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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN JOAQUIN

LUKE SOARES, as an individual and on
 behalf of all others similarly situated,

Plaintiff,

vs.

KEHE DISTRIBUTORS, INC., a
 Delaware corporation; and DOES 1
 through 50, inclusive,

Defendants.

Case No.: STK-CV- VOE -2020- 5844

**CLASS AND REPRESENTATIVE ACTION
 COMPLAINT FOR:**

- (1) VIOLATION OF LABOR CODE §§ 201-203;
- (2) VIOLATION OF LABOR CODE §§ 2698, ET SEQ.

DEMAND OVER \$25,000

1 Plaintiff Luke Soares (“Plaintiff”) hereby submits this Class and Representative Action
2 Complaint (“Complaint”) against Defendant KeHe Distributors, Inc. (“Defendant”), and Does 1-
3 50 (collectively, “Defendants”), as an individual and on behalf of all other similarly situated
4 current and former employees of Defendants for penalties and/or damages under California
5 Labor Code for failure to pay sick pay at the regular rate of pay, as follows:

6 **INTRODUCTION**

7 1. This class and representative action is within the Court’s jurisdiction under
8 California Labor Code §§ 201-203, 246, and 2698, *et seq.*, and the California Industrial Welfare
9 Commission’s (“IWC”) Wage Orders.

10 2. This Complaint challenges systemic illegal employment practices resulting in
11 violations of the California Labor Code against employees of Defendants.

12 3. Plaintiff is informed and believes, and based thereon alleges, that Defendants
13 jointly and severally have acted intentionally and with deliberate indifference and conscious
14 disregard to the rights of all employees by failing to pay sick pay at the regular rate of pay.

15 4. Plaintiff is informed and believes and based thereon alleges that Defendants have
16 engaged in, among other things a system of willful violations of the California Labor Code and
17 applicable IWC Wage Orders by creating and maintaining policies, practices and customs that
18 knowingly deny employees the above stated rights and benefits.

19 **JURISDICTION AND VENUE**

20 5. The Court has jurisdiction over the violations of the California Labor Code
21 §§ 201-203, 246, and 2698, *et seq.*

22 6. Venue is proper in San Joaquin County because Defendant operates business
23 locations in this County, and Plaintiff worked for Defendant in this County.

24 **PARTIES**

25 7. Plaintiff is a former employee of Defendant. On or about April 2018, Plaintiff
26 began working for Defendant as a Loader. Plaintiff was a non-exempt employee, and was paid
27 hourly. Plaintiff was terminated from his employment on or about May 4, 2020.

28 8. During his employment with Defendant, Plaintiff was paid various non-

1 discretionary incentive wages, including without limitation, job premium and shift differential
2 wages. During his employment with Defendant, Plaintiff was also paid wages for sick time.

3 9. Plaintiff was and is the victim of the policies, practices, and customs of
4 Defendants complained of in this action in ways that have deprived him of the rights guaranteed
5 by California Labor Code §§ 201-203, 246, and 2698, *et seq.*, and the applicable IWC Wage
6 Orders.

7 10. Plaintiff is informed and believes and based thereon alleges that Defendant was
8 and is a Delaware corporation doing business in the State of California. Defendant operates
9 distribution centers throughout California.

10 11. Plaintiff is informed and believes and based thereon alleges that at all times herein
11 mentioned Defendant and DOES 1 through 50 are and were business entities, individuals, and
12 partnerships, licensed to do business and actually doing business in the State of California.

13 12. As such, and based upon all the facts and circumstances incident to Defendants'
14 business in California, Defendants are subject to California Labor Code §§ 201-203, 246, and
15 2698, *et seq.*, and the IWC Wage Orders.

16 13. Plaintiff does not know the true names or capacities, whether individual, partner
17 or corporate, of the Defendants sued herein as DOES 1 through 50, inclusive, and for that reason,
18 said Defendants are sued under such fictitious names, and Plaintiff prays for leave to amend this
19 Complaint when the true names and capacities are known. Plaintiff is informed and believes and
20 based thereon alleges that each of said fictitious Defendants were responsible in some way for
21 the matters alleged herein and proximately caused Plaintiff and members of the general public
22 and class to be subject to the illegal employment practices, wrongs and injuries complained of
23 herein.

