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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

22CV401584

FRANCISCO SILVA, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

LYTE CONSTRUCTION, LLC, a California
Limited Liability Company, and DOES 1-10,
inclusive,

Defendant.

CASE NO:

**PLAINTIFF'S CLASS ACTION AND
REPRESENTATIVE ACTION COMPLAINT
FOR:**

**(1) PAGA PENALTIES FOR DEFENDANT'S
WILLFUL MISCLASSIFICATION IN
VIOLATION OF LABOR CODE SECTIONS
226.8, 2775, AND 2698, ET SEQ.;
(2) FAILURE TO PAY OVERTIME (LABOR
CODE § 510);
(3) FAILURE TO PROVIDE COMPLETE
WAGE STATEMENTS (LABOR CODE § 226);
(4) WAITING TIME PENALTIES (LABOR
CODE §§ 201 – 203);
(5) UNLAWFUL DEDUCTIONS FROM WAGES
(LABOR CODE § 221);
(6) UCL VIOLATIONS (BUS. & PROF. CODE §§
17200-17204); AND
(7) PAGA AND OTHER PENALTIES (LABOR
CODE §§ 2698 – 2699.5)**

DEMAND FOR JURY TRIAL

1 Plaintiff Francisco Silva (“Plaintiff”), on behalf of himself, the State of California, other
2 aggrieved employees, the California General public, and all others similarly situated (hereinafter
3 “Class Members”), complains and alleges as follows:

4 **OVERVIEW OF CLAIMS**

5 1. Plaintiff brings this action on behalf of himself and all others similarly situated, as a
6 class action, as a representative action pursuant to Labor Code § 2699, *et seq.*, and on behalf of the
7 California general public and the LWDA, against Defendant Lyte Construction, LLC
8 (“Defendant”) for (1) its willful misclassification of Plaintiff and other Class Members and
9 Aggrieved Employees as independent contractors; (2) its failure to pay overtime wages; (3) its
10 failure to provide complete wage statements to its current and former employees in California
11 within the one year prior to the filing of this Complaint; (4) its failure to pay all wages due to
12 former employees based on the foregoing; (6) its unlawful deductions from wages; (6) unfair
13 business practices based on the foregoing; and (7) PAGA and other penalties based on the
14 foregoing. As a result of the foregoing, Defendant has violated California statutory laws as
15 described below.

16 2. The “Class Period” is designated as the period from four years prior to the filing of
17 this action through the trial date. The PAGA Period is one year from the sending of the PAGA
18 letter to the LWDA through the present and on-going, i.e., from April 28, 2021 to the present.
19 Defendant’s violations of California’s wage and hour laws and unfair competition laws, as
20 described more fully below, have been ongoing throughout the Class Period and the PAGA Period.

21 **VENUE**

22 3. Venue is proper in this county under section 395.5 of the California Code of Civil
23 Procedure. Many of the putative Class Members and Aggrieved Employees were employed by
24 Defendant in Santa Clara County and/or performed work for Defendant in Santa Clara County
25 during the Class Period and the PAGA Period. Defendant operates a construction company in the
26 county of Santa Clara. Many of the acts alleged herein including Defendant’s willful
27 misclassification of its construction crew, its failure to pay overtime pay, and its failure to provide
28 Labor Code compliant wage statements occurred in Santa Clara County. Moreover, the majority of

1 the business conducted by Defendant in California is located in Santa Clara county. Venue is
2 therefore proper in Santa Clara County.

3 **JURISDICTION**

4 4. Defendant is within the jurisdiction of this Court. Defendant transacts millions of
5 dollars of business by providing construction services in California. Thus, Defendant has obtained
6 the benefits of the laws of the State of California. In addition, Plaintiff asserts no claims arising
7 under federal law. Rather, Plaintiff brings causes of action based solely on, and arising from,
8 California law. The claims of the class are also based solely on California law described herein.
9 Furthermore, the total amount at issue in this case, inclusive of attorneys' fees, is less than \$5
10 million. Thus, jurisdiction is proper in Santa Clara County Superior Court.

11 **THE PARTIES**

12 5. Plaintiff is a California resident and, during the relevant time period, was
13 misclassified as an independent contractor but was actually an employee of Defendant in the
14 position of construction worker in California. From at least four years prior to the filing of this
15 complaint through the present, and on-going, Defendant's construction crew, including Plaintiff
16 during his employment, were willfully misclassified as independent contractors; were not paid
17 overtime wages; were not provided accurate and/or complete wage statements; did not receive all
18 of their wages due upon termination of employment; and had deductions taken from their wages.

