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EVOLUTION SURGICAL, INC.,
ROB LAW, KELLY COAN

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA**

BENJAMIN LEVINE,

Plaintiff,

vs.

EVOLUTION SURGICAL, INC., a corporation,
KELLY COAN, an individual, ROB LAW, an
individual and DOES 1 to 10, inclusive,

Defendants.

Case No. 21-CV-000812

Judge: Hon. Frank Roesch

**DECLARATION OF JEFFREY M.
CURTISS IN SUPPORT OF JOINT
MOTION FOR PAGA SETTLEMENT
APPROVAL**

Date: April 20, 2023
Time: 3:30 p.m.
Dept: 17

*[Filed Concurrently with Notice of Joint Motion
and Joint Motion for PAGA Settlement
Approval; Memorandum of Points and
Authorities; and [Proposed] Order]*

Reservation No.: 356750104468

Action Filed: October 14, 2021
Trial Date: January 17, 2023

I, Jeffrey M. Curtiss, declare as follows:

1. I represent the plaintiff Benjamin Levine ("Plaintiff" or "Levine") in the above-captioned action. I am an attorney licensed to practice before all courts in the State of California. The

1 following is true and correct based on my own personal knowledge, except where stated on
2 information and belief.

3 2. Based on my review of Levine's personnel file, he worked for the defendant Evolution
4 Surgical, Inc. ("EVO" or "Defendant") as a Territory Manager between approximately January 5,
5 2017 and June 4, 2021. EVO is in the business of selling medical devices to health care providers in
6 the State of California. Levine alleges that EVO failed to compensate and reimburse him according
7 to the California Labor Code during his four-and-one-half years of employment. Attached as Exhibit
8 A to this declaration is a copy of the complaint filed in this action, which outlines the Labor Code
9 violations at issue.

10 3. On or about November 8, 2022, the parties entered into a confidential settlement
11 agreement, resolving Levine's individual claims. The settlement agreement is contingent on the
12 Court granting the instant joint motion for settlement approval of Levine's Private Attorneys General
13 Act ("PAGA") claim for \$5,000 (five thousand dollars), all of which is to be distributed to the Labor
14 and Workforce Development Agency and the aggrieved employees (and none of which would go
15 towards Levine's attorney's fees and costs). Attached as Exhibit B is a true and correct copy of this
16 PAGA Settlement Agreement, with redactions regarding confidential information. The version
17 attached is unsigned, although I retain copies of the signed version of the agreement (which were
18 transmitted in counterparts).

19 4. The LWDA had opportunity to investigate and obtain civil penalties after Plaintiff
20 submitted his PAGA notice to the LWDA on or about July 16, 2020. LWDA declined to respond to
21 the notice. Going forward, Labor Code § 2699(1)(2) requires that any proposed settlement of a PAGA
22 action be submitted to the LWDA. I will complete this requirement by submitting the instant motion
23 and supporting papers to the LWDA through its online submission portal concurrently with the filing
24 of the instant motion.

25 5. The thrust of the PAGA claim is that EVO: (1) did not pay wages two times per
26 month, as required by Labor Code § 204; (2) made unlawful deductions from wages, in violation of
27 Labor Code § 221; (3) issued inaccurate or incomplete wage statements, in violation of Labor Code
28 § 226(a); (4) owes waiting time penalties per Labor Code § 203 for the failure to pay out all wages

1 due and owing at the time of termination of employment; and (5) failed to reimburse employee
2 business expenses, as required by Labor Code § 2802. EVO generally denied Plaintiff's PAGA
3 allegations in its answer. The substance of this general denial has been further elucidated through the
4 course of discovery.¹

5 6. The parties have engaged in extensive discovery, including propounding and
6 responding to special interrogatories and requests for production. Levine took the depositions of the
7 principals of EVO, Kelly Coan and Rob Law, as well as a Person Most Knowledgeable deposition
8 of EVO, which included employees Eric Wiederhold, Vice President of Sales, Dalia Summerour,
9 Director of Finance, Mary-Anne Boutiette, Director of Human Resources, and Kelly Coan, Principal.

10 7. Through the course of the extensive discovery conducted in this action, EVO has
11 defended against the PAGA claim by asserting:

- 12 • With respect to the allegation that EVO did not pay commission wages two times per
13 month, as required by Labor Code § 204:
 - 14 o EVO asserts that commission wages are only due and owing once the
15 commissions are both earned and capable of calculation. (See, e.g., Dept. Labor
16 Standards Enforcement Opinion Letter (Dec. 9, 2002).) EVO asserts that its
17 outside sales representatives were paid one time per month during the relevant
18 statutory period, because the calculation of commissions depended on information
19 provided by Arthrex, Inc. ("Arthrex"), the manufacturer of the medical devices
20 EVO sold. This information was provided by Arthrex only once per month.
 - 21 o EVO paid commissions promptly upon being provided the information from
22 Arthrex which formed the basis for commission calculations. Thus, EVO did not
23 fail to pay commissions during pay periods when those commissions were both
24 earned and capable of calculation, because EVO contends that once it had the
25 requisite information to pay commissions to its outside sales representatives, the
26

27 ¹ Levine's individual claims differ in scope from those of the PAGA claim. There is no PAGA
28 claim for misclassification, and, hence, unpaid overtime. Likewise, there is no PAGA claim for
failure to provide a personnel file in a timely manner.

- 1 commissions were paid (and paid in a timely manner).
- 2 • With respect to the allegation that EVO made unlawful deductions from wages in
- 3 violation of Labor Code § 221:
- 4 o In response to Levine’s Special Interrogatories, EVO asserts that it did not deduct
- 5 from the commissions otherwise payable to its salespersons, except as required
- 6 by law or as authorized and agreed by the salesperson(s) in question. In essence,
- 7 EVO cites to the proposition that an employer can make deductions for the direct
- 8 costs associated with a sale, i.e. for things like shipping, the cost of the product
- 9 being sold, or the cost of free products offered by the salesperson to induce the
- 10 sale. *Davis v. Farmers Ins. Exchange*, 245 Cal. App. 4th 1302, 1332-1333 (2016).
- 11 o The Company calculated commissions payable to its salespersons by first
- 12 calculating the revenue allocable to salespersons within a territory as a result of
- 13 sales generated within the territory, then deducting costs associated with the sales
- 14 from the territory revenue to determine the net revenue payable to salespersons
- 15 within the territory, and then multiplying each salesperson’s commission
- 16 percentage by the net revenue for the territory to determine the commissions
- 17 payable to the individual salesperson.
- 18 o Evolution Surgical provided its salespersons with written commission statements
- 19 reflecting its calculation of commissions paid to them, and it provided them with
- 20 written confirmation of periodic changes in their commission rate, which they
- 21 acknowledged receiving.
- 22 • With respect to the allegation that EVO issued inaccurate or incomplete wage statements,
- 23 as required by Labor Code § 226(a):
- 24 o The claim is premised on EVO’s failure to make commission payments two times
- 25 per month, which would result in two wage statements per month, as opposed to
- 26 the single wage statement per month which EVO actually issued.
- 27 o EVO asserts that, for the same reasons that commission payments were only
- 28 earned and capable of calculation one time per month (see *infra*), only one wage

statement per month needed to be issued. In other words, because EVO sales representatives were properly paid one time per month, only one wage statement per month was required under Labor Code § 204.

- With respect to the allegation that EVO owes waiting time penalties per Labor Code § 203 for failure to pay out all wages due and owing at the time of termination of employment:

- o EVO asserts that Labor Code § 203 waiting time penalties are only available to employees who have ended their employment during the relevant statutory period, because waiting time penalties only accrue after the end of the employment relationship. Further, Labor Code § 203 waiting time penalties are only available for employers that intentionally withhold wages.

- o Of the thirty-nine aggrieved employees, thirteen ended their employment relationship with EVO during the relevant statutory period. Of these thirteen employees, EVO asserts that it both had a good faith belief that all wages due and owing were paid by the time of termination, and also that, in fact, all such wages due and owing were in fact paid. Thus, there is no liability for waiting time penalties.

- o The claim for waiting time penalties is, in essence, a derivative claim. An essential predicate for such a claim is the non-payment of wages. Here, the claim for non-payment of wages rests on the existence of unlawful deductions from commissions. Thus, to the extent the deductions from commissions were lawful, as EVO asserts, there is no derivative liability for waiting time penalties.

- With respect to the allegation that EVO failed to reimburse employee business expenses, as required by Labor Code § 2802:

- o Pursuant to expense reimbursement policies produced during the course of discovery in this action, EVO paid a monthly stipend of \$500.00 or \$750.00 per month (depending on the position) to its salespeople to reimburse them for mileage, internet connectivity and cellular connectivity charges that they incurred

1 in the course and scope of performing their job duties.

- 2 o To the extent that a salesperson believed that his or her actual expenses for
3 mileage, internet connectivity and cellular connectivity exceeded \$500.00 in any
4 month, the Company permitted the salesperson to submit documentation
5 supporting reimbursement in excess of that amount. The Company reimbursed
6 salespeople for expenses that they claimed they incurred that were not covered by
7 the monthly stipend.

8 8. I received and reviewed, among other things, the following information and evidence
9 with which to evaluate the PAGA claim: (1) information bearing on the number of “aggrieved
10 employees” and the number of pay periods during the relevant statutory period; (2) wage statements
11 for Levine and the aggrieved employees; (3) commission statements, including any deductions from
12 commissions; (4) expense reimbursements; (5) Company policies regarding expense
13 reimbursements; (6) all email messages during Levine’s employment; and (7) transcripts for the
14 depositions discussed above. I closely reviewed the documents and data provided by EVO to
15 determine the amount of potential PAGA penalties owed to Levine and other remedies potentially
16 available to Levine and the aggrieved individuals based on the claims in the action.

17 9. As a result of this investigation, Levine learned that there are a maximum of thirty-
18 nine total aggrieved employees, including Levine, throughout the State of California for the period
19 between July 16, 2020 and the settlement date (referred to as the “relevant statutory period” or the
20 “PAGA period”). These thirty-nine aggrieved individuals worked approximately 777 total pay
21 periods during the relevant statutory period, or roughly 20 pay periods per aggrieved employee
22 (calculated by taking 777 pay periods divided by thirty-nine aggrieved employees). The amount of
23 the settlement therefore equals an approximate penalty of \$128 per aggrieved employee or \$6.44 per
24 employee, per pay period. This amount is fair and reasonable considering the probability of recovery
25 in this matter and the role of judicial discretion in right-sizing any penalty amount.

26 10. After extensive, arms-length negotiations by and among the parties and their
27 respective counsel, including a full-day private mediation on September 28, 2021 before the
28 Honorable Kevin J. Murphy, the parties reached this settlement, completely resolving this matter,

1 including Plaintiff's individual claims and the representative PAGA claim. The PAGA settlement of
2 \$5,000 is a compromise by both parties and reflects, in my opinion, a reasonable assessment of the
3 risks for each, as well as the recognition that continued litigation will cause further, extensive and
4 costly discovery for all parties, followed by a jury trial, and that this further litigation would cause
5 inconvenience, distraction, disruption, delay and expense disproportionate to the potential benefits
6 of trial.

