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SUPERIOR COURT OF THE STATE OF CALIFORNIA

LOS ANGELES COUNTY – CENTRAL DISTRICT

BURBANK COURTHOUSE

BRENDA WINNER,

Plaintiff,

v.

NIVEK CORPORATION dba
FOOTHILL GYM; BRIAN PAUL
WHELAN; and DOES 1 through 50,
inclusive,

Defendants.

Case No.:

**COMPLAINT FOR DAMAGES AND CIVIL
PENALTIES**

1. Failure to Pay All Wages in Violation of Labor Code §§ 510, 1182.12, 1194, 1197 and 204, and IWC Wage Order 10-2001, Sect. 3;
2. Failure to Provide Meal Periods in Violation of Labor Code §§ 226.7 and 512, and IWC Wage Order 10-2001, Sect.11;
3. Failure to Provide Rest Periods in Violation of Labor Code §§ 226.7 and 512, and IWC Wage Order 10-2001, Sect.12;
4. Failure to Pay All Wages Due Upon Separation of Employment in Violation of Labor Code §§ 201, 202, and 203;
5. Failure to Provide Accurate Itemized Wage Statements in Violation of Labor Code §§ 226 and 1174;
6. Failure to Reimburse for Necessary Business Expenditures in Violation of Labor Code § 2802;
7. Civil Penalties under Labor Code §§ 2698 and 2699 (Private Attorneys General Act); and
8. Unfair Business Practices in Violation of Cal. Bus. & Prof. Code § 17200.

1 Plaintiff BRENDA WINNER (“Plaintiff”), individually and on behalf of herself and all
2 others similarly situated, complaint and alleges as follows:

3 **PRELIMINARY STATEMENT**

4 1. This is an action brought by Plaintiff individually against NIVEK
5 CORPORATION dba FOOTHILL GYM, BRIAN PAUL WHELAN, and DOES 1 through 50
6 (collectively referred to herein as “Defendants”) to recover damages for Labor Code and
7 Industrial Welfare Commission (“IWC”) Wage Order violations during the “Relevant Time
8 Period” defined as four (4) years prior to the filing of this Complaint. Specifically, Plaintiff seeks
9 relief against Defendants for its: (1) failure to pay all wages due, including minimum, regular and
10 overtime wages; (2) failure to provide meal periods or compensation in lieu thereof; (3) failure to
11 provide rest periods or compensation in lieu thereof; (4) failure to provide accurate itemized wage
12 statements; (5) failure to pay all wages due upon separation of employment to terminated or
13 resigned employees; and (6) failure to reimburse for necessary expenditures during the Relevant
14 Time Period.

15 2. Plaintiff further seeks equitable remedies in the form of declaratory relief and
16 injunctive relief, and relief under the Bus. & Prof. Code sections 17200 et seq. for unfair business
17 practices.

18 3. This is also a representative action pursuant to Labor Code section 2698 et seq.,
19 known as the Private Attorneys General Act of 2004 (“PAGA”), brought by Plaintiff on behalf of
20 herself and on behalf of all “Aggrieved Employee(s).” “Aggrieved Employee(s)” is defined as
21 non-exempt hourly-paid employees throughout California employed by Defendants during the
22 PAGA Period. The “PAGA Period” is defined as one (1) year and sixty-five (65) days prior to
23 the filing of this Complaint. Plaintiff reserves the right to amend this complaint to reflect a
24 different PAGA Period or modify the definition of Aggrieved Employees as further discovery is
25 conducted.

26 4. Plaintiff, by virtue of her employment with Defendants and having suffered from
27 all of Defendants’ violations of the Labor Code and IWC Wage Order provisions alleged herein,
28 is an aggrieved employee with standing to bring an action under the PAGA. Plaintiff has satisfied

1 all prerequisites to serve as a representative of the general public to enforce California's labor
2 laws, and the penalty provisions identified in Labor Code section 2699.5.

3 5. Plaintiff, on behalf of herself and all Aggrieved Employees, seeks penalties
4 pursuant to PAGA in connection with Defendants' Labor Code violations including one or more
5 of the following: (1) failure to pay all wages due, including minimum, regular and overtime
6 wages; (2) failure to provide meal periods or compensation in lieu thereof; (3) failure to provide
7 rest periods or compensation in lieu thereof; (4) failure to provide accurate itemized wage
8 statements; (5) failure to pay all wages due upon separation of employment to terminated or
9 resigned employees; and (6) failure to reimburse for necessary expenditures.

10 6. At all relevant times herein, Defendants consistently maintained and enforced
11 against Plaintiff and Aggrieved Employees the following unlawful practices and policies: (a)
12 willfully refusing to pay for all hours worked, including minimum, regular, and overtime wages;
13 (b) failing to provide meal and/or rest periods, or compensation in lieu thereof; (c) willfully
14 refusing to pay wages due and owing upon separation of employment; (d) willfully refusing to
15 furnish accurate itemized wage statements upon payment of wages; and (e) willfully failing to
16 reimburse business expenses.

17 **THE PARTIES**

18 **Plaintiff**

19 7. Plaintiff worked for Defendants from approximately 1995 to June 2020 as an
20 hourly non-exempt employee earning approximately twenty-one dollars (\$21.00) per hour at
21 Foothill Gym, Defendants' Monrovia, California location.

22 **Defendants**

23 8. Plaintiff is informed and believes, and based thereon alleges, that Defendant Nivek
24 Corporation is a California corporation, which is engaged in the business of fitness centers, and
25 owns and/or operates Foothill Gym located in Monrovia, California. Plaintiff alleges that
26 Defendant Nivek Corporation is and/or was the employer of Plaintiff and Aggrieved Employees
27 during the PAGA Period and Relevant Time Period.

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1 9. Plaintiff is informed and believes, and based thereon alleges, that Defendant
2 BRIAN PAUL WHELAN is the Chief Executive Officer and Director of Defendant Nivek
3 Corporation as provided in its Statement of Information filed with the California Secretary of
4 State, Statement of Information (“SOI”) Entity File No. C2517975.

5 10. Plaintiff is ignorant of the true names, capacities, relationships, and extent of
6 participation in the conduct herein alleged of Defendants sued herein as DOES 1 through 50,
7 inclusive, but on information and belief alleges that said Defendant is legally responsible for the
8 violations alleged herein. Plaintiff will amend this complaint to allege the true names and
9 capacities of the DOE Defendants when ascertained.

10 11. Plaintiff is informed believes, and thereon alleges, that each Defendant acted in all
11 respects pertinent to this action as the agent of the other Defendants, carried out a joint scheme,
12 business plan, or policy in all respects pertinent hereto, and the acts of each Defendant are legally
13 attributable to the other Defendants. Furthermore, Defendants operate as a joint venture and/or
14 single business enterprise, integrated enterprise and/or are agents of one another, are alter egos,
15 joint employers and conspire with one another to increase profits by engaging in the conduct
16 described in this complaint.

17 12. Plaintiff is informed and believes, and based thereon alleges, that each Defendant
18 acted in all respects as the agent, servant, partner, joint venture, alter-ego, employee, proxy,
19 managing agent, and/or principal of the co-Defendants, and in performing the actions mentioned
20 below was acting, at least in part, within the course and scope of that authority as such agent,
21 proxy, servant, partner, joint venture, employee, alter-ego, managing agent, and/or principal with
22 the permission and consent of the co-Defendants. Plaintiff also alleges the acts of each Defendant
23 are legally attributable to the other Defendants.

24 **JURISDICTION AND VENUE**

25 13. This Court has subject matter jurisdiction over the causes of action alleged in this
26 complaint because the Court is a court of general subject matter jurisdiction and is not otherwise
27 excluded from exercising subject matter jurisdiction over said causes of action.

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1 14. Defendants are a California corporation doing business throughout the State of
2 California. There is no federal question at issue, as the issues herein are based solely on California
3 statutes and law, including the Labor Code, IWC Wage Orders, Code of Civil Procedure, Business
4 and Professions Code, and Rules of Court. By doing business in the State of California,
5 Defendants purposefully availed itself of the state's jurisdiction. Accordingly, as personal
6 jurisdiction over Defendants would be constitutional, California's long-arm statute provides that
7 California courts may exercise personal jurisdiction over Defendants. (Code Civ. Pro., § 410.10.)

8 15. Venue is proper in the County of Los Angeles, because Defendants perform
9 business in the County of Los Angeles, and the acts set forth herein occurred in the County of
10 Los Angeles.

11 **PAGA ADMINISTRATIVE PREREQUISITE**

12 16. Prior to filing this complaint on January 5, 2021, Plaintiff gave written notice by
13 certified electronic mail to the Labor and Workforce Development Agency ("LWDA") and to
14 Defendants of the specified provisions alleged to have been violated, including the facts and
15 theories to support the alleged violation as required by Labor Code section 2699.3. A true and
16 correct copy of Plaintiff's original letter sent to the LWDA on January 5, 2021, is attached hereto
17 as "**Exhibit A**".