24 14. At all times herein mentioned, each of said Defendants participated in the doing
25 of the acts hereinafter alleged to have been done by the named Defendants; and furthermore, the
26 Defendants, and each of them, were the agents, servants and employees of each of the other
27 Defendants, as well as the agents of all Defendants, and at all times herein mentioned, were
28 acting within the course and scope of said agency and employment.

15. Plaintiff is informed and believes and based thereon alleges that at all times material hereto, each of the Defendants named herein was the agent, employee, alter ego and/or joint venturer of, or working in concert with each of the other co-defendants and was acting within the course and scope of such agency, employment, joint venture, or concerted activity. To the extent said acts, conduct, and omissions were perpetrated by certain Defendants, each of the remaining Defendants confirmed and ratified said acts, conduct, and omissions of the acting Defendants.

16. At all times herein mentioned, Defendants, and each of them, were members of, and engaged in, a joint venture, partnership and common enterprise, and acting within the course and scope of, and in pursuance of, said joint venture, partnership and common enterprise.

17. At all times herein mentioned, the acts and omissions of various Defendants, and each of them, concurred and contributed to the various acts and omissions of each and all of the other Defendants in proximately causing the injuries and damages as herein alleged. At all times herein mentioned, Defendants, and each of them, ratified each and every act or omission complained of herein. At all times herein mentioned, the Defendants, and each of them, aided and abetted the acts and omissions of each and all of the other Defendants in proximately causing the damages as herein alleged.

CLASS ACTION ALLEGATIONS

18. **Definition:** The named individual Plaintiff seeks class certification, pursuant to California Code of Civil Procedure § 382, of the following Class:

- a. All non-exempt employees of Defendant in the State of California who were paid sick pay wages during their employment and whose employment ended at any time between April 6, 2017, through the present (the “Class”);
- b. All non-exempt employees of Defendant in the State of California who were paid sick pay wages and non-discretionary incentive wages, including, but not limited to, job premium and/or shift differential wages, in the same workweek during their employment and whose employment ended at any time between April 6, 2017, through the present (“Subclass 1”); and

1 c. All non-exempt employees of Defendant in the State of California who were
2 paid non-discretionary incentive wages, including, but not limited to, job
3 premium and/or shift differential wages, within 90 days prior to the payment of
4 sick pay wages during their employment and whose employment ended at any
5 time between April 6, 2017, through the present (“Subclass 2”).

6 19. **Numerosity and Ascertainability:** The members of the Class are so numerous
7 that joinder of all members would be impractical, if not impossible. The identity of the members
8 of the Class is readily ascertainable by review of Defendants’ records, including payroll records.
9 Plaintiff alleges that Defendants failed to pay Class Members sick pay at the regular rate of pay
10 in violation of Labor Code §§ 201-203 and 246.

11 20. **Adequacy of Representation:** The named Plaintiff is fully prepared to take all
12 necessary steps to represent fairly and adequately the interests of the class defined above.
13 Plaintiff’s attorneys are ready, willing and able to fully and adequately represent the Class and
14 individual Plaintiff. Plaintiff’s attorneys have prosecuted and settled wage-and-hour class
15 actions in the past and currently have a number of wage-and-hour class actions pending in
16 California courts.

17 21. Defendants uniformly administered a corporate policy and practice of failing to
18 pay employees sick pay at their regular rate of pay and paying such wages at the time of their
19 termination and/or end of employment, in violation of Labor Code §§ 201-203 and 246.

20 22. **Common Question of Law and Fact:** There are predominant common questions
21 of law and fact and a community of interest amongst Plaintiff and the claims of the Class
22 concerning Defendants’ failure to pay sick pay at their regular rate of pay in violation of Labor
23 Code §§ 201-203 and 246.