7 11. During the relevant statutory period, there are thirty-nine employees who worked a
8 total of 777 pay periods. A settlement of \$128 per aggrieved employee or \$6.44 per employee, per
9 pay period, is reasonable under the circumstances. With respect to the proposed settlement, pursuant
10 to Labor Code section 2699(i), 75% of the total amount would be awarded to the California Labor
11 and Workforce Development Agency and 25% would be awarded to the thirty-nine aggrieved
12 employees.

13 12. In my opinion, the settlement amount is fair and reasonable in light of applicable case
14 law and for the following reasons:

- 15 a. The number of alleged "aggrieved employees" is small, totaling only thirty-nine
16 employees during the PAGA period.
- 17 b. The PAGA settlement was negotiated as part of an informed, non-collusive, arms-
18 length negotiation following a full day mediation with a private mediator, extensive
19 discovery and subsequent attorney-to-attorney negotiations.
- 20 c. The total PAGA settlement amount of \$5,000 is not subject to deduction for attorneys'
21 fees, as Levine's counsel is not asserting a claim for fees for this PAGA settlement.
- 22 d. Levine and his counsel bear significant risk in terms of obtaining full recovery of all
23 their claimed PAGA penalties. EVO has good faith arguments that it properly paid
24 and reimbursed Levine and the other sales representatives.
- 25 e. To recover under PAGA, Levine would -- arguably -- have to prevail on behalf of
26 each of the aggrieved employees. *Hibbs-Rines v. Seagate Techs., LLC.*, No. C 08-
27 05430 SI, 2009 WL 513496, at *4 (N.D. Cal. Mar. 2, 2009) ("Plaintiff will have to
28 prove Labor Code violations with respect to each and every individual on whose

behalf plaintiff seeks to recover civil penalties under PAGA.”). This could be a tall order.

- f. The differences among the “aggrieved employees” as to work locations, schedules, miles driven and commission deductions could have presented manageability issues for the Court, which may undermine this claim. *Salazar v. McDonald’s Corp.*, No. 14-cv-2096, 2017 WL 88999, at *7-9 (N.D. Cal. Jan. 5, 2017) (striking representative PAGA claims as unmanageable where underlying claims would require individualized determinations); see also *Raphael v. Tesoro Ref. & Mktg. Co. LLC*, No. 15-cv-2862-ODW, 2015 WL 5680310 at *2-3 (C.D. Cal. Sept. 25, 2015) (granting motion for judgment on the pleadings where resolving a PAGA claim would require the court to “engage in a multitude of individualized inquiries making the PAGA action unmanageable and inappropriate”).
- g. This PAGA settlement only covers PAGA claims for the period covered by the PAGA period. It does not affect any other employee’s ability to bring their own claims for non-PAGA claims.
- h. Last but certainly not least, even in the event liability is established under Levine’s PAGA claim, the Court may exercise its discretion to reduce any award. Labor Code § 2699(e)(2) provides that in an action by an aggrieved employee to recover penalties under PAGA, a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory. See *Amaral v. Cintas Corp.* No. 2, 163 Cal. App. 4th 1157, 1212 (2008).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 13, 2023 in Redwood City, CA.


Jeffrey M. Curtiss, Declarant

EXHIBIT A

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Attorney for Plaintiff
BENJAMIN LEVINE

ELECTRONICALLY FILED

Superior Court of California,
County of Alameda

10/14/2021 at 12:11:28 PM

By: Cheryl Clark, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

UNLIMITED JURISDICTION

BENJAMIN LEVINE, an individual,

Plaintiff,

v.

EVOLUTION SURGICAL, INC., a
corporation, KELLY COAN, an individual,
ROB LAW, an individual, and DOES 1 to
10, inclusive,

Defendants.

Case No:

COMPLAINT FOR:

- (1) UNPAID OVERTIME
- (2) UNLAWFUL WAGE DEDUCTIONS
- (3) IMPROPER WAGE STATEMENTS
- (4) WAITING TIME PENALTIES
- (5) UNPAID BUSINESS EXPENSES
- (6) VIOLATION OF B&P § 17200
- (7) PAGA
- (8) BAD FAITH
- (9) BREACH OF CONTRACT
- (10) UNTIMELY PERSONNEL FILE

JURY TRIAL DEMANDED

The plaintiff Benjamin Levine alleges as follows:

GENERAL ALLEGATIONS

1. The plaintiff Benjamin Levine ("Plaintiff" or "Levine") worked for the defendant Evolution Surgical, Inc. ("ESI" or "Defendant") as a Territory Manager between approximately January 5, 2017 and June 4, 2021.
2. ESI failed to compensate Levine according to the California Labor Code during his four-and-one-half years of employment, to wit:

- 1 ● ESI paid Levine and other employees involved in sales on a commission basis.
2 Despite the fact that ESI paid employees on a commission basis, ESI failed to
3 draft, propose or enter into a commission plan agreement. As a result, during
4 Levine's tenure, there was no document explaining how Levine's commissions, or
5 any other sales staff employee's commissions, were to be derived from ESI's
6 revenue.
- 7 ○ ESI is required to provide employees with a written agreement setting forth
8 the method by which commissions are computed and paid. Further, ESI is
9 obligated to give a signed copy of the agreement to each affected employee
10 and obtain a signed receipt for the agreement from each employee. For any
11 given sales territory, ESI split territory revenues 60%/40% between itself
12 and territory employees. However, there was never a written agreement
13 between the parties that ESI would retain 60% of territory revenues.
- 14 ○ Per Levine's Offer Letter, ESI promised to pay Levine on a commission-
15 only basis. See Exhibit A (Levine's Offer Letter). The Offer Letter states
16 "Your compensation will be 40% of the total commissions paid to your
17 Palo Alto/Fremont territory, less payroll deductions and required taxes and
18 withholdings[.]" The Offer Letter does not state how the total commissions
19 paid to the territory are to be calculated. It merely states that, of the total
20 commissions paid to the territory, 40% of those commissions will go to
21 Levine.
- 22 ○ ESI failed to keep its written promise to pay Levine 40% of the total
23 commissions paid to his territory. Levine's commission statements show
24 ESI paid him at a rate consistently less than 40% of total territory
25 commissions. See Exhibit B -- a sampling of Levine's commission
26 statements -- showing Levine earned between 31% and 40% of total
27 territory commissions for periods during which records are available.
28

1 ○ Even though ESI promised it would only subtract “payroll deductions and
2 required taxes and withholdings” from Levine’s commissions, ESI
3 routinely deducted its direct and indirect expenses from his commissions,
4 in violation of California law and its contract with Levine. See Exhibit B.¹

- 5 ● ESI paid Levine once per month, despite the fact that he, and all other sales
6 representatives, must be paid twice per month. The payments represented
7 commissions earned in the previous month, despite the fact that commissions
8 earned in the first half of the month must be paid later that same month.
- 9 ● ESI misclassified Levine as exempt, despite the fact that he does not fall under any
10 of the exemptions recognized in California. As a result, Levine never received
11 overtime pay for work beyond eight hours in one day or forty hours in one week.
- 12 ● ESI did not pay for Levine’s out-of-pocket expenses, which included mileage, cell
13 phones, laptops and cellular/internet connectivity.
- 14 ● ESI did not provide accurate wage statements. Levine should have received two
15 wage statements per month, which included any overtime worked and which did
16 not include unlawful deductions from commissions.
- 17 ● Because ESI has not paid all wages due and owing to Levine, he is entitled to
18 waiting time penalties.
- 19 ● ESI failed to provide Levine with a timely and complete personnel file. Levine
20 asked for a complete copy of his personnel file on June 4, 2021. He did not receive
21 a complete copy of his file until July 13, 2021, which is beyond the period allowed
22 by the California Labor Code to provide the file. Labor Code §§ 226; 432; 1198.5.
23 Further, the file itself did not include all commission statements for the previous
24 three years.

26 ¹ Payroll deductions are wages withheld from an employee’s total earnings for the purpose
27 of paying taxes, garnishments and benefits, like health insurance. These withholdings constitute
28 the difference between gross pay and net pay and may include: income tax; Social Security tax;
 401(k) contributions; wage garnishments; and child support payments.

- Many of the Labor Code violations Levine endured were also suffered by sales managers and representatives at ESI and are therefore the proper subject of a Private Attorney General's Act ("PAGA") claim. Levine has filed a PAGA letter with the California Labor And Workforce Development Agency, which is a prerequisite to filing a PAGA claim.

MISCLASSIFICATION

3. Levine was classified as an exempt employee. However, his work did not fall within any of the available exemptions under California law.

4. Levine does not qualify as an exempt outside salesperson, because he was not a salesperson. He was a manager. Labor Code § 1171 excludes from the overtime laws employees who are outside salespersons, defined as someone who regularly works more than half their working time engaged in sales activities outside the workplace. Cal. Code Regs., tit. 8, § 11070(2)(I). "In borderline cases, the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." *Brody v. Astrazeneca Pharms., LP*, 2008 U.S. Dist. LEXIS 107301, *1 at *8 (C.D. Cal. June 11, 2008). In contrast, "[i]f his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt." *Id.* Here, Levine spent the majority of his time managing and not selling. Indeed, his duties as Territory Manager are explicitly described as managerial in nature, including "lead[ing] and mentor[ing] the Palo Alto/Fremont team in day-to-day business operations, creat[ing] and implement[ing] sales plans and effective marketing strategies that position ESI to meet or exceed territory objectives."

5. Levine does not qualify as a commissioned salesperson for the same reason. He was not a salesperson. He was a manager. Further, with respect to a commissioned salesperson, all earned wages, including commissions, must be paid no less frequently than semi-monthly. Whether the minimum earnings prong of the commissioned employee exemption is satisfied depends on the amount of wages actually paid in a pay period; thus, an employer satisfies the minimum earnings prong only in those pay periods in which it actually pays the required

1 minimum earnings. An employer may not satisfy the prong by reassigning wages from a different
2 pay period to cure a shortfall. *Peabody v. Time Warner Cable, Inc.*, 59 Cal. 4th 662, 663 (2014).
3 Here, Levine does not meet the exemption because he was not paid semi-monthly.

4 6. Further, with respect to a commissioned salesperson, the sales work is performed
5 inside, not outside. See, e.g., 29 C.F.R. § 541.502 (“Thus, any fixed site, whether home or office,
6 used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of
7 the employer’s places of business, even though the employer is not in any formal sense the owner
8 or tenant of the property.”). Here, Levine did not work out of a fixed location. Rather, he spent
9 the majority of his time going from location to location.

