

James de la O
In Propria Persona

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Superior Court of California,
County of San Diego

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Clerk of the Superior Court
By Bernabe Montijo, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
CIVIL – UNLIMITED

JAMES DE LA O, in his representative
capacity,

vs.

XTRACTA DISTRIBUTION, INC., a
California corporation, and STEVEN
DANG, individually,

Defendants.

Case No. 37-2021-00026150-CU-OE-CTL

REPRESENTATIVE ACTION

COMPLAINT FOR:

Labor Code Private Attorneys General Act
of 2004 (Labor Code § 2698 et seq.)

**AMOUNT IN CONTROVERSY EXCEEDS
\$25,000.00**

James de la O ("JAMES DE LA O"), in his representative capacity for the Labor Workforce & Development Agency ("LWDA") and all current and former employees of Xtracta Distribution, Inc. ("XTRACTA"), brings this law enforcement action to enforce the Labor Code and to collect mandatory civil penalties from XTRACTA and its owner, Steven Dang ("STEVEN DANG") (collectively "Defendants"), under the Private Attorneys General Act of 2004 (the "PAGA"), California Labor Code § 2698 *et seq.*

INTRODUCTION

1. This case involves Defendants' deliberate scheme to misclassify their production workers as independent contractors, thereby denying them the fundamental protections due to employees under California law. By their unlawful misclassification

1 scheme, Defendants also evaded their obligation to provide workers' compensation
2 protection to these employees in an industry where work-related injuries and illnesses
3 are far from uncommon. The Labor Code requires employers to provide to its
4 employees, among other things, itemized wage statements, overtime wages, equal pay
5 for substantially similar work, sick time, vacation time, and prompt payment of wages
6 upon termination. Defendants failed to comply with California Labor Code requirements
7 due, in part, to the willful and intentional classification of JAMES DE LA O and the
8 aggrieved employees as independent contractors. Defendants also failed to institute an
9 work-injury program, and paid production workers of one ethnicity more than production
10 workers of other ethnicities for substantially similar work. JAMES DE LA O's position is
11 that all employees on the production line from start to finish should be paid equally
12 because they do substantially similar work. Defendants' acts and omissions, as
13 described herein violate provisions of the California Labor Code.

16 2. Further, Defendants evaded their obligation to provide health insurance,
17 sick pay, and vacation pay to JAMES DE LA O and the aggrieved employees under
18 their internal company policies by deliberately misclassifying them as temporary
19 workers, when, in fact, they were full-time employees.

21 3. After more than 600 hours of work, JAMES DE LA O asked Defendants to
22 follow California law and classify him as an employee instead of an independent
23 contractor. Defendants willfully refused to reclassify JAMES DE LA O and discharged
24 him for asking.
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1 4. JAMES DE LA O is authorized by the State of California to act on behalf of
2 the LWDA and the aggrieved employees of XTRACTA to collect mandatory penalties in
3 the public interest.

4 **JURISDICTION AND VENUE**

5 5. The events and circumstances surrounding this lawsuit, including the
6 actions and transactions described herein, took place in the State of California, County
7 of San Diego. Further, this Court has subject-matter jurisdiction (general jurisdiction);
8 JAMES DE LA O prays for the recovery of damages in excess of \$25,000.00 and,
9 therefore, the amount in controversy exceeds this Court's jurisdictional minimum. This
10 Court has personal jurisdiction over Defendants because they reside or do business in
11 California.
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13
14 6. JAMES DE LA O files this action in the venue of San Diego County,
15 California because Defendants live or do business in this county. In addition, San Diego
16 County is where the dispute arose or where the employment contract was entered into
17 or broken.
18

19 **PARTIES**

20 7. Plaintiff JAMES DE LA O is a natural person who is a resident of the State
21 of California, County of San Diego.

22 8. Defendant XTRACTA is a California corporation that distributes cannabis
23 products. It is a "person" within the meaning of California Civil Code § 1786.2(a). It
24 maintains offices and production facilities in San Diego, California. On information and
25 belief, XTRACTA is authorized to conduct business in California, and does conduct
26 business in California.
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1 9. Defendant STEVEN DANG is a natural person who is a resident of the
2 State of California, County of San Diego. He is the CEO and owner of XTRACTA.

3 10. JAMES DE LA O is informed and believes, and based thereon alleges,
4 that each defendant sued in this action acts and acted, in all respects pertinent to this
5 action, as the agent of the other defendants, carried out a joint scheme, business plan
6 or policy in all respects pertinent hereto, and that the acts of each defendant are legally
7 attributable to the other defendants.
8

9 11. JAMES DE LA O is informed and believes, and based thereon alleges,
10 that each defendant sued in this action is directly or indirectly responsible in some
11 manner for the occurrences, controversies and damages alleged herein, in various
12 capacities, including but not limited to serving as joint employer, joint tortfeasor, single
13 enterprise, alter ego, or agents of the other defendants. Each defendant approved,
14 participated in, controlled, or ratified the acts of all other defendants.
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16 **PAGA REPRESENTATIVE ACTION ALLEGATIONS**
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18 12. Pursuant to the PAGA, JAMES DE LA O brings this action on behalf of the
19 LWDA, himself, and all current and former employees of XTRACTA in the State of
20 California at any time within the period beginning one (1) year prior to the filing of the
21 Complaint in this action, and ending at the time this action settles or proceeds to final
22 judgment ("Penalty Period").
23

24 13. On April 6, 2021, JAMES DE LA O gave written notice by online filing of
25 Defendants' violations of various provisions of the California Labor Code as alleged in
26 this Complaint to the LWDA. Defendants received notice via certified mail. See Letter
27 from JAMES DE LA O to the LWDA and XTRACTA attached hereto as **Exhibit A**. The
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1 LWDA did not provide notice of its intention to investigate XTRACTA's alleged violations
2 within 65 calendar days of the April 6, 2021 date of the notice sent by JAMES DE LA O.
3 See Cal. Lab. Code § 2699.3(a)(2)(A). Defendants did not file a response letter to
4 JAMES DE LA O's written notice to the LWDA or submit a Notice of Cure.

5 14. On June 14, 2021, JAMES DE LA O amended his written notice by online
6 filing of Defendants' violations of various provisions of the California Labor Code as
7 alleged in this Complaint to the LWDA. A copy was sent to Defendants via certified mail.
8 The amended notice corrects years of employment and adds claims/violations, among
9 other things See Letter from JAMES DE LA O to the LWDA and XTRACTA attached
10 hereto as **Exhibit B**.
11

12 **FACTUAL ALLEGATIONS**

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14 15. JAMES DE LA O started work at XTRACTA on October 9, 2019. XTRACTA
15 classified him as an independent contractor and a temporary production assistant. He
16 worked intermittently from that date until mid-January 2020. From mid-January 2020 to
17 April 10, 2020, he worked full-time.
18

19 16. JAMES DE LA O received his pay on a weekly basis and was reimbursed
20 by XTRACTA for lunch on Fridays. He did not receive an employee manual, paystubs, a
21 notice disclosing wage information, or any other document that properly classified
22 employees received.
23

24 17. JAMES DE LA O was paid approximately 25% less than what employees
25 of another ethnicity received for substantially similar work.

26 18. JAMES DE LA O was not invited to company meetings or to XTRACTA's
27 Christmas party like properly classified employees. He also did not receive a uniform or
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1 employee benefits, such as medical insurance, vacation time, and sick pay like those
2 properly classified employees.

3 19. JAMES DE LA O interacted with about 12 to 15 other aggrieved
4 employees who were also misclassified independent contractors. JAMES DE LA O and
5 these aggrieved employees had the same rate of pay.
6

7 20. On Sunday, April 12, 2020, JAMES DE LA O sent a letter via email to the
8 human resources department at XTRACTA asking to be reclassified as an employee in
9 accordance with California law. In that letter, he notified XTRACTA that it was violating
10 the law. He also sent an email to his direct supervisor informing him that he would not
11 be in the next day. There was no response from XTRACTA to the letter, and JAMES
12 DE LA O never received an auto-reply from the HR email address. As a result of
13 receiving no response, JAMES DE LA O did not return to work on Tuesday, April 14,
14 2020 as he had planned.
15

16 21. On May 6, 2020, JAMES DE LA O sent a follow-up email to XTRACTA
17 asking it to confirm within 24 hours whether he was indeed discharged. He asked for his
18 vacation pay and sick pay if that was the case.
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20 22. On May 6, 2020, XTRACTA responded and asked for 48 hours to respond.