19 6. Plaintiff represents the state of California and the following group of aggrieved
20 employees defined as:

21 All individuals who were classified as 1099 independent contractors for tax purposes and
22 whose wages were reported on an IRS Form 1099, instead of an IRS Form W2, and who
23 worked for Defendant in California during the PAGA Period (hereinafter referred to as
"Aggrieved Employees").

24 7. By way of this action, Plaintiff also seeks to represent the following Class
25 Members:

26 All individuals who were classified as 1099 independent contractors for tax purposes and
27 whose wages were reported on an IRS Form 1099, instead of an IRS Form W2, and who
28 worked for Defendant in California during the Class Period.

8. Defendant is a California Limited Liability Company with its principal place of business in San Jose, California. Defendant is a construction company that transacts millions of dollars of business by construction services throughout California.

9. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants sued herein as DOES 1 to 100, inclusive, are currently unknown to Plaintiff, who therefore sues Defendants by such fictitious names under Code of Civil Procedure § 474. Plaintiff is informed and believes, and based thereon alleges, that each of the Defendants designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and capacities of the Defendants designated hereinafter as DOES when such identities become known.

10. Plaintiff is informed and believes, and based thereon alleges, that each Defendant acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are legally attributable to the other Defendants. Furthermore, Defendants in all respects acted as the employer and/or joint employer of Plaintiff, the Class, and the Aggrieved Employees.

11. Despite its willful misclassification of Plaintiff, the Class, and the Aggrieved Employees, Defendant was and is the employer of Plaintiff, the Aggrieved Employees, and Class Members for all relevant time periods. In fact, Defendant employed Plaintiff, the Class, and the Aggrieved Employees as construction workers in California at various times during the Class Period. Defendant employed several hundred construction workers in California during the Class Period, who were all willingly misclassified as independent contractors.

FACTUAL ALLEGATIONS

12. Defendant operates and, at all times during the Class Period and PAGA Period, has done and does business in California providing construction services in California. Defendant, in the course of operating its business in California during the Class Period, employed Plaintiff, the Class, and the Aggrieved Employees, even though they were misclassified and classified incorrectly as independent contractors.

13. During the Class Period, Plaintiff, like the other members of the Class and

1 Aggrieved Employees, typically worked at least eight hours per day and five days per week. Class
2 Members' and Aggrieved Employees' job duties included construction services.

3 14. Since at least four years prior to the filing of this action, including during the PAGA
4 Period, Defendant has maintained policies and practices based on or including the willful
5 misclassification of the Plaintiff, the Class, and Aggrieved Employees as independent contractors.
6 Under applicable standards of law, Plaintiff, the Class, and Aggrieved Employees are, or were
7 during their employment by Defendant, employees and not independent contractors.

8 15. The California Supreme Court in *Dynamex Operations West, Inc., v. Superior*
9 *Court*, 4 Cal. 5th 903, 956-57 (Cal. 2018) set forth the standard for determining whether an
10 individual performing work is an independent contractor or an employee, as follows:

11 We find merit in the concerns noted above regarding the disadvantages, particularly in
12 the wage and hour context, inherent in relying upon a multifactor, all the circumstances
13 standard for distinguishing between employees and independent contractors. As a
14 consequence, we conclude it is appropriate, and most consistent with the history and
15 purpose of the suffer or permit to work standard in California's wage orders, to interpret
16 that standard as: (1) placing the burden on the hiring entity to establish that the worker
17 is an independent contractor who was not intended to be included within the wage
18 order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to
19 establish *each* of the three factors embodied in the ABC test — namely (A) that the
20 worker is free from the control and direction of the hiring entity in connection with the
21 performance of the work, both under the contract for the performance of the work and
22 in fact; *and* (B) that the worker performs work that is outside the usual course of the
23 hiring entity's business; *and* (C) that the worker is customarily engaged in an
24 independently established trade, occupation, or business of the same nature as the work
25 performed. (citations omitted).