10 7. Levine does not meet the executive, administrative or professional exemptions,
11 because he was not paid on a salaried basis. A salary is a fixed minimum payment made
12 regardless of hours worked or the amount or quality of work performed. 29 C.F.R. § 541.602(a).
13 Here, the entirety of Levine’s compensation was based on commissions. There was no fixed
14 payment that rose to the level of the minimum salary requirement for California. *Semprini v.*
15 *Wedbush Securities, Inc.*, 57 Cal. App. 5th 246, 253-254 (2020) (holding that a commission-only
16 compensation system does not meet the salary basis test).

17 8. Accordingly, because Levine was not exempt, he is entitled to overtime pay.

18 **VENUE AND JURISDICTION**

19 9. Venue and jurisdiction are proper in the Superior Court of the County of Alameda.

20 10. ESI has its principal place of business in the City of Fremont.

21 11. Kelly Coan is a Principal and Co-Founder of ESI. He is an owner, director, officer
22 or managing agent of ESI for the purpose of California Labor Code §§ 558, 558.1, 1197.1.

23 12. Rob Law is a Principal and Co-Founder of ESI. He is an owner, director, officer or
24 managing agent of ESI for the purpose of California Labor Code §§ 558, 558.1, 1197.1.

25 **DOE DEFENDANTS**

26 13. The true names and capacities, whether individual, corporate, associate, or
27 otherwise, of DOES 1 through 10 are unknown to Plaintiff, who therefore sues the DOE
28 defendants by their fictitious names. Plaintiff will amend this complaint to show their true names

1 and capacities when they have been ascertained.

2 **FIRST CAUSE OF ACTION**

3 **UNPAID OVERTIME**

4 **(Against All Defendants)**

5 14. Levine worked an average of four hours of overtime per working day, not
6 including weekend work. Over the past four years, this amounts to approximately 4,000 hours of
7 unpaid overtime work.

8 15. Pay records for 2019 and 2020 indicate that Levine earned approximately
9 \$190,000 and \$250,000, respectively. Pay records for 2021 indicate that Levine was on track to
10 earn approximately \$300,000 for the calendar year. Pay records for 2017 and 2018 were not
11 provided. For 2019-2021, Levine's regular rate of pay is approximately \$95/hour, \$125/hour and
12 \$150/hour, respectively. This amounts to \$142,500 in unpaid overtime in 2019, \$187,500 in
13 unpaid overtime in 2020 and \$112,500 in unpaid overtime in 2021. Assuming a rate of pay in
14 2017 and 2018 similar to that of 2019, additional unpaid overtime of \$213,750 accrued, resulting
15 in total unpaid overtime of \$656,250.² These amounts are approximations and may be revised as

16 ² See, e.g., Cal. Labor Code § 510 ("Any work in excess of eight hours in one workday and
17 any work in excess of 40 hours in any one workweek and the first eight hours worked on the
18 seventh day of work in any one workweek shall be compensated at the rate of no less than one
19 and one-half times the regular rate of pay for an employee."); Cal. Labor Code § 1194(a) ("[A]ny
20 employee receiving less than . . . the legal overtime compensation applicable to the employee is
entitled to recover in a civil action the unpaid balance of the full amount of this . . . overtime
compensation, including interest thereon, reasonable attorney's fees, and costs of suit.").

21 See Wage Order 4-2001(7)(A)(3)-(5) (requiring employers to keep time records "showing
22 when the employee begins and ends each work period" and "total hours worked in the payroll
23 period and applicable rates of pay"). Here, ESI did not keep time records.

24 Once an employee shows that he performed work for which he was not paid, the fact of
25 damage is certain, and the only uncertainty is the amount of damage. *Hernandez v. Mendoza*, 199
26 Cal. App. 3d 721, 726 (1988). Further, "[i]t is the trier of fact's duty to draw whatever reasonable
27 inferences it can from the employee's evidence where the employer cannot provide accurate
28 information." *Id.* at 728; see *Ellerd v. County of L.A.*, 2012 U.S. Dist. LEXIS 35474, *18 (C.D.
Cal. Mar. 14, 2012) ("[A]n employee has carried out his burden [of establishing the number of
off-the-clock hours worked] if he proves that he has in fact performed work for which he was
improperly compensated and if he produces sufficient evidence to show the amount and extent of
that work as a matter of just and reasonable inference. . . [A] plaintiff can meet this burden by

1 discovery progresses.

2 16. As a result of ESI's misclassification of Levine, Levine has been damaged in an
3 amount according to proof at the time of trial.

4 **SECOND CAUSE OF ACTION**
5 **UNLAWFUL WAGE DEDUCTIONS**
6 **(Against All Defendants)**

7 17. ESI unlawfully deducted business expenses from Levine's pay and, in breach of its
8 promise in the Offer Letter, paid him at a rate lower than 40% of the commissions paid to his
9 territory.

10 18. Labor Code § 221 provides: "It shall be unlawful for any employer to collect or
11 receive from an employee any part of wages theretofore paid by said employer to said employee."
12 Commissions are wages within the meaning of § 221. See Labor Code § 200. As interpreted by
13 the Industrial Welfare Commission and California courts, § 221 has long been held to prohibit
14 deductions from an employee's wages for cash shortages, breakage, loss of equipment and other
15 business losses that may result from the employee's simple negligence. *Hudgins v. Neiman*
16 *Marcus Group, Inc.*, 34 Cal. App. 4th 1109, 1118-1119 (1995).

17 19. Notwithstanding this, a commission agreement may require an employee's
18 commission to be reduced by costs that are directly related to the sale. For example, an employer
19 can make deductions for things like shipping, the cost of the product being sold, or the cost of
20 free products offered by the salesperson to induce the sale — but only if those costs are directly
21 tied to the same sale. *Davis v. Farmers Ins. Exchange*, 245 Cal. App. 4th 1302, 1332-1333
22 (2016). An employer cannot, however, make deductions for things that are only remotely related
23 to the sale. Nor can an employer use deductions as a way of shifting their cost of doing business
24 to the employee. So, for example, an employer may not deduct the cost of the business's
25 electricity or the business's general overhead from the employee's commission. *Id.*

26 20. Crucially, if the employer wishes to make deductions from an employee's
27 _____
28 relying on recollection alone.") (citations omitted).

1 commissions, those deductions must related to the employee's sales and agreed upon in writing.
2 See *Marr v. Bank of Am., NA*, 506 F. App'x 661, 661 (9th Cir. 2013) ("Deductions from such
3 commissions are permitted, however, when (1) the deductions are tied to the employee's sales
4 rather than general business expenses, and (2) the employee agrees to the deductions by
5 contract."); *Koehl v. Verio, Inc.*, 142 Cal. App. 4th 1313 (2006); *Steinhebel v. L.A. Times*
6 *Commc'ns, LLC*, 126 Cal. App. 4th 696 (2005); *Prudential Ins. Co. of Am. v. Fromberg*, 240 Cal.
7 App. 2d 185 (1966).

8 21. ESI made unlawful deductions from commissions when it: (1) made deductions for
9 various costs of doing business, including, *inter alia*, expired/lost instruments; expired/lost
10 products; shipping of instruments/products; consignment fees and loaner fees; and (2) reduced
11 Levine's commission below 40%, in contravention of the promise made in his Offer Letter.

12 22. ESI unlawfully passed on costs of approximately \$2,000/month during Levine's
13 tenure, amounting to approximately \$96,000 in unlawful deductions for Company expenses in the
14 past four years. Further, ESI reduced Levine's commissions below 40% of net territory revenue
15 during the following months: July 2018 (34%); September-November 2018 (37.5%); December
16 2018 – July 2019 (39%); September 2019 (33.5%); October 2019 – June 2020 (35%); July –
17 December 2020 (31%); January – April 2021 (32.5%); May 2021 (31.5%); June (unknown).
18 Assuming that each percentage below 40% represents approximately \$700 in reduced
19 compensation, this represents an underpayment of approximately \$121,100. These amounts are
20 approximations and may be revised as discovery progresses.

21 23. As a result of ESI's wrongful deductions from commissions, Levine has been
22 damaged in an amount according to proof at the time of trial.

23 **THIRD CAUSE OF ACTION**

24 **IMPROPER WAGE STATEMENTS**

25 **(Against All Defendants)**

26 24. ESI is required to provide accurate wage statements pursuant to Labor Code
27 Section 226(a). California Labor Code section 226(e) provides that an employee may recover
28 actual damages or \$50 for an initial violation and \$100 for each subsequent violation of section

1 226(a), with a maximum penalty of \$4,000. As described above, since none of Levine's pay stubs
2 were correct, he is entitled to the \$4,000 penalty. The code section also provides that an employee
3 may recover their costs and attorney's fees in enforcing the code section.

4 **FOURTH CAUSE OF ACTION**

5 **WAITING TIME PENALTIES**

6 **(Against All Defendants)**

7 25. Labor Code sections 201 and 202 require that all wages due and owing be paid on
8 the employee's last day of employment. As described above, Levine has not yet received all
9 wages due and owing to him. Under these circumstances, Labor Code section 203 provides a
10 penalty amounting to Levine's daily wage rate for each day his wages remain unpaid, for a period
11 of up to 30 days. Assuming a regular rate of pay at the time of termination of \$150/hour, this
12 amounts to \$36,000. See Cal. Lab. Code § 203 ("If an employer willfully fails to pay, without
13 abatement or reduction ... any wages of an employee who is discharged or who quits, the wages
14 of the employee shall continue as a penalty from the due date thereof at the same rate until paid or
15 until an action therefor is commenced; but the wages shall not continue for more than 30 days.").

16 **FIFTH CAUSE OF ACTION**

17 **UNPAID BUSINESS EXPENSES**

18 **(Against All Defendants)**

19 26. Pursuant to Labor Code § 2802, ESI is obligated to reimburse employees for all
20 expenses required to perform their work. Labor Code § 2802(a) provides that an "employer shall
21 indemnify his or her employee for all necessary expenditures or losses incurred by the employee
22 in direct consequence of the discharge of his or her duties, or of his or her obedience to the
23 directions of the employer, even though unlawful, unless the employee, at the time of obeying the
24 directions, believed them to be unlawful."

25 27. Here, ESI regularly failed to pay for, *inter alia*: (1) mileage expenses of
26 approximately \$28,000 (12,500 miles/year at \$0.56/mile); (2) internet connectivity of
27 approximately \$4,800 (\$1,200/year); and (3) cellular connectivity of approximately \$4,800
28 (\$1,200/year). These amounts are approximations and may be revised as discovery progresses.

1 28. As a result of ESI's failure to reimburse Levine's business expenses, Levine has
2 been damaged in an amount according to proof at the time of trial.

3 **SIXTH CAUSE OF ACTION**

4 **VIOLATION OF CALIFORNIA BUSINESS AND PROFESSIONS**

5 **CODE § 17200 ET SEQ.**

6 **(Against ESI)**

7 29. Levine incorporates all previous allegations in the complaint, including the
8 allegations relating to unpaid overtime, unlawful deductions from commissions and unpaid
9 business expenses.