18 17. More than sixty-five (65) days have passed since Plaintiff submitted her January
19 5, 2021, notice to the LWDA and Defendants of the specific alleged Labor Code violations and
20 the LWDA have not provided notice to Plaintiff of its intent to investigate such alleged violations.
21 Plaintiff further has received no notice of Defendants' intent to cure any of the alleged violations.
22 Therefore, Plaintiff has satisfied the administrative prerequisites for filing this action with regard
23 to her January 5, 2021 PAGA notice.

24 **FACTUAL ALLEGATIONS**

25 18. This lawsuit arises out of an ongoing wrongful scheme by Defendants to deny their
26 employees their benefits due under California's wage and hour laws for work performed in
27 California. Defendants wrongfully refused to pay Plaintiff and the Aggrieved Employees regular
28 wages, overtime compensation, and denied them other statutory benefits mandated by California

1 wage and hour laws.

2 19. Labor Code section 1194 provides that, notwithstanding any agreement to work
3 for a lesser wage, an employee receiving less than the legal overtime compensation or minimum
4 wage compensation is entitled to recover in a civil action the unpaid balance of their overtime
5 compensation and/or minimum wage compensation, including interest thereon, reasonable
6 attorneys' fees, and costs of suit.

7 20. Further, Business and Professions Code section 17203 provides that any person
8 who engages in unfair competition may be enjoined in any court of competent jurisdiction.
9 Business and Professions Code section 17204 provides that any person who has suffered actual
10 injury and has lost money or property as a result of the unfair competition may bring an action in
11 a court of competent jurisdiction.

12 21. Plaintiff was employed by Defendants during the Relevant Time Period in the
13 State of California as a non-exempt hourly-paid employee. Further, during all, or a portion of the
14 PAGA Period, Plaintiff and Aggrieved Employees were employed by Defendants in the State of
15 California as non-exempt hourly-paid employees.

16 22. During the Relevant Time Period, Plaintiff often worked in excess of eight (8)
17 hours per day or forty (40) hours per week, or otherwise asked to perform work outside of her
18 scheduled hours and beyond eight (8) hours per day or forty (40) hours per week.

19 23. Plaintiff is further informed and believes, and based thereon alleges that during the
20 PAGA Period, Plaintiff and Aggrieved Employees often worked in excess of eight (8) hours per
21 day or forty (40) hours per week, or otherwise asked to perform work outside of their scheduled
22 hours beyond eight (8) hours per day or forty (40) hours per week.

23 24. Throughout the PAGA Period and Relevant Time Period, Plaintiff and Aggrieved
24 Employees were not paid all overtime wages due by Defendants because Defendants failed to
25 include in Plaintiff's and Aggrieved Employees' regular hourly rate shift differential payments
26 for purposes of paying the legally required overtime rate. Plaintiff and Aggrieved Employees
27 received a shift differential above and beyond their regular hourly rate of pay and Defendants
28 were required to include the same for purposes of paying overtime.

1 25. Throughout the PAGA Period and Relevant Time Period, Defendants required
2 Plaintiff and Aggrieved Employees to perform work responsibilities off-the-clock such as
3 cleaning, maintaining their uniforms provided by Defendants, repairing machines, and picking up
4 and ordering supplies, amongst various other assigned duties. Defendants failed to compensate
5 Plaintiff and Aggrieved Employees for all time spent they were subject to Defendants' control.

6 26. Throughout the PAGA Period and Relevant Time Period, Defendants utilized a
7 rounding policy with respect to Plaintiff's and Aggrieved Employees' hours worked wherein the
8 Defendants benefitted from the rounding policy. Defendants' rounding policy was used in such a
9 manner that resulted, over a period of time, in failure to compensate the employees properly for
10 all the time they have actually worked, and systematically undercompensated Plaintiff and
11 Aggrieved Employees, as well as in failure to pay Plaintiff and Aggrieved Employees all wages
12 owed.

13 27. As a result of Defendants' policies and practices as described herein, Defendants
14 failed to pay all wages owed to Plaintiff and Aggrieved Employees, including minimum, regular,
15 and overtime wages earned on their regularly scheduled payday for all work performed.
16 Defendants knew they were required to pay Plaintiff and Aggrieved Employees these wages owed
17 no later than the payday following the payroll period in which the wages were earned, yet it
18 willfully failed to do so.

19 28. As the further result of Defendants' failure to pay Plaintiff and Aggrieved
20 Employees for all hours worked for Defendants as described above, as well as all overtime pay at
21 the proper legal rate, Defendants failed, and continue to fail, to pay all wages due to Plaintiff and
22 Aggrieved Employees as required by Labor Code sections 201 and 202.

23 29. Plaintiff's employment with Defendants was terminated on or about June 12, 2020
24 without being paid all wages she earned during the Relevant Time Period.

25 30. Plaintiff and Aggrieved Employees who ended their employment during the
26 PAGA Period, but were not paid the above due compensation for all hours worked, including
27 minimum wage for regular hours and overtime compensation, timely upon the termination of their
28 employment as required by Labor Code sections 201, 202, and 203, are entitled to penalties as

provided by Labor Code section 203.

31. As a result of Defendants' failure to pay all wages owed and the rounding policy as described herein, Defendants failed to keep accurate payroll records and failed to provide Plaintiff and Aggrieved Employees with complete and accurate wage statements showing the true number of hours worked and accurate overtime/premium wages earned per pay. Plaintiff further alleges that Defendants consistently violated Labor Code section 226(a), subd. (1), (2), (5), (8) and (9). by failing to include on each pay stub all hours worked, specifically, time spent subject to the Defendants' control, as well as failing to include in Plaintiff's and Aggrieved Employees' regular rates of pay the shift differential for purposes of paying the legally required overtime rate. In addition, Defendants failed to provide Plaintiff and Aggrieved Employees pay stubs that included Defendants' actual legal entity name (NIVEK Corporation) and address of the legal entity. Defendants' conduct is in violation of Labor Code sections 226 and 1174, and is actionable under PAGA.

32. Throughout the PAGA Period and Relevant Time Period, Plaintiff and Aggrieved Employees were required to work through their lunch periods. Defendants had a practice of failing to provide adequate staffing to allow Plaintiff and Aggrieved Employees to be completely relieved of all of their work responsibilities while on their legally mandated meal or rest breaks. As a result of Defendants' practice of failing to provide adequate staffing, Plaintiff and Aggrieved Employees were obligated to work through their meal and/or rest breaks, take late meal breaks, and/or interrupt their breaks in order to attend to Foothill Gym members or complete their assigned work. As a result of the Defendants' aforementioned policy and practices, Plaintiff and Aggrieved Employees did not receive timely uninterrupted meal and rest periods in violation of Labor Code sections 226.7 and 512, is also actionable under PAGA. Further, Defendants failed to maintain a policy or practice of paying one (1) hour of pay to Plaintiff and Aggrieved Employees for non-compliant meal periods, including for short, interrupted, late or missed meal and/or rest periods.

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1 33. Further, during the PAGA Period and Relevant Time Period, Defendants failed
2 and/or refused to reimburse Plaintiff and Aggrieved Employees for necessary business
3 expenditures incurred in the course of performing their job duties as follows:

4 (a) Defendants required Plaintiff and Aggrieved Employees to use their
5 personal cellphones to carry out their work-related duties, including
6 without limitation communicating with supervisors, regarding schedules,
7 equipment repairs, and any issues related to gym members.

8 (b) Defendants required Plaintiff and Aggrieved Employees to regularly use
9 their personal vehicles to drive from Defendants' facility to and from stores
10 to pick up supplies, equipment and equipment parts. Defendants failed to
11 maintain adequate insurance coverage, reimburse Plaintiff and Aggrieved
12 Employees for additional insurance premiums for the use of their personal
13 vehicles to perform job-related tasks, or pay for any deductible or costs
14 associated with automobile accidents that arose while Plaintiff and
15 Aggrieved Employees used their personal vehicles to carry out their job
16 duties. Moreover, Plaintiff and Aggrieved Employees never received a
17 mileage reimbursement, compliant with the IRS standard mileage rates
18 when they used their personal vehicles in the course and scope of their
19 employment.

20 (c) Defendants required Plaintiff and Aggrieved Employees to wear t-shirts
21 embroidered with Defendants' logo and provided by Defendants. Plaintiff
22 and Aggrieved Employees were required to maintain Defendants'
23 uniforms throughout their employment and were not reimbursed by
24 Defendants for doing so.

25 Defendants' failure to reimburse the expenditures as described herein constitutes a violation of
26 Labor Code section 2802 and is actionable under PAGA.

