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7
8 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES**

10 JAMES TRUBY, as a private attorney general
on behalf of all aggrieved employees,

11 Plaintiff,

12 vs.

13 GUCKENHEIMER ENTERPRISES, INC., a
14 Delaware limited liability company; and DOES
1 through 10, inclusive,

15 Defendants.
16
17
18

Case No. 21STCV13656

**SECOND AMENDED REPRESENTATIVE
ACTION COMPLAINT**

(1) Claim for Civil Penalties for Violation of
California's Private Attorneys General Act
of 2004 (Labor Code § 2698, *et seq.*)

Action Filed: April 12, 2021

Trial Date: T.B.D

Dept.: 31, Stanley Mosk Courthouse

Judge: The Hon. Yolanda Orozco

[Assigned for all Purposes]

1 Plaintiff James Truby, as a private attorney general and proxy for the State of California,
2 alleges on information and belief as follows:

3 **INTRODUCTION**

4 1. This is a representative action under the Labor Code Private Attorneys General Act
5 of 2004, Labor Code Section 2698, *et seq.* (“PAGA”) that challenges systemic employment practices
6 resulting in violations of the California Labor Code against all non-exempt and exempt employees
7 who worked for Defendants in California.

8 2. The Labor Code is broadly remedial in nature. Its laws serve an important public
9 interest in establishing minimum working conditions and requirements in California. These labor
10 standards protect employees from onerous terms and conditions of employment or exploitation by
11 employers who have superior economic and bargaining power.

12 3. PAGA was enacted to improve the enforcement of California’s Labor Code by
13 empowering an aggrieved employee to bring an enforcement action as a private attorney general and
14 proxy for the State of California for an employer’s violations of California labor law.

15 4. By this action, Plaintiff seeks civil penalties and any other available relief under the
16 PAGA on behalf of himself, the State of California and all other current and former employees who
17 worked for Defendants as non-exempt, hourly-paid and exempt employees in California.

18 5. This Complaint seeks civil penalties and other relief pursuant to the PAGA for
19 Defendants’ violations of Labor Code Section 2802.

20 **THE PARTIES**

21 6. Plaintiff James Truby (“Plaintiff”) is and at all times relevant to this Complaint was
22 an individual residing in Los Angeles County, California.

23 7. Defendant Guckenheimer Enterprises, Inc. (“Guckenheimer”) is and at all times
24 relevant to this Complaint was a Delaware limited liability company that does business in Los
25 Angeles County, California.

26 8. Plaintiff is unaware of the true names and capacities, whether individual, corporate,
27 associate, or otherwise of the defendants sued herein as Doe 1 through 10. Plaintiff therefore sues
28 those defendants by fictitious names. Plaintiff will amend this Complaint to show the true names and

capacities of each Doe defendant when such information has been ascertained.

9. Except as otherwise noted, a reference to “Defendants” in this Complaint shall include the named Defendant and the Doe defendants.

10. Upon information and belief, Defendants acted as the employers and/or joint employers of Plaintiff, and directly or indirectly, or through actual agents, ostensible agents and/or other persons, employed Plaintiff, and exercised control over her wages, hours, and working conditions. Defendants’ control included, but was not limited to, the authority to hire and fire, assign work tasks and engage in day-to-day supervision.

11. Upon information and belief, at all relevant times, each of the Defendants is and was the agent, partner, joint venturer, principal, alter ego, employee, co-conspirator, and/or aider or abettor of each of the other Defendants, and in doing the things alleged was acting within the course and scope of their agency or employment and with the knowledge and consent of each of the other Defendants. Upon information and belief, the acts and conduct of each of the Defendants was known to, and authorized and ratified by, the remaining Defendants, and each of the Defendants is jointly and severally responsible and liable for the damages alleged herein.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction over all causes of action alleged in this Complaint pursuant to the California Constitution, Article VI, Section 10, which grants the Superior Court “original jurisdiction in all causes except those given by statute to other courts.” Plaintiff’s claims arise under the laws of the State of California and are not statutorily assigned to any other trial court.

13. The amount in controversy under this Complaint exceeds the minimal jurisdictional limit of the Superior Court and will be established according to proof at trial.

14. The Court has personal jurisdiction over the Defendants because they are residents of and/or are doing business in the State of California.

15. Venue is proper in this Court pursuant to Code of Civil Procedure Sections 395 and 395.5 because, Plaintiff resides in Los Angeles County, Defendant Guckenheimer conducts business in Los Angeles County, and the liability for the alleged wrongs described herein arose in Los Angeles

County. Venue is also proper in this Court because “venue is proper in any county in which an aggrieved employee worked and Labor Code violations allegedly occurred.” *Crestwood Behavioral Health, Inc. v. Superior Court of Alameda County* (Cal. Ct. App., Feb. 17, 2021) No. A160523, 2021 WL 613700, at *2. Venue is also proper because a foreign corporation that has failed to designate a principal place of business in California, like Defendant Guckenheimer, may be sued in any county in the state. *See, e.g., Easton v. Superior Court* (1970) 12 Cal. App. 3d 243, 246-247.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

16. On February 3, 2021, Plaintiff provided written notice by online filing to the Labor and Workforce Development Agency (“LWDA”) and by certified mail to Defendant Guckenheimer of the specific provisions of the Labor Code alleged to have been violated, including facts and theories to support the alleged violations, in accordance with Labor Code Section 2699.3. A true and correct copy of Plaintiff’s PAGA Notice is attached hereto as Exhibit 1.