10 30. By violating the foregoing statutes and regulations, the acts of ESI constitute
11 unfair and unlawful business practices under Business and Professions Code § 17200 et seq.

12 31. ESI's violations of California wage and hour laws constitute a business practice,
13 because it was done repeatedly over a significant period of time and in a systematic manner to the
14 detriment of Levine.

15 32. Levine has suffered as a result of these business practices and requests restitution
16 of all monies held by ESI as a result of their violations of California wage and hour laws in an
17 amount according to proof at time of trial.

18 **SEVENTH CAUSE OF ACTION**

19 **PAGA**

20 **(Against ESI)**

21 33. In addition to Levine, there are approximately forty other sales representatives
22 entitled to relief as a result of ESI's: (1) failure to provide timely payment two times per month;
23 (2) unlawful deductions from wages; (3) improper wage statements; (4) failure to pay waiting
24 time penalties; and (5) failure to reimburse business expenses. Levine and the affected employees
25 are entitled to recover 25% of any such relief under the Private Attorney General's Act of 2004
26 ("PAGA").

27 34. Labor Code section 2699.5 allows a right of action pursuant to PAGA for
28 violations of the Labor Code. PAGA applies a default penalty of \$100.00 for initial violations and

1 \$200.00 for subsequent violations per aggrieved employee per pay period, unless the Labor Code
2 section that has been violated provides for a different civil penalty. Cal. Labor Code, § 2699(f)(2).
3 Notably, wage statement violations are calculated at a rate of \$250.00 for the initial violation, and
4 \$1,000.00 for every subsequent violation thereafter. *Id.* at § 226.3; *Raines v. Coastal Pacific Food*
5 *Distributors, Inc.*, 23 Cal.App.5th 667, 680 (2018).

6 35. On or about July 16, 2021, pursuant to the requirements of Labor Code § 2699.3,
7 Levine provided notice of the PAGA claims at issue to ESI and the Labor And Workforce
8 Development Agency. See Exhibit C. It has been at least sixty-five days since the date of notice
9 provided. LWDA has not provided a response to Levine's notice.

10 **EIGHTH CAUSE OF ACTION**

11 **BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

12 **(Against ESI)**

13 36. ESI is required to provide to employees a written agreement setting forth the
14 method by which commissions are computed and paid. Further, ESI is obligated to give a signed
15 copy of the agreement to each affected employee and obtain a signed receipt for the agreement
16 from each employee. See Labor Code § 2751. ESI did not meet this requirement.

17 37. For any given sales territory, ESI purported to split net territory revenues
18 60%/40% between itself and territory employees. However, there was never a written agreement
19 between the parties that ESI would retain 60% of net territory revenues.

20 38. Even assuming, *arguendo*, ESI's 60%/40% split was reasonable in principle, it
21 was not adhered to in practice. ESI acted in bad faith when, instead of deducting certain costs of
22 doing business from overall revenues -- i.e., from both ESI's and its employees' shares -- it
23 deducted those costs of doing business from the employees' share alone.

24 39. In practice, ESI gained more than the 60% share of net revenue to which it
25 purported to be entitled by passing certain costs of doing business entirely onto its sales staff,
26 including but not limited to Levine. As a result, the total commission pool from which Levine
27 drew was artificially shrunk by ESI for its own gain.

28 40. Due to ESI's bad faith conduct, Levine has been damaged in an amount to be

1 proven at the time of trial.

2 **NINTH CAUSE OF ACTION**

3 **BREACH OF CONTRACT**

4 **(Against ESI)**

5 41. Per Levine's Offer Letter, ESI promised to pay Levine on a commission-only
6 basis. See Exhibit A (Levine's Offer Letter). The Offer Letter states "Your compensation will be
7 40% of the total commissions paid to your Palo Alto/Fremont territory, less payroll deductions
8 and required taxes and withholdings[.]" The Offer Letter does not state how the total
9 commissions paid to the territory are to be calculated. It merely states that, of the total
10 commissions paid to the territory, 40% of those commissions will go to Levine.

11 42. ESI failed to keep its written promise to pay Levine 40% of the total commissions
12 paid to his territory. Levine's commission statements show ESI paid him at a rate consistently
13 less than 40% of total territory commissions. See Exhibit B (a sampling of Levine's commission
14 statements). The actual percentage of net territory revenues Levine earned varied between 31%
15 and 40% (for periods during which records are available).

16 43. Even though ESI promised it would only subtract "payroll deductions and required
17 taxes and withholdings" from Levine's commissions, ESI routinely deducted its direct and
18 indirect expenses from his commissions, in violation of California law and its contract with
19 Levine. See Exhibit B.

20 44. Due to ESI's breach of the promises set forth in his Offer Letter, Levine has been
21 damaged in an amount to be proven at the time of trial.

22 **TENTH CAUSE OF ACTION**

23 **UNTIMELY PERSONNEL FILE**

24 **(Against ESI)**

25 45. ESI failed to provide Levine with a timely and complete personnel file. Levine
26 asked for a complete copy of his personnel file on June 4, 2021. He did not receive a complete
27 copy of his file until July 13, 2021, which is beyond the period allowed by the California Labor
28 Code to provide the file. Labor Code §§ 226; 432; 1198.5. Further, the file itself did not include

1 all commission statements for the previous three years.

2 **PRAYER FOR RELIEF**

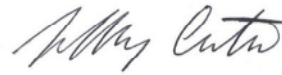
3 WHEREFORE, Plaintiff prays to this Court for judgment in his favor against each
4 Defendant, jointly and severally, as follows:

- 5 1. For compensatory damages according to proof;
- 6 2. For statutory damages/penalties according to proof;
- 7 3. For prejudgment interest;
- 8 4. For restitution of all monies due to Levine from the unlawful business practices of
9 ESI;
- 10 5. For reasonable attorney's fees and costs pursuant to California Labor Code
11 sections 218.5, 1194 and/or 2699;
- 12 6. For relief available under the Private Attorney General's Act of 2004;
- 13 7. For such other and further relief as the Court may deem proper and just under the
14 circumstances.

15 Dated: October 14, 2021

Respectfully Submitted,

16
17 By:



Jeffrey M. Curtiss
Attorney for Plaintiff
BENJAMIN LEVINE

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DEMAND FOR JURY TRIAL

Plaintiff hereby demand a jury trial for all causes of action triable to a jury.

Dated: October 14, 2021

Respectfully Submitted,

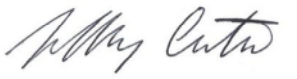
By: 
Jeffrey M. Curtiss
Attorney for Plaintiff
BENJAMIN LEVINE

EXHIBIT A



46531 Fremont Blvd.
Fremont, CA 94538

January 1, 2017

Benjamin Levine
2 Pierce Ave., #751
San Jose, CA 95110

Dear Mr. Levine,

We are pleased to present the following offer of employment. This letter will summarize and confirm the details of our offer for you to join Evolution Surgical, Inc. (ESI), in the position of Territory Manager of Palo Alto/Fremont commencing on January 5, 2017 and reporting to Eric Wiederhold, Vice President of Sales East Bay. In this position, you will lead and mentor the Palo Alto/Fremont team in day-to-day business operations, create and implement sales plans and effective marketing strategies that position ESI to meet or exceed territory objectives.

Orientation Information: On your first day of work, you should plan to report to Eric Wiederhold at 8am. You will have a new employee orientation meeting with Shannon Coan, HR/Employee Relations.

Here are the specific details of our offer:

TriNet HR Corporation: This letter and accompanying enclosure will summarize important details of matters pertaining to your employment. Also enclosed is information about current benefits, which are provided to the workforce here at ESI. Our benefits, payroll, and other human resource management services are provided through TriNet HR Corporation, a professional employer organization. As a result of ESI's arrangement with TriNet, TriNet will be considered your employer of record for these purposes and your managers here at ESI will be responsible for directing your work, reviewing your performance, setting your schedule, and otherwise directing your work at ESI.

Compensation: Your compensation will be 40% of the total commissions paid to your Palo Alto/Fremont territory, less payroll deductions and required taxes and withholdings, and will be paid the 23rd of the month. This is an exempt position and you are expected to work during the core hours of 7am-4pm Monday through Friday as well as those hours necessary to get the job done.

- Commissions shall not become due and payable to you until the Company, from Arthrex, Inc, has received payment.
- Commissions will be subject to charge backs for products returned or unpaid for by the end-user.
- Accrued commissions shall be paid on the 23rd of every month for the month prior's sales.
- You will not be entitled to commissions on sales made in the Territory after termination of the employment relationship.

Based on your start date of January 5, 2017 your first opportunity for a review of your compensation will be February 23, 2017.



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Fremont, CA 94538

Bonus: During the term of your employment, you will be entitled to Bonus compensation as follows:

1. **Arthrex – Year End Bonus.** If during a calendar year, the Company achieves and/or exceeds the annual sales quota assigned to it by Arthrex, Inc. and is paid a Year End bonus by Arthrex, Inc., forty percent (40%) of the bonus received by the Company will be divided amongst the Territories. The amount allocated to each Territory will be determined by multiplying the bonus by the percentage that each Territory's gross sales represent to the Company's total gross sales; provided, however, Territories that have not achieved or exceeded their annual sales quota assigned to it by the Company, will receive less than their full shares with the balance paid to the Territories that have achieved or exceeded their sales quotas. Your share of the bonus compensation will equal to your percentage of sales commissions. The Bonus will be paid within fifteen (15) days of receipt of payment from Arthrex, Inc.
2. **Company – Year End Bonus.** If during a calendar year the Company does not earn an Arthrex – Year End Bonus, but your Territory achieves and/or exceeds the annual sales quota assigned to it by the Company, your Territory will receive a Company – Year End Bonus. The Company, in its sole discretion, will determine whether a Bonus is due and the amount. Your share of the bonus compensation will equal to your percentage of sales commissions. The Bonus will be paid during the first calendar quarter after close of the calendar year.
3. **DEX and Shoulder Bonuses.** If during a calendar year, your Territory achieves and/or exceeds the annual sales quota assigned to it by the Company for sales of DEX and Shoulder products, your Territory will receive a DEX and Shoulder Bonus. The Company, in its sole discretion, will determine whether a Bonus is due and the amount. Your share of the bonus compensation will equal to your percentage of sales commissions. The Bonus will be paid during the first calendar quarter after close of the calendar year.
4. **Product Specific Bonuses.** Periodically the Company will issue Product Specific Bonus Notices, detailing potential Bonuses for achieving and/or exceeding the sales quota for specific products assigned to it by the Company. If your Territory achieves and/or exceeds the sales quota for the specific products, your Territory will receive a Product Specific Bonus. The Company, in its sole discretion, will determine whether a Bonus is due and the amount. Your share of the bonus compensation will equal to your percentage of sales commissions. The Bonus will be paid as set forth in the written in the Product Specific Bonus Notice. To be eligible for a Bonus, you must be employed by the Company on the date the Bonus is paid.