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1 **FIRST CAUSE OF ACTION**

2 **Failure to Pay All Wages in Violation of Labor Code §§ 510, 1182.12, 1194, 1197 and 204,**
3 **and IWC Wage Order 10-2001, Sect. 3**

4 **(Against All Defendants)**

5 34. Plaintiff realleges and incorporates by reference the preceding paragraphs of this
6 complaint as if fully set forth herein.

7 35. Any employee receiving less than the legal minimum wage or legal overtime
8 compensation is entitled to recover in a civil action the amount of unpaid wages, attorneys' fees,
9 and costs of suit. (Labor Code section 1194, subd. (a).)

10 36. Plaintiff is informed and believes, and based thereon alleges, that Defendants
11 employed less than 25 people.

12 37. Labor Code section 1182.12 provides that on and after January 1, 2016, the
13 minimum wage for all industries shall not be less than ten (\$10.00) per hour. For employers who
14 employed twenty-five (25) or less people from January 1, 2017 to December 31, 2017, the
15 minimum wage rate in California was ten dollars (\$10.00) per hour. (State of California
16 Department of Industrial Relations, Official Notice: California Minimum Wage, *available at*
17 <https://www.dir.ca.gov/Iwc/MW-2019.pdf>.) From January 1, 2018 to December 31, 2018, the
18 minimum wage rate was ten dollars and fifty cents (\$10.50) per hour. (*Ibid.*) From January 1,
19 2019 to December 31, 2019, the minimum wage rate was eleven dollars (\$11.00) per hour. (*Ibid.*)
20 As of January 1, 2020, through December 31, 2020, the minimum wage rate is twelve dollars
21 (\$12.00) per hour. (*Ibid.*)

22 38. Additionally, many California cities and counties impose a separate minimum
23 wage higher than that set by section 1182.12, which may be applicable to Plaintiff and Aggrieved
24 Employees. For example, Los Angeles County, where Plaintiff is employed, had a minimum wage
25 of ten dollars and fifty cents (\$10.50) per hour effective July 1, 2016, twelve dollars (\$12.00)
26 effective July 1, 2017, thirteen dollars and twenty-five cents (\$13.25) effective July 1, 2018, and
27 fourteen dollars and twenty-five cents (\$14.25) as of July 1, 2019. (County of Los Angeles
28 Minimum Wage Ordinance, *available at* <http://lacounty.gov/minimum-wage/>.)

1 39. Notwithstanding any other provision of the Labor Code, hourly minimum wage
2 rates are set for all industries according to statute. (Labor Code § 1182.12). Employers must pay
3 employees no less than minimum wage for each hour worked. (Labor Code § 1194; IWC Wage
4 Order 10-2001, Sect. 4.)

5 40. Any work in excess of eight hours in any workday and any work in excess of forty
6 (40) hours in a workweek shall be compensated at a rate of no less than one and one-half times
7 the regular rate of pay for an employee. (Labor Code § 510(a); IWC Wage Order 10-2001, Sect.
8 3(A).) Any work in excess of twelve (12) hours in a workday shall be compensated at the rate of
9 twice the regular rate of pay for an employee. (*Ibid.*)

10 41. Any employee receiving less than the legal minimum wage or legal overtime
11 compensation is entitled to recover in a civil action the amount of unpaid wages and interests
12 thereon, attorneys' fees, and costs of suit. (Labor Code § 1194(a).)

13 42. All wages earned in employment are due and payable twice during each calendar
14 month on dates designated in advance by the employer. (Labor Code § 204.)

15 43. Defendants failed to pay Plaintiff and Aggrieved Employees all minimum wage,
16 overtime premiums, and/or double-time premiums for all hours worked in excess of eight (8)
17 hours per day and/or forty (40) hours per week for work performed for Defendants, including
18 work performed off-the-clock as herein before alleged.

19 44. Further, during the PAGA Period and Relevant Time Period, Plaintiff and
20 Aggrieved Employees were not paid all overtime wages due by Defendants because Defendants
21 failed to include in Plaintiff's and Aggrieved Employees' regular hourly rate shift differential
22 payments for purposes of calculating and paying the legally required overtime rate.

23 45. As further herein before alleged, Defendants' use of a rounding policy, with an
24 eye towards Defendants benefiting from the rounding, resulted over a period of time in failure to
25 compensate the employees properly for all the time they have actually worked, and systematically
26 undercompensated Plaintiff and Aggrieved Employees.

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1 46. Defendants willfully violated the Labor Code by failing to pay Plaintiff and
2 Aggrieved Employees all wages, including both minimum wage and overtime. Defendants have
3 regularly violated the Labor Code with respect to meeting the requirements of paying wages
4 earned, including minimum wage, overtime, double-time and remuneration when calculating the
5 employees' rate of pay, as herein before alleged. Defendants intentionally excluded remuneration
6 that must be included in all employees' rate of pay in order to avoid payment of accurate overtime
7 wages and other benefits in violation of the Labor Code and the order issued by the IWC. Thereby,
8 Defendants are able to reduce their overhead and operating expenses and gain an unfair advantage
9 over competing fitness centers that comply with state law.

10 47. Plaintiff and Aggrieved Employees were also frequently required to work through
11 meal periods. To the extent that thirty (30) minutes of meal period had been deducted from the
12 time recorded even though Plaintiff worked through her meal periods, Plaintiff alleges unpaid
13 wages as a result.

14 48. Plaintiff is informed and believes that Defendants have violated and continue to
15 violate provisions of the California Labor Code and applicable Wage Orders related to the
16 payment of wages.

17 49. Plaintiff, individually, seeks the payment of all wages, including minimum,
18 regular, overtime, and/or double time compensation which she earned and accrued during the
19 Relevant Time Period, according to proof. Plaintiff is further entitled to the recovery of liquidated
20 damages, plus interest and statutory penalties thereon, and attorneys' fees and costs under Labor
21 Code section 1194.

22 50. Further, since the LWDA has not indicated that it will be investigating and more
23 than 65 days have passed since Plaintiff mailed her letter, and because Defendants took no
24 corrective action to remedy the allegations set forth above, Plaintiff, as a representative of the
25 people of the State of California, will seek any and all penalties otherwise capable of being
26 collected by the Labor Commission, the LWDA and/or the Department of Labor Standards
27 Enforcement ("DLSE"). This includes, but is not limited to, each of the following, as set forth in
28 Labor Code section 2699.5, which provides that section 2699.3, subdivision (a) applies to any

1 alleged violation of the following provisions: 204, 206, 510, 1182.12, 1194, 1194.2 and 1197.

2 51. Plaintiff, as a personal representative of the general public, will and does seek to
3 recover any and all penalties for each and every violation shown to exist or to have occurred
4 during the PAGA Period, in an amount according to proof, as to those penalties that are otherwise
5 only available to public agency enforcement actions. Funds recovered will be distributed in
6 accordance with the PAGA, with at least 75% of the penalties recovered being reimbursed to the
7 LWDA.

8 52. Additionally, Plaintiff and Aggrieved Employees are entitled to attorneys' fees
9 and costs pursuant to Labor Code sections 2699, subdivision (g)(1), 1194, and prejudgment
10 interest.

11 **SECOND CAUSE OF ACTION**

12 **Failure to Provide Meal Periods, or Compensation in Lieu Thereof, in Violation**
13 **of Labor Code §§ 226.7 and 512, and IWC Wage Order 10-2001, Sect. 11**

14 **(Against All Defendants)**

15 53. Plaintiff realleges and incorporatess by reference the preceding paragraphs of this
16 complaint as if fully set forth herein.

17 54. Labor Code sections 226.7 and 512, provides that no employer shall employ any
18 person for a work period of more than five (5) hours without providing a meal period of not less
19 than thirty (30) minutes or employ any person for a work period of more than ten (10) hours
20 without a second meal period of not less than thirty (30) minutes.

21 55. Labor Code section 226.7 provides that if an employer fails to provide an
22 employee a meal period in accordance with this section, the employer shall pay the employee one
23 (1) hour of pay at the employee's regular rate of compensation for each workday that the meal
24 period is not provided in accordance with this section.

25 56. Defendants failed to make available timely off-duty meal periods to the Plaintiff
26 and Aggrieved Employees. Plaintiff and Aggrieved Employees could not take and/or receive such
27 meal periods within the statutory timeframe and were required to, or otherwise had no choice but
28 to, continue working during meal periods. Plaintiff and Aggrieved Employees were often forced

1 to forego meal periods, have them interrupted, and/or shortened because of Defendants' practice
2 of failing to provide adequate staffing to allow Plaintiff and Aggrieved Employees to be
3 completely relieved of all of their work responsibilities while on their legally mandated meal
4 breaks. In so doing, Defendants have intentionally and improperly denied meal periods to
5 Plaintiff and Aggrieved Employees in violation of Labor Code sections 226.7, 512, IWC Wage
6 Order 10-2001, Sect. 11, and other pertinent regulations and statutes.