21 23. On May 8, 2020, XTRACTA sent a letter to JAMES DE LA O summarily
22 discharging him and asking him to sign a release in order to receive his sick pay. The
23 letter stated that there was an auto-reply that JAMES DE LA O should have received.
24

25 24. On May 12, 2020, JAMES DE LA O sent a letter to XTRACTA refusing to
26 sign a release and stating that no auto-reply was received. In addition to his sick pay
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1 and vacation pay, JAMES DE LA O demanded the wage differential under the Equal
2 Pay Act.

3 25. On May 14, 2020, counsel for XTRACTA sent a letter to JAMES DE LA O
4 informing him that XTRACTA classified him as a temporary employee, not a full-time
5 employee. As a result, it refused to pay him vacation time, but said it would pay him the
6 sick pay. XTRACTA also refused to pay the wage differential under the Equal Pay Act.
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8 26. On May 15, 2020, JAMES DE LA O received a check in the amount of
9 \$600.00 for his sick pay from XTRACTA. He did not have to sign a release.
10

11 **PAGA REPRESENTATIVE ACTION ALLEGATIONS**

12 **Misclassification [Cal. Labor Code § 226.8]**

13 27. In order to run its production and/or distribution business, XTRACTA hired
14 JAMES DE LA O and the aggrieved employees to work on the production line in their
15 facilities in San Diego, California. As a condition to working for XTRACTA, JAMES
16 DE LA O and the aggrieved employees were required to interview with the HR
17 Department over the phone and/or email, submit their resume, and sign an IRS form.
18 Except for the requirement of a food handler's license, XTRACTA imposed minimal
19 qualifications on JAMES DE LA O and the aggrieved employees. No special skills
20 outside of the ability to work on a production line were required. On information and
21 belief, individuals who succeed on the production line at XTRACTA have unique traits,
22 such as a good attitude, punctuality, reliability, ambition, eagerness to learn,
23 communication skills, and a strong work ethic.
24
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26 28. JAMES DE LA O and the aggrieved employees spent their work time on
27 tasks assigned by XTRACTA, which included, but was not limited to, labeling tin cans,
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1 using label machines, sorting candy, wiping ink of tin cans with Acetone, cutting open
2 boxes with box cutters, and using dollies to transport heavy boxes from one area to
3 another.

4 29. JAMES DE LA O and the aggrieved employees were an integral part of
5 XTRACTA's business of providing products and/or services to its California clients.
6 Indeed, during the coronavirus pandemic they were labeled "essential" by XTRACTA.
7

8 30. XTRACTA imposed on JAMES DE LA O and the aggrieved employees
9 record keeping requirements by which they were required to document, on forms
10 generated by XTRACTA, their hours worked, in the manner and frequency dictated by
11 XTRACTA. XTRACTA also required them to sign forms after they received their weekly
12 pay in cash. XTRACTA keeps and maintains these records.
13

14 31. XTRACTA controlled the assignment and dissemination of work to JAMES
15 DE LA O and the aggrieved employees, and directed their work. They were subject to
16 discipline by XTRACTA.
17

18 32. XTRACTA unilaterally set the hourly pay rates of JAMES DE LA O and the
19 aggrieved employees, which were not negotiable as would be expected in a true
20 independent contractor relationship.

21 33. JAMES DE LA O and the aggrieved employees were not engaged in a
22 separate business or profession, but instead regularly worked for XTRACTA at least five
23 (5) days a week. JAMES DE LA O and the aggrieved employees were dependent on
24 XTRACTA for their livelihoods.
25

26 34. JAMES DE LA O and the aggrieved employees were integrated into
27 XTRACTA's regular business operations and were essential to XTRACTA's day-to-day
28

1 operations. XTRACTA controlled the means, manner and methods by which JAMES
2 DE LA O and the aggrieved employees performed their work for XTRACTA.
3 Nevertheless, in a short-sighted attempt to maximize profits, XTRACTA willfully
4 misclassified them as independent contractors in order to minimize costs at the expense
5 of their primary workforce.

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7 35. Through their unlawful misclassification scheme, XTRACTA avoided the
8 costs of providing workers compensation/occupational accident insurance to JAMES
9 DE LA O and the aggrieved employees, denying them much needed protection in the
10 event of work-related injuries or illnesses.

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12 36. In order to evade their obligations under their very own internal company
13 policies, XTRACTA classified JAMES DE LA O and certain aggrieved employees as
14 temporary workers, when, in fact, they were full-time employees who had worked full-
15 time for XTRACTA for more than one month.

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17 37. XTRACTA maintained the right to terminate and could easily terminate
18 JAMES DE LA O and the aggrieved employees at any time for seemingly insignificant
19 grounds.

20
21 38. XTRACTA's unlawful conduct of misclassifying production workers also
22 allowed XTRACTA to deprive JAMES DE LA O and other aggrieved employees of
23 fundamental employment rights, such as the right to accurate itemized wage
24 statements, the right to overtime pay, the right to the prompt payment of full wages
25 within time limits designated by law, the right to sick pay, the right to equal pay for
26 substantially similar work, the right to workers compensation protection, and the right to
27 health insurance under XTRACTA's internal policies.
28

1 39. JAMES DE LA O interacted with about 12 to 15 other misclassified
2 employees on XTRACTA's production line.

3 **Failure to Pay Wages on Discharge**
4 **[Cal. Labor Code §§ 201 and 202]**

5 40. Pursuant to Labor Code §§ 201 and 202, XTRACTA is required to pay all
6 earned and unpaid wages to an employee who is discharged. Labor Code Section 201
7 mandates that if an employer discharges an employee, the employee's wages accrued
8 and unpaid at the time of discharge are due and payable immediately.

9
10 41. Furthermore, pursuant to Labor Code § 202, XTRACTA is required to pay
11 all accrued wages due to an employee no later than seventy-two (72) hours after the
12 employee quits their employment, unless the employee provided seventy-two (72) hours
13 previous notice of their intention to quit, in which case the employee is entitled to his or
14 her wages at the time of quitting.

15
16 42. During the Penalty Period, XTRACTA willfully failed to pay accrued wages
17 and other compensation to JAMES DE LA O and the aggrieved employees in
18 accordance with Labor Code §§ 201 and 202, including vacation pay. In addition,
19 because XTRACTA has failed and continues to fail to properly compensate JAMES
20 DE LA O and the aggrieved employees for all hours worked when due, overtime wages,
21 and vacation pay, XTRACTA has also willfully failed and continues to fail to pay accrued
22 wages and other compensation to JAMES DE LA O and the aggrieved employees in
23 accordance with Labor Code §§ 201 and 202.
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Failure to Pay Timely Wages
[Cal. Labor Code § 204]

43. Labor Code § 204 provides that all wages earned by any person in any employment between the 1st and 15th days, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 16th and 26th day of the month during which the labor was performed. Labor Code Section 204 further provides that all wages earned by any person in any employment between the 16th and the last day, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 1st and the 10th day of the following month. Labor Code § 204 further provides that all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period.

44. XTRACTA had an established policy, practice, or agreement to provide paid vacation to its full-time employees. Under California law, earned vacation time is considered wages, and vacation time is earned, or vests, as labor is performed.

45. JAMES DE LA O is informed and believes, and based thereon alleges, that XTRACTA improperly classified him and other aggrieved employees as temporary workers to evade their obligations to pay vacation time, among other things, under their own internal company policies when, in fact, they were full-time employees who worked full-time for more than one month.

46. During the Penalty Period, XTRACTA, among other things, failed to pay JAMES DE LA O and the aggrieved employees all wages earned and due to them, including, but not limited to, overtime payments, and vacation pay within the the time period permissible under Labor Code § 204.