Benefits: ESI, through TriNet, offers a full range of benefits for you and your qualified dependents as outlined in the attached Summary of Benefits. Information about these benefits is included with this letter, and additional information will be available on-line on the terms and conditions included in the End User License Agreement (EULA) each new employee must accept in order to access TriNet's on-line self-service portal, HR Passport.

This offer of employment is contingent upon you fulfilling each of the following terms:

Acknowledgement of Company Handbook and Confidentiality Agreement: As an ESI employee, you are required to follow its rules and regulations. Therefore you will be asked to acknowledge in writing that you have read the Evolution Surgical, Inc. employee handbook, and sign and comply with the included Proprietary Information Agreement, which prohibits, among other things, the unauthorized use or



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Fremont, CA 94538

disclosure of ESI's confidential and proprietary information. In order to retain necessary flexibility in the administration of its policies and procedures, ESI reserves the right to change or revise its policies, procedures, and benefits at any time.

Required Documentation: To comply with the government-mandated confirmation of employment eligibility, please review the enclosed I-9 Form and "Lists of Acceptable Documents" as approved by the United States Department of Justice for establishing identity and employment eligibility. Please bring the required I-9 documents with you on your first day of employment; failure to submit proof of your employment eligibility will postpone your start date or result in termination of your employment. Also enclosed are additional new hire forms that you should complete and return with this offer letter.

At Will Employment: Please understand, as stated in all job offers, ESI is an employment-at-will company. That means that you or the Company may terminate your employment at any time, with or without cause and with or without prior notice. Accordingly, this letter is not a contract and should not be construed as creating contractual obligations.

This offer letter, together with your Proprietary Information Agreement and EULA forms the complete and exclusive statement of your employment with Evolution Surgical, Inc. It supersedes any other agreements or promises made to you by anyone, whether oral or written. Changes to the terms of this letter require a written modification signed by an authorized employee of Evolution Surgical, Inc. Additionally, ESI reserves the right to revoke this offer should it not receive a satisfactory reference and background check.

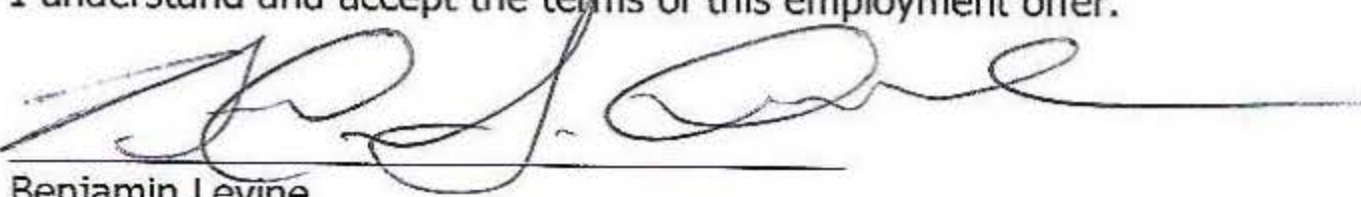
If you wish to accept employment at Evolution Surgical, Inc. under the terms described above, please sign and date this letter and the Proprietary Information Agreement, and return via email by **[Date]**. Please retain copies for your records.

Benjamin, we are excited that you are joining Evolution Surgical's team and feel that you have a great deal to contribute. If you have any questions, please feel free to call Kelly Coan 650-208-9206.

Sincerely,

Kelly Coan
Co-Founder

I understand and accept the terms of this employment offer.


Benjamin Levine

1/4/17
Date

1/4/17
Start Date



46531 Fremont Blvd.
Fremont, CA 94538

cc: HR

Enclosures: Evolution Surgical, Inc. Proprietary Information Agreement
I-9 Acceptable Documents
Benefits-At-A-Glance
New Employee Information Sheet

EXHIBIT B

EMPLOYEE:		BENJAMIN LEVINE			
TERRITORY:		PALO ALTO			
COMMISSION PERIOD:		JULY 2019			
Territory Commission Rate		40%			
Employee Commission Rate		39.0%			
Income		Territory Gross		Territory Net	Employee Portion
Product Commission - PA	JULY 2019	229,743.35	x 40% =	91,897.34	x 39.0% = 35,839.96
Tissue Commission - PA	JUNE 2019	1,713.67	x 40% =	685.47	x 39.0% = 267.33
Total Commission					36,107.30
Deductions		Territory Gross		Territory Net	Employee Portion
Consignment Fees -PA		3,577.56	x 40%	1,431.02	x 39.0% = 558.10
PA-LOANER LATE FEE		539.51	x 100%	539.51	x 39.0% = 210.41
PA- LOST -AR-9231-21		244.34	x 100%	244.34	x 39.0% = 95.29
PA -APRIL EXPIRED/LOST @ 50%		373.50	x 100%	373.50	x 39.0% = 145.67
PA-INVOICE REVERSAL - LUCILLE PACKARD		61.46	x 100%	61.46	x 39.0% = 23.97
PA - Freight Credits		(2,020.00)	x 80%	(1,616.00)	x 39.0% = (630.24)
PA - FED EX -EXPRESS 100%		108.14	x 100%	108.14	x 39.0% = 42.17
PA - FED EX -2 DAY 40%		0.00	x 40%	0.00	x 39.0% = 0.00
		0.00	x 100%	0.00	x 39.0% = 0.00
PA - LOST-AR-8943-27 reversal 6/2019		(345.50)	x 100%	(345.50)	x 39.0% = (134.75) REVERSAL
		0.00	x 40%	0.00	x 39.0% = 0.00
Other: Lost Instrument		0.00	x 100%	0.00	x 39.0% = 0.00
		0.00	x 100%	0.00	x 39.0% = 0.00
PALO ALTO LAB		0.00	x 40%	0.00	x 39.0% = 0.00
ARTHREX KAISER ADMIN FEES -@ 40% - FINAL 7/2019		560.50	x 100%	560.50	x 39.0% = 218.60
Total Deductions					529.22
Net Commission after Deductions					35,578.08
Other - Special Adjustments -					0.00
Other - Special Adjustments- (4018.58) Transfer to Fremont Territory					(1,687.24)
Net Amount Due					34,010.84

EMPLOYEE:		BENJAMIN LEVINE			
TERRITORY:		PALO ALTO			
COMMISSION PERIOD:		AUGUST 2019			
Territory Commission Rate		40%			
Employee Commission Rate		39.0%			
Income		Territory Gross		Territory Net	
Product Commission - PA		189,421.42	x 40% =	75,768.57	x 39.0% = 29,549.74
Tissue Commission - PA		1,089.37	x 40% =	435.75	x 39.0% = 169.94
Total Commission				29,719.68	
Deductions		Territory Gross		Territory Net	
Consignment Fees -PA		4,194.34	x 40%	1,677.74	x 39.0% = 654.32
PA-LOST AR-1688-CP		1,174.44	x 100%	1,174.44	x 39.0% = 458.03
PA- EXPIRED/LOST		743.68	x 100%	743.68	x 39.0% = 290.04
PA - EXPIRED		79.80	x 100%	79.80	x 39.0% = 31.12
PA-INVOICE REVERSAL		83.02	x 100%	83.02	x 39.0% = 32.38
PA - Freight Credits		(4,140.00)	x 80%	(3,312.00)	x 39.0% = (1,291.68)
PA - FED EX -EXPRESS 100%		559.25	x 100%	559.25	x 39.0% = 218.11
PA - FED EX -2 DAY 40%		242.17	x 40%	96.87	x 39.0% = 37.78
		0.00	x 100%	0.00	x 39.0% = 0.00
		0.00	x 100%	0.00	x 39.0% = 0.00
PA -RAR-13595 RENTAL		218.50	x 100%	218.50	x 39.0% = 85.22
		0.00	x 40%	0.00	x 39.0% = 0.00
Other: Lost Instrument		0.00	x 100%	0.00	x 39.0% = 0.00
PALO ALTO SOAR REBATE - AUGUST 2019 - 12 installments 1 of 12		2,635.32	x 100%	2,635.32	x 39.0% = 1,027.78
PALO ALTO LAB		2,201.07	x 40%	880.43	x 39.0% = 343.37
ARTHREX KAISER ADMIN FEES -@ 40% - FINAL 7/2019		0.00	x 100%	0.00	x 39.0% = 0.00
Total Deductions				1,886.45	
Net Commission after Deductions				27,833.24	
Other - Special Adjustments -				0.00	
Other - Special Adjustments- (2654.12) Transfer to Fremont Territory				(1,035.11)	
Net Amount Due				26,798.13	

EMPLOYEE:		BENJAMIN LEVINE	
TERRITORY:		PALO ALTO	
COMMISSION PERIOD:		SEPT 2019	
Territory Commission Rate		40%	
Employee Commission Rate		33.5%	
Income		Territory Gross	Territory Net
Product Commission - PA	SEPT 2019	189,709.44 x 40% =	75,883.78 x 33.5% =
Tissue Commission - PA	AUGUST 2019	3,755.56 x 40% =	1,502.22 x 33.5% =
Total Commission		25,924.31	
Deductions		Territory Gross	Territory Net
Consignment Fees -PA		4,125.24 x 40%	1,650.10 x 33.5% =
PA-LOST AR-1688-CP		0.00 x 100%	0.00 x 33.5% =
PA- EXPIRED/LOST		718.44 x 100%	718.44 x 33.5% =
PA -LATE LOANER FEE		200.00 x 100%	200.00 x 33.5% =
PA-INVOICE REVERSAL		0.00 x 100%	0.00 x 33.5% =
PA - Freight Credits		(5,535.00) x 80%	(4,428.00) x 33.5% =
PA - FED EX -EXPRESS 100%		410.96 x 100%	410.96 x 33.5% =
PA - FED EX -2 DAY 40%		56.23 x 40%	22.49 x 33.5% =
		0.00 x 100%	0.00 x 33.5% =
		0.00 x 100%	0.00 x 33.5% =
PA -RAR-13595 RENTAL		0.00 x 100%	0.00 x 33.5% =
		0.00 x 40%	0.00 x 33.5% =
Other: Lost Instrument		0.00 x 100%	0.00 x 33.5% =
PALO ALTO SOAR REBATE - AUGUST 2019 - 12 installments 2 of 12		2,635.32 x 100%	2,635.32 x 33.5% =
PALO ALTO LAB		9,565.10 x 40%	3,826.04 x 33.5% =
ARTHREX KAISER ADMIN FEES -@ 40% - FINAL 7/2019		0.00 x 100%	0.00 x 33.5% =
Total Deductions		1,686.84	
Net Commission after Deductions		24,237.47	
Other - Special Adjustments -		0.00	
Other - Special Adjustments- Corrections for August/September 2019 - net \$ 183.79		61.57	
Net Amount Due		24,299.04	