7 57. At all times relevant hereto, Plaintiff and Aggrieved Employees have worked more
8 than five (5) hours in a workday.

9 58. Plaintiff and Aggrieved Employees did not voluntarily or willfully waive meal
10 periods.

11 59. By virtue of the Defendants' failure to make available meal periods in accordance
12 with the applicable Wage Order and Labor Codes, Defendants have caused Plaintiff and
13 Aggrieved Employees to suffer, and continue to suffer damages in the amounts which are
14 presently unknown, but which exceed the jurisdictional limits of this Court and which will be
15 ascertained according to proof at trial.

16 60. Plaintiff is informed and believes that Defendants have violated and continues to
17 violate provisions of the Labor Code and applicable Wage Orders related to the meal period
18 violations.

19 61. Plaintiff, individually, requests recovery of meal period compensation pursuant to
20 Labor Code section 226.7 which they are owed during the Relevant Time Period and PAGA
21 Period, as well as the assessment of any statutory penalties against these Defendants, and each of
22 them, in a sum as provided by the Labor Code and/or other statutes.

23 62. Further, since the LWDA has not indicated that it will be investigating and more
24 than 65 days have passed since Plaintiff mailed her letter, and because Defendants took no
25 corrective action to remedy the allegations set forth above, Plaintiff, as a representative of the
26 people of the State of California, will seek any and all penalties otherwise capable of being
27 collected by the Labor Commission, the LWDA and/or the Department of Labor Standards
28 Enforcement ("DLSE"). This includes, but is not limited to, each of the following, as set forth in

1 Labor Code section 2699.5, which provides that section 2699.3 subdivision (a) applies to any
2 alleged violation of Labor Code sections 226.7 and 512.

3 63. Plaintiff, as a personal representative of the general public, will and does seek to
4 recover any and all penalties for each and every violation shown to exist or to have occurred
5 during the PAGA Period for Defendants' failure to provide meal periods or compensation in lieu
6 thereof, in an amount according to proof, as to those penalties that are otherwise only available
7 to public agency enforcement actions. Funds recovered will be distributed in accordance with the
8 PAGA, with at least 75% of the penalties recovered being reimbursed to the LWDA.

9 64. Additionally, Plaintiff and Aggrieved Employees are entitled to attorneys' fees
10 and costs pursuant to Labor Code sections 2699, subdivision (g)(1), and prejudgment interest.

11 **THIRD CAUSE OF ACTION**

12 **Failure to Provide Rest Periods, or Compensation in Lieu Thereof, in Violation**
13 **of Labor Code §§ 226.7 and 512, and IWC Wage Order 10-2001, Sect. 12**
14 **(Against All Defendants)**

15 65. Plaintiff realleges and incorporates by reference the preceding paragraphs of this
16 complaint as if fully set forth herein.

17 66. Labor Code section 226.7 provides that employers authorize and permit all
18 employees to take rest periods at the rate of ten (10) minutes rest time per four (4) work hours.

19 67. Labor Code section 226.7, subdivision (b) provides that if an employer fails to
20 provide an employee rest periods in accordance with this section, the employer shall pay the
21 employee one (1) hour of pay at the employee's regular rate of compensation for each workday
22 that the rest period is not provided.

23 68. Defendants failed or refused to implement a relief system by which Plaintiff and
24 Aggrieved Employees could receive proper rest periods as herein before alleged. Defendants
25 denied Plaintiff and Aggrieved Employees duty free rest periods by denying rest periods
26 altogether, having them shortened, and/or interrupted. By and through their actions, Defendants
27 intentionally and improperly denied rest periods to the Plaintiff and Aggrieved Employees in
28 violation of Labor Code sections 226.7 and 512.

69. At all times relevant hereto, Plaintiff and Aggrieved Employees, have worked more than four (4) hours in a workday.

70. By virtue of the Defendants' unlawful failure to provide rest periods to Plaintiff and Aggrieved Employees as a result of their scheduling, workload, and shift relief system, Plaintiff and Aggrieved Employees have suffered, and will continue to suffer, damages, in amounts which are presently unknown, but which exceed the jurisdictional limits of this Court and which will be ascertained according to proof at trial.

71. Plaintiff, individually, requests recovery of rest period compensation pursuant to Labor Code section 226.7 which they are owed during the Relevant Time Period and PAGA Period, as well as the assessment of any statutory penalties against these Defendants, and each of them, in a sum as provided by the Labor Code and/or other statutes.

72. Further, since the LWDA has not indicated that it will be investigating and more than 65 days have passed since Plaintiff mailed her letter, and because Defendants took no corrective action to remedy the allegations set forth above, Plaintiff, as a representative of the people of the State of California, will seek any and all penalties otherwise capable of being collected by the Labor Commission, the LWDA and/or the DLSE. This includes, but is not limited to, each of the following, as set forth in Labor Code section 2699.5, which provides that section 2699.3, subdivision (a) applies to any alleged violation of Labor Code sections 226.7 and 512.

73. Plaintiff, as a personal representative of the general public, will and does seek to recover any and all penalties for each and every violation shown to exist or to have occurred during the PAGA Period, in an amount according to proof, as to those penalties that are otherwise only available to public agency enforcement actions. Funds recovered will be distributed in accordance with the PAGA, with at least 75% of the penalties recovered being reimbursed to the LWDA.

74. Additionally, Plaintiff and Aggrieved Employees are entitled to attorneys' fees and costs pursuant to Labor Code section 2699, subdivision (g)(1), and prejudgment interest.

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1 **FOURTH CAUSE OF ACTION**

2 **Failure to Pay All Wages Due Upon Separation of Employment in Violation**

3 **of Labor Code §§ 201, 202, and 203**

4 **(Against All Defendants)**

5 75. Plaintiff realleges and incorporates by reference the preceding paragraphs of this
6 complaint as if fully set forth herein.

7 76. Labor Code section 201 provides that an employer is required to pay an employee
8 whose employment is terminated by the employer all wages earned and unpaid immediately upon
9 termination.

10 77. Labor Code section 202 requires an employer pay to an employee who quits his or
11 her employment, all wages earned and unpaid no later than 72 hours thereafter.

12 78. Labor Code section 203 provides that an employer who fails to pay all wages
13 earned and due an employee who is discharged or who quits within the timeframe set forth in
14 sections 201 and 202, the wages of the employee shall continue as a penalty from the due date at
15 the same rate of pay until paid, but not more than 30 days. In other words, the employer owes the
16 employee his or her daily rate of pay at their regular rate of pay for each day the full amount of
17 unpaid wages that are not paid, for a penalty of up to 30 days' wages.

18 79. Plaintiff is informed and believes, and thereon alleges, that as part of Defendants'
19 ongoing unfair business practices, Defendants failed to pay Plaintiff all wages earned during her
20 employment at the time of her separation in violation of Labor Code section 201 and 203.

21 80. Plaintiff's employment with Defendants was terminated on or about June 12, 2020
22 without being paid all wages she earned during the Relevant Time Period.

23 81. As a result of Defendants' failure to comply with Labor Code sections 201, 202,
24 and 203, Plaintiff is entitled to waiting time penalties for not having been paid all wages due to
25 her upon her separation from employment with Defendants on or about March 6, 2020. As such,
26 Plaintiff seeks payment of penalties pursuant to Labor Code section 203, according to proof.

27 82. Additionally, Plaintiff is entitled to attorneys' fees and costs, pursuant to Labor
28 Code section 203 and prejudgment interest pursuant to Labor Code section 218.6 and Civil Code

1 section 3287.

2 83. Additionally, Plaintiff and certain members of the Aggrieved Employees who
3 ended their employment with Defendants during the PAGA Period, are entitled to be promptly
4 paid minimum wages, lawful overtime compensation including overtime at the proper rate,
5 regular pay, and other premiums, as required by Labor Code sections 201, 202, and 203.

6 84. Defendants refused and/or failed to promptly compensate Plaintiff and Aggrieved
7 Employees wages owed as a result of Defendants' failure to provide meal and/or rest periods as
8 well as pay including minimum wages, lawful overtime compensation including overtime at the
9 proper rate, regular pay, and/or premiums for work performed for Defendants.

10 85. Plaintiff, as a representative of the people of the State of California, will seek any
11 and all penalties otherwise capable of being collected by the Labor Commission and/or the DLSE.
12 This includes, but is not limited to, each of the following, as set forth in Labor Code section
13 2699.5, which provides that section 2699.3, subdivision (a) applies to any alleged violation of
14 Labor Code sections 201, 202, and 203.

15 86. Plaintiff, as a personal representative of the general public, will and does seek to
16 recover any and all penalties for each and every violation shown to exist or to have occurred
17 during the PAGA Period, in an amount according to proof, as to those penalties that are otherwise
18 only available to public agency enforcement actions. Funds recovered will be distributed in
19 accordance with the PAGA, with at least 75% of the penalties recovered being reimbursed to the
20 LWDA.