26 16. This standard – set forth by the California Supreme Court – is commonly referred to
27 as the “ABC test,” and was codified by California Assembly Bill 5 (2019). *See* Cal. Labor Code §
28 2750.3(a) (codifying the ABC test set forth by the California Supreme Court in *Dynamex*). Under
the ABC Test, Defendant has the burden of establishing that Plaintiff, the Class, and Aggrieved
Employees were independent contractors and not intended to be included within the wage order's
coverage. Recently, the *Dynamex* decision was held to be retroactive. *See Vasquez v. Jan-Pro*
Franchising International Inc., 2021 wc 127201 (Cal. Jan 14, 2021). Further, Defendant must
establish that Plaintiff, the Class, and Aggrieved Employees meet all three factors of the ABC
Test, which Defendant cannot meet.

1 17. At all times, Defendant retained and retains the right to control the method and
2 manner of how Plaintiff, the Class, and Aggrieved Employees perform their job duties and retained
3 and retains all necessary control over Plaintiff, the Class, and the Aggrieved Employees during
4 their employment. Among other things, Plaintiff, the Class, and Aggrieved Employees were not
5 hired as subcontractors and could be sent home by supervisors if there wasn't enough work. Under
6 applicable standards of law, Plaintiff, the Class, and aggrieved employees are, or were during their
7 employment by Defendant, employees and were and are not independent contractors.

8 18. In sum, Defendant retained and retains the right to control the method and manner
9 of how Plaintiff, the Class, and Aggrieved Employees performed his and their job duties and
10 retained and retains all necessary control over Plaintiff, the Class, and the Aggrieved Employees
11 during his and their employment. Among other things, Plaintiff, the Class, and Aggrieved
12 Employees are required to follow detailed requirements imposed on them by Defendant. As a
13 result, Plaintiff, the Class, and Aggrieved Employees were and are employees of Defendant. *See,*
14 *e.g., Labor Code sections 2775 and 226.8.*

15 19. Further, Defendant cannot establish that Plaintiff, the Class, and the Aggrieved
16 Employees perform work outside the Defendant's normal course of business. To the contrary,
17 Plaintiff, the Class, and the Aggrieved Employees were performing work completely within
18 Defendant's normal course of business, since Defendant is in the construction industry, Plaintiff,
19 the Class, and the Aggrieved Employees performed construction jobs for Defendant

20 20. Lastly, Defendant's construction crew, including Plaintiff, the Class, and the
21 Aggrieved Employees, are not and were not customarily considered part of an independently
22 established business. Indeed, many, if not all, of the Class Members and Aggrieved Employees
23 worked full-time for Defendant and did not work for any other construction companies. Moreover,
24 few, if any of the Class Members and Aggrieved Employees held themselves out to the world as
25 operating independent construction companies

26 21. As a result, under applicable law, Plaintiff, the Class, and Aggrieved Employees
27 were employees of Defendant and they were willfully misclassified with their pay reported on an
28 IRS Form 1099 basis. *See Labor Code section 226.8 and 2775; see also Dynamex Operations*

1 *West, Inc., v. Superior Court*, 4 Cal. 5th 903, 956-57 (Cal. 2018); *Ayala v. Antelope Valley*
2 *Newspapers, Inc.* 59 Cal.App.4th 522 (2014); *Ruiz v. Affinity Logistics, Corp.*, 754 F. Supp. 3d
3 1093 (9th Cir. 2014) (employer's right to control detail of employees' work supports finding of
4 employer-employee relationship); *Alexander v. FedEx Ground Package System, Inc.* 765 F. Supp.
5 3d 381 (9th Cir. 2014) (independent contractors were deemed employees as a matter of law where
6 Defendant controlled times employees worked and controlled aspects of employees' work). *See*
7 *also Villapando v. Excel Direct, Inc.*, 2015 WL 15179486 (N.D. Cal. 2015) (granting summary
8 judgment to Plaintiff on Defendant's defense that the employees at issue were independent
9 contractors).

10 22. Because Defendant cannot meet any part of the ABC test, as codified in Labor Code
11 section 2775, it is clear that Defendant intentionally and willfully misclassified Plaintiff, the Class,
12 and PAGA Aggrieved Employees as independent contractors in violation of Labor Code §
13 226.8(a). Moreover, the willful misclassification of Plaintiff, the Class, and PAGA Aggrieved
14 Employees was part of a pattern or practice of Defendant willfully misclassifying their
15 construction crew. Accordingly, the stepped-up penalties in Section 226.8 should be recoverable
16 here.

