LAW OFFICES OF
THOMAS M. DIACHENKO, APC
ATTORNEYS AT LAW
1916 Third Avenue
San Diego, California 92101
(619) 699-5870

Thomas M. Diachenko, Esq. (SBN 140763)
Heidi Brown, Esq., (SBN 131888)

Attorneys for Plaintiff, Katherine Hopper

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

KATHERINE HOPPER, an individual, Plaintiff, *v.* FM ORANGE COUNTY LLC, a California limited liability company; ; BBB ORANGE COUNTY LLC , a California limited liability company; WILLIAM STORY, an individual; TIM ROGERS, an individual; MARK THOMAS, an individual; and CHRIS BERLIN, an individual; and DOES 1 - 20, inclusive, Defendants.	Case No: 30-2021-01199454-CU-OE-CJC FIRST AMENDED COMPLAINT **1. FAILURE TO PAY OVERTIME** **2. FAILURE TO PAY PREMIUMS** **3. FAILURE TO INDEMNIFY** **4. RECORD VIOLATIONS** **5. WAITING TIME PENALTIES** **6. UNFAIR BUSINESS PRACTICES** **7. GENDER BASED HARASSMENT/ DISCRIMINATION** **8. FAILURE TO PREVENT HARASSMENT** **9. VIOLATION OF PUBLIC POLICY** **10. RETALIATION** **11. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS** **12. LC § 2699 PAGA CLAIMS** Filing Date: May 11, 2021 Judge: Hon. Martha K. Gooding Dept: C32 Trial: TBD

Plaintiff KATHERINE HOPPER (hereinafter also referred to as "Plaintiff" or "HOPPER"), by and through her attorneys of record, brings this individual action and alleges as follows:

JURISDICTION & DEFENDANTS

1. This action arises out of acts, representations, and events occurring within the jurisdiction of Orange County and the Orange Judicial District.

2. Defendant FM ORANGE COUNTY, LLC, also dba Ferrari and Maserati of Orange County (hereinafter referred to as "FM ORANGE COUNTY," (hereinafter also collectively referred to as "Entity Defendants," or two of the "Defendants") is believed to be a California Limited Liability Company with its headquarters located at 900 West Coast Highway, Newport Beach, CA 92663, licensed to do business, and doing business in California. "FM So Cal, LLC" is the sole identified Manager/Member for FM ORANGE COUNTY. WILLIAM STORY ("STORY") is believed to be the manager of FM So Cal, LLC and served in various executive and director levels. FM ORANGE COUNTY employed Plaintiff in Newport Beach, California. FM ORANGE COUNTY also employed individual Defendants TIM ROGERS ("ROGERS") and MARK THOMAS ("THOMAS"). Defendant BBB ORANGE COUNTY, LLC (hereinafter referred to as "BBB ORANGE COUNTY," (which is believed to be doing business under the fictitious names of "Maserati of Newport Beach" and "Ferrari of Newport Beach" one of the "Entity Defendants," or one of the "Defendants") is believed to be a California Limited Liability Company with its headquarters located at 9130 W. Sunset Blvd., Los Angeles, CA 90069, licensed to do business, and doing business in California. FM ORANGE COUNTY and BBB ORANGE COUNTY jointly employed Plaintiff in Newport Beach, California. BBB ORANGE COUNTY was managed by CHRIS BERLIN and also employed Defendants TIM ROGERS and MARK THOMAS after it is believed to have assumed control of FM ORANGE COUNTY. HOPPER resides and was employed by the Entity Defendants in Orange County. STORY, ROGERS, THOMAS, BERLIN are also hereinafter sometimes collectively referred to as "Individual Defendants"). The Individual Defendants were also employed by the Entity Defendants in Orange County. Therefore, jurisdiction and venue are properly with this court.

3. Individual Defendants were at all relevant times herein engaged in certain acts which are the subject of this Complaint on the premises of or on behalf of one of the Entity Defendants as set forth below and were employed and managed by Entity Defendants at the time of the incidents mentioned herein.

4. The true names and capacities of Defendants sued under California Code of Civil Procedure section 474 as DOES 1 through 20, inclusive, and each of them, are unknown to Plaintiff

who therefore sues these Defendants by fictitious names. Plaintiff will seek to amend this Complaint to set forth the true names and capacities of the fictitiously named Defendants when the true names and capacities of these fictitiously named Defendants have been fully ascertained. Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named Defendants are responsible in some manner for the events and occurrences alleged by Plaintiff, and Plaintiff' damages were directly and proximately caused by the conduct, acts and omissions of these Defendants. Plaintiff also intends to amend this Complaint as a matter of right to add PAGA claims after the applicable notice period has expired.

GENERAL ALLEGATIONS

5. At all times mentioned herein, Plaintiff was an "employee" (as defined by Labor Code section 350) of Defendants and was paid "wages" (as defined by Labor Code section 200) by Defendants.

6. HOPPER was employed by FM ORANGE COUNTY as a non-exempt sales assistant from Nov. 2017 to August 2019 at which point she was promoted to the position of marketing assistant and advised that she was now an "exempt" employee. Plaintiff is informed and believes that in January 2021, FM ORANGE COUNTY sold its interest in the ongoing business to BBB ORANGE COUNTY. Plaintiff was provided "re-hire" paperwork for the new employer and advised her supervisors that she did not believe that the marketing assistant position was properly classified as exempt but was told that she would be better off as an exempt employee for several reason, including but not limited to be entitled to more time off, paying less in taxes, etc., none of which were true. HOPPER continued her work in the same position for the new business owner/operator until March 4, 2021 when her employment as terminated by BBB ORANGE COUNTY without explanation. As marketing assistant, Plaintiff was responsible for supporting sales staff with marketing, including marketing and public relations sales and after sales tasks, reporting and data entry and was to complete tasks in a timely manner based on her supervisor's requirements.

7. Plaintiff had no involvement in the in the actual sales of vehicles and was not paid any commissions on any sales. Entity Defendants expected and required Plaintiff to perform job duties which were primarily, if not totally, non-exempt tasks, rendering her a non-exempt employee

for the entire period of her employment with Entity Defendants under the applicable law of the state of California. However, Entity Defendants intentionally misclassified Plaintiff as an exempt employee and failed to pay Plaintiff on an hourly basis, for certain hours worked, particularly all overtime hours Plaintiff was suffered or permitted, and in fact, expected and required, to work. Entity Defendants reaped the benefits of treating Plaintiff as an exempt employee while averting the responsibilities of paying her as a non-exempt employee all to the detriment of Plaintiff.

8. Entity Defendants failed to pay Plaintiff all wages earned pursuant to the applicable California Wage Orders, Labor Code and case law, including overtime, meal period premiums and rest period premiums (for all required meal periods and rest periods Defendants failed to provide) and waiting time penalties. Defendants expected Plaintiff to work overtime and not take the required meal and rest periods. Defendants also failed to indemnify and/or reimburse HOPPER and other employees for certain business related expenses, including cell phones and phone service expenses. Further, Entity Defendants failed to maintain time records reflecting hours worked by Plaintiff and failed to provide pay stubs as required by the California Labor Code when issuing pay-checks to Plaintiff as her employer.

9. When Plaintiff raised the issue of paying her as an exempt employee, Defendant BBB ORANGE COUNTY retaliated against her by terminating her employment.