1 47. JAMES DE LA O is informed and believes, and based thereon alleges,
2 that XTRACTA did not properly compensate aggrieved employees for hours worked in
3 excess of eight in a day and forty in a week. Accordingly, XTRACTA violated California
4 Labor Code § 204(a), which requires that employers pay "all wages [...] twice during
5 each calendar month on days designated in advance by the employer as regular pay
6 days."
7

8 **Failure to Post a Conspicuous Notice of Regular Paydays**
9 **[Cal. Labor Code § 207]**

10 48. JAMES DE LA O is informed and believes, and based thereon alleges,
11 XTRACTA violated Labor Code § 207 by failing to post a conspicuous notice of regular
12 paydays, including time and place of payment at its Armour location.
13

14 **Failure to Pay Vacation Time**
15 **[Cal. Labor Code § 227.3]**

16 49. XTRACTA had an established policy, practice, or agreement to provide
17 paid vacation to its full-time employees. Under California law, earned vacation time is
18 considered wages, and vacation time is earned, or vests, as labor is performed.
19

20 50. JAMES DE LA O is informed and believes, and based thereon alleges,
21 that XTRACTA improperly classified him and other aggrieved employees as temporary
22 workers to evade their obligations under California law and their own internal company
23 policies when, in fact, they were full-time employees who worked full-time for more than
24 one month.

25 51. JAMES DE LA O is informed and believes, and based thereon alleges,
26 XTRACTA violated Labor Code § 227.3 by illegally withholding JAMES DE LA O's
27 earned vacation time, and the earned vacation time of the aggrieved employees.
28

**Failure to Furnish Accurate Itemized Wage Statements
[Cal. Labor Code § 226(a)]**

52. During the Penalty Period, XTRACTA routinely failed to provide JAMES DE LA O and the aggrieved employees with timely, accurate, and itemized wage statements in writing showing each employee's gross wages earned, total hours worked, all deductions made, net wages earned, and all applicable hourly rates in effect during each pay period and the corresponding number of hours worked at each hourly rate, in violation of Labor Code § 226.

53. During the Penalty Period, and in order to conceal its wage theft, XTRACTA knowingly and intentionally failed to provide JAMES DE LA O and other aggrieved employees with timely and accurate itemized wage statements.

54. XTRACTA's knowingly and intentionally failed to provide JAMES DE LA O and the aggrieved employees with timely, accurate, and itemized wage statements in accordance with Labor Code Section 226(a) so as to prevent JAMES DE LA O and the aggrieved employees from being able to determine whether they were being paid for, among other things, all the hours they worked and at the proper rates of pay.

**Failure to Provide Paid Sick Leave
[Cal. Labor Code § 246]**

55. XTRACTA violated Labor Code § 246 because it did not provide JAMES DE LA O and the aggrieved employees with paid sick leave during their employment with XTRACTA.

56. On May 15, 2020, XTRACTA paid JAMES DE LA O's sick leave only after he demanded it.

Failure to Pay Overtime
[Cal. Labor Code §§ 510, 1194 and 1198]

57. JAMES DE LA O and the aggrieved employees are, and at all relevant times were, covered by Labor Code §§ 510, 1194 and 1198, which required employers to pay employees one-and-one-half times their normal hourly rates for hours worked in excess of eight per day and in excess of forty per week and at twice the normal hourly rate for hours worked in excess of twelve per day and eight on the seventh day worked in a work week. However, JAMES DE LA O is informed and believes, and based thereon alleges, that XTRACTA has had a policy and/or practice of failing to compensate aggrieved employees for all overtime hours worked as required under the foregoing provisions of the Labor Code. XTRACTA's paid the aggrieved employees their normal hourly rate for any overtime worked, instead of the rate mandated by the Labor Code.

58. In violation of California law, XTRACTA has knowingly and willfully refused to perform its obligation to compensate the aggrieved employees for all wages earned and all hours worked as the legally required rates of pay.

Failure to Keep Payroll Records
[Cal. Labor Code § 1174(d)]

59. JAMES DE LA O is informed and believes, and based thereon alleges, that XTRACTA violated Labor Code § 1174(d) by failing to keep required payroll records. XTRACTA failed to keep payroll records showing total hours worked and wages paid to employees. Under California Labor Code § 1174(d), employers must keep "payroll records showing the hours worked daily by and the wages paid to...employees [...]." XTRACTA kept records of payments to JAMES DE LA O and the

1 aggrieved employees, but on information and belief these are the not the same types of
2 records they kept for employees who were properly classified.

3 **Failure to Pay Employees Equally for Substantially Similar Work**
4 **[Cal. Labor Code § 1197.5]**

5 60. XTRACTA unilaterally set the pay rates of JAMES DE LA O and certain
6 aggrieved employees at a rate that was around 25% less than what other employees of
7 a different ethnicity made for substantially similar work on the production line. On
8 information and belief, there is no justifiable reason for the lower pay rate because
9 XTRACTA did not have a seniority or merit system in place for their employees.
10

11 **Failure to Abide by Wages, Hours and Working Conditions**
12 **[Cal. Labor Code § 1199]**

13 61. XTRACTA violated Labor Code §§ 1199 by (a) causing the aggrieved
14 employees to work for longer hours than those fixed, or under conditions of labor
15 prohibited by an order of the commission; (b) paying or causing to be paid Mr. de la O
16 and the aggrieved employees a wage less than the minimum fixed by an order of the
17 commission; and (c) violating or refusing or neglecting to comply with any provision of
18 Chapter 1: Wages, Hours and Working Conditions [1171 – 1206], or any order or ruling
19 of the commission.
20

21 **Failure to Abide by Wages, Hours and Working Conditions**
22 **[Cal. Labor Code § 1199.5]**

23 62. XTRACTA violated Labor Code § 1199.5 by paying or causing to be paid
24 Mr. de la O and the aggrieved employees a wage less than the rate paid to an
25 employee of another sex, race, or ethnicity, as required by Section 1197.5.
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**Failure to Provide a Written Notice that Discloses Wage Information
[Cal. Labor Code § 2810.5]**

63. XTRACTA violated Labor Code § 2810.5 because it failed to provide JAMES DE LA O and the aggrieved employees with a written notice that discloses wage information.

**CAL/OSHA VIOLATIONS
[Cal. Labor Code §§ 6400, 6401, 6401.7(a), 6402, 6403]**

64. XTRACTA failed to establish, implement, and maintain an effective injury prevention program under Labor Code § 6401.7(a) for JAMES DE LA O and the aggrieved employees, who engaged in work that could cause injury.

65. In addition, while XTRACTA provided face masks, gloves and disinfectant wipes during the coronavirus pandemic, XTRACTA failed to (1) take individual measures and screening such as temperature checks and pre-shift screening, (2) have a written illness prevention program or provide training; (3) conduct a hazard assessment to determine if any PPE is needed to protect employees from hazards that are present or are likely to be present in the workplace; (4) establish infection prevention measures such as encouraging sick employees to stay home, implementing social distancing protocols, or establishing procedures to routinely disinfect and clean commonly used surfaces; and (5) provide illness prevention training.

66. As a result of all of the foregoing, XTRACTA violated Labor Code § 6400 (Failure to provide a place of employment that is safe and healthful); Labor Code § 6401 (Failure to furnish and use safety devices and safeguards, and adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful; Labor Code § 6401.7(a)

(Failure to implement and maintain an effective written injury prevention program); Labor Code § 6402 (Requiring or permitting an employee to go or be in any employment or place of employment which is not safe and healthful); and Labor Code § 6403 (Failure or neglect to provide and use reasonably adequate safety devices and safeguards or adopt or use reasonably adequate methods and processes, or to do every other thing reasonably necessary to protect the life, safety and health of employees).

Owner's Liability

67. Defendant STEVEN DANG, acting for himself, and on behalf of XTRACTA, is responsible for the violations of law described herein, in that he decided, planned, caused, assisted, participated in, allowed and/or ratified the unlawful acts as alleged herein. As CEO, and the highest-ranking officer of XTRACTA in California, STEVEN DANG exercises supervisory authority and control over the key employees that implemented, and continue to implement, the unlawful labor practices against JAMES DE LA O and the aggrieved employees. STEVEN DANG knew that JAMES DE LA O and the aggrieved employees should be regarded as employees, but chose to willfully misclassify them as independent contractors, in order to maximize profits for XTRACTA. Even after JAMES DE LA O asked to be reclassified and notified STEVEN DANG that his company was violating California law, STEVEN DANG willfully disregarded it and discharged JAMES DE LA O.