17. As of the filing date of this Complaint, over 65 days have passed since Plaintiff sent the February 3, 2021 LWDA Notice, and the LWDA has not responded that it intends to investigate Plaintiff’s claims, and Defendants have not cured the violations.

18. On June 9, 2021, Plaintiff provided an amended written notice by online filing to the LWDA and by certified mail to Defendant, which supplemented and clarified the facts and theories in her original LWDA notice, in accordance with Labor Code Section 2699.3. A true and correct copy of Plaintiff’s June 9, 2021 amended PAGA notice is attached hereto as Exhibit 2.

19. As of the filing date of this Second Amended Complaint, over 65 days have passed since Plaintiff sent his June 9, 2021 amended PAGA notice, and the LWDA has not responded that it intends to investigate Plaintiff’s claims, and Defendants have not cured the violations.

20. Plaintiff has thus satisfied the administrative prerequisites under Labor Code Sections 2699.3(a) and 2699.3(c) to recover civil penalties against Defendants, in addition to other remedies, for violations of Labor Code Section 2802.

GENERAL ALLEGATIONS

21. Defendants employed Plaintiff as an hourly-paid, non-exempt employee in California from October 2019 until February 4, 2021. Plaintiff worked as a dishwasher.

22. This is a representative action brought on behalf of the State of California and the following individuals:

All current and former non-exempt and exempt employees who worked one or more pay periods for Guckenheimer Enterprises, Inc. in the State of California at any time during the PAGA Period (“Aggrieved Employees”).

23. The PAGA Period is defined as the period of time beginning on February 4, 2020, the date that is one year prior to the date of Plaintiff’s notice letter to the LWDA, and continuing to the present.

24. Plaintiff and all other current and former non-exempt and exempt employees who worked one or more pay periods for Guckenheimer Enterprises, Inc. in the State of California at any time during the PAGA Period are “aggrieved employees” within the meaning of Labor Code Section 2699, *et seq.* See Labor Code § 2699(c).

25. On information and belief, Defendants subjected Plaintiff and all other Aggrieved Employees to the same policies, practices and procedures governing the reimbursement of necessary business expenses incurred by Plaintiff and the other Aggrieved Employees at the direction of Defendants, and uniformly denied Plaintiff and the other Aggrieved Employees rights afforded to them under the Labor Code, IWC Wage Order No. 5–2001 and the California Business and Professions Code.

26. Defendants knew or should have known that Plaintiff and all other Aggrieved Employees were entitled to receive full reimbursement for all business-related expenses and costs they incurred during the course and scope of their employment, and that they did not receive full reimbursement of applicable business-related expenses and costs incurred.

27. Within the one-year period prior to the date Plaintiff provided notice of these PAGA claims to the LWDA and continuing through the present, Defendants systematically failed to reimburse Plaintiff and all other Aggrieved Employees for necessary business expenses incurred at the direction of Defendants.

28. Within the one-year period prior to the date Plaintiff provided notice of these PAGA claims to the LWDA and continuing through the present, Defendants, on a company-wide basis,

1 required that Plaintiff and all other Aggrieved Employees utilize their own personal cell phones and
2 cell phone data, and/or personal computers and Internet plans, to carry out their job duties.
3 Defendants also required Plaintiff and the Aggrieved Employees to incur other costs for home office
4 expenses for work purposes.

5 29. Although Defendants required Plaintiff and all other Aggrieved Employees to
6 regularly utilize, and to incur expenses for the use of, their personal cellular phones and/or cellular
7 data plans, and/or personal computers and personal Internet plans to carry out work-related
8 responsibilities, and to incur other expenses to work remotely including home office expenses to
9 carry out work-related responsibilities, Defendants failed to reimburse them for those costs.

10 30. Further, on information and belief, Defendants failed to reimburse Plaintiff and other
11 Aggrieved Employees for necessary business expenses incurred regardless of the job position and/or
12 job classification held by an Aggrieved Employee, and regardless of the location in California where
13 the Aggrieved Employee worked for Defendants. As a result of Defendants' failure to comply with
14 Labor Code Section 2802, all Aggrieved Employees were harmed.

15 **FIRST CAUSE OF ACTION**

16 **For Civil Penalties, Pursuant to Labor Code § 2698, *et seq.***

17 **(By Plaintiff on Behalf of the State of California and Aggrieved Employees**

18 **Against all Defendants)**

19 31. Plaintiff incorporates all preceding allegations as if fully set forth herein.