10. Additionally, Defendants ROGERS and THOMAS harassed Plaintiff and other female employees based on their gender and Entity Defendants failed to prevent that harassment and discriminated against Plaintiff and other female employees based on their gender. Plaintiff and other female employees complained about offensive and abusive comments which created a hostile work environment. In response to those complaints, Entity Defendants failed to conduct an adequate investigation and instead, told Plaintiff to deal with it herself and thereafter, retaliated against Plaintiff in a manner that included, but was not limited to terminating Plaintiff's employment.

11. At all times relevant herein, Individual Defendants were acting on behalf of Entity Defendants in their capacity as managers, agents and/or employees of Entity Defendants.

12. Entity Defendants, STORY and BERLIN also exerted ultimate control and decision-making authority as it pertained and continues to pertain to the illegal pay practices and

labor code violations, as described above. In addition, Entity Defendants failed to ensure a work environment free of gender-based harassment and failed to properly address (investigate) specific acts of gender-based harassment by ROGERS and THOMAS which were offensive to Plaintiff. Plaintiff obtained a right to sue letter from the DFEH prior to the filing of this Complaint, and which was within one year after Defendants wrongfully discharged Plaintiff on March 4, 2021, and which was the most recent in a series of continuing discriminatory acts committed by Defendants.

13. Many of the above-described practices subject the Entity Defendants, STORY and BERLIN to liability pursuant to Labor Code section 2699, et. seq. However, such claims cannot be asserted until 65 days have passed after notice, without action by the state. Accordingly, Plaintiff intends to amend this Complaint when the procedural requirements are satisfied.

FIRST CAUSE OF ACTION

(Failure to Pay Overtime Wages Against Entity Defendants Only)

14. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this section as though fully set forth herein as they apply to Entity Defendants.

15. Pursuant to, Industrial Welfare Commission Order 4-2001, section 3(A), and Labor Code sections 200, 500, 510, and 1198, Entity Defendants were required to compensate Plaintiff for all overtime, which is calculated at one and one-half (1.5) times the regular rate of pay for hours worked in excess of eight (8) hours in one workday and forty (40) hours in any one workweek, and for the first eight (8) hours on the seventh consecutive workday in any one workweek; with double (2) time after eight (8) hours on the seventh day of any workweek, or after twelve (12) hours in any workday for all worked performed as a non-exempt employee.

16. As a direct result of Defendants failure to pay overtime as required under California law, Plaintiff has suffered, and continues to suffer, substantial losses related to the use and enjoyment of such wages, lost interest on such wages, expenses and attorneys' fees in seeking to compel Entity Defendants to fully perform their obligations under state law, all to the detriment of Plaintiff, according to proof at the time of trial, but in amounts believed to be in far in excess of the minimal jurisdictional requirements of this Court. Entity Defendants committed the acts alleged herein knowingly and willfully.

17. Therefore, pursuant to Labor Code sections 204, 210, 218.6, 226, 510, 558 and 1194, and Civil Code section 3289, Plaintiff, is entitled to recover the unpaid balance of hourly pay owed, overtime compensation, interest, penalties, attorney fees, expenses, and costs of suit.

SECOND CAUSE OF ACTION

(Failure to Pay Meal and Rest Period Premiums Against Entity Defendants)

18. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this section as though fully set forth herein as it applies to Entity Defendants.

19. Plaintiff was a non-exempt employee as were all of the other employees with the same or similar jobs as Plaintiff. Entity Defendants failed to provide Plaintiff meal or rest periods during work periods lasting more than six hours. Defendants were required to provide meal and/or rest periods to the Plaintiff according to the California Labor Code sections discussed below. The failure to provide meal and rest periods required Defendants to pay Plaintiff meal and rest period premiums. Thus, Defendants failed to provide meal and rest periods for Plaintiff on some occasions for which Plaintiffs were not paid meal or rest period premiums.

20. Pursuant to California Labor Code §§ 226.7, 512 and California Wage Orders, off duty meal periods of thirty (30) minutes are required for all non-exempt employees who work at least five (5) hours in a shift, except that when a work period of not more than six (6) hours will complete the day's work then the meal period may be waived by mutual consent of the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived. Time records of meal breaks must be kept except that meal periods during which operations cease need not be recorded. Employers must provide non-exempt employees two (2) off duty rest periods of ten (10) minutes each in a normal eight (8) hour shift. Rest periods need not be recorded. The meal periods are unpaid unless the employee is not fully relieved of all duties. Off duty rest periods must be paid. An employer who fails to provide off duty meal and rest periods must pay the employee an additional one-hour regular pay for each break not provided.

21. At all times mentioned herein, Defendants violated Labor Code §§ 226.7 and 512 by refusing to allow Plaintiffs to take uninterrupted meal and rest periods. Accordingly, Plaintiff seeks damages available pursuant to the Labor Code, including but not limited to Labor Code §§ 204, 210, 226.7 and 512 plus interest pursuant to Labor Code § 1194 and Civil Code § 3289.

THIRD CAUSE OF ACTION

(Failure to Indemnify Against Entity Defendants Only)

22. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this section as though fully set forth herein as they apply to Entity Defendants.

23. California Labor Code section 2802(a) states, in pertinent part as follows: "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 . . ."

24. Throughout her employment Entity Defendants failed to indemnify Plaintiff, and other aggrieved employees, for personal expenditures including, but not limited to, use of her personal cell phone(s).

25. Pursuant to California Labor Code section 2802, Plaintiff is entitled to indemnification from Entity Defendants for all expenditures incurred by Plaintiff in direct consequence of the discharge of her duties, plus attorneys' fees and interest which "shall accrue from the date on which the employee incurred the necessary expenditure or loss". See Labor Code sections 2802 (b) and (c).

FOURTH CAUSE OF ACTION

(Record Violations Against Entity Defendants Only)

26. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this section as though fully set forth herein as they apply to Entity Defendants.

27. Entity Defendants failed to provide Plaintiff with proper pay-stubs. This failure was in clear violation of California Labor code sections 226 and 226.3.

28. Labor Code section 226(a) states, in part, as follows:

> An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying

> the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except as provided in subdivision (j), (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer..., and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee and, beginning July 1, 2013, if the employer is a temporary services employer as defined in Section 201.3, the rate of pay and the total hours worked for each temporary services assignment. The deductions made from payment of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. For purposes of this subdivision, "copy" includes a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information required by this subdivision.

29. Labor Code section 226 (e)(1) states that, "[a]n employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees."

30. Entity Defendants failed to provide Plaintiff with pay stubs that accurately reflected the hours worked, wages earned, including overtime wages, and the rate of pay for hours worked. Consequently, Entity Defendants' failure to provide accurate pay stubs violated Labor Code section 226(a).

31. Entity Defendants knowingly and intentionally failed to comply with Labor Code section 226(a), as delineated above. Accordingly, Entity Defendants are liable for damages owed to Plaintiff as specified in Labor Code section 226(e)(1).

32. Pursuant to Labor Code § 1174(d), Defendants have a legal obligation to "[k]eep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the

respective plants or establishments."

33. Defendants failed to maintain records of Plaintiff's hours worked which Defendants were required to keep pursuant to Labor Code §1174(d). Therefore, Defendants violated Labor Code § 1174(d) by failing to collect and keep records indicating the daily hours worked by Plaintiff and other aggrieved employees.