68. Consequently, STEVEN DANG is individually liable, pursuant to the PAGA and California law, for civil penalties arising: (a) under Labor Code § 226.8, which makes it unlawful for “any person or employer to engage” in “willful misclassification of

1 an individual as an independent contractor"; (b) under Labor Code § 558, which holds
2 liable any "person acting on behalf of an employer who violates, or causes to be
3 violated," *inter alia*, Labor Code § 512, and/or "any provision regulating hours and days
4 of work in any order of the Industrial Welfare Commission"; (c) under Labor Code §
5 210(a), which holds liable "every person who fails to pay the wages of each employee
6 as provided" within the time limits set under Labor Code § 204; and (d) under Labor
7 Code § 225.5, which holds liable "every person who unlawfully withholds wages due
8 any employee in violation of", *inter alia*, Labor Code § 221.

10 **FIRST CAUSE OF ACTION**
11 **VIOLATION OF THE PRIVATE ATTORNEYS GENERAL ACT (the "PAGA")**
12 **(California Labor Code § 2698, et seq.)**
13 **(AGAINST ALL DEFENDANTS)**

14 69. JAMES DE LA O incorporates by reference the allegations set forth in
15 paragraphs 1 through 68 as if fully set forth therein.

16 70. JAMES DE LA O and all current and former employees of XTRACTA are
17 "aggrieved employees" under the PAGA, as they were employed by Defendants during
18 the applicable statutory period and suffered one or more of the Labor Code violations
19 set forth herein. Accordingly, they seek to recover on behalf of themselves and all other
20 current and former aggrieved employees of Defendants, the civil penalties provided by
21 the PAGA, plus reasonable attorney's fees and costs, if necessary.

22 71. JAMES DE LA O is entitled to recover two types of PAGA civil penalties:
23 (1) penalties for violating Labor Code provisions that themselves provide for civil
24 penalties and that were traditionally recoverable only by the LWDA or its related entities;
25 and (2) default civil penalties under Labor Code § 2699(f) for violations of Labor Code
26 provisions that do not themselves provide for civil penalties.
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1 72. JAMES DE LA O is entitled to recover civil penalties pursuant to the PAGA
2 for violations of the following Labor Code provisions (Category One: Violations of Labor
3 Code Provisions Specifically Listed in Labor Code § 2699.5): §§ 201 and 202; § 227.3;
4 §§ 226 and 1174; §§ 510, 1194 and 1198; Labor Code §§ 1174(d); § 1197.5; § 1199;
5 and § 1199.5 .
6

7 73. JAMES DE LA O is entitled to civil penalties pursuant to the PAGA for
8 violations of the following Labor Code provisions (Category Two: CAL/OSHA): §§ Labor
9 Code §§ 6400, 6401, 6401.7(a), 6402, and 6403.
10

11 74. JAMES DE LA O is entitled to civil penalties pursuant to the PAGA for
12 violations of the following Labor Code provisions (Category Three: Unspecified Labor
13 Code Violations): Labor Code §§ 207; 226.8; 246; 247; 558, 1194 and 1198; and
14 2810.5.
15

16 75. JAMES DE LA O is entitled to civil penalties pursuant to PAGA for any and
17 all violations based on the facts, evidence and a future audit in this matter.
18

19 76. With respect to violations of Labor Code § 226.8, Labor Code § 226.8(b)
20 imposes a civil penalty of five thousand dollars (\$5,000) and not more than fifteen
21 thousand dollars (\$15,000) for each violation, in addition to any other penalties or fines
22 permitted by law, if a court issues a determination that a person or employer has
23 engaged in any of the enumerated violations of subdivision (a). Further, Labor Code §
24 226.8(c) imposes a civil penalty of not less than ten thousand dollars (\$10,000) and not
25 more than twenty-five thousand dollars (\$25,000) for each violation, in addition to any
26 other penalties or fines permitted by law, if a court issues a determination that a person
27 or employer has engaged in any of the enumerated violations of subdivision (a) and the
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1 person or employer has engaged in or is engaging in a pattern or practice of these
2 violations.

3 77. With respect to violations of Labor Code § 226(a), Labor Code § 226.3
4 imposes a civil penalty in addition to any other penalty provided by law of two hundred
5 fifty dollars (\$250) per aggrieved employee for the first violation, and one thousand
6 dollars (\$1,000) per aggrieved employee for each subsequent violation of Labor Code §
7 226(a).
8

9 78. With respect to violations of Labor Code § 510, 512, Labor Code § 558
10 imposes a civil penalty in addition to any other penalty provided by law of fifty (\$50) for
11 initial violations for each underpaid employee for each pay period for which the
12 employee was underpaid in addition to an amount sufficient to recover underpaid
13 wages, and one hundred dollars (\$100) for subsequent violations for each underpaid
14 employee for each pay period for which the employee was underpaid in addition to an
15 amount sufficient to recover underpaid wages. Moreover, JAMES DE LA O seeks civil
16 penalties in the amount of unpaid wages owed to aggrieved employees pursuant to
17 Labor Code § 558(a)(3).
18
19

20 79. With respect to violations Labor Code § 1174(d), Labor Code Section
21 1174.5 imposes a civil penalty of \$500.00.
22

23 80. When no pre-existing civil penalty in the Labor Code exists, the PAGA
24 imposes a civil penalty of “one hundred dollars . . . for each aggrieved employee pay
25 period for the initial violation and two hundred dollars . . . for each aggrieved employee
26 per pay period for each subsequent violation.” Labor Code § 2699(f)(2). Cf. Cal. Lab.
27 Code § 210(a)(2) (imposing a \$200 dollar penalty for subsequent violations of failing to
28

1 make a payment, or any willful or intentional violation, plus 25 percent of the illegally
2 withheld amount).

3 81. JAMES DE LA O exhausted his administrative remedies for this cause of
4 action. He gave notice to the LWDA of these violations on April 6, 2021, and gave
5 XTRACTA notice via certified mail. The LWDA has not provided JAMES DE LA O with
6 notice that it intends to investigate these violations, although 65 calendar days have
7 elapsed since the postmark date of JAMES DE LA O's notice. Accordingly, JAMES
8 DE LA O is entitled to commence this action under Labor Code § 2699(a). On June 14,
9 2021, JAMES DE LA O submitted an amended notice to the LWDA, and provided a
10 copy of that to XTRACTA via certified mail.
11

12
13 82. JAMES DE LA O reserves his right to allege any additional and all other
14 violations of the Labor Code as may be disclosed in discovery and as a result of
15 additional investigation that may be pursued in this action.
16

17 **PRAYER FOR RELIEF**

18 WHEREFORE, JAMES DE LA O, individually, and on behalf of the LWDA and the
19 aggrieved employees of XTRACTA, prays for judgment against Defendants as follows:

- 20 A. An award of civil penalties pursuant to the PAGA.
21 B. An award of reasonable attorney's fees pursuant to California Labor Code
22 § 2699(g) and/or other applicable law if JAMES DE LA O retains counsel;
23 C. Costs;
24 D. Pre-judgment and post-judgment interest as provided by law;
25 E. An incentive award payable to JAMES DE LA O and to any current or
26 former employee of XTRACTA who assists in discovery; and
27
28

1 F. Such other and further relief that the Court may deem just and proper.

2 Dated: June 14, 2021

3 Respectfully submitted,

4 *de la O*

5 _____
6 James de la O

Exhibit A

James de la O



April 6, 2021

VIA ONLINE FILING

Julie A. Su, Secretary
Labor and Workforce Development Agency
800 Capitol Mall, Suite 5000 (MIC-55)
Sacramento, CA 95814

**Re: The Private Attorneys General Act (“PAGA”) Notice Pursuant to
Labor Code § 2699.3**

Dear Ms. Su:

The following is James de la O’s written notice of the specific provisions of the Labor Code that he alleges Xtracta Distribution, Inc. (“Xtracta”) violated, including the facts and theories to support the alleged violations. This matter involves allegations regarding the misclassification of multiple production workers as independent contractors and unequal pay. Mr. de la O respectfully requests that your agency investigate the allegations below.