24 23. **Typicality:** The claims of Plaintiff are typical of the claims of all members of the
25 Class in that Plaintiff has suffered the harm alleged in this Complaint in a similar and typical
26 manner as the Class Members. As with other Class Members, Plaintiff was a non-exempt
27 employee and was paid hourly. Plaintiff routinely earned non-discretionary incentive wages,
28 such as job premiums and/or shift differential wages, that increased his regular rate of pay.

1 However, whenever sick pay was paid to Plaintiff, it was paid at Plaintiff's base rate of pay
2 rather than the correct, higher regular rate of pay that included any non-discretionary incentive
3 wages. As such, Plaintiff is a member of the Class and has suffered the alleged violations of
4 California Labor Code §§ 201-203 and 246.

5 24. The California Labor Code and upon which Plaintiff bases these claims is broadly
6 remedial in nature. These laws and labor standards serve an important public interest in
7 establishing minimum working conditions and standards in California. These laws and labor
8 standards protect the average working employee from exploitation by employers who may seek
9 to take advantage of superior economic and bargaining power in setting onerous terms and
10 conditions of employment.

11 25. The nature of this action and the format of laws available to Plaintiff and
12 members of the Class identified herein make the class action format a particularly efficient and
13 appropriate procedure to redress the wrongs alleged herein. If each employee were required to
14 file an individual lawsuit, the corporate Defendant would necessarily gain an unconscionable
15 advantage since it would be able to exploit and overwhelm the limited resources of each
16 individual Plaintiff with Defendant's vastly superior financial and legal resources. Requiring
17 each Class member to pursue an individual remedy would also discourage the assertion of lawful
18 claims by employees who would be disinclined to file an action against their former and/or
19 current employer for real and justifiable fear of retaliation and permanent damage to their careers
20 at subsequent employment.

21 26. The prosecution of separate actions by the individual class members, even if
22 possible, would create a substantial risk of (a) inconsistent or varying adjudications with respect
23 to individual Class members against Defendants and which would establish potentially
24 incompatible standards of conduct for the Defendants, and/or (b) adjudications with respect to
25 individual Class members which would, as a practical matter, be dispositive of the interest of the
26 other Class members not parties to the adjudications or which would substantially impair or
27 impede the ability of the Class members to protect their interests. Further, the claims of the
28 individual members of the Class are not sufficiently large to warrant vigorous individual

prosecution considering all of the concomitant costs and expenses.

27. Such a pattern, practice and uniform administration of corporate policy regarding illegal employee compensation described herein is unlawful and creates an entitlement to recovery by the Plaintiff and the Class identified herein, in a civil action, for all applicable penalties and/or damages, reasonable attorneys' fees, and costs of suit according to the mandate of California Labor Code §§ 218.5 and 1194, and Code of Civil Procedure § 1021.5.

28. Proof of a common business practice or factual pattern, which the named Plaintiff experienced and is representative of, will establish the right of each of the members of the Class to recovery on the causes of action alleged herein.

29. The Class is commonly entitled to a specific fund with respect to the compensation illegally and unfairly retained by Defendants. The Class is commonly entitled to restitution of those funds being improperly withheld by Defendants. This action is brought for the benefit of the entire Class and will result in the creation of a common fund.

FIRST CAUSE OF ACTION

VIOLATION OF LABOR CODE §§ 201-203

(BY PLAINTIFF AND THE CLASS, SUBCLASS 1, AND SUBCLASS 2 AGAINST ALL DEFENDANTS)

30. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 29 as though fully set forth herein.

31. Labor Code § 246(l)(1) provides that paid sick time for non-exempt employees be "calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek."

32. Labor Code § 246(l)(2) further provides that paid sick time for non-exempt employees be "calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment."