34. Pursuant to Labor Code § 1174.5, "any person employing labor who willfully fails to maintain...accurate and complete records required by subdivision (d) of Section 1174...shall be subject to a civil penalty of five hundred dollars ($500)." Accordingly, Defendants are required to pay Plaintiff an additional $500 along with consequential damages.

FIFTH CAUSE OF ACTION

(Waiting Time Penalties Against Entity Defendants Only)

35. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this section as though fully set forth herein as they apply to Entity Defendants.

36. Pursuant to Labor Code sections 201 and 203, Plaintiff was entitled to all wages earned and unpaid immediately upon discharge from employment.

37. Entity Defendants failed to pay Plaintiff all wages and sums owed within the time allotted by Labor Code sections 201 and 202 or at all.

38. Therefore, pursuant to Labor Code section 203, Plaintiff is entitled to receive up to 30 days worth of pay calculated at her regular rate of pay which Entity Defendants knowingly and willfully failed to pay Plaintiff at the time of her termination.

SIXTH CAUSE OF ACTION

(Unfair Business Practices Under Business and Professions Code section 17200 Against Entity Defendants Only)

39. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside thissection as though fully set forth herein as they apply to Entity Defendants.

40. In addition to the statutes cited throughout this Complaint, Defendants also violated various Labor Code sections, including, but not limited to, Labor Code sections 215, 216, 223, 225, and 226.6.

41. Entity Defendants' actions alleged above and throughout this Complaint constitute unfair business practices in violation of California Business and Professions Code sections 17200, et seq., because they were done repeatedly over a significant period of time, and in a systemic manner to the detriment of Plaintiff.

42. As a result, Plaintiff has suffered damages and requests damages and/or restitution of all monies and further requests that profits be disgorged from Entity Defendants in an amount according to proof at time of trial, but in an amount believed to be in excess of the minimal jurisdictional requirements of this Court.

43. Pursuant to California Business & Professions Code section 17203, Plaintiff requests that this Court order Entity Defendants to disgorge all ill-gotten gains and award Plaintiff full restitution of all monies wrongfully acquired by Entity Defendants by such "unfair" business act and practices as outlined herein above, plus interest and attorneys' fees pursuant to California Code of Civil Procedure section 1021.5. Plaintiff additionally requests that such funds be impounded by the Court or that an asset freeze or constructive trust be imposed upon such revenues and profits to avoid dissipation and/or fraudulent transfers or concealment of such monies by Entity Defendants. Plaintiff may be irreparably harmed and/or denied an effective and complete remedy if such an order is not granted.

44. Pursuant to California Business & Professions Code section 17203, Plaintiff further seeks an order of this Court for equitable and/or injunctive relief in the form of requiring Entity Defendants to correct the unfair business acts and practices referenced herein.

45. Plaintiff reserves the right to allege other violations of law which constitute unlawful acts or practices.

SEVENTH CAUSE OF ACTION

(Sexual Harassment Against Entity Defendants, ROGERS and THOMAS)

46. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this section as though fully set forth herein.

47. At all pertinent times mentioned herein, Entity Defendants were "employers" as defined by the provisions of Government Code section 12940. Section 12940 prohibits employers

or their agents from discriminating and harassing employees based upon their gender/sex. Plaintiff is, and was at all times relevant herein, a female and is, and was at all times relevant herein, a member of a class contemplated and protected by section 12940. Harassment is considered a form of discrimination.

48. Defendants ROGERS and THOMAS made repeated offensive personal comments to Plaintiff and to other female employees and interacted with Plaintiff and other female employees in abusive manners, in contrast to their professional and non-offensive interactions with other male employees. The actions of ROGERS and THOMAS created a hostile work environment for Plaintiff and other female employees resulting in not only severe emotional distress with physical manifestations in the case of Plaintiff, but also diminished opportunities for success in the workplace. Entity Defendants were on notice of the offensive behavior. Article 1, section 8 of the California Constitution prohibits discrimination and sexual harassment. California Government Code section 12940(a) prohibits discrimination as it relates to the terms and conditions of employment based upon gender/sex. California Government Code section 12940(j)(1) prohibits harassment based upon gender/sex. Furthermore, California Government Code section 12940(k) requires employers to take all "reasonable steps necessary to prevent discrimination and harassment from occurring." Defendants, through their agents and employees, harassed, and failed to prevent the same from occurring despite their legal obligations to do so under the aforementioned law of California, as described further in the Ninth Cause of Action herein. Entity Defendants negligently and/or intentionally failed to meet the statutory obligations owed to Plaintiff. Both Plaintiff's supervisors and managers, and Entity Defendants failed to protect Plaintiff and failed to prevent sexual harassment, gender discrimination, and retaliation in the work place.

49. The harassing behavior included, but was not necessarily limited to, derogatory comments, offensive comments, prying into personal affairs, and other acts which constitute hostile work environment sexual harassment. Plaintiff was subjected to conduct and comments which were based upon her sex/gender. During Plaintiff's employment, ROGERS and THOMAS verbally harassed Plaintiff on the basis of her gender as alleged above. Such conduct was sexual in nature, offensive, disparaging, degrading, humiliating, embarrassing, severe, pervasive, constant over time,

and not welcomed or consented to by Plaintiff. The effect of ROGERS' and THOMAS's behavior and Entity Defendants' failure to take corrective measures upon notice, created a hostile work environment for Plaintiff and amounts to sexual harassment.

50. Upon being put on notice, Entity Defendants, were vicariously responsible for the acts of ROGERS and THOMAS, who at all relevant times were acting as employees and agents, of Entity Defendants, and who controlled the day-to-day operations of Entity Defendants *vis a vis* Plaintiff. Entity Defendants were placed on notice of the behavior of ROGERS and THOMAS directly through Plaintiff advising Human Resources for Entity Defendants of such conduct. Instead of preventing the harassment and/or conducting an investigation and developing remedial measures for the harassment after reports were made, Entity Defendants (through their human resources department) told Plaintiff to deal with the issue on her own instead of performing an investigation pertaining to Plaintiffs' reports of harassment and ultimately, retaliated against Plaintiff by denying her promotions/bonuses and ultimately terminating her employment.

51. ROGERS and THOMAS, agents and employees of Entity Defendants, engaged in the behavior themselves and said offensive behavior was made known to Entity Defendants' human resources department. Thus, Entity Defendants knew or should have known of the harassment, but failed to take corrective action. As alluded to above, Plaintiff complained to Human Resources regarding the harassing conduct. Furthermore, at all times mentioned herein, Defendants collectively failed to do the following: (1) take reasonable steps to prevent and/or eliminate sexual harassment in the workplace; (2) maintain and enforce an anti-sexual harassment policy; (3) conduct an investigation; and (4) take permanent remedial measures reasonably calculated to both end the current harassment and deter future harassment from the same offender and/or others.

52. As a direct, foreseeable and proximate result of Defendants' wrongful acts, Plaintiff has suffered a loss of earnings, as well as past severe humiliation, embarrassment, mental and emotional distress, and discomfort, to be expected when subjected to sexual harassment and predatory behavior from a superior, all to her economic and non-economic damage in an amount according to proof at time of trial.

53. Defendants' acts and omissions alleged above were committed maliciously,

fraudulently, or oppressively with the intent of injuring Plaintiff, and/or with a willful and conscious disregard for Plaintiff's right to work in an environment free from sexual harassment. Because these acts were carried out in a deliberate and intentional manner, Plaintiff is entitled to recover punitive damages in a sum sufficient to punish and deter such conduct in the future.