BENJAMIN LEVINE				
TERRITORY:		PALO ALTO		
COMMISSION PERIOD:		OCT 2019		
NEW - EFFECTIVE 10/1/2019				
Territory Commission Rate		40%		
Employee Commission Rate		35.0%		
Income				
		Territory Gross	Territory Net	Employee Portion
Product Commission - PA	OCT 2019	206,144.92	x 40% = 82,457.97	x 35.0% = 28,860.29
Tissue Commission - PA	SEPT 2019	2,565.81	x 40% = 1,026.32	x 35.0% = 359.21
Total Commission		29,219.50		
Deductions				
		Territory Gross	Territory Net	Employee Portion
Consignment Fees -PA		4,559.36	x 40%	1,823.74 x 35.0% = 638.31
PA-WRITE OFF - MILLS PEN		13.02	x 100%	13.02 x 35.0% = 4.56
PA- EXPIRED		261.25	x 100%	261.25 x 35.0% = 91.44
PA - LOANER FEE- RAR-13330FS		273.13	x 100%	273.13 x 35.0% = 95.60
PA-WRITE OFF - PAMF		11.75	x 100%	11.75 x 35.0% = 4.11
PA - Freight Credits		(3,525.00)	x 80%	(2,820.00) x 35.0% = (987.00)
PA - FED EX -EXPRESS 100%		1,073.06	x 100%	1,073.06 x 35.0% = 375.57
PA - FED EX -2 DAY 40%		109.22	x 40%	43.69 x 35.0% = 15.29
		0.00	x 100%	0.00 x 35.0% = 0.00
		0.00	x 100%	0.00 x 35.0% = 0.00
PA- SAMPLES- SUTTER/STANFORD		3,399.00	x 40%	1,359.60 x 35.0% = 475.86
Lab Foot & Ankle 10/26/2019 - Dr Yurgelon - No show		500.00	x 100%	500.00 x 35.0% = 175.00
Other: Lost Instrument		0.00	x 100%	0.00 x 35.0% = 0.00
PALO ALTO SOAR REBATE - AUGUST 2019 - 12 installments 3 of 12		2,635.32	x 100%	2,635.32 x 35.0% = 922.36
PALO ALTO LAB		370.00	x 40%	148.00 x 35.0% = 51.80
ARTHREX KAISER ADMIN FEES -@ 40% - FINAL 7/2019		0.00	x 100%	0.00 x 35.0% = 0.00
Total Deductions		9,680.11	5,322.57	1,862.90
Net Commission after Deductions		27,356.60		
Other - Special Adjustments - Transfer October PAMF commission to Silicon Valley				(556.95)
Other - Special Adjustments- Correction for September Commission adjustment 15.5% VS 14% - Madeline Bouvier				1,073.00
Net Amount Due		27,872.65		

BENJAMIN LEVINE			
TERRITORY:	PALO ALTO		
COMMISSION PERIOD:	NOV 2019		
NEW - EFFECTIVE 10/1/2019			
Territory Commission Rate	40%		
Employee Commission Rate	35.0%		
Income	Territory Gross	Territory Net	Employee Portion
Product Commission - PA NOV 2019	181,454.78	x 40% = 72,581.91	x 35.0% = 25,403.67
Tissue Commission - PA OCT 2019	3,328.03	x 40% = 1,331.21	x 35.0% = 465.92
Total Commission			25,869.59
Deductions	Territory Gross	Territory Net	Employee Portion
Consignment Fees -PA	4,685.04	x 40%	1,874.02 x 35.0% = 655.91
PA-LOANER LATE FEE	400.00	x 100%	400.00 x 35.0% = 140.00
PA- EXPIRED 19%	541.69	x 100%	541.69 x 35.0% = 189.59
PA - LOANER FEE- RAR-13330F	273.13	x 100%	273.13 x 35.0% = 95.60
PA-EXPIRED/LOST 50%	2,732.50	x 100%	2,732.50 x 35.0% = 956.38
PA - Freight Credits	(576.00)	x 80%	(460.80) x 35.0% = (161.28)
PA - FED EX -EXPRESS 100%	669.47	x 100%	669.47 x 35.0% = 234.31
PA - FED EX -2 DAY 40%	87.46	x 40%	34.98 x 35.0% = 12.24
	0.00	x 100%	0.00 x 35.0% = 0.00
	0.00	x 100%	0.00 x 35.0% = 0.00
PA- LOST AR-13216-05 AR-2001AOT,AR-8690PAR-8930D AR-8950RH	751.80	x 100%	751.80 x 35.0% = 263.13
	0.00	x 100%	0.00 x 35.0% = 0.00
Other: Lost Instrument	0.00	x 100%	0.00 x 35.0% = 0.00
PALO ALTO SOAR REBATE - AUGUST 2019 - 12 installments 4 of 12	2,635.32	x 100%	2,635.32 x 35.0% = 922.36
PALO ALTO LAB	870.00	x 40%	348.00 x 35.0% = 121.80
ARTHREX KAISER ADMIN FEES -@ 40% - FINAL 7/2019	0.00	x 100%	0.00 x 35.0% = 0.00
Total Deductions	13,070.41	9,800.11	3,430.04
Net Commission after Deductions			22,439.55
Other - Special Adjustments - Transfer November PAMF commission to Silicon Valley			(427.63)
Other - Special Adjustments-			-
Net Amount Due			22,011.92

		BENJAMIN LEVINE					
TERRITORY:		PALO ALTO					
COMMISSION PERIOD:		DEC 2019					
NEW - EFFECTIVE 10/1/2019							
Territory Commission Rate		40%					
Employee Commission Rate		35.0%					
Income		Territory Gross		Territory Net		Employee Portion	
Product Commission - PA	DEC 2019	192,658.37	x 40% =	77,063.35	x 35.0% =	26,972.17	
Tissue Commission - PA	NOV 2019	4,428.69	x 40% =	1,771.48	x 35.0% =	620.02	
Total Commission						27,592.19	
Deductions		Territory Gross		Territory Net		Employee Portion	
Consignment Fees -PA		2,559.00	x 40%	1,023.60	x 35.0% =	358.26	
PA-LOST EVO INSTRUMENTS		1,497.62	x 100%	1,497.62	x 35.0% =	524.17	
PA- EXPIRED 19%		337.94	x 100%	337.94	x 35.0% =	118.28	
PA - NOVEMBER FREIGHT CREDIT CORRECTION		(3,749.00)	x 80%	(2,999.20)	x 35.0% =	(1,049.72)	
PA-EXPIRED/LOST 50%		1,417.72	x 100%	1,417.72	x 35.0% =	496.20	
PA - Freight Credits		(5,300.00)	x 80%	(4,240.00)	x 35.0% =	(1,484.00)	
PA - FED EX -EXPRESS 100%		318.84	x 100%	318.84	x 35.0% =	111.59	
PA - FED EX -2 DAY 40%		116.46	x 40%	46.58	x 35.0% =	16.30	
		0.00	x 100%	0.00	x 35.0% =	0.00	
PA- LOST AR-13216-05 AR-2001AOT,AR-8690PAR-8930D AR-8950RH		0.00	x 100%	0.00	x 35.0% =	0.00	
		0.00	x 100%	0.00	x 35.0% =	0.00	
Other: Lost Instrument		0.00	x 100%	0.00	x 35.0% =	0.00	
PALO ALTO SOAR REBATE - AUGUST 2019 - 12 installments 5 of 12		2,635.32	x 100%	2,635.32	x 35.0% =	922.36	
PALO ALTO LAB		2,054.15	x 40%	821.66	x 35.0% =	287.58	
ARTHREX KAISER ADMIN FEES -@ 40% - FINAL 7/2019		0.00	x 100%	0.00	x 35.0% =	0.00	
Total Deductions		1,888.05		860.09		301.03	
Net Commission after Deductions						27,291.16	
Other - Special Adjustments - Transfer DECEMBER PAMF commission to Silicon Valley (AVERAGE) \$1856.72						(649.85)	
Other - Special Adjustments- Special Bonus to Alex Cooper from Benjamin Levine.						(500.00)	
Net Amount Due						26,141.31	

EXHIBIT C

Jeffrey M. Curtiss
jeff@jcurtisslaw.com



390 Bridge Parkway, Suite 220
Redwood City, CA 94065
650.739.0200

July 16, 2021

Via Online Portal:

PAGA Administrator
Labor and Workforce Development Agency/
Department of Industrial Relations
1515 Clay Street, Ste. 801
Oakland, CA 94612

Via Certified Mail:

Dalia Summerour
Agent For Service Of Process
Evolution Surgical, Inc.
46531 Fremont Boulevard
Fremont, CA 94538

Copy via Email:

Kelly Coan
kellyc@evosurgical.com
Agency Principal
Evolution Surgical, Inc.
46531 Fremont Boulevard
Fremont, CA 94538

Daniel F. Pyne
DPyne@hopkinscarley.com
Hopkins & Carley
70 South First Street
San Jose, CA 95113

Re: Benjamin Levine/Evolution Surgical, Inc.
Private Attorneys General Act (PAGA) -- Filing
New PAGA Claim Notice

Dear PAGA Administrator:

The undersigned represents Benjamin Levine ("Levine") with respect to his employment at Evolution Surgical, Inc. ("ESI" or the "Company") as a Territory Manager between approximately January 5, 2017 and June 4, 2021.

The purpose of this letter is to provide notice of a claim on behalf of Levine and all other similarly situated current and former sales employees of the Company pursuant to the Private Attorney's Generals Act of 2004, California Labor Code §§ 2698 et seq. ("PAGA"). This letter shall not waive any of Levine's rights, all of which are reserved.

In the event the Labor and Workforce Development Agency ("LWDA") provides notice that it does not intend to investigate or pursue the below-described matters or if no notice is provided within 65 calendar days of the date of this notice, Levine intends to file, *inter alia*, a cause of action pursuant to PAGA.

FAILURE TO PROVIDE COMMISSION AGREEMENT

California Labor Code § 2751 requires employers to provide written commission plan agreements to all employees who perform services in California and whose compensation involves commissions. The agreement must explain the method by which the commissions shall be computed and paid. The commission plan must also be signed by the employer and the employer must obtain a signed receipt from each employee.

A commission is compensation paid for services rendered in the sale of property and/or services and "based proportionately upon the amount or value thereof." Labor Code § 204.1. In *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785, 803–804 (1999), the Supreme Court defined two essential requirements for finding that a compensation scheme involves commissions: (1) that the employees are involved in selling a product or service, and (2) that the amount of compensation is "a percent of the price of the product or service."

Here, there is no genuine dispute that Levine was to be paid on a commission basis. Levine's January 1, 2017 Offer Letter states, *inter alia*, that his "compensation will be 40% of the total commissions paid to [the] Palo Alto/Fremont territory, less payroll deductions and required taxes and withholdings, and will be paid the 23rd of the month." Despite the fact that Levine's Offer Letter makes plain that he would be paid on a commission basis, the Company did not provide Levine – nor any of its other California sales personnel – with a commission agreement. Accordingly, the Company is in violation of California Labor Code § 2751.