21 87. Additionally, Plaintiff and Aggrieved Employees are entitled to attorneys' fees
22 and costs pursuant to Labor Code section 2699, subdivision (g)(1), and prejudgment interest.

23 **FIFTH CAUSE OF ACTION**

24 **Failure to Provide Accurate Itemized Wage Statements in Violation**
25 **of Labor Code §§ 226 and 1174**
26 **(Against All Defendants)**

27 88. Plaintiff realleges and incorporates by reference the preceding paragraphs of this
28 complaint as if fully set forth herein.

1 89. Labor Code section 226, subdivision (a), states in pertinent part that, “every
2 employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her
3 employees, either as a detachable part of the check, draft, or voucher paying the employee’s
4 wages, or separately when wages are paid by personal check or cash, an accurate itemized
5 statement in writing showing: (1) gross wages earned; (2) total hours worked by the employee . .
6 . ; (3) the number of piece-rate units earned . . . ; (4) all deductions . . . ; (5) net wages; (6) the
7 inclusive dates of the period for which the employee is paid; (7) the name of the employee and
8 only the last four digits of his or her social security number or an employee identification number
9 other than a social security number; (8) the name and address of the legal entity that is the
10 employer . . . ; and (9) all applicable hourly rates in effect during the pay period and corresponding
11 number of hours worked at each hourly rate by the employee...” (Lab. Code, § 226.)

12 90. Defendants knowingly and intentionally failed to provide timely and accurate
13 itemized wage statements to Plaintiff and Aggrieved Employees in accordance with Labor Code
14 section 226, subdivision (a), by failing to record the accurate number of hours worked, the
15 accurate rate of pay for each hour worked, the accurate amount of premiums wages earned, the
16 accurate net pay, and the accurate gross pay. Such failure caused injury to Plaintiff and Aggrieved
17 Employees.

18 91. As herein before alleged, Defendants failed to pay all wages owed and used a
19 rounding policy that systematically undercompensated Plaintiff and Aggrieved Employees.
20 Defendants’ policy and practice resulted in the failure to keep accurate payroll records, and
21 subsequently, in the failure to provide Plaintiff and Aggrieved Employees with complete and
22 accurate wage statements showing the true number of hours worked and accurate
23 overtime/premium wages earned per pay. Plaintiff further alleges that Defendants consistently
24 violated Labor Code section 226(a), subd. (1), (2), (5), (8) and (9). by failing to include on each
25 pay stub all hours worked, specifically, time spent subject to the Defendants’ control, as well as
26 failing to include in Plaintiff’s and Aggrieved Employees’ regular rates of pay the shift differential
27 for purposes of paying the legally required overtime rate.

28 ///

1 92. Further, an employee is deemed to suffer injury if the employer fails to provide a
2 wage statement containing all of the required information set forth in Labor Code section 226,
3 subdivision (a). (Lab. Code § 226, subd. (e)(2).) In particular, Defendants failed to keep accurate
4 wage statements by failing to include the accurate name and address of the legal entity that is the
5 employer. In particular, Defendants failed to provide Plaintiff and Aggrieved Employees pay
6 stubs that included Defendants' actual legal entity name (NIVEK Corporation) and address of the
7 legal entity.

8 93. Labor Code section 226, subdivision (e) provides that if an employer knowingly
9 and intentionally fails to provide a statement itemizing, *inter alia*, the gross and net wages earned,
10 the total hours worked by the employee and the applicable hourly overtime rates, causing the
11 employee injury, then the employee is entitled to recover the greater of all actual damages or fifty
12 dollars (\$50.00) for the initial violation and one hundred dollars (\$100.00) for each subsequent
13 violation, up to four thousand dollars (\$4,000.00). Plaintiff is informed and believes that
14 Defendant willfully failed to make or keep accurate records for Plaintiff and Aggrieved
15 Employees.

16 94. Plaintiff, individually, seeks penalties for Defendants' failure to provide her with
17 accurate itemized wage statements for the Relevant Time Period as provided under Labor Code
18 section 226, subdivision (e), as well as reasonable attorneys' fees and costs.

19 95. Plaintiff, as a representative of the people of the State of California, will seek any
20 and all penalties otherwise capable of being collected by the Labor Commission and/or the DLSE
21 for Defendants' failure to provide accurate wage statements. This includes each of the following,
22 as set forth in Labor Code section 2699.5, which provides that section 2699.3(a) applies to an
23 alleged violation of Labor Code section 226.

24 96. Plaintiff, as a personal representative of the general public, will and does seek to
25 recover any and all penalties for each and every violation shown to exist or to have occurred
26 during the PAGA Period for Defendants' violation of Labor Code section 226, in an amount
27 according to proof, as to those penalties that are otherwise only available to public agency
28 enforcement actions. Funds recovered will be distributed in accordance with the PAGA, with at

1 least seventy five percent (75%) of the penalties recovered being reimbursed to the LWDA.

2 97. Additionally, Plaintiff and Aggrieved Employees are entitled to attorneys' fees
3 and costs pursuant to Labor Code section 2699, subdivision (g)(1), and prejudgment interest.

4 **SIXTH CAUSE OF ACTION**

5 **Failure to Reimburse for Necessary Business Expenditures in Violation**

6 **of Labor Code § 2802**

7 **(Against All Defendants)**

8 98. Plaintiff realleges and incorporates by reference the preceding paragraphs of this
9 complaint as if fully set forth herein.

10 99. California Labor Code section 2802, states "An employer shall indemnify his or
11 her employee for all necessary expenditures or losses incurred by the employee in direct
12 consequence of the discharge of his or her duties."

13 100. Plaintiff and Aggrieved Employees were not reimbursed by Defendants for
14 necessary expenditures as a direct consequence of the discharge of their duties. In particular,
15 Defendants failed to compensate Plaintiff and Aggrieved employees for (a) using their cellphones
16 to carry out their work-related duties, (b) using their personal vehicles to drive from Foothill Gym
17 to and from stores to pick up supplies, equipment, and equipment parts, (c) costs incurred by
18 Plaintiff and Aggrieved Employees for additional insurance premiums for the use of their personal
19 vehicles to perform work for Defendants, any deductibles or costs associated with automobile
20 accidents that arose during the course of using their vehicles to perform work for Defendants, or
21 mileage reimbursement compliant with IRS standard mileage rates, and (d) the costs of
22 maintaining Plaintiff and Aggrieved Employees' uniforms which Defendants require them to
23 wear while performing work for Defendants.

24 101. Defendant knowingly, willingly and intentionally attempted to offset the cost of
25 doing business on the Plaintiff and Aggrieved Employees.

26 102. Defendant had a corporate practice and policy of requiring Plaintiff and Aggrieved
27 Employees to shoulder the burden of Defendant's cost of doing business by failing to reimburse
28 Plaintiff for necessary expenditures.

1 103. Accordingly, Plaintiff is entitled to an award of “necessary expenditures or losses”
2 incurred during the Relevant Time Period, which shall include all reasonable costs, including, but
3 not limited to, attorney’s fees and interest.

4 104. Further, Plaintiff and Aggrieved Employees are entitled to an award of “necessary
5 expenditures or losses” incurred during the PAGA Period, which shall include all reasonable
6 costs, including, but not limited to, attorney's fees and interest.

7 105. Plaintiff, as a representative of the people of the State of California, will seek any
8 and all penalties otherwise capable of being collected by the Labor Commission and/or the DLSE.
9 This includes, but is not limited to, each of the following, as set forth in Labor Code section
10 2699.5, which provides that section 2699.3, subdivision (a) applies to any alleged violation of
11 Labor Code sections 2800 and 2802.

12 106. Plaintiff, as a personal representative of the general public, will, and does, seek to
13 recover any and all penalties for each and every violation shown to exist or to have occurred
14 during the PAGA Period, in an amount according to proof, as to those penalties that are otherwise
15 only available to public agency enforcement actions. Funds recovered will be distributed in
16 accordance with the PAGA, with at least 75% of the penalties recovered being reimbursed to the
17 LWDA.

18 107. Additionally, Plaintiff and Aggrieved Employees are entitled to attorneys’ fees
19 and costs pursuant to Labor Code section 2699, subdivision (g)(1), and prejudgment interest.

20 **SEVENTH CAUSE OF ACTION**

21 **Unfair Business Practices in Violation of Cal. Bus. & Prof. Code § 17200**

22 **(Against All Defendants)**

23 108. Plaintiff realleges and incorporates by reference the preceding paragraphs of this
24 complaint as if fully set forth herein.

25 109. Business & Professions Code section 17200, *et seq.*, known as California’s Unfair
26 Competition Law (“UCL”), prohibits unfair competition in the form of any unlawful, unfair, or
27 fraudulent business act or practice.