I. Facts.

A. The Employer.

Xtracta is a manufacturer and distributor of cannabis products. In San Diego, the employer operates at 4425 Convoy Street, Suite 106, San Diego, CA and 8026 Armour Street, San Diego, CA 92111.

B. Employment.

(1) Summary of Employment; Similarly Situated Employees; Overtime.

Xtracta hired James de la O in early October 2019 as a production assistant in the production department. He worked full-time from mid-January 2021 to April 10, 2021, and worked more than 600 hours from October to April 2019. Xtracta directed his work, set his working hours, set his working conditions, and set his rate of pay. It paid him in cash every Friday. He signed time sheets for each day or week he worked; he also signed blue sheets stating the amount of money he was paid. His working hours were typically from 8 a.m. to 4 p.m. Xtracta classified Mr. de la O as a temporary worker and an independent contractor. On April 12, 2020, Mr. de la O requested that Xtracta reclassify him to employee status and cited statutes and case law to support his request. There was no response. As a result, he stopped coming into work. When he followed up in early May, his request for reclassification was denied. He

demanding his vacation pay and sick pay on discharge, but Xtracta refused to acknowledge that he was a full-time employee and asked him to sign a release in order to receive his \$600.00 sick pay, which he refused to do. Mr. de la O received his sick pay in the amount of \$600.00 on May 15, 2020. He was issued a 1099 in late January 2020 and in late January 2021.

There were other independent contractors at Xtracta. Mr. de la O personally interacted with approximately 12 - 15 of these employees. These include current and former workers. Xtracta had a policy of not paying these individuals overtime based on their independent contractor status. Xtracta would only pay them their normal hourly rate for any time in excess of 8 hours in a day or 40 hours in a week. It would not pay them one and one half their regular rate of pay for overtime work like it did for its other employees. These similarly situated employees did not receive (1) a notice that discloses wage information; (2) sick pay; and (3) vacation pay.

(2) Failure to Keep Payroll Records or Provide Wage Statements.

Xtracta kept accurate timesheets, records of hours worked and pay records for Mr. de la O and each misclassified employee. However, on information and belief, these records were incomplete or inadequate because they were kept in the usual course of business for independent contractors, not employees. Xtracta did not provide wage statements to Mr. de la O and other misclassified employees after each pay period like it supposedly did for its other employees.

(3) Equal Pay.

On information and belief, Xtracta paid Mr. de la O and other similarly situated employees less than what employees of another ethnicity (the "Convoy Employees") made for substantially similar work. The Convoy Employees worked at a different facility than Mr. de la O, and there were no seniority or merit systems at Xtracta. The Convoy Employees did substantially similar work compared to Mr. de la O and other similarly situated employees. Further, the Convoy Employees did substantially equal work compared to regular employees who were paid less than them. Mr. de la O's stance is that all of the production employees should be paid the same for substantially similar work.

In October 2020, Mr. de la O filed an equal pay complaint with the Labor Commissioner's office. Based on the facts provided, the agency agreed to assign an investigator to investigate the allegations.

(4) Injury Prevention Program.

Xtracta did not establish, implement, and maintain an effective injury prevention program. Mr. de la O and the other similarly situated employees were never a part of any such program and did not receive any training. Further, Mr. de la O and the similarly situated employees engaged in work that could cause injury, such as lifting and carrying boxes, operating label machines and dollies, and using box cutters.

(5) California Wage Theft Act.

Xtracta did not provide Mr. de la O or similarly situated employees with a written notice that discloses wage information. On information and belief, Xtracta did not provide this written notice to any of its employees.

II. Theories.

A. Misclassification.

When misclassified, workers lose out on the many protections afforded to employees by state and federal labor laws. Willful misclassification is defined as “voluntarily and knowingly misclassifying that individual as an independent contractor.” (Labor Code § 226.8) Mr. de la O and other similarly situated individuals, were employees for Xtracta under the ABC test mandated by AB 5 and the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal. 5th 903. Therefore, based on the facts and California law:

A: We were not free from the control and direction of Xtracta in connection with the performance of the work, both under the contract for performance of the work and in fact.

B: We did not perform work that was outside the usual course of the business of Xtracta.

C: We were not customarily engaged in an independently established trade, occupation or business of the same nature as that involved in the work performed.

The standard set forth in AB 5 and *Dynamex* places the burden on the employer to prove all three elements of the ABC test to establish independent contractor status. Further, California law “does not exclude services from employment that are commonly referred to as day labor, part-time help, casual labor, temporary help, probationary, or outside labor.”¹ Xtracta’s classification of Mr. de la O as an independent contractor was contrary to California law. Further, its refusal to reclassify him demonstrated the willful nature of the multiple misclassifications.

B. Overtime.

As described above, Xtracta required its misclassified employees to work in excess of eight hours in a day and forty in a week, but did not pay these employees overtime compensation. As a result, Xtracta employees were denied “the unpaid balance of the full amount of this...overtime compensation” as required by California Labor Code § 1194, and Xtracta is liable for civil penalties pursuant to California Labor Code § 2698 et seq. Under California Labor Code §§ 1199 (a) and (c), an employer who “requires or causes any employee to work for longer than those fixed” or “violates or refuses or neglects to comply with any provision of” the Labor Code regarding employees’ wages, hours, and working conditions, is subject to

¹ 2020 California Employer’s Guide. Employment Development Department, p. 8. Retrieved from https://www.edd.ca.gov/pdf_pub_ctr/de44.pdf.

PAGA penalties. As described above, Xtracta required its misclassified employees to work hours in excess of eight (8) in a day and forty (40) in a week (thereby violating § 1199(a)) and violated numerous provisions of the Labor Code pertaining to wages and hours (thereby violating § 1199(b)).

C. California's Equal Pay Act.

Xtracta violated California's Equal Pay Act (Labor Code § 1197.5) because it paid Mr. de la O, misclassified employees, and other production employees less than what employees of another ethnicity made for substantially similar work. Under the law, two employees who perform "substantially similar" work and are of different ethnicities must be paid the same salary unless there is a valid reason, unrelated to gender or ethnicity, for the pay gap. The employer is required to justify this pay gap. Mr. de la O gave Xtracta every opportunity to justify the pay gap, but the company has been unable to justify it to his satisfaction.

D. Payroll Records; Wage Statements.

Xtracta failed to keep payroll records for the misclassified employees as they would for their regular employees showing total hours worked and wages paid to them. Under California Labor Code § 1174(d), employers must keep "payroll records showing the hours worked daily by and the wages paid to...employees [...]" Because Xtracta did not keep accurate time records reflecting hours worked for the misclassified employees as it would for regular employees, it is liable for civil penalties under Labor Code § 2698. To the extent that Xtracta's failure to keep accurate payroll records was willful, it is liable for civil penalties under California Labor Code § 1174.5.

Xtracta violated California Labor Code § 226(a) by willfully failing to furnish its employees with accurate, itemized wage statements showing the actual hours worked on a daily basis. When Xtracta compensated Mr. de la O and other similarly situated individuals it had them sign timesheets and receipts for pay received, but did not provide them with a copy or a pay stub of same.

E. Injury Prevention Program.

Xtracta did not establish, implement, and maintain an effective injury prevention program in accordance with Labor Code § 6401.7. Under the statute, the program must be written. Mr. de la O and similarly situated employees never received training or written material regarding such a program. As a result, Xtracta violated the statute.