20 32. Labor Code Section 2698, *et seq.* permits Plaintiff to recover civil penalties for the
21 violation(s) of the Labor Code Sections enumerated in Labor Code Section 2699.5. Section 2699.5
22 enumerates Labor Code Section 2802.

23 33. Pursuant to Labor Code Sections 2699(a) and (f), Plaintiff may recover civil penalties
24 on behalf of himself, the State of California and other aggrieved current and former employees in the
25 following amounts:

- 26 a. For violations of Labor Code Section 2802, one hundred dollars (\$100.00) for each
27 aggrieved employee per pay period for each initial violation and two hundred dollars
28 (\$200.00) for each aggrieved employee per pay period for each subsequent violation

(penalty amounts established by Labor Code Sections 2699(f)(2));

34. As detailed below, Defendants violated Labor Code Section 2802. These violations were willful, knowing, and intentional.

FAILURE TO REIMBURSE BUSINESS EXPENDITURES

(Labor Code § 2802)

35. Labor Code Section 2802(a) provides that an 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, or of his or her obedience to the directions of the employer.”

36. Section 9(B) of IWC Wage Order No. 5 provides in pertinent part that, “When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer.”

37. Defendants had and, on information and belief, continue to have, a company-wide policy and/or practice of not reimbursing Plaintiff and other Aggrieved Employees for expenses necessarily incurred.

38. As detailed above, Defendants as a matter of practice and/or policy violated Labor Code Section 2802 by denying Plaintiff and other Aggrieved Employees reimbursement for necessary expenditures that they incurred as a result of discharging their duties and/or obeying the directions of Defendants.

39. Plaintiff and other Aggrieved Employees were required to incur out-of-pocket expenses, including expenses to obtain and maintain a personal cell phone and a cellular data plan, personal computers and a personal Internet plan and other home office expenses that were used at Defendants’ direction for work purposes.

40. Defendants could have provided Plaintiff and other Aggrieved Employees with the actual tools required for use on the job. Defendants also could have reimbursed Plaintiff and other Aggrieved Employees for the costs they incurred in obtaining and maintaining a personal cell phone and a cellular data plan, a personal computer and a personal Internet plan and other home office expenses. Instead, Defendants passed those operating costs off onto Plaintiff and other Aggrieved Employees in violation Labor Code Section 2802.

41. Plaintiff and all other Aggrieved Employees are therefore entitled to recover civil penalties pursuant to Labor Code Section 2699(a), (f)-(g).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment for himself and all others on whose behalf this suit is brought against Defendants, jointly and severally, as follows:

1. For civil penalties pursuant to Labor Code Section 2699(a), (f) and (g), and all other relevant statutes, for Plaintiff, the State of California and all Aggrieved Employees for Defendants' violations of Labor Code Section 2802;

2. For attorneys' fees and costs pursuant to Labor Code Section 2699(g)(1), and all other relevant statutes, for Defendants' violations of Labor Code Section 2802;

3. For pre-judgment and post-judgment interest as provided by law; and

4. For such other and further relief as the Court may deem equitable and appropriate.

DEMAND FOR JURY TRIAL

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

Dated: August 25, 2021

CUSTIS LAW, P.C.

By: _____



Keith Custis

Attorneys for Plaintiff
JAMES TRUBY

Exhibit 1



February 3, 2021

Keith A. Custis
kcustis@custislawpc.com

SUBMITTED VIA ONLINE CLAIM NOTICE

(<https://dir.tfaforms.net/198>)

California Labor and Workforce
Development Agency
Attn. PAGA Administrator
1515 Clay Street, Ste 801
Oakland, CA 94612

SENT VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

President
Guckenheimer Enterprises, Inc.
1017 Central Parkway North, Suite 100
San Antonio, TX 78232

Cogency Global, Inc.
Agent for Service of Process of
Guckenheimer Enterprises, Inc.
1325 J Street, Suite 1550
Sacramento, CA 95814

Travis Fahey
People and Culture Manager
Guckenheimer Enterprises, Inc.
1017 Central Parkway North, Suite 100
San Antonio, TX 78232

Re: *James Truby v. Guckenheimer Enterprises, Inc., et al.*: Written Notice of Intent to File
Civil Action Pursuant to Labor Code § 2699.3

Dear PAGA Administrator and Guckenheimer Enterprises, Inc.:

This office represents James Truby with respect to claims arising from his employment by Guckenheimer Enterprises, Inc. (“Guckenheimer”). Mr. Truby began working at Guckenheimer as a non-exempt employee in October 2019 and continues to work at Guckenheimer.

Mr. Truby intends to file a civil action against Guckenheimer, seeking, *inter alia*, civil penalties, attorneys’ fees, costs and other available relief that is recoverable under the Private Attorneys General Act of 2004 (“PAGA”), Labor Code Section 2698, *et al.*, for violations of the

Labor Code. Mr. Truby shall seek relief on behalf of himself, the State of California, and other persons who are or were employed by Guckenheimer as non-exempt and exempt employees in California (“Aggrieved Employees”).