54. Plaintiff satisfied her administrative requirements before asserting these claims against Defendants with the Department of Fair Employment and Housing and subsequently was issued a Right-to-Sue letter. Pursuant to Government Code section 12965(b), Plaintiff requests an award of attorneys' fees and costs against Defendants, and each of them.

EIGHTH CAUSE OF ACTION

(Failure to Prevent Harassment/Discrimination, Against Entity Defendants Only)

55. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this section as though fully set forth herein as they apply to Entity Defendants.

56. At all pertinent times mentioned herein, Entity Defendants were "employers" as defined by the provisions of Government Code section 12940. Section 12940 prohibits employers or their agents from discriminating and harassing employees based upon their gender/sex. Plaintiff is, and was at all times relevant herein, a female and is, and was at all times relevant herein, a member of a class contemplated and protected by section 12940. Not only was Plaintiff discriminated against because of her gender, she was harassed in the workplace in such a manner that would constitute hostile work environment and quid pro quo sexual harassment. Harassment is also considered a form of discrimination.

57. Entity Defendants had knowledge of ROGERS and THOMAS's pervasive gender-based harassment and discrimination toward women in the workplace, through complaints made to Human Resources by Plaintiff during her employment with Entity Defendants, as well as other female employees. The Human Resources employee to whom reports were made was, at all times relevant herein, an agent and/or employee of Entity Defendants. Entity Defendants told HOPPER to address the issue directly with the harasser, instead of performing an investigation as required under California law cited herein.

58. Plaintiff was subjected to sexual harassment, gender discrimination, and retaliation

during the course of her employment in a manner that constitutes hostile work environment sexual harassment, gender discrimination, and retaliation, as described throughout this Complaint.

59. Entity Defendants had an affirmative and mandatory duty to prevent harassment and discrimination. (*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035.) However, Entity Defendants failed to take all reasonable steps to prevent the harassment, gender discrimination, and retaliation suffered by Plaintiff at the hands of ROGERS and THOMAS, Entity Defendants' agents and employees. Therefore, Entity Defendants violated Government Code section 12940(k).

60. Entity Defendants' failure to take all reasonable steps to prevent sexual harassment, gender discrimination, and retaliation was a substantial factor in causing the harm Plaintiff suffered entitling her to recovery for economic and non-economic damages, attorney fees and punitive damages as stated in the prior cause of action, pursuant to Government Code section 12695 (b) and Civil Code section 3294.

NINTH CAUSE OF ACTION

(Violation of Public Policy Against Entity Defendants Only)

61. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this section as though fully set forth herein as they apply to Entity Defendants.

62. Plaintiff was employed by Entity Defendants performing services for the benefit of Entity Defendants of a type that Entity Defendants are in the business of selling and servicing cars. In 2021, after having questioned her classification as an exempt employee, and despite excellent performance reviews, and after Plaintiff had reported gender-based harassment and discrimination, Entity Defendants retaliated against Plaintiff by terminating her employment based on her reporting of illegal actions by Defendants.

63. Accordingly, Plaintiff was discharged from her employment with Entity Defendants in violation of public policy, entitling her to recovery of economic and non-economic damages. In addition, Defendants' acts and omissions alleged above were committed maliciously, fraudulently, or oppressively with the intent of injuring Plaintiff, and/or with a willful and conscious disregard for Plaintiff's right to work in an environment free from sexual harassment and discrimination and to

be properly paid wages in accordance with California law. Because these acts were carried out in a deliberate and intentional manner, Plaintiff is entitled to recover punitive damages in a sum sufficient to punish and deter such conduct in the future.

TENTH CAUSE OF ACTION

(Retaliation Against Entity Defendants)

64. Plaintiff alleges and hereby incorporates by reference all paragraphs outside this section as though fully set forth herein as they apply to all Defendants.

65. Plaintiff engaged in protected activity, questioning Defendants' classification of her as an exempt employee resulting in wage theft as well as reporting sexual harassment/ discrimination, which were motivating reasons for Entity Defendants' decision to take adverse employment action against HOPPER. Defendants put profits above compliance with the law. This resulted in financial and emotional harm to Plaintiff or at a minimum was a substantial factor in harming Plaintiff.

66. Liability of Defendants is based upon Labor Code section 1102.5 and Government Code section 12940. Defendants were aware of illegal pay practices (misclassification to avoid paying overtime, premiums, etc.,) and the sexual harassment and discrimination of women - yet retaliated against Plaintiff for reporting her related concerns.

67. The reports by Plaintiff to Defendants' were made to persons with authority to investigate, discover and correct the violations and noncompliance. Instead of correcting those issues raised by Plaintiff, Defendants chose instead to retaliate against Plaintiff by termination of her employment.

68. Defendants' failure to remediate longstanding illegal behavior violated the provisions set forth in Labor Code section 1102.5 subjecting Defendants to penalties set forth therein. In addition, Entity Defendants are liable for said retaliatory actions pursuant to Government Code section 12940 for taking adverse action against Plaintiff for her opposition to and reporting of various illegal activity committed by Defendants as described throughout this complaint.

69. Accordingly, Plaintiff is entitled to all consequential damages, including but not limited to financial loses, past emotional distress damages, costs and attorney fees pursuant to

Government Code section 12695(b) and Code of Civil Procedure 1021.5 as well as punitive damages justified by Defendants malicious, fraudulent and oppressive behavior and practices in conscious disregard of Plaintiff's rights. Plaintiff is also entitled to punitive damages because Defendants retaliatory actions were willful, malicious, fraudulent and oppressive done with the intent to injure Plaintiff, and/or with a willful and conscious disregard of Plaintiff rights to an environment free from discrimination, harassment and retaliation for reporting certain activity which she in good faith, believed to be illegal and which in fact, was illegal.

ELEVENTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress - Against ROGERS and THOMAS only)

70. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this section as though fully set forth herein as they apply to Defendants ROGERS and THOMAS.

71. ROGERS and THOMAS engaged in outrageous conduct which they either intended to cause Plaintiff distress or acted with reckless disregard of the probability that Plaintiff would suffer emotional distress, knowing that Plaintiff was present when the conduct occurred. ROGERS and THOMAS were in positions of authority and had the power to effect Plaintiffs interests. They also knew that Plaintiff was vulnerable to emotional distress and knew that their conduct would likely result in emotional distress to Plaintiff. Alternatively, ROGERS and THOMAS acted with reckless disregard in that they knew Plaintiff would probably suffer emotional distress or gave little thought to the probable causes of his conduct.

72. The conduct of Defendants ROGERS and THOMAS was a substantial factor in causing severe emotional distress to Plaintiff and their behavior described above and throughout this complaint was malicious, oppressive, despicable and fraudulent warranting the award of punitive damages against said Defendants in accordance with the meaning of same as set forth in California Civil Code section 3294.

ELEVENTH CAUSE OF ACTION

(Labor Code § 2699 Claims Against Entity Defendants, STORY & BERLIN)

78. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this section as though fully set forth herein.

79. On May 7, 2021, pursuant to Labor Code sections 2699(a) and 2699.3, Plaintiff provided notice, on behalf of other aggrieved employees and the State of California in writing, by electronic submission, to the California Labor Workforce Development Agency ("LWDA") and, by certified mail and regular mail, to Defendants, that Plaintiff intended to assert PAGA claims pursuant to section 2699(a) on his own behalf, and in a representative capacity on behalf of other current or former aggrieved employees, for Defendants' violations of specified provisions of the California Labor Code. A true and correct copy of the notice is attached hereto as Exhibit "1" and thereby incorporated by reference herein.