F. California Wage Theft Act.

Xtracta violated Section 2810.5 of the Labor Code when it failed to provide Mr. de la O, similarly situated employees and other employees with a notice under the California Wage Theft Act upon hiring. According to the Labor Commissioner, "Section 2810.5 of the Labor Code requires that employers provide notice to employees of their rate(s) of pay, designated

pay day, the employer's intent to claim allowances (meal or lodging allowances) as part of the minimum wage, and the basis of wage payment (whether paying by hour, shift, day, week, piece, etc.), including any applicable rates for overtime. The law requires that the notice contain the employer's "doing business as" names, and that it be provided at the time of hiring and within 7 days of a change if the change is not listed on the employee's pay stub for the following pay period. The notice must be provided in the language the employer normally uses to communicate employment-related information to the employee, through translated notices provided by the Department of Labor."²

G. Willful Misclassification.

Xtracta's misclassification of Mr. de la O and similarly situated employees was willful because his request to be reclassified under California law was rejected. Pursuant to California Labor Code Section 226.8, it is unlawful for an employer to willfully misclassify an employee as an independent contractor. "Willful misclassification" is defined as "voluntarily and knowingly misclassifying that individual as an independent contractor" and carries a civil penalty of between \$5,000 and \$25,000 per violation.

III. Violations by Xtracta.

Category One: Violations of Labor Code Provisions Specifically Listed in Labor Code § 2699.5. (Specified Labor Code Violations)

1. Xtracta violated Labor Code §§ 201, 202 and 203 by failing to pay Mr. de la O's wages when they were due and payable on discharge, and the wages of any other similarly situated employee.
2. Xtracta violated Labor Code § 206 by failing to pay Mr. de la O's wages that it conceded were due. Xtracta conceded that his sick pay was due, but refused to immediately pay it unless he signed a release of claims.
3. Xtracta violated Labor Code § 207 by failing to post a conspicuous notice of regular paydays, including time and place of payment.
4. Xtracta violated Labor Code § 227.3 by illegally withholding Mr. de la O's vacation pay, and the vacation pay of other similarly situated employees.
5. Xtracta violated Labor Code §§ 226, 226.3, 1174 and 1174.5 by failing to provide Mr. de la O and any other similarly situated employees with wage statements.
6. Xtracta violated Labor Code §§ 510, 1194 and 1198 by failing to provide similarly situated employees with overtime pay.

2 Source: <https://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html>

7. Xtracta violated IWC Order No. 1 and Labor Code §§ 1174(d) by failing to keep required payroll records.

8. Xtracta violated Labor Code § 1197.5 by paying Mr. de la O, other similarly situated employees, and regular employees less than employees of another ethnicity for substantially similar work.

Category Two: Violations of Labor Code Provisions Specifically Listed in Labor Code § 2699.5 (Workplace health and safety violations)

None.

Category Three: Unspecified Labor Code and Wage Order Violations

1. Xtracta violated Labor Code § 226.8 by willfully misclassifying Mr. de la O and other similarly situated employees as independent contractors.

2. Xtracta violated Labor Code § 246 by failing to provide Mr. de la O and similarly situated employees with paid sick leave.

3. Xtracta violated Labor Code § 247 by failing to display a poster in a conspicuous place at the Armour location regarding paid sick days.

4. Xtracta violated IWC Order No. 1 and Labor Code §§ 558, 1194 and 1198 by failing to pay overtime wages or other wages regulated by the foregoing Order to Mr. de la O and similarly situated employees.

5. Xtracta violated Labor Code § 1198 for violations of IWC Wage Order No. 1 against Mr. de la O and other similarly situated employees that regulates conditions of labor, including sections 5 (Reporting Time Pay), 7 (Records), 18 (Filing Reports) and 22 (Posting of Order).

6. Xtracta violated Labor Code § 6401.7 by failing to establish, implement, and maintain an effective injury prevention program.

7. Xtracta violated Labor Code § 2810.5 (the California Wage Theft Act) by failing to provide Mr. de la O and other similarly situated employees with a written notice that discloses wage information. The wage notice law provides no specific civil penalty. Hence, the default penalties contained in section 2699 (f)(1) and (2) of the Private Attorneys General Act (PAGA) apply.

8. Xtracta violated any and all sections of the Labor Code based on the the misclassification of employees because it misclassified Mr. de la O and other similarly situated employees as independent contractors.

9. Xtracta violated any and all sections of the Labor Code based on the facts, evidence and a future audit in this matter.

IV. Standing to Prosecute.

The undersigned has standing to prosecute this matter as a private attorney general on behalf of the LWDA and the similarly situated employees. The term “private attorney general” refers to a private citizen who is authorized to bring a lawsuit that is considered to be in the public interest. (See, e.g., William B. Rubenstein, *On What A “Private Attorney General” Is — and Why It Matters*, 57 Vand. L. Rev. 2129, 2148-2149 (2004).) The concept of the private attorney general dates back hundreds of years to English common law, where a king’s proctor at times represented the public’s interest. (*Ibid.*) The facts show that Mr. de la O had an employment relationship with Xtracta, and that he suffered one or more Labor Code violations. In *Kim v. REINS INTERNATIONAL CALIFORNIA, INC.*, No. S246911 (Cal. Mar. 12, 2020), the California Supreme Court held that for standing to prosecute a PAGA action, an employee does not need to have suffered a “redressable” injury and only need demonstrate: (1) an employment relationship; and (2) suffered one or more Labor Code violations. In order to achieve maximum compliance with the Labor Code, “PAGA allows an ‘aggrieved employee’ – a person affected by at least one Labor Code violation committed by an employer – to pursue penalties for all the Labor Code violations committed by that employer.” (*Huff v. Securitas Security Services USA, Inc.* (Ct. App. 2018) 23 Cal. App. 5th 745). Accordingly, an employee alleging a single violation of the California Labor Code may bring PAGA claims against his employer for all violations suffered by any other employee of the same employer.

V. Incentive Award.

“Incentive awards to class representatives are intended to compensate class representatives for the work and risk undertaken on behalf of the class, to reimburse expenses incurred in the class litigation, and sometimes to recognize the willingness of class representatives to act as a private attorney general.” *Golba v. Dick’s Sporting Goods, Inc.* (2015) 238 Cal. App. 4th 1251, 1272, 190 Cal. Rptr. 3d 337 (citing *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393-1394 [113 Cal.Rptr.3d 510].) In *Van Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294, 299, the court awarded a class representative \$50,000 and suggested that his original request for \$100,000 would have been granted if he had kept an itemization about the actual hours spent and the actual expenses incurred during the litigation. In *Ingram v. Coca-Cola Co.* (N.D. Ga. 2001) 200 F.R.D. 685, 694, the court awarded \$300,000 incentive payments to each of four representative plaintiffs in lieu of compensation plaintiffs would have received as members of the class, and observing that these individuals had agreed never to seek reemployment with the defendant.

Julie A. Su
April 6, 2021
Page 8 of 8

VI. Conclusion.

"It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience." (Alexander Hamilton, Federalist No. 15 (1787).)

As with Hamilton, the Legislature declared that "California has important worker protections," but "these laws are meaningless if they are not enforced." (Assembly Jud. Com., Analysis of Sen. Bill No. 1809 (2004-2005 Reg. Sess.) as amended May 26, 2004, p. 4.) The facts and theories set forth herein demonstrate that Xtracta is liable for civil penalties.

Sincerely,

de la O

James de la O

cc: Xtracta Distribution, Inc.

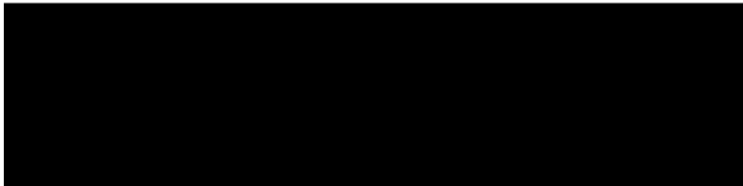


Exhibit B

James de la O



June 14, 2021

VIA ONLINE FILING

Julie A. Su, Secretary
Labor and Workforce Development Agency
800 Capitol Mall, Suite 5000 (MIC-55)
Sacramento, CA 95814

Re: The Private Attorneys General Act (“PAGA”) Amended Notice Pursuant to Labor Code § 2699.3

Dear Ms. Su:

The following is James de la O's amended written notice of the specific provisions of the Labor Code that he alleges Xtracta Distribution, Inc. (“Xtracta”) violated, including the facts and theories to support the alleged violations. This matter involves allegations regarding the misclassification of multiple production workers as independent contractors and unequal pay. Mr. de la O respectfully requests that your agency investigate the allegations below.