NOTICE TO GUCKENHEIMER

California law strictly prohibits an employer from terminating, retaliating and/or discriminating against a current employee because that employee has made a complaint about unpaid wages and/or filed a PAGA notice letter like this one. Specifically, Labor Code Section 98.6 provides in pertinent part that:

[An employer] shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee . . . because the employee . . . made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to Section 2699.

Labor Code § 98.6. This section also provides that “In addition to other penalties, an employer who violates this section is liable for a civil penalty not exceeding ten thousand dollars (\$10,000) per employee for each violation of this section, to be awarded to the employee or employees who suffered the violation.”

Labor Code Section 1102.5 likewise prohibits an employer from “retaliat[ing] against an employee for disclosing information . . . to a government or law enforcement agency . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule. This section likewise provides that: “In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars (\$10,000) for each violation of this section.”

These laws exist to protect currently-employed workers who report violations of California’s wage and hour laws. We will enforce them on Mr. Truby’s behalf if necessary.

Pursuant to Labor Code Section 2699.3, this letter serves as Mr. Truby’s written notice to the Labor and Workforce Development Agency (“LWDA”) and Guckenheimer regarding the following alleged violations of the Labor Code, and the facts and legal theories that support those

violations.¹ This letter is being submitted to the LWDA online pursuant to the process described on the California Department of Industrial Relations' website.² The \$75.00 filing fee required by Labor Code Section 2699.3 shall be paid to the LWDA during the online submission process.

As detailed below, Guckenheimer has violated the Labor Code within the last year and beyond as to Mr. Truby and other Aggrieved Employees in the following respects:

A. Failure to Reimburse Necessary Business Expenses in Violation of Labor Code Section 2802

Labor Code Section 2802 requires employers to pay for all necessary expenditures and losses incurred by the employee in the performance of his or her job. The purpose of Labor Code Section 2802 is to prevent employers from passing off their cost of doing business and operating expenses on to their employees. *Cochran v. Schwan's Home Service, Inc.*, 228 Cal. App. 4th 1137, 1144 (2014). The applicable wage order provides that: "[w]hen tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer . . ."

Within the previous twelve months, Guckenheimer, on a company-wide basis, required that Mr. Truby and other Aggrieved Employees utilize their own personal cell phones and cell phone data, and/or personal computers and Internet plans, to carry out their job duties, but Guckenheimer failed to reimburse them for the costs of their cell phones, cell phone data plans and/or personal computers and Internet plans. For example, Guckenheimer required Mr. Truby and other Aggrieved Employees to work from home and use their personal cell phones and/or personal computers and Internet plans to attend mandatory remote/virtual training meetings on a daily basis. Although Guckenheimer required Mr. Truby and other Aggrieved Employees to regularly utilize their personal cellular phones and/or data, and/or personal computers and Internet plans to carry out work-related responsibilities, Guckenheimer failed to reimburse them for this cost between April 2020 and December 2020. In January 2021, Guckenheimer began to pay only \$5.00 per month to Aggrieved Employees for the use of their personal cell phones, data plans, personal computers and Internet plans, an amount that is deficient as the average cost of cell phone plans is approximately \$100 per month. Guckenheimer also required Mr. Truby and the Aggrieved Employees to incur other costs for home office expenses, but failed to reimburse them for those costs.

¹ The Labor Code violations, facts and legal theories detailed herein are based on the Plaintiff's experience and his counsel's review of the records currently available relating to the Plaintiff's employment. Discovery conducted in litigation of wage and hour claims such as these often reveals that the employer violated additional Labor Code Sections and additional facts and legal theories supporting all Labor Code violations. Thus, Plaintiff reserves the right to supplement this letter with additional facts, theories, and claims if they become aware of them subsequent to the submission of this letter.

² See <http://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html>.

Guckenheimer could have provided Mr. Truby and other Aggrieved Employees with the actual tools required for use on the job, including company phones, or reimbursed employees a reasonable percentage of their cell phone usage and/or personal computer/home Internet costs, but instead, Guckenheimer passed off these operating costs on to Mr. Truby and other Aggrieved Employees. Thus, Guckenheimer violated Section 2802 by uniformly failing to reimburse any portion of Mr. Truby's and other Aggrieved Employees' cell phone and data plan expenses and personal computer and home Internet costs, and other home office expenses. *See, e.g., Cochran*, 228 Cal. App. 4th at 1144 ("We hold that when employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills."); *Ritchie v. Blue Shield of California*, 2014 WL 6982943, at *21 (N.D. Cal. Dec. 9, 2014) (certifying class of cell phone reimbursement claim and adopting the logic of *Cochran*).

Guckenheimer's policy and/or practice of passing off its operating costs on to Mr. Truby and other Aggrieved Employees by requiring that they use their personal cell phones and/or personal computers and home Internet plans without reimbursement violates Labor Code Section 2802.

As a result, Mr. Truby and other Aggrieved Employees are entitled to recover civil penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Section 2699(f)-(g).