17 23. Labor Code § 510 requires an employer to compensate an employee who works
18 more than eight (8) hours in one workday, forty (40) hours in a workweek, and for the first eight
19 (8) hours worked on the seventh consecutive day no less than one and one-half times the regular
20 rate of pay for an employee. In accordance with Labor Code § 1194, Plaintiff, the Class, and the
21 Aggrieved Employees could not then agree to work for a lesser wage than the amount proscribed
22 by Labor Code §§ 510 and 1194.

23 24. On a regular basis, Plaintiff, the Class, and the Aggrieved Employees worked more
24 than 8 hours in a day and more than 40 hours in a week; however, Defendant failed to pay
25 overtime wages altogether. Therefore, Defendant violated Labor Code § 510 and Section 3(A) of
26 the applicable IWC Wage Order by failing to pay overtime.

27 25. Furthermore, by virtue of the misclassification, Defendant did not and does not
28 issue adequate wage statements to Plaintiff, the Class, and the Aggrieved Employees, under Labor

1 Code Sections 226(a).

2 26. Defendant knowingly and intentionally failed to pay Plaintiff, the Class, and
3 Aggrieved Employees with wage statements that include the total hours worked by the employee,
4 the inclusive dates of the period for which the employee is paid, the address of the legal entity that
5 is the employer, and the applicable hourly rates in effect during the pay period and the
6 corresponding number of hours worked at each hourly rate by the employee. Additionally, due to
7 Defendant's failure to pay overtime wages to Plaintiff, the Class, and Aggrieved Employees, the
8 wage statements issued failed to include gross wages earned and net wages earned.

9 27. Defendant's violation of Labor Code § 226 was knowing and intentional. *See*
10 *Garnett v. ADT LLC* 139 F. Supp. 3d 1121, 1131 (E.D. Cal. Oct. 6, 2015) (finding that the
11 defendant knowingly and intentionally violated Labor Code § 226 because the "[d]efendant knew
12 that it was not providing total hours worked to plaintiff or other employees paid on commission"
13 even though it believed that employees paid solely on commission or commission and salary "are
14 exempt and therefore we do not record hours on a wage statement").

15 28. Moreover, Plaintiff, the Class, and all Aggrieved Employees also suffered legal
16 "injury" for purposes of Labor Code Section 226(e) insofar as they were unable to readily and
17 easily determine the information required to be set forth by Section 226(a). Specifically, Plaintiff,
18 the Class, and the Aggrieved Employees were unable to determine their actual and accurate total
19 hours worked, their gross wages earned, their net wages earned, since Defendant failed to pay all
20 overtime wages owed.

21 29. Plaintiff and the Aggrieved Employees will prevail on their claim for PAGA
22 penalties under Labor Code § 226(a). *See Lopez v. Friant & Assoc. LLC*, 15 Cal. App.5th 773, 788
23 (2017) (a plaintiff seeking PAGA penalties for a violation of Labor Code section 226(a) does not
24 have to show injury or a knowing and intentional violation); *Willner v. Manpower Inc.* 35 F. Supp.
25 3d 1116, 1136 (N.D. Cal. 2014) (To obtain judgment on a PAGA claim, "all [plaintiff] needs to
26 establish is a violation of section 226(a), which she has done, as discussed above."); *McKenzie v.*
27 *Fed. Exp. Corp.* 765 F.Supp.2d 1222, 1232 (C.D. Cal. 2011) (holding that "for the purposes of
28 recovering PAGA penalties, one need only prove a violation of Section 226(a), and need not

1 establish a Section 226(e) injury.”); *Aguirre v. Genesis Logistics*, 2013 U.S. Dist. LEXIS 189815,
2 at *28 (C.D. Cal. July 3, 2013) (“Plaintiffs do not need to establish a Cal. Lab. Code § 226(e)
3 injury to recover penalties under § 2699(f) of PAGA.”).