I. Facts.

A. The Employer.

Xtracta is a manufacturer and distributor of cannabis products. In San Diego, the employer operates at 4425 Convoy Street, Suite 106, San Diego, CA and 8026 Armour Street, San Diego, CA 92111.

B. Employment.

(1) Summary of Employment; Similarly Situated Employees; Overtime.

Xtracta hired James de la O in early October 2019 as a production assistant in the production department. He worked full-time from mid-January 2020 to April 10, 2020, and worked more than 600 hours from October 2019 to April 2020. Xtracta directed his work, set his working hours, set his working conditions, and set his rate of pay. It paid him in cash every Friday. He signed time sheets for each day or week he worked; he also signed blue sheets stating the amount of money he was paid. His working hours were typically from 8 a.m. to 4 p.m. Xtracta classified Mr. de la O as a temporary worker and an independent contractor. On April 12, 2020, Mr. de la O requested that Xtracta reclassify him to employee status and cited statutes and case law to support his request. There was no response. As a result, he stopped coming into work. On May 6, 2020, Mr. de la O sent a follow-up email to Xtracta asking it to

confirm within 24 hours whether he was indeed discharged. He asked for his vacation pay and sick pay if that was the case. Xtracta responded and asked for 48 hours. On May 8, 2020, Xtracta refused to acknowledge that Mr. de la O was a full-time employee and denied his request to be classified to employee status; it asked him to sign a release in order to receive the \$600.00 sick pay. On May 12, 2020, Mr. de la O refused to sign the release and demanded the wage differential under the Equal Pay Act in addition to his vacation pay and sick pay. Xtracta rejected his request for the wage differential under the Equal Pay Act and said he was not a full-time employee. But it agreed to pay the sick pay. On May 15, 2020, Mr. de la O received his sick pay in the amount of \$600.00, and he did not have to sign a release. He was issued a 1099 in late January 2020 and in late January 2021.

There were other approximately 12-15 other independent contractors at Xtracta that Mr. de la O interacted with. Xtracta had a policy of not paying these individuals overtime based on their independent contractor status. Xtracta would only pay them their normal hourly rate for any time in excess of 8 hours in a day or 40 hours in a week. It would not pay them one and one half their regular rate of pay for overtime work like it did for its other employees. These similarly situated employees did not receive (1) a notice that discloses wage information; (2) sick pay; and (3) vacation pay.

(2) Failure to Keep Payroll Records or Provide Wage Statements.

Xtracta kept accurate timesheets, records of hours worked and pay records for Mr. de la O and each misclassified employee. However, on information and belief, these records were incomplete or inadequate because they were kept in the usual course of business for independent contractors, not employees. Xtracta did not provide wage statements to Mr. de la O and other misclassified employees after each pay period like it supposedly did for its other employees.

(3) Equal Pay.

On information and belief, Xtracta paid Mr. de la O and other similarly situated employees less than what employees of another ethnicity (the "Convoy Employees") made for substantially similar work. The Convoy Employees worked at a different facility than Mr. de la O, and there were no seniority or merit systems at Xtracta. The Convoy Employees did substantially similar work compared to Mr. de la O and other similarly situated employees. Further, the Convoy Employees did substantially equal work compared to properly classified employees who were paid less than them. Mr. de la O's stance is that all of the production employees should be paid the same for substantially similar work.

In October 2020, Mr. de la O filed an equal pay complaint with the Labor Commissioner's office. Based on the facts provided by Mr. de la O, the agency agreed to assign an investigator to investigate the allegations.

(4) California Wage Theft Act.

Xtracta did not provide Mr. de la O or similarly situated employees with a written notice that discloses wage information. On information and belief, Xtracta did not provide this written notice to any of its employees.

(5) Cal/OSHA.

Xtracta did not establish, implement, and maintain an effective injury prevention program. Mr. de la O and the other similarly situated employees were never a part of any such program and did not receive any training. Further, Mr. de la O and the similarly situated employees engaged in work that could cause injury, such as lifting and carrying boxes, operating label machines and dollies, and using box cutters.

While XTRACTA provided face masks, gloves and disinfectant wipes during the coronavirus pandemic, XTRACTA failed to (1) take individual measures and screening such as temperature checks and pre-shift screening, (2) conduct a hazard assessment to determine if any PPE is needed to protect employees from hazards that are present or are likely to be present in the workplace; (3) establish infection prevention measures such as encouraging sick employees to stay home, implementing social distancing protocols, or establishing procedures to routinely disinfect and clean commonly used surfaces; and (4) provide illness prevention training.

II. Theories.

A. Misclassification.

When misclassified, workers lose out on the many protections afforded to employees by state and federal labor laws. Willful misclassification is defined as “voluntarily and knowingly misclassifying that individual as an independent contractor.” (Labor Code § 226.8) Mr. de la O and other similarly situated individuals, were employees for Xtracta under the ABC test mandated by AB 5 and the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal. 5th 903. Therefore, based on the facts and California law:

A: We were not free from the control and direction of Xtracta in connection with the performance of the work, both under the contract for performance of the work and in fact.

B: We did not perform work that was outside the usual course of the business of Xtracta.

C: We were not customarily engaged in an independently established trade, occupation or business of the same nature as that involved in the work performed.

The standard set forth in AB 5 and *Dynamex* places the burden on the employer to prove all three elements of the ABC test to establish independent contractor status. Further,

California law “does not exclude services from employment that are commonly referred to as day labor, part-time help, casual labor, temporary help, probationary, or outside labor.”¹ Xtracta’s classification of Mr. de la O as an independent contractor was contrary to California law. Further, its refusal to reclassify him demonstrated the willful nature of the multiple misclassifications.

B. Overtime.

As described above, Xtracta permitted its misclassified employees to work in excess of eight hours in a day and forty in a week, but did not pay these employees overtime compensation. As a result, Xtracta employees were denied “the unpaid balance of the full amount of this...overtime compensation” as required by California Labor Code § 1194, and Xtracta is liable for civil penalties pursuant to California Labor Code § 2698 et seq. Under California Labor Code §§ 1199 (a) and (c), an employer who “requires or causes any employee to work for longer than those fixed” or “violates or refuses or neglects to comply with any provision of” the Labor Code regarding employees’ wages, hours, and working conditions, is subject to PAGA penalties. As described above, Xtracta required its misclassified employees to work hours in excess of eight (8) in a day and forty (40) in a week (thereby violating § 1199(a)) and violated numerous provisions of the Labor Code pertaining to wages and hours (thereby violating § 1199(b)).

C. California’s Equal Pay Act.

Xtracta violated California’s Equal Pay Act (Labor Code § 1197.5) because it paid Mr. de la O, misclassified employees, and other production employees less than what employees of another ethnicity made for substantially similar work. Under the law, two employees who perform “substantially similar” work and are of different ethnicities must be paid the same salary unless there is a valid reason, unrelated to gender or ethnicity, for the pay gap. The employer is required to justify this pay gap. Mr. de la O gave Xtracta every opportunity to justify the pay gap, but the company has been unable to justify it to his satisfaction.

D. Payroll Records; Wage Statements.

Xtracta failed to keep payroll records for the misclassified employees as they would for their regular employees showing total hours worked and wages paid to them. Under California Labor Code § 1174(d), employers must keep “payroll records showing the hours worked daily by and the wages paid to...employees [...]” Because Xtracta did not keep accurate time records reflecting hours worked for the misclassified employees as it would for regular employees, it is liable for civil penalties under Labor Code § 2698. To the extent that Xtracta’s failure to keep accurate payroll records was willful, it is liable for civil penalties under California Labor Code § 1174.5.

¹ 2020 California Employer’s Guide. Employment Development Department, p. 8. Retrieved from https://www.edd.ca.gov/pdf_pub_ctr/de44.pdf.

Xtracta violated California Labor Code § 226(a) by willfully failing to furnish its employees with accurate, itemized wage statements showing the actual hours worked on a daily basis. When Xtracta compensated Mr. de la O and other similarly situated individuals it had them sign timesheets and receipts for pay received, but did not provide them with a copy or a pay stub of same.