80. The LWDA failed to respond to Plaintiff's notice within the statutory period of sixty-five (65) days from the electronic submission date of May 7, 2021, and, as a result, Plaintiff has perfected his right to sue Defendants, and each of them, in a civil action, on behalf of other aggrieved employees and the state of California LWDA to collect statutory penalties, pursuant to Labor Code section 2699.3(a)(2)(A)(1).

81. As a result of the acts alleged above, Plaintiff brings this action on his own behalf, and in his representative capacity on behalf of other current or former aggrieved employees, for penalties pursuant to California Labor Code section 2699 for Defendants' violations of the enumerated Labor Code sections alleged in throughout this pleading including, but not limited to sections 201, 202, 203, 203.1, 204, 210, 218.5, 2018.6, 226, 226.3, 226.6, 226.7, 510, 512, 552, 558, 558.1, 1174, 1174.5, 1175, 1194, 1197.1, 1198, 1198.5, 1199 and 2751.

82. Labor Code section 558 states that, "[a]ny employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. (2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. (3) Wages recovered pursuant to this section shall be paid to the affected employee." The Section further states that "[t]he civil penalties provided

for in this section are in addition to any other civil or criminal penalty provided by law."

83. Labor Code section 558.1 (a) also states that, "[a]ny employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation."

84. STORY was an employee and/or person acting on behalf of FM ORANGE COUNTY violated, or caused to be violated, Labor Code Sections and Wage Orders including, but not limited to, those requiring: timely payment of all wages owed, payment of overtime, payment of wages due at the time of separation, delivery of pay stubs, production of documents requested, maintenance of time records, alleged herein.

85. BERLIN was an employee and/or person acting on behalf of BBB ORANGE COUNTY violated, or caused to be violated, Labor Code Sections and Wage Orders including, but not limited to, those requiring: timely payment of all wages owed, payment of overtime, payment of wages due at the time of separation, delivery of pay stubs, production of documents requested, maintenance of time records, alleged herein.

85. Accordingly, Plaintiff, on her own behalf, other aggrieved employees, and the state of California (specifically, the California Labor & Workforce Development Agency, aka the "LWDA") are entitled to personally recover against Defendants, and all of them, such penalties as set forth in Labor Code section 558, 558.1 , as delineated above, and for amounts owed under Labor Code sections 203, 203.1, 226, 226.3, 226.6, 226.7, 1194, and 2802, alleged herein, pursuant to Labor Code section 558.1.

86. It should also be noted that Labor Code section 1197.1 specifically states, in part, as follows: "Any employer or other person acting either individually or as an officer, agent, or employee of another person, who pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission shall be subject to a civil penalty and restitution of wages payable to the employee, as follows: (1) For any initial violation that is intentionally committed, one hundred dollars ($100) for each underpaid employee for each pay period for which

the employee is underpaid. This amount shall be in addition to an amount sufficient to recover underpaid wages. (2) For each subsequent violation for the same specific offense, two hundred fifty dollars ($250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed. This amount shall be in addition to an amount sufficient to recover underpaid wages..." STORY and BERLIN were persons acting individually or as an officer, agent, or employee of an entity Defendants who caused the Plaintiff and other aggrieved employees to be paid less than the statutorily required minimum wage as described in this First Amended Complaint. Accordingly, she is subject to individual liability pursuant to Labor Code section 1197.1. The same holds true pursuant to Labor Code section 558, as described above.

87. Pursuant to California Labor Code section 2699, Plaintiff and other aggrieved employees are entitled to be awarded twenty-five percent (25%) of all penalties referenced herein and due under California law, in addition to interest, attorneys' fees, and costs.

88. The Court shall award seventy-five percent (75%) of all penalties referenced herein and due under California law to the State of California.

89. Plaintiff therefore seeks to recover from Defendants, and each of them, allowable penalties, interest, costs, and attorneys' fees, in an amount according to proof at time of trial, in accordance with Labor Code sections 2699, et seq.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, prays for judgment against Defendants, as follows:

1. Compensatory damages, including but not limited to unpaid wages, overtime pay, liquidated damages, economic damages, non-economic damages and premiums according to proof;

2. Penalties, liquidated damages and compensation pursuant to Labor Code sections 203, 204, 210, 226, 226.3, 226.7, 510, 512, 1102.5, 1174.5, 1194, 1194.2, 1197.1; Government Code section 12940;

3. Interest pursuant to all applicable statues including but not limited to, Labor Code sections 218.6 and Civil Code section 3289;

4. All damages available pursuant to all applicable sections of the Labor Code;

5. Restitution and/or disgorgement pursuant to Business & Professions Code section 17200, et seq. and Labor Code section 1197.1;

6. Punitive damages pursuant to Civil Code section 3294;

7. Reasonable attorneys' fees and costs pursuant to all applicable statutes, including but not limited to, Labor Code sections 218.5, 226, 1194, and Code of Civil Procedure section 1021.5, and Government Code section 12965(b); and

8. Other and further relief as the Court deems proper.

Respectfully Submitted By:

LAW OFFICES OF THOMAS M. DIACHENKO, APC

Dated: June 18th, 2021

Thomas M. Diachenko, Esq., Attorney for Plaintiff, KATHERINE HOPPER

EXHIBIT 1

LAW OFFICES OF

THOMAS M. DIACHENKO, APC

Practice Areas Include:
Wage, Employment, Personal Injury & Business Litigation

E-mail: Thom@DiachenkoLaw.com

1916 Third Avenue
San Diego, California 92101
Tel: (619) 699-5870
Fax: (619) 699-5871

May 7, 2021

Refer to File No:
03042021-04022021

Sent via electronic mail to:
PAGA Administrator
David M. Lanier
PAGAfilings@dir.ca.gov

Re: FM ORANGE COUNTY LLC, a California Limited Liability Company; BBB ORANGE COUNTY LLC , a California Limited Liability Company; WILLIAM STORY, an Individual; TIM ROGERS, an Individual; MARK THOMAS, an Individual; and CHRIS BERLIN, an Individual; and Does 1 - 20, Inclusive,

Dear Mr. Lanier:

I represent Katherine Hopper ("Plaintiff" or "HOPPER"), individually and on behalf of all other aggrieved employees. Plaintiff and the other aggrieved employees are collectively referred to hereinafter as "PAGA Plaintiffs", "Plaintiffs" or "Plaintiff and other aggrieved employees"). HOPPER is a former employee of FM Orange County, LLC ("FM Orange County") and of BBB Orange County, LLC ("BBB") who was misclassified as exempt so paid a set monthly salary regardless of the amount of hours suffered or permitted to work, as were other aggrieved employees. William Story, ("Story") in his various executive capacities carried out and/or ratified FM Orange County's illegal employment practices. Chris Berlin, ("Berlin") in his various executive capacities carried out and/or ratified BBB'sillegal employment practices. FM Orange County, BBB, Story and Berlin are also sometime hereinafter collectively referred to as "Defendants".

Pursuant to Labor Code section 2699.3, this letter constitutes written notice of Defendants' various Labor Code violations and of our intent to recover statutory penalties under the Labor Code's Private Attorney General Act of 2004. Payment will be submitted concurrently with this letter through the LWDA/PAGA portal: (https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html).