B. Violations of Labor Code Section 1102.5

Labor Code Section 1102.5(b) provides that "An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance . . . , if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employees job duties."

Within the previous twelve months, including in January and February 2021, Mr. Truby engaged in protected activity under Labor Code Section 1102.5(b) by complaining to Guckenheimer that Guckenheimer was violating Labor Code Section 2802 by failing to reimburse Mr. Truby and other Aggrieved Employees for the use of their personal cell phones and data plans. In addition, on February 2, 2021, Mr. Truby notified Guckenheimer that he intended to file a civil action for violation of the Private Attorneys General Act of 2004 ("PAGA"), Labor Code Section 2698, *et al.*, for violations of Labor Code Section 2802.

Mr. Truby's conduct constituted a disclosure of and/or opposition to conduct that Mr. Truby had reasonable cause to believe disclosed a violation of state, local and/or federal laws, rules, or regulations. Mr. Truby made such disclosures to person(s) with authority over Mr. Truby who had the authority to investigate, discover, or correct the violation or non-compliance. Guckenheimer also perceived, feared and/or believed that Mr. Truby may make protected disclosures in the future. Mr. Truby's conduct was thus protected under Labor Code Section 1102.5.

On February 3, 2021, Guckenheimer retaliated against Mr. Truby in violation of Labor Code Section 1102.5(b) by providing Mr. Truby with a purported Final Written "Employee Corrective Action Notice," which alleged that Mr. Truby had been absent on January 20 and 27, 2021. Mr. Truby was not absent on those days—when all employees were working from home. Instead, Mr. Truby was unable to participate in mandatory video training calls because he could not afford the approximate \$10 in data use charges that it would cost him to attend. Mr. Truby had repeatedly advised Guckenheimer that he could not afford to attend these mandatory meetings. Prior to February 3, 2021, Guckenheimer had not provided Mr. Truby with any other written corrective actions regarding these issues. The first written corrective action was a "final" corrective written action. Moreover, on February 3, 2021, Guckenheimer told Mr. Truby that he was required to attend a mandatory training meeting that day, but failed to provide Mr. Truby with the necessary link to access the meeting, thereby ensuring that he could not attend—which would be recorded as a no-call, no show. Guckenheimer thus engaged in a calculated effort to fabricate a basis to terminate Mr. Truby for three supposed no-call, no-shows.

Mr. Truby's protected activities, refusals and/or opposition on and before February 2, 2021 was/were a contributing factor to Guckenheimer's decision to take these adverse actions against Mr. Truby on February 3, 2021. The one-day period between Mr. Truby's protected activity and Guckenheimer's decisions to subject Mr. Truby to adverse employment actions—e.g., a meritless Final Warning and a requirement to attend a remote/virtual meeting that Guckenheimer ensured that he could not access—supports an inference that Guckenheimer's decision to terminate Mr. Truby was retaliatory. *See Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000) (noting that causation can be inferred from timing alone); *see also Miller v. Fairchild Indus.*, 885 F.2d 498, 505 (9th Cir. 1989) (prima facie case of causation was established when discharges occurred forty-two and fifty-nine days after EEOC hearings).

Labor Code Section 1102.5(f) provides that "In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars (\$10,000) for each violation of this section."

Upon information and belief, Guckenheimer has also violated Labor Code Section 1102.5 with respect to other Aggrieved Employees.

Mr. Truby and other Aggrieved Employees are entitled to recover civil penalties and

reasonable attorneys' fees and costs pursuant to Labor Code Sections 1102.5(f) and/or 2699(a), (f)-(g).

C. Violations of Labor Code Section 98.6

Labor Code Section 98.6 prohibits an employer from discriminating against, retaliating against, or taking any adverse action against an employee because the employee has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights that are under the jurisdiction of the Labor Commissioner, or because the employee has initiated any action or notice pursuant to Section 2699, or because of the exercise by the employee for employment on behalf of himself, herself, or others of any rights afforded him or her under the Labor Code. Labor Code Section 98.6(b)(3) provides that, "[i]n addition to other remedies available, an employer who violates this section is liable for a civil penalty not exceeding ten thousand dollars (\$10,000) per employee for each violation of this section, to be awarded to the employee or employees who suffered the violation."

Guckenheimer violated Labor Code Section 98.6 with respect to Mr. Truby for the same reasons it violated Labor Code Section 1102.5, detailed above. Upon information and belief, The Local also violated Labor Code Section 98.6 with respect to other Aggrieved Employees.

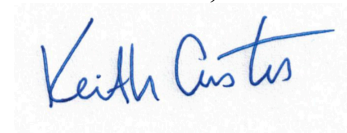
Mr. Truby and other Aggrieved Employees are entitled to recover civil penalties and reasonable attorneys' fees and costs pursuant to Labor Code Sections 98.6 and/or 2699(a), (f)-(g).