E. Cal/OSHA.

As a result of its failure to establish, implement, and maintain an effective injury prevention program, and its failure to provide a safe environment during the coronavirus pandemic, XTRACTA violated Labor Code § 6400 (Failure to provide a place of employment that is safe and healthful); Labor Code § 6401 (Failure to furnish and use safety devices and safeguards, and adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful); Labor Code § 6401.7(a) (Failure to implement and maintain an effective written injury prevention program); Labor Code § 6402 (Requiring or permitting an employee to go or be in any employment or place of employment which is not safe and healthful); and Labor Code § 6403 (Failure or neglect to provide and use reasonably adequate safety devices and safeguards or adopt or use reasonably adequate methods and processes, or to do every other thing reasonably necessary to protect the life, safety and health of employees).

F. California Wage Theft Act.

Xtracta violated Section 2810.5 of the Labor Code when it failed to provide Mr. de la O, similarly situated employees and other employees with a notice under the California Wage Theft Act upon hiring. According to the Labor Commissioner, "Section 2810.5 of the Labor Code requires that employers provide notice to employees of their rate(s) of pay, designated pay day, the employer's intent to claim allowances (meal or lodging allowances) as part of the minimum wage, and the basis of wage payment (whether paying by hour, shift, day, week, piece, etc.), including any applicable rates for overtime. The law requires that the notice contain the employer's "doing business as" names, and that it be provided at the time of hiring and within 7 days of a change if the change is not listed on the employee's pay stub for the following pay period. The notice must be provided in the language the employer normally uses to communicate employment-related information to the employee, through translated notices provided by the Department of Labor."²

G. Willful Misclassification.

Xtracta's misclassification of Mr. de la O and similarly situated employees was willful because his request to be reclassified under California law was rejected. Pursuant to California Labor Code Section 226.8, it is unlawful for an employer to willfully misclassify an employee as an independent contractor. "Willful misclassification" is defined as "voluntarily

2 Source: <https://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html>

and knowingly misclassifying that individual as an independent contractor” and carries a civil penalty of between \$5,000 and \$25,000 per violation.

III. Violations by Xtracta.

Category One: Violations of Labor Code Provisions Specifically Listed in Labor Code § 2699.5. (Specified Labor Code Violations)

Xtracta violated:

1. Labor Code §§ 201 and 202 by failing to pay Mr. de la O’s wages when they were due and payable on discharge, and the wages of any other similarly situated employee;
2. Labor Code § 227.3 by illegally withholding Mr. de la O’s vacation pay, and the vacation pay of other similarly situated employees;
3. Labor Code §§ 226 and 1174 by failing to provide Mr. de la O and any other similarly situated employees with wage statements;
4. Labor Code §§ 510, 1194 and 1198 by failing to provide similarly situated employees with overtime pay;
5. Labor Code §§ 1174(d) by failing to keep required payroll records; and
6. Labor Code § 1197.5 by paying Mr. de la O, other similarly situated employees, and regular employees less than employees of another ethnicity for substantially similar work.
7. Labor Code §§ 1199 by (a) requiring or causing the aggrieved employees to work for longer hours than those fixed, or under conditions of labor prohibited by an order of the commission; (b) paying or causing to be paid Mr. de la O and the aggrieved employees a wage less than the minimum fixed by an order of the commission; and (c) violating or refusing or neglecting to comply with any provision of Chapter 1: Wages, Hours and Working Conditions [1171 – 1206], or any order or ruling of the commission; and
8. Labor Code § 1199.5 by paying or causing to be paid Mr. de la O and the aggrieved employees a wage less than the rate paid to an employee of another sex, race, or ethnicity, as required by Section 1197.5.

Category Two: Violations of Labor Code Provisions Specifically Listed in Labor Code § 2699.5 (Workplace health and safety violations)

XTRACTA violated:

1. Labor Code § 6400 (Failure to provide a place of employment that is safe and healthful);

2. Labor Code § 6401 (Failure to furnish and use safety devices and safeguards, and adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful);

3. Labor Code § 6401.7(a) (Failure to implement and maintain an effective written injury prevention program);

4. Labor Code § 6402 (Requiring or permitting an employee to go or be in any employment or place of employment which is not safe and healthful); and

5. Labor Code § 6403 (Failure or neglect to provide and use reasonably adequate safety devices and safeguards or adopt or use reasonably adequate methods and processes, or to do every other thing reasonably necessary to protect the life, safety and health of employees).

Category Three: Unspecified Labor Code Violations

Xtracta violated:

1. Labor Code § 207 by failing to post a conspicuous notice of regular paydays, including time and place of payment;

2. Labor Code § 226.8 by willfully misclassifying Mr. de la O and other similarly situated employees as independent contractors;

3. Labor Code § 246 by failing to provide Mr. de la O and similarly situated employees with paid sick leave;

4. Labor Code § 247 by failing to display a poster in a conspicuous place at the Armour location regarding paid sick days;

5. Labor Code §§ 558, 1194 and 1198 by failing to pay overtime wages or other wages regulated by IWC Wage Order No. 1 to Mr. de la O and similarly situated employees;

6. Labor Code § 2810.5 (the California Wage Theft Act) by failing to provide Mr. de la O and other similarly situated employees with a written notice that discloses wage information;

7. Any and all sections of the Labor Code based on the the misclassification of employees because it misclassified Mr. de la O and other similarly situated employees as independent contractors; and

8. Any and all sections of the Labor Code based on the facts, evidence and a future audit in this matter.

IV. Standing to Prosecute.

The undersigned has standing to prosecute this matter as a private attorney general on behalf of the LWDA and the similarly situated employees. The facts show that Mr. de la O had an employment relationship with Xtracta, and that he suffered one or more Labor Code violations. In *Kim v. REINS INTERNATIONAL CALIFORNIA, INC.*, No. S246911 (Cal. Mar. 12, 2020), the California Supreme Court held that for standing to prosecute a PAGA action, an employee does not need to have suffered a “redressable” injury and only need demonstrate: (1) an employment relationship; and (2) suffered one or more Labor Code violations. In order to achieve maximum compliance with the Labor Code, “PAGA allows an ‘aggrieved employee’ – a person affected by at least one Labor Code violation committed by an employer – to pursue penalties for all the Labor Code violations committed by that employer.” (*Huff v. Securitas Security Services USA, Inc.* (Ct. App. 2018) 23 Cal. App. 5th 745). Accordingly, an employee alleging a single violation of the California Labor Code may bring PAGA claims against his employer for all violations suffered by any other employee of the same employer.

V. Incentive Award.

By deputizing the undersigned, you agree that an incentive award is reasonable to compensate the undersigned for the work and risk he undertakes on behalf of the State of California, the LWDA and the aggrieved employees. (See *Golba v. Dick's Sporting Goods, Inc.* (2015) 238 Cal. App. 4th 1251, 1272, 190 Cal. Rptr. 3d 337 (citing *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393-1394 [113 Cal.Rptr.3d 510].) [“Incentive awards to class representatives are intended to compensate class representatives for the work and risk undertaken on behalf of the class, to reimburse expenses incurred in the class litigation, and sometimes to recognize the willingness of class representatives to act as a private attorney general.”] In *Van Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294, 299, the court awarded a class representative \$50,000 and suggested that his original request for \$100,000 would have been granted if he had kept an itemization about the actual hours spent and the actual expenses incurred during the litigation. In *Ingram v. Coca-Cola Co.* (N.D. Ga. 2001) 200 F.R.D. 685, 694, the court awarded \$300,000 incentive payments to each of four representative plaintiffs in lieu of compensation plaintiffs would have received as members of the class, and observing that these individuals had agreed never to seek reemployment with the defendant.

Julie A. Su
June 14, 2021
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VI. Conclusion.

"It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience." (Alexander Hamilton, Federalist No. 15 (1787).)

As with Hamilton, the Legislature declared that "California has important worker protections," but "these laws are meaningless if they are not enforced." (Assembly Jud. Com., Analysis of Sen. Bill No. 1809 (2004-2005 Reg. Sess.) as amended May 26, 2004, p. 4.) The facts and theories set forth herein demonstrate that Xtracta is liable for civil penalties.

Sincerely,

de la O

James de la O

cc: Xtracta Distribution, Inc.