The following information is based upon best information and belief available at the time of this writing.

INVOLVED ENTITIES AND INDIVIDUALS

Defendant FM Orange County is a California limited liability company, doing business as Ferrari and Maserati of Orange County located at 900 West Coast Highway, Newport Beach, California 92663. FM So Cal, LLC is the sole identified Manager/ Member for the LLC. William

Story is believed to be the manager of FM So Cal, LLC and served in various executive and director levels. This individual was responsible for making and/or ratifying all decisions relevant to the below claims. During all times relevant herein, this individual possessed and exerted decision-making power over Plaintiffs' working conditions, failure to pay wages (for overtime hours worked), failure to provide compliant meal and rest periods and/or premiums for missed or late meal and rest periods, failure to maintain required records of hours worked, failure to provide legally compliant paystubs and failure to pay all wages owed at the termination of employment.

Defendant BBB is a California limited liability company, doing business as both, "Ferrari of Newport Beach" and "Maserati of Newport Beach" located at 900 West Coast Highway, Newport Beach, California 92663. Chris Berlin is the sole identified Manager/ Member for the LLC and is believed to have served in various executive and director levels. This individual was responsible for making and/or ratifying all decisions relevant to the below claims. During all times relevant herein, this individual possessed and exerted decision-making power over Plaintiffs' working conditions, failure to pay wages (for overtime hours worked), failure to provide compliant meal and rest periods and/or premiums for missed or late meal and rest periods, failure to maintain required records of hours worked, failure to provide legally compliant pay stubs and failure to pay all wages owed at the termination of employment.

After and in response to HOPPER's expressed concerns about FM Orange County's and BBB's illegal employment practices, Defendants retaliated against HOPPER by terminating her employment.

GENERAL ALLEGATIONS

At all times mentioned herein, Plaintiff was an "employee" (as defined by Labor Code section 350) of Defendants and was paid "wages" (as defined by Labor Code section 200) by Defendants.

HOPPER was employed by FM ORANGE COUNTY as a non-exempt sales assistant from Nov. 2017 to August 2019 at which point she was promoted to the position of marketing assistant and advised that she was now an "exempt" employee. Plaintiff is informed and believes that in January 2021, FM ORANGE COUNTY sold its interest in the ongoing business to BBB ORANGE COUNTY. Plaintiff was provided "re-hire" paperwork for the new employer and advised her supervisors that she did not believe that the marketing assistant position was properly classified as exempt but was told that she would be better off as an exempt employee for several reason, including but not limited to be entitled to more time off, paying less in taxes, etc., none of which were true. HOPPER continued her work in the same position for the new business owner/operator until March 4, 2021 when her employment as terminated by BBB ORANGE COUNTY without explanation. As marketing assistant, Plaintiff was responsible for supporting sales staff with marketing, including marketing and public relations sales and after sales tasks, reporting and data entry and was to complete tasks in a timely manner based on her supervisor's requirements.

Plaintiff had no involvement in the in the actual sales of vehicles and was not paid any commissions on any sales. Entity Defendants expected and required Plaintiff to perform job duties which were primarily, if not totally, non-exempt tasks, rendering her a non-exempt employee for the entire period of her employment with Entity Defendants under the applicable law of the state of

California. However, Entity Defendants intentionally misclassified Plaintiff as an exempt employee and failed to pay Plaintiff on an hourly basis, for certain hours worked, particularly all overtime hours Plaintiff was suffered or permitted, and in fact, expected and required, to work. Entity Defendants reaped the benefits of treating Plaintiff as an exempt employee while averting the responsibilities of paying her as a non-exempt employee all to the detriment of Plaintiff.

Entity Defendants failed to pay Plaintiff all wages earned pursuant to the applicable California Wage Orders, Labor Code and case law, including overtime, meal period premiums and rest period premiums (for all required meal periods and rest periods Defendants failed to provide) and waiting time penalties. Defendants expected Plaintiff to work overtime and not take the required meal and rest periods. Defendants also failed to indemnify and/or reimburse HOPPER and other employees for certain business related expenses, including cell phones and phone service expenses. Further, Entity Defendants failed to maintain time records reflecting hours worked by Plaintiff and failed to provide pay stubs as required by the California Labor Code when issuing pay-checks to Plaintiff as her employer.

When Plaintiff raised the issue of paying her as an exempt employee, Defendant BBB ORANGE COUNTY retaliated against her by terminating her employment.

Additionally, Defendants ROGERS and THOMAS harassed Plaintiff and other female employees based on their gender and Entity Defendants failed to prevent that harassment and discriminated against Plaintiff and other female employees based on their gender. Plaintiff and other female employees complained about offensive and abusive comments which created a hostile work environment. In response to those complaints, Entity Defendants failed to conduct an adequate investigation and instead, told Plaintiff to deal with it herself and thereafter, retaliated against Plaintiff in a manner that included, but was not limited to terminating Plaintiff's employment.

At all times relevant herein, Individual Defendants were acting on behalf of Entity Defendants in their capacity as managers, agents and/or employees of Entity Defendants.

Entity Defendants and STORY and BERLIN also exerted ultimate control and decision-making authority as it pertained and continues to pertain to the illegal pay practices and labor code violations, as described above. In addition, Entity Defendants failed to ensure a work environment free of gender-based harassment and failed to properly address (investigate) specific acts of gender-based harassment by ROGERS and THOMAS which were offensive to Plaintiff. Plaintiff obtained a right to sue letter from the DFEH prior to the filing of this Complaint, and which was within one year after Defendants wrongfully discharged Plaintiff on March 4, 2021, and which was the most recent in a series of continuing discriminatory acts committed by Defendants.

Many of the above-described practices subject the Entity Defendants to liability pursuant to Labor Code section 2699, et. seq. However, such claims cannot be asserted until 65 days have passed after notice, without action by the state. Accordingly, Plaintiff intends to amend this Complaint when the procedural requirements are satisfied.

STATUTORY VIOLATIONS

Retaliation

California Labor Code § 1102.5 (entitled "Whistleblower Protection") prohibits an employer, or any person acting on behalf of the employer from retaliating against an employee "because the employer believes that the employee disclosed or may disclose 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 or regulation, regardless of whether disclosing the information is part of the employee's job duties." In addition, Labor Code section 98.6 (a), states in pertinent part as follows:

> A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter... made a written or oral complaint that he or she is owed unpaid wages,... or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her.

Defendants failed and refused to pay Plaintiffs for various types of wages including overtime hours worked, in violation of Labor Code sections 200, 223, 226.6, 227.3, 510 and 2751.

After HOPPER complained to Defendants about these pay deficiencies, no corrective action was taken but instead, Defendants terminated HOPPER's employment. HOPPER's assertion of her, and other aggrieved employees' rights under the Labor Code was one of the reason for HOPPER's termination. As such, Defendants' above described retaliatory actions were each a substantial factor in causing harm. Pursuant to California Labor Code § 98.6 (b) (1), "any employee who is. . . .retaliated against... shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer." Pursuant to California Labor Code § 1102.5(f), "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." Plaintiffs seek said civil penalties via the PAGA carrying statutes as codified in Labor Code sections 2699 et. seq.