28 ///

1 110. Business and Professions Code section 17204 allows “any person who has
2 suffered injury in fact and has lost money or property as a result of such unfair competition” to
3 prosecute a civil action for violation of the UCL.

4 111. Labor Code section 90.5, subdivision (a) states it is the public policy of California
5 to vigorously enforce minimum labor standards in order to ensure employees are not required to
6 work under substandard and unlawful conditions, and to protect employers who comply with the
7 law from those who attempt to gain competitive advantage at the expense of their workers by
8 failing to comply with minimum labor standards.

9 112. Beginning at an exact date unknown to Plaintiff, but at least during the Relevant
10 Time Period, Defendants have committed acts of unfair competition as defined by the Unfair
11 Business Practices Act, by engaging in the unlawful, unfair, and fraudulent business practices and
12 acts described in this complaint, including but not limited to violations of Labor Code
13 sections 226, 226.7, 512, 510, 1194, 2802 and 201, 202, 203, as well as other statutes as described
14 above, including wrongful termination in violation of public policy.

15 113. The violations of these laws and regulations, as well as of the fundamental
16 California public policies protecting workers, serve as unlawful predicate acts and practices for
17 purposes of Business and Professions Code section 17200 *et seq.*

18 114. The acts and practices described above constitute unfair, unlawful, and fraudulent
19 Business Practices, and unfair competition, within the meaning of Business and Professions Code,
20 section 17200 *et seq.* Among other things, the acts and practices have forced Plaintiff to labor for
21 many hours off-the-clock and without receiving the meal and rest periods and/or compensation,
22 to which she is entitled by law.

23 115. As a direct and proximate result of Defendants’ violations, Plaintiff’s rights under
24 the law were violated because Plaintiff suffered monetary losses, costs and attorney’s fees.
25 Plaintiff seeks restitution in the form of unpaid wages and premium wages due for meal and rest
26 periods, with accrued interest at the maximum legal rate, as well as special and general damages,
27 together with injunctive relief to prohibit Defendants from violating the regulations alleged in this
28 complaint, as well as any and all other available remedies.

1 116. Business and Professions Code section 17203 provides that a court may make such
2 orders or judgments as may be necessary to prevent the use or employment by any person of any
3 practice which constitutes unfair competition. Injunctive relief is necessary and appropriate to
4 prevent Defendants from repeating their unlawful, unfair, and fraudulent business acts and
5 business practices alleged above.

6 117. Section 17203 expressly authorizes orders necessary to restore money or property
7 to any person in interest from whom the money or property has been obtained through an unfair
8 business practice.” (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 168).
9 The employee working at the company at issue is a recognized “person in interest” under the
10 UCL. (*Id.*). The chief requirement is that the Plaintiff show that “any finding of unfairness to
11 competitors under section 17200 is tethered to some legislatively declared policy or proof of some
12 actual or threatened impact on competition.” (*Cel-Tech Communications, Inc. v. Los Angeles*
13 *Cellular Telephone Co.* (1999) 20 Cal.4th 163, 186-187). Plaintiff is entitled to restitution
14 pursuant to Business and Professions Code section 17203 for wages and payments unlawfully
15 withheld, including premiums for missed meal and rest periods.

16 118. Business and Professions Code section 17202 provides: “Notwithstanding section
17 3369 of the Civil Code, specific or preventative relief may be granted to enforce a penalty,
18 forfeiture, or penal law in a case of unfair competition.” Plaintiff is entitled to enforce all
19 applicable penalty provisions of the Labor Code pursuant to Business and Professions Code
20 section 17202.

21 119. Plaintiff seeks and is entitled to restitution, civil penalties, declaratory and
22 injunctive relief, and all other equitable remedies owed to her.

23 120. Plaintiff has incurred costs and attorney’s fees in bringing this action and seeks to
24 recover those costs under sections 226 subdivision (e), 218.5, 1194 of the Labor Code, and section
25 12965 subdivision (b) of the Government Code.

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1 **EIGHTH CAUSE OF ACTION**

2 **Civil Penalties under Labor Code §§ 2698 and 2899 (Private Attorneys General Act)**

3 **(Against All Defendants)**

4 121. Plaintiff realleges and incorporates by reference the preceding paragraphs of this
5 complaint as if fully set forth herein.

6 122. Labor Code sections 2698 through 2699, known as the Private Attorney's General
7 Act of 2004 ("PAGA"), provides for a civil penalty to be assessed and collected by the Labor and
8 Workforce Development Agency, or any of its departments, divisions, commissions, boards,
9 agencies or employees for a violation of the Labor Code, may be recovered through a civil action
10 by an aggrieved employee on behalf of himself or herself, and collectively on behalf of all other
11 current or former employees.

12 123. Whenever the Labor and Workforce Development Agency, or any of its
13 departments, divisions, commissions, boards agencies or employees has discretion to assess a
14 civil penalty, a court in a civil action is authorized to exercise the same discretion, subject to the
15 same limitations and conditions to assess a civil penalty.

16 124. Plaintiff and Aggrieved Employees are "aggrieved employees" as defined by
17 Labor Code section 2699 in that they are all current or former employees of Defendants, and one
18 or more of the alleged violations was committed against them.

19 125. Plaintiff, by virtue of her employment with Defendants and having suffered from
20 all of Defendants' violations of the Labor Code and IWC Wage Order provisions herein before
21 alleged, is an aggrieved employee with standing to bring an action under the PAGA. Plaintiff has
22 satisfied all prerequisites to serve as a representative of the general public to enforce California's
23 labor laws, and the penalty provisions identified in Labor Code section 2699.5.

24 126. Pursuant to PAGA, prior to filing this complaint, on January 5, 2021, Plaintiff gave
25 written notice to the LWDA, and by certified mail to Defendant, of the specified provisions of
26 the Labor Code alleged to have been violated, including the facts and theories that support the
27 alleged violation as required by Labor Code section 2699.3. (LWDA Case No. LWDA-CM-
28 768100-20.) A true and correct copy of Plaintiff's original and amended written notices sent to

the LWDA, dated January 5, 2021 is attached hereto as **Exhibit A**.

127. Plaintiff asserts all of the claims in this complaint against Defendants, individually and on behalf of all Aggrieved Employees, in her capacity as private attorney general, and seeks all statutory penalties available under the Labor Code for each violation herein before alleged.

128. Pursuant to Labor Code section 2699 Plaintiff, individually and on behalf of all Aggrieved Employees, request and are entitled to recover from Defendant: unpaid wages, overtime compensation, rest and meal period compensation and penalties, waiting period wages and penalties according to proof, penalties for failure to keep accurate payroll records, penalties for failing to reimburse necessary business expenditures, interest, attorney's fees and costs pursuant to Labor Code sections 218.5, 1194, subdivision (a), and 1174, as well as all statutory penalties, and attorneys' fees against Defendants, including but not limited to:

- (a) Penalties under Labor Code section 2699 in the amount of one hundred dollars (\$100.00) for each aggrieved employee per pay period for each initial violation, and two hundred dollars (\$200.00) for each Aggrieved Employee per pay period for each subsequent violation;
- (b) Penalties under Code of Regulations Title 8 section 11050 in the amount of fifty dollars (\$50.00) for each aggrieved employee per pay period for the initial violation, and two hundred dollars (\$200.00) for each Aggrieved Employee per pay period for each subsequent violation; and
- (c) Any and all additional penalties and sums are provided by the Labor Code and/or other statutes.

129. In addition, thereto, Plaintiff seeks and is entitled to fifty percent (50%) of all penalties obtained under Labor Code section 2699 to be allocated to the general fund, and twenty five percent (25%) of all penalties obtained to be allocated to the Labor and Workforce Development Agency, for education of employers and employees about their rights and responsibilities under the Labor Code and twenty five percent (25%) to all Aggrieved Employees.

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1 130. Further, Plaintiff is entitled to seek and recover reasonable attorney's fees and
2 costs pursuant to Labor Code sections 2699, 218.5, 226, 1174, and 1194, and any other applicable
3 statute.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiff and Aggrieved Employees pray for judgment as follows:

- 6 1. For compensatory damages in an amount according to proof;
- 7 2. For declaratory relief and injunctive relief, and relief under the Bus. & Prof. Code
8 sections 17200 et seq.
- 9 3. For civil penalties for each violation for Plaintiff and each Aggrieved Employee
10 as provided by law, including, but not limited to, those civil penalties provided by
11 statute, provided by PAGA and for unpaid wages pursuant to Labor Code section
12 558;
- 13 4. For costs of suit and expenses incurred herein pursuant to Labor Code sections
14 2699, subdivision (g) and any other statutory basis or pursuant to the California
15 Rules of Court;
- 16 5. For reasonable attorneys' fees pursuant to Labor Code sections 2699, subdivision
17 (g), 2802, Code of Civil Procedure section 1021.5, and any other statutory basis,
18 and;
- 19 6. For all such other and further relief as the Court may deem just and proper.