FAILURE TO PROVIDE TIMELY PAYMENT

Under California Labor Code § 204, timely payment means sales commissions earned must be paid at least twice per calendar month on the days designated in advance by the employer as paydays.

If sales commissions were earned between the 1st and 15th days of the month, then payment must be made to the sales employee between the 16th and 26th day of the same month. For sales made from the 16th through the last day of the month, payment must be made between the 1st and 10th day of the following month.

Here, the Company failed to comply with Labor Code § 204, because it only paid Levine and other sales staff once per month, usually between the 23rd and the 25th of the month. Further, these commission payments were late, because the commission payments represented payment for commissions earned during the previous month.

UNLAWFUL DEDUCTIONS FROM WAGES

Labor Code § 221 provides: “It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.” Commissions are wages within the meaning of § 221. See Labor Code § 200. As interpreted by the Industrial Welfare Commission (IWC) and the California courts, § 221 has long been held to prohibit deductions from an employee’s wages for cash shortages, breakage, loss of equipment, and other business losses that may result from the employee’s simple negligence. *Hudgins v. Neiman Marcus Group, Inc.*, 34 Cal. App. 4th 1109, 1118-1119 (1995). Further, employers are prohibited from deducting their own costs of doing business from sales commissions that have been earned unless they can establish that there was a loss caused by a dishonest or willful act of the employee, or by the culpable negligence of the employee. *Quillian v. Lion Oil*, 96 Ca.App.3d 156, 162-163 (1979).

The Company made unlawful deductions from wages when it: (1) made deductions from commissions of various costs of doing business, including, *inter alia*, expired/lost instruments; expired/lost products; shipping of instruments/products; consignment fees and loaner fees; and (2) reduced Levine’s commission below 40%, in contravention of the promise made in his offer letter. The Company unlawfully passed on Company costs of approximately \$2,000/month during Levine’s tenure, amounting to approximately \$96,000 in unlawful deductions for Company expenses. Further, the Company reduced Levine’s commissions below 40% during the following months: July 2018 (34%); September-November 2018 (37.5%); December 2018 – July 2019 (39%); September 2019 (33.5%); October 2019 – June 2020 (35%); July – December 2020 (31%); January – April 2021 (32.5%); May 2021 (31.5%); June (Unknown). Assuming that each percentage below 40% represents approximately \$700 in reduced compensation, this represents an underpayment of approximately \$121,100.

Levine is informed and believes that the Company similarly deducted business ex-penses and reduced the commission rates of other sales representatives, in violation of applicable law and their offer letters.¹

¹ As noted in the accompanying PAGA letter, Levine did not receive a commission agreement, in violation of Labor Code § 2751. The only written agreement outlining Levine’s commission rate – the January 1, 2017 offer letter -- states nothing about a commission rate lower than 40%, i.e.: “Your compensation will be 40% of the total commissions paid to your Palo Alto/Fremont territory, less payroll deductions and required taxes and withholdings, and will be paid on the 23rd of the month.”

MISCLASSIFICATION

Levine was classified as an exempt employee. However, his work did not fall within any of the available exemptions:

- Levine does not qualify as an exempt outside salesperson. Labor Code § 1171 excludes from the overtime laws employees who are outside salespersons, defined as someone who regularly works more than half their working time engaged in sales activities outside the workplace. Cal. Code Regs., tit. 8, § 11070(2)(I). “In borderline cases, the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling.” *Brody v. Astrazeneca Pharms., LP*, 2008 U.S. Dist. LEXIS 107301, *1 at *8 (C.D. Cal. June 11, 2008). In contrast, “[i]f his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt.” *Id.* Here, Levine spent the majority of his time managing and not selling. Indeed, his duties as Territory Manager are explicitly described as managerial in nature, including “lead[ing] and mentor[ing] the Palo Alto/Fremont team in day-to-day business operations, creat[ing] and implement[ing] sales plans and effective marketing strategies that position ESI to meet or exceed territory objectives.”
- Levine does not qualify as a commissioned salesperson. All earned wages, including commissions, must be paid no less frequently than semi-monthly. Whether the minimum earnings prong of the commissioned employee exemption is satisfied depends on the amount of wages actually paid in a pay period; thus, an employer satisfies the minimum earnings prong only in those pay periods in which it actually pays the required minimum earnings. An employer may not satisfy the prong by reassigning wages from a different pay period to cure a shortfall. *Peabody v. Time Warner Cable, Inc.*, 59 Cal. 4th 662, 663 (2014). Here, Levine does not meet the exemption because he was not paid semi-monthly.
- Similarly, Levine does not meet the executive, administrative or professional exemptions, because he was not paid on a salaried basis. A salary is a fixed minimum payment made regardless of hours worked or the amount or quality of work performed. Here, the entirety of Levine’s compensation was based on commissions. There was no fixed payment that rose to the level of the minimum salary requirement for California.

FAILURE TO PAY OVERTIME

Levine routinely worked in excess of eight hours in a workday or forty hours in a workweek. For the reasons outlined above, Levine and the Company's other, similarly situated managerial sales personnel were misclassified as exempt, thereby entitling them to overtime pay.

See, e.g., Labor Code § 510 ("Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee."); Labor Code § 558 (providing penalties for unpaid overtime).

IMPROPER WAGE STATEMENTS

The Company is required to provide accurate wage statements pursuant to Labor Code Section 226(a). The Company failed to provide accurate wage statements because it, *inter alia*, failed to pay its sales staff twice per month; failed to pay commissions in a timely manner (i.e., it paid commissions earned in one month during the following month); made unlawful deductions to wages; failed to reimburse for business expenses incurred; and failed to pay for overtime.

Wage statement violations are calculated at a rate of \$250.00 for the initial violation, and \$1,000.00 for every subsequent violation thereafter. *Id.* at §§ 226, 226.3; *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal.App.5th 667, 680 (2018).

WAITING TIME PENALTIES

Labor Code §§ 201 and 202 require that all wages due and owing be paid on the employee's last day of employment. Labor Code § 203 provides for waiting time penalties in the event full payment is not made. Levine intends to recover penalties for such unpaid amounts on behalf of himself and other similarly situated sales representatives due to the Company's unlawful deductions from its commission payments, as described in greater detail above.

See Cal. Lab. Code § 203 ("If an employer willfully fails to pay, without abatement or reduction ... any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days."); Cal. Labor Code, § 2699(f)(2) (setting default penalty of \$100.00 for initial violations and \$200.00 for subsequent violations).

FAILURE TO REIMBURSE BUSINESS EXPENSES

Pursuant to Labor Code § 2802, the Company is obligated to reimburse employees for all expenses required to perform their work. Here, the Company regularly failed to pay for sales representatives' mileage expenses, internet connectivity, cellular connectivity and devices.

See Cal. Labor Code, § 2699(f)(2) (setting default penalty of \$100.00 for initial violations and \$200.00 for subsequent violations).

TIME RECORDS

Employers with employees covered by Wage Order 4-2001, such as ESI in the case of Levine, are required to keep time records for employees not covered by the administrative, executive or professional exemptions. This means that, even assuming, *arguendo*, Levine was properly classified as an exempt outside sales employee, the Company was still obligated to keep time records. ESI did not keep time records for its outside sales staff, including but not limited to Levine.²

See Cal. Labor Code, § 2699(f)(2) (setting default penalty of \$100.00 for initial violations and \$200.00 for subsequent violations).

CONCLUSION

Your prompt attention to this matter is appreciated. Please do not hesitate to contact the undersigned should you have any questions or concerns.

Very truly yours,



² See Wage Order 4-2001(7)(A)(3)-(5) (requiring employers to keep time records “showing when the employee begins and ends each work period” and “total hours worked in the payroll period and applicable rates of pay”).

EXHIBIT B

SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

A dispute exists between Benjamin Levine (hereafter referred to as “Levine”) and Evolution Surgical, Inc. (“Evolution Surgical” or “the Company”), Kelly Coan, and Rob Law (collectively, “the Defendants”) concerning certain alleged violations of wage-and-hour laws asserted by Levine in his individual capacity and as a representative of Aggrieved Employees (defined below) pursuant to California’s Private Attorneys General Act, as described in more detail in Levine’s complaint in Alameda County Superior Court case number 21CV000812. Levine and the Defendants disagree on whether any liability exists on the part of the Defendants, or any of them, but desire to conclude their dispute at this time. Accordingly, the parties agree as follows:

1. Definitions. As used in this Agreement, the following terms shall have the meanings specified below.

1.1. Action. “Action” shall mean Alameda County Superior Court case number 21CV000812.

1.2. Aggrieved Employees. “Aggrieved Employees” shall mean all persons, except Levine, who were employed by Evolution Surgical as Territory Managers or sales representatives at any time between July 16, 2020 and the date on which the Court approves this Settlement.

1.3. Aggrieved Employee Individual Payment. “Aggrieved Employee Individual Payment” shall mean the amount which is ultimately distributed to each individual Aggrieved Employee in settlement of the claims asserted by Levine pursuant to the California Private Attorneys General Act (PAGA), Labor Code sections 2698 et seq.

1.4. Court. “Court” shall mean the Alameda County Superior Court.

1.5. Defendants. “Defendants” shall mean Evolution Surgical, Inc., Kelly Coan and Rob Law.

1.6. Effective Date. “Effective Date” shall mean the date on which the Court issues a final order granting Levine’s motion for approval of the settlement.

1.7. PAGA Period. The “PAGA Period” shall mean the period commencing on July 16, 2020 and concluding on the date on which the Court approves the Settlement.

1.8. PAGA Settlement Amount. The “PAGA Settlement Amount” shall mean the gross sum of \$5,000.00 (five thousand dollars and no cents).

1.9. Parties. The “Parties” shall mean Levine, Evolution Surgical, Coan and Law.

1.10. Plaintiff’s Counsel. “Plaintiff’s Counsel” shall mean Jeffrey M. Curtiss.

1.11. Released PAGA Claims. “Released PAGA Claims” shall mean any and all claims for civil penalties that were asserted or could have been asserted by Levine or the California Labor and Workforce Development Agency (LWDA) pursuant to PAGA on behalf of the Aggrieved Employees based on the facts and violations alleged in the Action during the PAGA Period, including, but not limited to, any claims for civil penalties for failure to pay minimum and overtime wages, failure to provide meal periods, failure to provide rest breaks, failure to issue accurate itemized wage statements, failure to pay all wages due and owing twice each calendar month, failure to pay all wages due and payable upon demand, failure to pay all wages due and owing upon termination, failure to maintain adequate and accurate payroll records, and failure to provide notice of pay.

1.12. Released Parties. “Released Parties” shall mean the Defendants and all of their current and former shareholders, directors, officers, employees, agents and representatives.

1.13. Settlement. “Settlement” shall mean the settlement of the Action as described in this Agreement.

2. Conditional settlement. The Parties agree that the Settlement is contingent upon the Court’s approval. If the Court does not enter a final order(s) or a judgment consistent with the terms of the Settlement for any reason, this Agreement shall be null and void.