***Failure to Pay Wages** (Over time, premiums, liquidated damages, premiums, etc.):*

Defendants are subject to PAGA penalties for the above described failure to pay and failure to timely pay all wages owed in violation of Labor Code sections 200, 201, 203, 203.1, 204, 210, 223, 221, 226.6, 226.7, 227, 227.3, 500, 510, 512, 1194, 1198 and 2751, subjecting Defendants the civil penalties in the amounts and frequencies as described and pursuant to Labor Code sections 558, 558.1, 226.6, 227, 203.1, 210, 1194.2, 1197.1, 1199 and 2699. Story and Berlin's personal liability lies in the plan language of these statutory provisions. For example, pursuant to Labor Code section 1199, "[e]very employer or *other person acting either individually or as an officer, agent, or employee* of another person is guilty of a misdemeanor and is punishable by a fine of not less than one hundred dollars ($100) or by imprisonment for not less than 30 days, or by both, who does any of the following: (a) [r]equires or causes any employee to work for longer hours than those fixed, or under conditions of labor prohibited by an order of the commission...." (Emphasis added.) Defendants can also be held personally liable pursuant to Labor Code sections 558 and 558.1 (without having to prove alter-ego) pursuant to the applicable PAGA provisions. See *Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809.

Failure to Indemnify:

California Labor Code section 2802(a) states, in pertinent part as follows: "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 . . .". Throughout her employment Entity Defendants failed to indemnify Plaintiff, and other aggrieved employees, for personal expenditures including, but not limited to, use of her personal cell phone(s). Pursuant to California Labor Code section 2802, Plaintiff is entitled to indemnification from Entity Defendants for all expenditures incurred by Plaintiff in direct consequence of the discharge of her duties, plus attorneys' fees and interest which "shall accrue from the date on which the employee incurred the necessary expenditure or loss". See Labor Code sections 2802 (b) and (c).

Failure to Maintain Records

Pursuant to Labor Code Section 1174(d), Defendants have a legal obligation to "[k]eep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments."

Defendants failed to maintain records of the PAGA Plaintiffs' hours worked which Defendants were required to keep pursuant to Labor Code Section 1174(d). Therefore, Defendants violated Labor Code Section 1174(d) by failing to collect and keep records indicating the daily hours worked by Plaintiff and other aggrieved employees.

Pursuant to Labor Code Section 1174.5, "any person employing labor who willfully fails to maintain . . . accurate and complete records required by subdivision (d) of Section 1174 . . . shall be subject to a civil penalty of five hundred dollars ($500)." Accordingly, Defendants are required to pay an additional $500 per PAGA Plaintiff in penalties.

Failure to Provide Proper Pay Stubs (Wage Statements)

Defendants failed to provide the PAGA Plaintiffs with accurate pay stubs. This failure was in clear dereliction of its duties as set forth in California Labor code sections 226 and 226.3

Labor Code section 226(a) states, in part, as follows:

An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying

> the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except as provided in subdivision (j), (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer..., and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee and, beginning July 1, 2013, if the employer is a temporary services employer as defined in Section 201.3, the rate of pay and the total hours worked for each temporary services assignment. The deductions made from payment of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. For purposes of this subdivision, "copy" includes a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information required by this subdivision.

California Labor Code section 226.3, states in pertinent part as follows: "Any employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars ($250) per employee per violation in an initial citation and one thousand dollars ($1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the records required in subdivision (a) of Section 226. The civil penalties provided for in this section are in addition to any other penalty provided by law."

Defendants failed to comply with Labor Code Sections 226 and 226.3. Accordingly, Defendants are liable pursuant to Labor Code Section 226 which states that "[a]n employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees." Entity Defendants failed to provide Plaintiff with pay stubs that accurately reflected the hours worked, wages earned, including overtime wages, and the rate of pay for hours worked. Consequently, Entity Defendants' failure to provide accurate pay stubs violated Labor Code section 226(a).

Entity Defendants knowingly and intentionally failed to comply with Labor Code section 226(a), as delineated above. Accordingly, Entity Defendants are liable for damages owed to Plaintiff as specified in Labor Code section 226(e)(1).

Personal liability for violations of section 226 can be found in Labor code section 226.6 which reads as follows: "Any employer who knowingly and intentionally violates the provisions of Section 226, or any officer, agent, employee, fiduciary, or other person who has the control, receipt, custody, or disposal of, or pays, the wages due any employee, and who knowingly and intentionally participates or aids in the violation of any provision of Section 226 is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one thousand dollars ($1,000) or be imprisoned not to exceed one year, or both, at the discretion of the court. That fine or imprisonment, or both, shall be in addition to any other penalty provided by law."

Waiting Time Penalties

Pursuant to Labor Code sections 201, 202 and 203, the PAGA Plaintiffs were entitled to all wages earned and unpaid at the time of discharge or within the time allotted by Labor Code sections 201 and 202.

Defendants failed to pay the PAGA Plaintiffs, when they terminated them, all wages and sums owed at time of discharge, or within the time allowed by Labor Code sections 201 and 202, including, but not limited to, minimum wage, overtime, in accordance with Labor Code section 203. Defendants intentionally failed to pay Plaintiffs all wages owed to her at the time of her termination and that Defendants also failed to pay other aggrieved employees the wages owed to them at their time of discharge from employment as well.

As a direct result, the PAGA Plaintiffs have suffered, and continue to suffer, substantial losses related to the use and enjoyment of such wages, lost interest on such wages, expenses and attorneys' fees in seeking to compel Defendants to fully perform their obligations under state law. The PAGA Plaintiffs are also entitled to waiting time penalties as provided by Labor Code §§ 201, 202, 203 and civil penalties as described in Labor Code sections 558, 558.1, 226.6, 227, 203.1, 210, 1194.2, 1197.1, 1199 and 2699.

REQUEST FOR RELIEF

Accordingly, Plaintiff respectfully requests that the Labor & Workforce Development Agency ("LWDA") initiate an enforcement action with respect to the aforementioned violations pertaining to all aggrieved employees. If the LWDA declines to pursue enforcement, Plaintiff fully intends to pursue these claims for civil penalties on behalf of themselves and all other current and former aggrieved employees in a Superior Court action. Plaintiffs, through counsel, intend to bring this action as a representative action on behalf of other current or former aggrieved employees, for penalties pursuant to California Labor Code section 2699, et. seq., for Defendants' violations of the various enumerated Labor Code sections set forth throughout this notice letter and the associated sections which provide for civil penalties, including, but not limited to Labor Code sections 98.6, 200-204, 210, 216, 221, 223, 225.5, 226, 226.3, 226.6, 226.7, 227, 227.3, 500, 510, 512, 558, 558.1, 1102.5, 1174, 1174.5, 1175, 1194, 1194.2, 1197.1, 1198, 1199, 2699 and 2751.

Should you have any questions or concerns regarding the above, please do not hesitate to contact my office. Thank you for your attention to this matter.

Sincerely,

Thomas M. Diachenko, Esq.