* * *

If the LWDA does not provide notice that it will investigate these violations within 65 days of the date of this notice, Mr. Truby, acting in the public interest as a private attorney general, shall file a civil action—and seek assessment and collection of civil penalties and all other available relief for himself, all other Aggrieved Employees, and the State of California—against Guckenheimer for violations of Labor Code Sections 98.6, 1102.5, and 2802, as detailed herein. Mr. Truby shall seek all applicable and available penalties and remedies related to these violations of the Labor Code pursuant to PAGA, including an award of reasonable attorneys' fees and costs pursuant to Labor Code § 2699(g).

Sincerely,

CUSTIS LAW, P.C.



Keith A. Custis

Exhibit 2



June 9, 2021

Keith A. Custis
kcustis@custislawpc.com

SUBMITTED VIA ONLINE CLAIM NOTICE

(<https://dir.tfaforms.net/198>)

California Labor and Workforce
Development Agency
Attn. PAGA Administrator
1515 Clay Street, Ste 801
Oakland, CA 94612

SENT VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Cogency Global, Inc.
Agent for Service of Process of
Guckenheimer Enterprises, Inc.
1325 J Street, Suite 1550
Sacramento, CA 95814

Julie O'Dell, Esq.
Rochelle Rotea, Esq.
Lewis Brisbois Bisgaard & Smith LLP
650 Town Center Drive, Suite 1400
Costa Mesa, CA 92626

Re: *James Truby v. Guckenheimer Enterprises, Inc., et al.*: Amended Written Notice of Intent
to File Civil Action Pursuant to Labor Code § 2699.3

Dear PAGA Administrator and Guckenheimer Enterprises, Inc.:

This office represents James Truby with respect to claims arising from his employment by Guckenheimer Enterprises, Inc. ("Guckenheimer"). Mr. Truby worked for Guckenheimer as a non-exempt employee in California from October 2019 until February 4, 2021. Mr. Truby worked for Guckenheimer as a dishwasher.

Mr. Truby has filed a civil action against Guckenheimer, seeking, *inter alia*, civil penalties, attorneys' fees, costs and other available relief that is recoverable under the Private Attorneys General Act of 2004 ("PAGA"), Labor Code Section 2698, *et al.*, for violations of the Labor Code. Mr. Truby is seeking relief on behalf of himself, the State of California, and all other aggrieved employees, who are defined as "all current and former non-exempt and exempt employees who worked at least one pay period for Guckenheimer in California at any time between February 3, 2020 and the present" (hereafter, "Aggrieved Employees").

On February 3, 2021, pursuant to Labor Code Section 2699.3, this office provided notice of Mr. Truby's claims to the California Labor and Workforce Development Agency ("LWDA") and Guckenheimer regarding the following alleged violations of the Labor Code, and the facts and legal theories that support those violations.¹ On February 3, 2021, Mr. Truby also submitted the \$75.00 filing fee required by Labor Code Section 2699.3 during the online submission process.

Pursuant to Labor Code Section 2699.3, this letter serves as Mr. Truby's amended written notice to the LWDA and Guckenheimer regarding the following alleged violations of the Labor Code, and the facts and legal theories that support those violations. This letter is being submitted to the LWDA online pursuant to the process described on the California Department of Industrial Relations' website. This amended notice supplements the prior LWDA notice by clarifying the facts and legal theories supporting the alleged violations of Labor Code, although Plaintiff contends that the initial notice was sufficient and adequate to provide notice to both the LWDA and Guckenheimer.

As detailed below, Guckenheimer has violated the Labor Code within the last year and beyond as to Mr. Truby and other Aggrieved Employees in the following respects:

A. Failure to Reimburse Necessary Business Expenses in Violation of Labor Code Section 2802

Labor Code Section 2802 requires employers to pay for all necessary expenditures and losses incurred by the employee in the performance of his or her job. The purpose of Labor Code Section 2802 is to prevent employers from passing off their cost of doing business and operating expenses on to their employees. *Cochran v. Schwan's Home Service, Inc.*, 228 Cal. App. 4th 1137, 1144 (2014). The applicable wage order provides that: "[w]hen tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer . . ."

Within the previous twelve months, Guckenheimer, on a company-wide basis, required that Mr. Truby and other Aggrieved Employees utilize their own personal cell phones and cell phone data, and/or personal computers and Internet plans, to carry out their job duties, but Guckenheimer failed to reimburse them for the costs of their cell phones, cell phone data plans and/or personal computers and Internet plans. For example, Guckenheimer required Mr. Truby and other Aggrieved Employees to work from home and use their personal cell phones and/or personal computers and Internet plans to attend mandatory remote/virtual training meetings on a

¹ The Labor Code violations, facts and legal theories detailed herein are based on the Plaintiff's experience and his counsel's review of the records currently available relating to the Plaintiff's employment. Discovery conducted in litigation of wage and hour claims such as these often reveals that the employer violated additional Labor Code Sections and additional facts and legal theories supporting all Labor Code violations. Thus, Plaintiff reserves the right to supplement this letter with additional facts, theories, and claims if they become aware of them subsequent to the submission of this letter.

daily basis. Although Guckenheimer required Mr. Truby and other Aggrieved Employees to regularly utilize their personal cellular phones and/or data, and/or personal computers and Internet plans to carry out work-related responsibilities, Guckenheimer failed to reimburse them for this cost between April 2020 and December 2020. In January 2021, Guckenheimer began to pay only \$5.00 per month to Aggrieved Employees for the use of their personal cell phones, data plans, personal computers and Internet plans, an amount that is deficient as the average cost of cell phone plans is approximately \$100 per month. Guckenheimer also required Mr. Truby and the Aggrieved Employees to incur other costs for home office expenses, but failed to reimburse them for those costs.

