors arising out of said filing. Furthermore, PSA will require disclaimer language regarding facsimile transmissions. PSA will not be responsible for any acts or omissions caused by the USPS. PSA shall not make payments to any claimants without verified, valid Social Security Numbers. All responses and class member information are held in strict confidentiality. Additional class members are \$10.00 per opt-out.

Payment Terms: All postage charges and 50% of the final administration charges are due at the commencement of the case and will be billed immediately upon receipt of the data and/or notice documents. PSA bills are due upon receipt unless otherwise negotiated and agreed to with PSA by Counsel/Client. In the event the settlement terms provide that PSA is to be paid out of the settlement fund, PSA will request that Counsel/Client endeavor to make alternate payment arrangements for PSA charges that are due at the onset of the case. The entire remaining balance is due and payable at the time the settlement account is funded by Defendant, or no later than the time of disbursement. Amounts not paid within thirty (30) days are subject to a service charge of 1.5% per month or the highest rate permitted by law.

Tax Reporting Requirements

PSA will file the necessary tax returns under the EIN of the QSF, including federal and state returns. Payroll tax returns will be filed if necessary. Under the California Employment Development Department, all taxes are to be reported under the EIN of the QSF with the exception of the following taxes: Unemployment Insurance (UI) and Employment Training Tax (ETT), employer-side taxes, and State Disability Insurance (SDI), an employee-side tax. These are reported under Defendant's EIN. Therefore, to comply with the EDD payroll tax filing requirements we will need the following information:

1. Defendant's California State ID and Federal EIN.
2. Defendant's current State Unemployment Insurance (UI) rate and Employment Training Tax (ETT) rate. This information can be found in the current year DE 2088, Notice of Contribution Rates, issued by the EDD.
3. Termination dates of the class members, or identification of current employee class members, so we can account for the periods that the wages relate to for each class member.
4. An executed Power of Attorney (Form DE 48) from Defendant. This form is needed so that we may report the UI, SDI, and ETT taxes under Defendant's EIN on their behalf. If this form is not provided we will work with the EDD auditors to transfer the tax payments to Defendant's EIN.
5. Defendant is responsible for reporting the SDI portion of the settlement payments on the class member's W-2. PSA will file these forms on Defendant's behalf for an additional fee and will issue an additional W-2 for each class member under Defendant's EIN, as SDI is reported under Defendant's EIN rather than the EIN of the QSF. The Power of Attorney (Form DE 48) will be needed in order for PSA to report SDI payments.

EXHIBIT 13