20
21 Dated: March 12, 2021

MAHONEY LAW GROUP, APC

22 
23

24 _____
25 Kevin Mahoney, Esq.
26 Kate N. Blanco, Esq.
27 Attorneys for Plaintiff BRENDA WINNER
28

EXHIBIT A



Kevin Mahoney, Esq.
562-590-5550 phone
562-590-8400 facsimile
kmahoney@mahoney-law.net

January 5, 2021

VIA ELECTRONIC FILING:

LABOR AND WORKFORCE DEVELOPMENT AGENCY
Attn: PAGA Administrator

VIA U.S. MAIL & CERTIFIED MAIL: #7019 2970 0000 2983 6377

Return Receipt Requested

Nivek Corporation
202 S Myrtle Avenue
Monrovia, CA 91016

VIA U.S. MAIL & CERTIFIED MAIL: #7019 2970 0000 2983 6384

Return Receipt Requested

Nivek Corporation
ATTN: Brian Paul Whelan
5596 Via De Mansion
La Verne, CA 91750

Re: Winner v. Nivek Corporation

**NOTICE OF LABOR CODE VIOLATIONS PURSUANT TO
LABOR CODE SECTIONS 2698 ET SEQ.**

To: California Labor and Workforce Development Agency, Nivek Corporation and Brian Paul Whelan

From: Brenda Winner ("Claimant"), on behalf of herself and aggrieved employees who were subject to the employer's wage and hour policies and practices as set forth below.

Factual Statement

Please be advised that this firm, Mahoney Law Group, APC, represents the interests of Claimant and all other aggrieved employees who intend to file a complaint alleging various Labor Code violations. Claimant is a former employee of Nivek Corporation ("Employer").

This letter shall serve as Claimant's written notice to the Labor and Workforce Development Agency ("LWDA") and Employer of the alleged Labor Code violations Claimant contends that the Employer committed against Claimant and other aggrieved employees in California. Claimant provides this notice in accordance with the California Private Attorneys General Act of 2004 ("PAGA"), Labor Code §2699.3. Claimant desires to file a civil action to enforce the rights under PAGA and seek civil penalties on behalf of all aggrieved employees if the LWDA declines to investigate. Pursuant to Labor Code §2699(a) and by way of this letter, Claimant also intends to represent all other current and former aggrieved employees who performed work for the Employer in California and who have suffered at least one of the wage and hour violations described herein during their employment.

This notice shall be construed as extending without limitation to any past, present or continuing violations of the California Labor Code, applicable Industrial Welfare Commission ("IWC") Wage Orders, or regulations which might be discovered as a result of a reasonable and diligent investigation made pursuant to this notice.

Pursuant to PAGA, this letter sets forth the specific provisions of the Labor Code and IWC Wage Orders which Claimant alleges that the Employer has violated, including the facts and theories to support the alleged violations known to Claimant at the time of this correspondence. (*Brown v. Ralph's Grocery Co.* (2018) 28 Cal.App.5th 824, 836 [sufficient facts and theories include "any basis for the allegations" (citing *Williams v. Superior Court* (2017) 3 Cal.5th 531, 546)].)

Preliminary Statement-Identification of Labor Code Sections At Issue

Claimant and other aggrieved employees allege they have suffered one or more violations by the Employer of the following statutes: §§201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1174.5, 1182.12, 1194, 1197, 1198, and 2802.

Facts and Theories of Labor Code Violations

Claimant was employed by the Employer from approximately 1995 through June 2020 as an hourly non-exempt employee earning approximately twenty-one dollars (\$21.00) per hour in the Employer's Monrovia, California location.

The Employer failed to maintain universal policies and practices applicable to Claimant and other employees in the form of written employee handbooks. Claimant on behalf of herself and other aggrieved employees of the Employer seek civil penalties for violations that occurred during the (1) one year preceding the date of this notice letter as follows:

I. Failure to Pay Overtime Wages: Labor Code §§ 510, 1194.

Pursuant to Labor Code §§510, 1194 and the applicable IWC Wage Order, Sect. 3, employers are required to compensate Claimant and other aggrieved employees for all overtime hours worked which is calculated at one and one-half (1 ½) times the regular rate of pay for all hours worked in excess of eight (8) hours per day and/or forty (40) hours per week, and for the

first eight (8) hours on the seventh (7th) consecutive workday, with double the regular rate of pay for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive workday or after twelve (12) hours in any workday. The regular rate of pay for purposes of calculating overtime pay must include all remuneration, including but not limited to, hourly earnings, piece rate earnings, non-discretionary bonus wages, shift differentials and commissions. When an employee earns two (2) or more hourly rates of pay and works overtime in the same workweek, the regular rate is calculated using the weighted average of all rates of pay earned during the workweek.

Claimant and aggrieved employees were not paid all overtime wages due by Employer because Employer failed to include in the Claimant and aggrieved employees regular hourly rate shift differential payments for purposes of paying the legally required overtime rate. Claimant and aggrieved employees received a shift differential above and beyond their regular hourly rate of pay and Employer was required to include the same for purposes of paying overtime.

II. Failure to Pay Minimum Wage: Labor Code §§ 510, 1182.12, 1194, 1197:

Labor Code §1197 states, “[t]he 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.” Labor Code §1194(a) states, “any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” Liquidated damages in an amount equal to the minimum wages unlawfully paid and interest thereon are provided for under Labor Code §1194.2.

Labor Code §1182.12 sets forth the minimum wage pay rate in California for all industries from 2014 through 2023.

Here, Claimant and aggrieved employees were required to perform work responsibilities off-the-clock such as cleaning, maintaining their uniform provided by Employer, repairing machines, pick up/order supplies, amongst various other assigned duties. Accordingly, Claimant and aggrieved employees were not compensated for all time spent they were subject to Employer’s control.

III. Failure to Provide Compliant Meal Periods: Labor Code §§226.7, 512, 1198 and Applicable IWC Wage Order Sections:

Labor Code §§226.7, 512, states that no employer shall employ any non-exempt employee for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes. Employers are required to pay one (1) hour of compensation for each missed or non-compliant meal period to their non-exempt employees. Additionally, if a non-exempt employee is not relieved of all duty during a meal period, the meal period shall be considered “on duty” and counted as time worked. A paid “on duty” meal period is permitted only when (1) the nature of the work prevents an employee from being relieved of all duty, and (2) the parties have a written agreement agreeing to the on-duty meal periods.

Claimant and aggrieved employees were required to work through lunch period. Employer had a practice of failing to provide adequate staffing to allow Claimant and other aggrieved employees to be completely relieved of all of their work responsibilities while on their legally mandated meal or rest break. As a result of the lack of employees Employer staffed at its location, Claimant and other aggrieved employees were obligated to work through breaks, take late meal breaks, and or interrupt their breaks, to attend to members and or complete their assigned work. As a result of Employer's policy and practices, Claimant and other aggrieved employees did not receive timely uninterrupted meal and rest periods. Employer's conduct is in violation of Labor Code Sections 226.7 and 512, is also actionable under PAGA.

Employer also failed to maintain a policy or practice of paying one (1) hour of pay to Claimant and aggrieved employees for non-compliant meal periods, including for short, interrupted, late or missed.

IV. Failure to Make Reasonably Available Rest Periods: Labor Code §§226.7, 512 and Applicable IWC Wage Order Sections:

Labor Code §§226.7, 512, and the applicable, provides that employers are required to provide a ten (10) minute rest period for every four (4) hours worked or major fraction thereof. Further, authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages. If the employer fails to provide an employee a rest period the employer shall pay the employee one (1) hour of pay at the employee's regular rate of pay for each workday that the rest period is not provided

As detailed above, due to Employer's policy and/or practice of failing to adequately staff employees and prioritizing business demands, Claimant and aggrieved employees' rest periods were often not provided and if they were provided they were interrupted. Claimant and aggrieved employees were not provided with one (1) hour of pay at their regular rate of pay for each day that their rest periods were interrupted, short or missed.

V. Failure to Timely Pay All Wages Due: Labor Code §204:

Pursuant to Labor Code §204, employers must pay employees at least twice a month for all wages earned during the preceding pay period. California Labor Code §204 provides that labor performed between the first (1st) and fifteenth (15th) days, inclusive, of any calendar month shall be paid for between the sixteenth (16th) and the twenty-sixth (26th) day of the month during which the labor was performed, and labor performed between the sixteenth (16th) and the last day, inclusive, of any calendar month, shall be paid for between the first (1st) and the tenth (10th) day of the following month. Employers using an alternate payday schedule must pay wages within seven (7) calendar days of the end of the payroll period within which the wages are earned.