Guckenheimer could have provided Mr. Truby and other Aggrieved Employees with the actual tools required for use on the job, including company phones, or reimbursed employees a reasonable percentage of their cell phone usage and/or personal computer/home Internet costs, but instead, Guckenheimer passed off these operating costs on to Mr. Truby and other Aggrieved Employees. Thus, Guckenheimer violated Section 2802 by uniformly failing to reimburse any portion of Mr. Truby's and other Aggrieved Employees' cell phone and data plan expenses and personal computer and home Internet costs, and other home office expenses. *See, e.g., Cochran*, 228 Cal. App. 4th at 1144 ("We hold that when employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills."); *Ritchie v. Blue Shield of California*, 2014 WL 6982943, at *21 (N.D. Cal. Dec. 9, 2014) (certifying class of cell phone reimbursement claim and adopting the logic of *Cochran*).

Guckenheimer's policy and/or practice of passing off its operating costs on to Mr. Truby and other Aggrieved Employees by requiring that they use their personal cell phones and/or personal computers and home Internet plans without reimbursement violates Labor Code Section 2802.

As a result, Mr. Truby and all other Aggrieved Employees are entitled to recover civil penalties, attorneys' fees, costs, and interest thereon, pursuant to Labor Code Section 2699(f)-(g).

B. Violations of Labor Code Section 1102.5

Labor Code Section 1102.5(b) provides that "An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance . . . , if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employees job duties."

Within the previous twelve months, including in January and February 2021, Mr. Truby engaged in protected activity under Labor Code Section 1102.5(b) by complaining to Guckenheimer that Guckenheimer was violating Labor Code Section 2802 by failing to reimburse Mr. Truby and other Aggrieved Employees for the use of their personal cell phones and data plans. In addition, on February 2, 2021, Mr. Truby notified Guckenheimer that he intended to file a civil action for violation of the Private Attorneys General Act of 2004 (“PAGA”), Labor Code Section 2698, *et al.*, for violations of Labor Code Section 2802.

Mr. Truby’s conduct constituted a disclosure of and/or opposition to conduct that Mr. Truby had reasonable cause to believe disclosed a violation of state, local and/or federal laws, rules, or regulations. Mr. Truby made such disclosures to person(s) with authority over Mr. Truby who had the authority to investigate, discover, or correct the violation or non-compliance. Guckenheimer also perceived, feared and/or believed that Mr. Truby may make protected disclosures in the future. Mr. Truby’s conduct was thus protected under Labor Code Section 1102.5.

On February 3, 2021, Guckenheimer retaliated against Mr. Truby in violation of Labor Code Section 1102.5(b) by providing Mr. Truby with a purported Final Written “Employee Corrective Action Notice,” which alleged that Mr. Truby had been absent on January 20 and 27, 2021. Mr. Truby was not absent on those days—when all employees were working from home. Instead, Mr. Truby was unable to participate in mandatory video training calls because he could not afford the approximate \$10 in data use charges that it would cost him to attend. Mr. Truby had repeatedly advised Guckenheimer that he could not afford to attend these mandatory meetings. Prior to February 3, 2021, Guckenheimer had not provided Mr. Truby with any other written corrective actions regarding these issues. The first written corrective action was a “final” corrective written action. Moreover, on February 3, 2021, Guckenheimer told Mr. Truby that he was required to attend a mandatory training meeting that day, but failed to provide Mr. Truby with the necessary link to access the meeting, thereby ensuring that he could not attend—which would be recorded as a no-call, no show. Guckenheimer thus engaged in a calculated effort to fabricate a basis to terminate Mr. Truby for three supposed no-call, no-shows.

On February 4, 2021, Guckenheimer retaliated against Mr. Truby in violation of Labor Code Section 1102.5(b) by terminating Mr. Truby’s employment.

Mr. Truby’s protected activities, refusals and/or opposition on and before February 2, 2021 was/were a contributing factor to Guckenheimer’s decision to take these adverse actions against Mr. Truby on February 3 and 4, 2021. The short time period between Mr. Truby’s protected activity and Guckenheimer’s decisions to subject Mr. Truby to adverse employment actions—e.g., a meritless Final Warning and a requirement to attend a remote/virtual meeting that Guckenheimer ensured that he could not access—supports an inference that Guckenheimer’s decision to terminate Mr. Truby was retaliatory. *See Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000) (noting that causation can be inferred from timing alone); *see also Miller v. Fairchild Indus.*, 885 F.2d 498, 505 (9th Cir. 1989) (prima facie case of causation was established when discharges occurred forty-two and fifty-nine days after EEOC hearings).