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1 33. Defendants violated Labor Code § 246 by failing to pay sick pay at the regular
2 rate of pay. Plaintiff and Class Members routinely earned non-discretionary incentive wages,
3 including without limitation, job premium and/or shift differential wages, thereby increasing
4 their regular rates of pay to amounts that were higher than their base rates of pay. However,
5 whenever sick pay was paid to Plaintiff and Class Members, it was paid at their base rates of pay
6 rather than the correct, higher regular rates of pay, as required under Labor Code § 246.
7 Defendants routinely deducted taxes and other withholdings from the wages that it paid Class
8 Members in the form of sick pay.

9 34. As a pattern and practice, Defendants regularly failed to pay Plaintiff and Class
10 Members their correct wages and accordingly owe waiting time penalties pursuant to Labor
11 Code § 203. Further, Plaintiff is informed and believes and based thereon alleges that such
12 failure to pay sick pay at the correct regular rate was willful, such that Plaintiff and Class
13 Members whose employment has separated are entitled to waiting time penalties pursuant to
14 Labor Code §§ 201-203.

15 35. Such a pattern, practice and uniform administration of corporate policy regarding
16 illegal employee compensation as described herein is unlawful and creates an entitlement to
17 recovery by the Plaintiff and the Class identified herein, in a civil action, for the unpaid balance
18 of the full amount of damages and penalties, attorneys' fees, and costs of suit according to the
19 mandate of California Labor Code §§ 201-203, 218.5, and 1194.

20 **SECOND CAUSE OF ACTION**

21 **VIOLATION OF LABOR CODE §§ 2698, *ET SEQ.***

22 **(BY PLAINTIFF AND THE AGGRIEVED EMPLOYEES AGAINST ALL**
23 **DEFENDANTS)**

24 36. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 35 as
25 though fully set forth herein.

26 37. Plaintiff brings this cause of action as a proxy for the State of California and in
27 this capacity, seeks penalties on behalf of all Aggrieved Employees from July 1, 2020, through
28 the present, for Defendants' violations of Labor Code §§ 201-203 and 246. As alleged above,

Defendants, as a matter of policy and practice, failed to pay Plaintiff and other Aggrieved Employees sick pay wages at the regular rate of pay, which resulted in employees whose employment ended not receiving all wages due and owing at the conclusion of their employment.

38. On or about July 1, 2020, Plaintiff sent written notice to the California Labor & Workforce Development Agency (“LWDA”) of Defendants’ violations of Labor Code §§ 201-203 and 246, pursuant to Labor Code § 2698, *et seq.*, the Private Attorney General Act (“PAGA”). As of the date of the filing of this Complaint, the LWDA has yet to provide notice as to whether it intends to investigate the Labor Code violations provided for in Plaintiff’s written notice. Pursuant to Labor Code § 2699.3, Plaintiff also sent written notice of Defendants’ violations of Labor Code §§ 201-203 and 246 to Defendants via certified mail.

39. As such, pursuant to Labor Code § 2699(a), Plaintiff seeks recovery of any and all applicable civil penalties for Defendants’ violations of Labor Code §§ 201-203 and 246, for the time period described above, on behalf of herself and all other Aggrieved Employees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as an individual and on behalf of all others that this suit is brought against Defendants, jointly and severally, as follows:

1. For an order certifying the proposed Class;
2. For an order appointing Plaintiff as the representative of the Class as described herein;
3. For an order appointing counsel for Plaintiff as Class counsel;
4. Upon the First Cause of Action, for unpaid wages and/or penalties pursuant to California Labor Code §§ 201-203, and for costs and attorneys’ fees;
5. Upon the Second Cause of Action, for the full amount of civil penalties according to the PAGA, Labor Code § 2698, *et seq.*, and for costs and attorneys’ fees;
6. On all causes of action, for attorneys’ fees and costs as provided by California Labor Code §§ 218.5, 1194, and 2699, and Code of Civil Procedure § 1021.5; and

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1 7. For such other and further relief as the Court may deem just and proper.
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3 DATED: July 9, 2020

DIVERSITY LAW GROUP, P.C.

4 By:  _____

5 Larry W. Lee

6 Max W. Gavron

7 Attorneys for Plaintiff, the Class, and Aggrieved
8 Employees
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