Employer failed to pay all overtime wages and minimum wages earned on their regularly scheduled payday for all labor performed during the preceding pay period by, among other things, failing to pay Claimant and aggrieved employees at the proper legal overtime rate due to

Employer's failure to include the shift differential in their regular rate, for time spent subject to Employer's control. As a result, Employer failed to pay Claimant and aggrieved employees proper overtime pay.

Employer knew it was required to pay Claimant and other aggrieved employees these wages owed no later than the payday following the payroll period in which the wages were earned, yet it willfully failed to do so.

VI. Failure to Pay All Wages Due Upon Separation of Employment: Labor Code §§201-203:

Pursuant to California Labor Code §§201-203, employers are required to pay all earned and unpaid wages immediately upon termination by the employer and within seventy-two (72) hours if the employee resigns. California Labor Code §203 provides that if an employer fails to pay all wages earned and due throughout the employees' employment within the timeframes proscribed by Sections 201 and 202, the employer is liable for waiting time penalties in the form of continued daily compensation at the employee's last rate of pay until all earned wages are paid up to 30 workdays.

Because Claimant and aggrieved employees were not paid for all worked for Employer as described above, as well as all overtime at the proper legal rate, Employer has failed and continues to fail to pay all wages due to aggrieved employees as required by Labor Code §§201-202.

VII. Failure to Provide Accurate Itemized Wage Statements: Labor Code §226/1174:

Labor Code §226(a) requires every employer to provide an accurate, itemized wage statement in writing with respect to each of its employees showing: (1) gross wages earned, (2) total hours worked by the employee, (3) the number of piece-rate units earned and applicable piece rate paid to employee, (4) all deductions, (5) net wages earned, (6) dates of the period for which employee is paid, (7) name of the employee and only the last four digits of the social security number or an employee identification number other than social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates of pay in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

Labor Code §226(e) imposes a penalty of the greater of all actual damages or \$50 for the initial pay period in which a violation occurs and \$100 per employee for each violation in a subsequent pay period, not exceeding an aggregate per employee of \$4,000. The employee is also entitled to an award of costs and reasonable attorney's fees. Labor Code §226.3 imposes an additional civil penalty on the employer of \$250 per employee per violation of Labor Code §226(a) in an initial citation and \$1,000 per employee for each violation in a subsequent citation.

Claimant alleges Employer has consistently violated Labor Code §§226(a), subd. (1), (2), (5), (8) and (9). Employer violated these provisions by failing to include on each pay stub all hours worked, specifically, time spent in subject to the Employer's control and failing to include

in Claimant and aggrieved employee's regular rate of pay the shift differential for purposes of paying the legally required overtime rate. In addition, Employer failed to provide Claimant and other aggrieved employees pay stubs that included Employer's actual legal entity name (NIVEK Corporation) and address of the legal entity. Employer's conduct is in violation of Labor Code Sections 226 and 1174, and is actionable under PAGA.

Labor Code §1174 states, "[e]very person employing labor in this state shall...[k]eep 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, ..., employees employed at the respective plants or establishments." The "Records" section of the applicable Wage Order requires every employer to keep accurate information with respect to each one of its employees, including time records showing when the employee begins and ends each work period and meal period, total hours worked in the payroll period and applicable rates of pay, and the total wages paid in each payroll period.

Labor Code §1174.5 imposes a civil penalty of \$500 for an employer's failure to maintain accurate and complete records. This civil penalty is in addition to the civil penalty of \$100-\$200 per pay period, per aggrieved employee that would be imposed pursuant to Labor Code §2699 for a violation of §1174(d).

VIII. Failure to Reimburse for Necessary Business Expenditures: Labor Code §2802:

A. Employer Failed to Reimburse Claimant and Aggrieved Employees for Using their Personal Cellphones

Under Labor Code section 2802, employers must reimburse employees for required work-related use of personal cellphones – regardless of whether they incur any additional out of pocket expense from that work-related use. *See, Cochran v. Schwan's Home Service, Inc.* 228 Cal App. 4th 1137 (August 12, 2014) (reversing denial of class certification in cell phone reimbursement class action). *Cochran* held that "[i]f an employee is required to use personal cellphone to carry out work related duties, then he or she is incurring an expense for the purpose of section 2802. It does not matter whether the phone bill is paid for by a third person, or at all...it is irrelevant whether the employee changed plans to accommodate work related cellphone usage...To show liability under section 2802, an employee need only show that he or she was required to use a personal cellphone to carry out work related duties, and he or she was no reimbursed." *Id.* At 1144-45 (emphasis added.)

Employer failed to reimburse Claimant and other aggrieved employees for necessary business expenses incurred in the course of performing their job duties. Specifically, Employer required Claimant and other aggrieved employees to use their personal cellphones to carry out their work-related duties, including without limitation communicating with supervisors, regarding schedules, equipment repairs, and any issues related to gym members. However, Claimant and other aggrieved employees were not reimbursed for the reasonable percentage of their cellphone bills. Employer's failure to reimburse said expenditure constitutes a violation of Labor Code section 2802 and is actionable under PAGA.

B. Employer Failed to Reimburse Claimant and the Other Aggrieved Employees for Using their Personal Vehicles

Further, Employer required Claimant and other aggrieved employees to regularly use their personal vehicles to drive from Employer's facility to and from stores to pick up supplies, equipment and equipment parts. Employer failed to maintain adequate insurance coverage, reimburse Claimant and other aggrieved employees for additional insurance premiums for the use of their personal vehicles to perform job-related tasks, and pay for any deductible or costs associated with automobile accidents that arose while Claimant and other aggrieved employees used their personal vehicles to carry out their job duties. Moreover, Claimant and other aggrieved employees never received a mileage reimbursement, compliant with the IRS standard mileage rates when they used their personal vehicles in the course and scope of their employment. Employer's failure to reimburse Claimant and other aggrieved employees for these business-related expenditures is in violation of Labor Code section 2802 and actionable under PAGA.

C. Employer Failed to Reimburse Claimant and the Other Aggrieved Employees for Maintaining Employer's Uniform

Labor Code section 2802 provides, "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties..." The Industrial Welfare Commission Order No. 5-2001, section (8)(A) provides, "[w]hen the employer requires uniforms to be worn by the employee as a condition of employment, such uniforms shall be provided *and maintained* by the employer." The purpose of California Labor Code section 2802 is "'to prevent employers from passing their operating expenses on to their employees.'" (*Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1143–1144.) The issue of "maintenance" has been addressed several times by the DLSE. "[S]o long as we exercise our independent judgment, we may consider the DLSE's interpretation and the reasons the DLSE proffered in support of it, and we may adopt the DLSE's interpretation as our own if we are persuaded that it is correct." (*Alvarado v. Dart Container Corp. of Calif.* (2018) 4 Cal.5th 542, 561, (addressing DLSE enforcement policy contained in DLSE's Enforcement Policies and Interpretations Manual); *Gattuso v. Harte-Hanks Shoppers, Inc.*, supra, 42 Cal.4th at 563.) When uniforms are subject to heavy soiling in the performance of work duties, it is the employer's obligation to pay employees for the expense and time of maintaining uniforms.

Employer required Claimant and other aggrieved employees to wear uniforms, T-shirts embroidered with Employer's logo, provided by Employer. Claimant and other aggrieved employees were required to maintain Employer's uniforms throughout their employment and were not reimbursed by Employer for doing so. Here, Employer failed to reimburse Claimant and other aggrieved employees for the repair and maintenance of Employer's uniform. Employer's failure to reimburse said expenditure constitutes a violation of Labor Code section 2802 and is actionable under PAGA.

IX. CONCLUSION

The facts and claims contained herein are based on the information available at the time of this writing. Therefore, if through discovery and/or expert review, Claimant becomes aware of additional compensation owed or losses incurred by Claimant or by any other aggrieved employee of the Employer, Claimant expressly reserves the right to revise these facts and/or add any new claims by amending the claim letter or by adding applicable causes of action to the

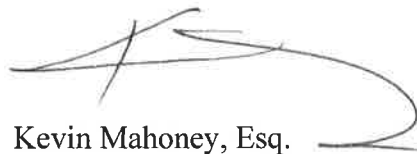
complaint which will relate back to the date of this letter.

If Employer wants clarification of any of the alleged violations or facts and theories upon which they are based at this time, Employer is invited to contact Claimant's counsel. Otherwise, Claimant will presume Employer fully understands the allegations contained herein.

If the Labor and Workforce Development Agency intends to investigate the allegations set forth herein, please provide notice via certified mail to:

Mahoney Law Group, APC
Kevin Mahoney
249 E. Ocean Blvd., Suite 814
Long Beach, CA 90802
Tel: (562)590-5550
Email: kmahoney@mahoney-law.net

Sincerely,

A handwritten signature in black ink, appearing to be 'Kevin Mahoney', with a stylized flourish extending to the right.

Kevin Mahoney, Esq.
MAHONEY LAW GROUP, APC