3. Settlement of Levine’s individual claims.

3.1.

[REDACTED]

■

[REDACTED]

■

[REDACTED]

■

[REDACTED]

[REDACTED]

3.2. Tax issues. Except as provided in section 3.1(a) above, Levine acknowledges and agrees that he is solely responsible for all tax reporting and payment obligations that may arise as a consequence of his receipt of the payment described in section 3.1 above. Levine agrees to indemnify and hold the Defendants harmless from any taxes, interest or penalties that may be deemed due and owed by him as a consequence of his receipt of the payment described above. In the event that a court or governmental agency later determines that additional taxes, interest and/or penalties are owed, Levine acknowledges and agrees that he is solely responsible for reporting and paying all taxes that may be imposed upon him as a former employee of Evolution Surgical, and Evolution Surgical acknowledges and agrees that it is solely responsible for reporting and paying all taxes that may be imposed upon it as Levine's former employer.

3.3. Release of claims by Levine. In exchange for the consideration described in this section 3, Levine hereby releases and discharges fully Evolution Surgical, its parent, subsidiary and affiliated entities, and the current and former shareholders, members, partners, limited partners, directors, officers, employees, agents and representatives of each (including, but not limited to, Rob Law and Kelly Coan) (which entities and persons, together with Evolution Surgical, are hereafter referred to collectively as "the Released Parties") from any and all claims, liabilities, charges and causes of action of any kind whatsoever which Levine holds or may hold against them as of the date on which he signs this Agreement, including, but not limited to:

- (a) any and all claims relating to or in any manner arising from Levine's employment Evolution Surgical the termination of that employment;
- (b) any and all claims arising under the Civil Rights Act of 1964 (42 U.S.C. 2000, et seq.);
- (c) any and all claims arising under the California Fair Employment and Housing Act (Government Code section 12900 et seq.);
- (d) any and all claims arising under the Americans with Disabilities Act (29 U.S.C. 706 et seq.);
- (e) any and all claims for violation of the Fair Labor Standards Act, California Labor Code, or California Wage Orders, including, but not limited to, claims for violation of Labor Code sections 201, 202, 203, 204, 221, 226, 510, 2698 et seq., 2751, and 2802;
- (f) any and all claims and rights arising under any contracts or agreements between Levine and any of the Released Parties; and
- (g) any and all claims for breach of contract, breach of the covenant of good faith and fair dealing, discrimination, harassment, retaliation,

wrongful discharge, invasion of privacy, infliction of emotional distress, defamation and misrepresentation.

This Agreement shall not apply, however, to any claims not subject to waiver by law, including, but not limited to, claims for unemployment insurance benefits, workers' compensation benefits, or indemnity pursuant to applicable law.

3.4. Scope of release by Levine. Levine understands and intends that the claims and causes of action released herein include all legal, contractual, statutory and equitable claims and causes of action held by him against the Released Parties, or any of them, regardless of whether those claims or causes of action are presently existing, known or anticipated, excepting only those claims not subject to waiver by law.

3.4.1. Administrative complaints and reports excluded. This Agreement does not prohibit Levine from reporting alleged violations of applicable law to any government agency or entity, including, but not limited to, the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, the Department of Justice, the Department of Labor, and the Securities and Exchange Commission, or making other disclosures that are protected under applicable law, provided that he may not personally recover any financial compensation in connection with such claims.

3.4.2. Class action and representative claims. If any other party commences or has commenced any action or proceeding against any of the Released Parties related to or arising out of any aspect of Levine's work for Evolution Surgical, Levine shall, upon learning of the existence of such action or proceeding, take all steps necessary to dismiss himself from the action or proceeding. Levine agrees that he shall not accept any compensation or relief of any type as the result of any claim, complaint or grievance under which he may be deemed a party, complainant, beneficiary or otherwise be entitled to any monetary or other relief for work performed for Evolution Surgical.

3.5. Due consideration. Levine represents and agrees that:

- (a) he has had the opportunity to consider this Agreement for a reasonable time of at least ten days before signing it;
- (b) he has had a reasonable opportunity to consult an attorney before signing this Agreement;
- (c) he has read this Agreement in full and understands all of the terms and conditions set forth herein; and
- (d) he knowingly and voluntarily agrees to all of the terms and conditions set forth herein and intends to be legally bound by them.

3.6. Release of claims by Defendants. The Defendants, and each of them, release and discharge Levine and his legal counsel fully from any and all claims, liabilities, charges and causes of action of any kind whatsoever which they hold or may hold against Levine

as of the date on which they sign this Agreement, including, but not limited to, claims for malicious prosecution, and defamation.

3.7. New or different facts; application of release to unknown claims. Levine and the Defendants each acknowledge that they may hereafter discover facts different from or in addition to those now known or believed to be true regarding the subject matter of the Agreement, but:

- (a) agree that this Agreement shall remain in full force and effect notwithstanding the existence or discovery of any such new or different facts; and
- (b) hereby waive all rights to which they may be entitled pursuant to California Civil Code section 1542, which provides as follows:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

3.8.



3.9. Payment of compensation. Levine acknowledges and agrees that Evolution Surgical has paid to him all compensation he earned during his employment with the Company, with the exception of compensation subject to dispute which is resolved through this Agreement. Levin also acknowledges and agrees that Evolution Surgical reimbursed him for all business expenses he incurred during his employment with the exception of expenses subject to dispute which is resolved through this Agreement.

3.10. Liens and Medicare. Levine represents that no persons or entities hold or have asserted any lien rights with respect to claims he has asserted against the Defendants or money to be paid pursuant to this Agreement. Levine agrees that he is solely responsible for

paying or resolving any such liens and agrees to hold the Released Parties harmless and indemnify them against any cost or expense, including attorney fees and costs, relating to any liens that may exist. Levine also represents that he has not received benefits or treatment pursuant to Medicare or other governmental agencies or programs in connection with any damage that he contends he has experienced as a result of the conduct of the Released Parties, or any of them.



4. Settlement of PAGA claims.

4.1. Payment by Evolution Surgical. If the Court approves the Settlement, Evolution Surgical shall, within 45 days of the Effective Date, pay \$5,000.00 (five thousand dollars and no cents) to resolve the PAGA claims asserted in the Action, as follows:

4.1.1. Labor and Workforce Development Agency (LWDA). Evolution Surgical shall pay 75% of the PAGA Settlement Amount to the LWDA.

4.1.2. Aggrieved Employees. Evolution Surgical shall pay 25% of the PAGA Settlement Amount to the Aggrieved Employees collectively, and shall calculate the Aggrieved Employee Individual Payment for each individual Aggrieved Employee by dividing the number of months worked by the Aggrieved Employee during the PAGA Period by the total number of months worked by all Aggrieved Employees collectively during the PAGA Period and multiplying by \$5,000.00, as follows:

(Number of months worked by individual Aggrieved Employee during PAGA Period / Total number of months worked by all Aggrieved Employees during PAGA Period) x \$5,000.00

4.2. Release of PAGA Claims. In exchange for the payments described in this section 4, each Aggrieved Employee shall release and waive his or her right to assert the Released PAGA Claims or pursue such claims in any manner.

4.3. Motion for Court approval of Settlement to be filed by Levine. Levine's counsel shall prepare a motion seeking the Court's approval of the Settlement, and shall confer with Evolution Surgical's counsel regarding the motion and provide a draft of the motion to Evolution Surgical's counsel at least five days prior to the date on which the motion is filed.

4.4. No additional legal fees or costs. Levine and his counsel shall not seek any legal fees or costs in connection with the settlement of the PAGA claims in the Action.

■ [REDACTED]

[REDACTED]

[REDACTED]

6. Miscellaneous.

6.1. Successors and assigns. Each Party represents that it has not transferred to any person or entity any of the rights released or transferred through this Agreement. The Parties agree that this Agreement shall be binding upon their future successors and assignees, if any.

6.2. Severability. If a court of competent jurisdiction declares or determines that any provision of this Agreement is invalid, illegal or unenforceable, the invalid, illegal or unenforceable provision(s) shall be deemed not a part of the Agreement, but the remaining provisions shall continue in full force and effect. If a court declares or determines that any of the release provisions set forth in sections 3.3 above are invalid, illegal or unenforceable, however, and Levine pursues claims against the Defendants, or any of them, that are otherwise released pursuant to this Agreement, the Defendants, and each of them, shall have the option of declaring section 3.1 of this Agreement null and void and, in the event that any Defendant exercises that option, Levine shall return all consideration received by him pursuant to this Agreement to Evolution Surgical within 15 days of the date on which any Defendant informs Levine's counsel that it has declared section 3.1 of this Agreement null and void.

6.3. Further Assurances. Levine and the Defendants agree to perform such actions, and to execute such additional documents, if any, as may be necessary or appropriate to effectuate the intent of this Agreement.

6.4. Costs and fees. Except as otherwise provided herein, each Party shall bear any costs and fees it may incur in connection with this Agreement, including legal fees, and neither shall be entitled to recover such costs or fees from the other.

6.5. Governing law. The laws of the State of California shall govern the construction and enforcement of this Agreement.

6.6. Dispute resolution. In the event a dispute arises between them in the future, the Parties shall first attempt to resolve the dispute informally through a meet and confer effort. In the event that the parties fail to resolve their dispute through a meet and confer effort, they shall resolve it in the Superior Court of the County of Alameda, and each consents to mandatory personal jurisdiction and venue exclusively in these courts pursuant to, *inter alia*, California Code of Civil Procedure Section 664.6.

6.7. Entire agreement; modification. Except as otherwise provided in this Agreement, this Agreement sets forth the entire agreement between the parties and supersedes all prior agreements or understandings, both written and oral, between the parties regarding the subject matter of this Agreement. The parties may modify this Agreement only through a writing signed by each.

Date: _____
_____ Benjamin Levine

Evolution Surgical, Inc.

Date: _____ By: _____
Title: _____

Date: _____
_____ Rob Law

Date: _____
_____ Kelly Coan

PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1150 West 79th Street, Los Angeles, California, 90044. On March 14, 2023, I served a copy of the within document(s):

**DECLARATION OF JEFFREY M. CURTISS IN SUPPORT OF JOINT MOTION FOR
PAGA SETTLEMENT APPROVAL**

- ☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Los Angeles, California addressed as set forth below.
- ☐ by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
- ☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Daniel F. Pyne, III
Karishma Borkar
Hopkins & Carley, A Law Corporation
70 South First Street
San Jose, CA 95113
dpayne@hopkinscarley.com – Email
kborkar@hopkinscarley.com – Email

Attorneys for Defendants
EVOLUTION SURGICAL, INC.,
ROB LAW, KELLY COAN

California Labor & Workforce Development Agency
800 Capitol Mall, Suite 5000 (MIC-55)
Sacramento, CA 95814

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on March 14, 2023, at Los Angeles, California.


DeEtra Crudup