Labor Code Section 1102.5(f) provides that “In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars (\$10,000) for each violation of this section.”

Upon information and belief, Guckenheimer has also violated Labor Code Section 1102.5 with respect to other Aggrieved Employees by retaliating against such Aggrieved Employees for their complaints concerning violations of Labor Code Section 2802 by subjecting such Aggrieved Employees to baseless discipline and/or including termination.

Mr. Truby and other Aggrieved Employees are entitled to recover civil penalties and reasonable attorneys’ fees and costs pursuant to Labor Code Sections 1102.5(f) and/or 2699(a), (f)-(g).

C. Violations of Labor Code Section 98.6

Labor Code Section 98.6 prohibits an employer from discriminating against, retaliating against, or taking any adverse action against an employee because the employee has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights that are under the jurisdiction of the Labor Commissioner, or because the employee has initiated any action or notice pursuant to Section 2699, or because of the exercise by the employee for employment on behalf of himself, herself, or others of any rights afforded him or her under the Labor Code. Labor Code Section 98.6(b)(3) provides that, “[i]n addition to other remedies available, an employer who violates this section is liable for a civil penalty not exceeding ten thousand dollars (\$10,000) per employee for each violation of this section, to be awarded to the employee or employees who suffered the violation.”

Guckenheimer violated Labor Code Section 98.6 with respect to Mr. Truby for the same reasons it violated Labor Code Section 1102.5, detailed above. Upon information and belief, Guckenheimer also violated Labor Code Section 98.6 with respect to other Aggrieved Employees by retaliating against such Aggrieved Employees for their complaints concerning violations of Labor Code Section 2802 by subjecting such Aggrieved Employees to baseless discipline and/or termination.

Mr. Truby and other Aggrieved Employees are entitled to recover civil penalties and reasonable attorneys’ fees and costs pursuant to Labor Code Sections 98.6 and/or 2699(a), (f)-(g).

* * *

If the LWDA does not provide notice that it will investigate these violations within 65 days of the date of this notice, Mr. Truby, acting in the public interest as a private attorney general, shall file a civil action—and seek assessment and collection of civil penalties and all other available relief for himself, all Aggrieved Employees, and the State of California—against Guckenheimer

California Labor and Workforce Development Agency
Guckenheimer Enterprises, Inc.
June 9, 2021
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for violations of Labor Code Sections 98.6, 1102.5, and 2802, as detailed herein. Mr. Truby shall seek all applicable and available penalties and remedies related to these violations of the Labor Code pursuant to PAGA, including an award of reasonable attorneys' fees and costs pursuant to Labor Code § 2699(g).

Sincerely,

CUSTIS LAW, P.C.



Keith A. Custis

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California; I am over the age of 18 years and not a party to the within action; my business address is 1999 Avenue of the Stars, Suite 1100, Los Angeles, California 90067.

On August 25, 2021, I served the foregoing document(s) described as:

SECOND AMENDED REPRESENTATIVE ACTION COMPLAINT

on the interested parties in this action,

John L. Barber, Esq.

Julie O'Dell, Esq.

Rochelle Rotea, Esq.

Lewis Brisbois Bisgaard & Smith LLP

650 Town Center Drive, Suite 1400

Costa Mesa, CA 92626

Email:

John.Barber@lewisbrisbois.com

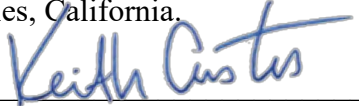
Julie.ODell@lewisbrisbois.com

Rochelle.Rotea@lewisbrisbois.com

by sending a true copy thereof to the interested parties as follows:

- ☐ **(BY PERSONAL SERVICE)** By causing to be delivered the document(s) listed above to the person(s) at the address(es) set forth above.
- ☒ **(BY EMAIL)** By electronically mailing a true and correct copy through Custis Law, P.C.'s electronic mail system from kcustis@custislawpc.com to the email addresses set forth above pursuant to Rule 2.251 of the California Rules of Court, an agreement between the parties to accept electronic service pursuant to Code of Civil Procedure Section 1010.6 and Rule 12 of the Judicial Council Emergency Rules.
- ☐ **(BY U.S. MAIL)** In accordance with the regular mailing collection and processing practices of this office, with which I am readily familiar, by means of which mail is deposited with the United States Postal Service at Los Angeles, California, that same day in the ordinary course of business, I deposited such sealed envelope, with postage thereon fully prepaid, for collection and mailing on this same date following ordinary business practices, addressed as set forth below.
- ☐ **BY OVERNIGHT DELIVERY:** I am readily familiar with the practice of Custis Law, P.C. for collection and processing of correspondence for overnight delivery and know that the document described herein will be deposited in a box or other facility regularly maintained by Federal Express for overnight delivery.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 25, 2021 in Los Angeles, California.


Keith Custis