TMD;maj

Enclosure:
Proof of Service

cc:
See service list attached

<u>SERVICE LIST</u>

<u>Sent via certified mail and USPS to</u>:

William Story
Agent for Service of Process
FM ORANGE COUNTY LLC
3120 Airway Avenue
Costa Mesa, California 92626

Chris Berlin
Agent for Service of Process
BBB ORANGE COUNTY LLC
9130 West Sunset Boulevard
Los Angeles, California 90069

William Story
43 Montecito Drive
Corona Del Mar, California 92625

Chris Berlin
1000 W Coast Highway
Newport Beach, California 92663

LAW OFFICES OF
THOMAS M. DIACHENKO, APC
ATTORNEYS AT LAW
1916 Third Avenue
San Diego, California 92101
(619) 699-5870

KATHERINE HOPPER

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over eighteen years of age and not a party to this action; my business address is 1916 Third Avenue, San Diego, California, 92101. My electronic Service address is Malia@Dicahenkolaw.com

On May 7, 2021, I served a true copy of the foregoing document(s):

1. CORRESPONDENCE, PAGA NOTICE LETTER

on all interested parties in this action as follows:

William Story Agent for Service of Process FM ORANGE COUNTY LLC 3120 Airway Avenue Costa Mesa, California 92626	Chris Berlin Agent for Service of Process BBB ORANGE COUNTY LLC 9130 West Sunset Boulevard Los Angeles, California 90069
William Story 43 Montecito Drive Corona Del Mar, California 92625	Chris Berlin 1000 W Coast Highway Newport Beach, California 92663
PAGA Administrator (Via Email Only) David M. Lanier PAGAfilings@dir.ca.gov	

☒ **(CERTIFIED U.S. MAIL):** I caused each such envelope to be placed in the U.S. Post Office at San Diego, California. I am readily familiar with the firm's practice of collection and processing of correspondence for overnight delivery. Under that practice it would be deposited directly with the U.S. Postal Service or other facility maintained by the U.S. Postal Service, in an envelope or package designated for use by U.S. Postal service and with delivery fees prepaid.

☒ **(U.S. MAIL):** I enclosed the documents in a sealed envelope or package addressed to the person(s) at the addresses above. I placed the envelope fo collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☑ **(VIA ELECTRONIC MEANS):** To the PAGA Administrator ONLY. I caused such document(s) to be sent by electronic means, pursuant to written agreement between the parties.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 7, 2021 at San Diego, California.

Malia Johnson

Malia Johnson

LAW OFFICES OF
THOMAS M. DIACHENKO, APC
ATTORNEYS AT LAW
1916 Third Avenue
San Diego, California 92101
(619) 699-5870

7018 1830 0001 8697 5961

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.us

OFFICIAL U

Certified Mail Fee $

Extra Services & Fees (check box, add fee as appropriate)
- ☐ Return Receipt (hardcopy) $
- ☐ Return Receipt (electronic) $
- ☐ Certified Mail Restricted Delivery $
- ☐ Adult Signature Required $
- ☐ Adult Signature Restricted Delivery $

Postage $

Total Postage and Fees $

Sent To Chris Berlin

Street and Apt. No., or PO Box No. 1000 W Coast Highwa

City, State, ZIP+4® Newport Beach CA 9

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse

Hopper PAGA Notice

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Chris Berlin
1000 W Coast Highway
Newport Beach CA 92663

9590 9402 5272 9154 7346 16

2. Article Number 7018 1830 0001 8697 5961

COMPLETE THIS SECTION ON DELIVERY

A. Signature X ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

NEWPORT BEACH CA 92658 MAY 12 2021 USPS

3. Service Type
- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☒ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Return Receipt for Merchandise
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, July 2015 PSN 7530-02-000-9053 Domestic Return Receipt

7018 1830 0001 8697 5954

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.us

OFFICIAL U

Certified Mail Fee $

Extra Services & Fees (check box, add fee as appropriate)
- ☐ Return Receipt (hardcopy) $
- ☐ Return Receipt (electronic) $
- ☐ Certified Mail Restricted Delivery $
- ☐ Adult Signature Required $
- ☐ Adult Signature Restricted Delivery $

Postage $

Total Postage and Fees $

Sent To William Story

Street and Apt. No., or PO Box No. 43 Montecito Drive

City, State, ZIP+4® Corona Del Mar CA 92

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse

Hopper PAGA Notice

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

William Story
43 Montecito Drive
Corona Del Mar, CA. 92625

9590 9402 5272 9154 7346 23

2. Article Number (Transfer from service label) 7018 1830 0001 8697 5954

COMPLETE THIS SECTION ON DELIVERY

A. Signature X ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery
CV/19

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

NEWPORT BEACH CA MAY 12 2021 USPS

3. Service Type
- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☒ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Return Receipt for Merchandise
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, July 2015 PSN 7530-02-000-9053 Domestic Return Receipt

7018 1830 0001 8697 5978

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.us

OFFICIAL U

Certified Mail Fee $

Extra Services & Fees (check box, add fee as appropriate)
- ☐ Return Receipt (hardcopy) $
- ☐ Return Receipt (electronic) $
- ☐ Certified Mail Restricted Delivery $
- ☐ Adult Signature Required $
- ☐ Adult Signature Restricted Delivery $

Postage $

Total Postage and Fees $

Sent To Chris Berlin, AFS
BBB Orange County LLC

Street and Apt. No., or PO Box No. 9130 West Sunset Blvd

City, State, ZIP+4® Los Angeles CA 90069

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse

Hopper PAGA Notice

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Chris Berlin, Agent for Service
BBB Orange County LLC
9130 West Sunset Blvd
Los Angeles CA 90069

9590 9402 5272 9154 7346 30

2. Article Number (Transfer from service label) 7018 1830 0001 8697 5978

COMPLETE THIS SECTION ON DELIVERY

A. Signature X ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☒ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Return Receipt for Merchandise
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, July 2015 PSN 7530-02-000-9053 Domestic Return Receipt

Hopper PAGA Notice

U.S. Postal Service™ CERTIFIED MAIL® RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.usps.com®.

OFFICIAL USE

Certified Mail Fee
$
Extra Services & Fees (check box, add fee as appropriate)
☐ Return Receipt (hardcopy) $
☐ Return Receipt (electronic) $
☐ Certified Mail Restricted Delivery $
☐ Adult Signature Required $
☐ Adult Signature Restricted Delivery $
Postage
$
Total Postage and Fees

Postmark Here

William Story, AFS
Sent To
FM Orange County LLC
Street and Apt. No., or PO Box No.
3120 Airway Ave
City, State, ZIP+4®
Costa Mesa CA 92626

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

7018 1830 0001 8697 5930

SENDER: COMPLETE THIS SECTION

2, and 3.
d address on the reverse
rn the card to you.
the back of the mailpiece,
ace permits.

y, Agent for Service
County LLC
y Ave
CA 92626

5272 9154 7346 54

0001 8697 5930

2015 PSN 7530-02-000-9053

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Ngr P ☐ Agent ☐ Addressee
B. Received by (Printed Name)
C. Date of Delivery
5/12
D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Adult Signature
☐ Adult Signature Restricted Delivery
☒ Certified Mail®
☐ Certified Mail Restricted Delivery
☐ Collect on Delivery
☐ Collect on Delivery Restricted Delivery
☐ Insured Mail
☐ Insured Mail Restricted Delivery (over $500)
☐ Priority Mail Express®
☐ Registered Mail™
☐ Registered Mail Restricted Delivery
☐ Return Receipt for Merchandise
☐ Signature Confirmation™
☐ Signature Confirmation Restricted Delivery

Domestic Return Receipt

LAW OFFICES OF
THOMAS M. DIACHENKO, APC
ATTORNEYS AT LAW
1916 Third Avenue
San Diego, California 92101
(619) 699-5870