4 30. Labor Code § 201(a) provides in pertinent part: “If an employer discharges an
5 employee, the wages earned and unpaid at the time of discharge are due and payable
6 immediately.” Labor Code § 202(a) states in pertinent part “If an employee not having a written
7 contract for a definite period quits his or her employment, his or her wages shall become due and
8 payable not later than 72 hours thereafter, unless the employee has given 72 hours’ previous notice
9 of his or her intention to quit, in which case the employee is entitled to his or her wages at the time
10 of quitting.” Labor Code § 203(a) states “If an employer willfully fails to pay, without abatement
11 or reduction, in accordance with Sections 201, 201.3, 201.5, 201.9, 202, and 205.5, any wages of
12 an employee who is discharged or who quits, the wages of the employee shall continue as a
13 penalty from the due date thereof at the same rate until paid or until an action therefor is
14 commenced; but the wages shall not continue for more than 30 days.”

15 31. Due to Defendant’s faulty policies described above, Plaintiff, the Class, and all
16 Aggrieved Employees whose employment with Defendant concluded were not compensated for
17 each and every overtime hour worked. Additionally, Defendant has failed to pay all Class
18 Members and Aggrieved Employees for all overtime hours worked, whose sums were certain, at
19 the time of termination or within seventy-two (72) hours of their resignation and have failed to pay
20 those sums for thirty (30) days thereafter.

21 32. Labor Code § 221 prohibits employees from collecting or receiving from an
22 employee any part of wages therefore paid by said employer to said employee.

23 33. Here, Defendant charged the cost of construction materials for its construction jobs
24 to Plaintiff, the Class, and the Aggrieved Employees and deducted the costs of construction
25 materials from their wages in violation of Labor Code § 221.

26 34. The administrative prerequisites of PAGA were satisfied after 65 days elapsed from
27 April 28, 2022 (i.e., 65 days since Plaintiff’s mailing of the PAGA notice with no further
28 communication from the LWDA to Plaintiff’s counsel). Plaintiff has paid the \$75.00 fee and has

1 otherwise satisfied the administrative prerequisites of PAGA, as amended.

2 35. Plaintiff by this action seeks to recover, on behalf of himself and all other current
3 and former Aggrieved Employees of Defendant, the civil penalties provided by PAGA, as
4 specified in Labor Code § 2699(f). Plaintiff seeks to recover the PAGA civil penalties through a
5 representative action as permitted by PAGA and the California Supreme Court in *Arias v. Superior*
6 *Court*, 46 Cal. 4th 969 (2009). Class certification of the PAGA claims is not required.

7 **CLASS ACTION ALLEGATIONS**

8 36. Plaintiff brings this action, on behalf of himself and all others similarly situated, as
9 a class action pursuant to Code of Civil Procedure § 382. Plaintiff seeks to represent a Class
10 composed of and defined as: All individuals who were classified as 1099 independent contractors
11 for tax purposes and whose wages were reported on an IRS Form 1099, instead of an IRS Form
12 W2, and who worked for Defendant in California during the Class Period (hereinafter “Class
13 Members”). All such Class Members were subject to Defendant’s unlawful misclassification, and,
14 as a result, were not paid overtime.

15 37. This action has been brought and may properly be maintained as a class action
16 under Code of Civil Procedure § 382 because there is a well-defined community of interest in the
17 litigation, the proposed class is easily ascertainable, and Plaintiff is a proper representative of the
18 Class:

19 a. Numerosity: The potential members of the Class as defined are so
20 numerous that joinder of all the members of the Class is impracticable. While the precise number
21 of Class Members has not been determined at this time, Plaintiff is informed and believes that
22 Defendant has employed several hundred Class Members as construction workers in California
23 who were subject to Defendant’s unlawful misclassification. The Class Members are dispersed
24 throughout California. Joinder of all members of the proposed classes is therefore not practicable.

25 b. Commonality: There are questions of law and fact common to Plaintiff and
26 the Class that predominate over any questions affecting only individual members of the Class.
27 These common questions of law and fact include, without limitation:

28 i. Whether Defendant violated Sections 226.8 and 2775 of the Labor Code by

1 willfully misclassifying Plaintiff and Class Members as independent contractors, and whether
2 Defendant engaged in a pattern and practice of such wrongful misclassification;

3 ii. Whether Defendant violated Section 510 of the Labor Code by failing to pay
4 overtime to Plaintiff and the Class during the Class Period;

5 iii. Whether Defendant failed to provide Plaintiff and the members of the Class
6 complete wage statements in violation of Labor Code Section 226(a);

7 iv. Whether Defendant violated Section 201-203 of the Labor Code by failing
8 to pay all wages owed to former employees upon separation of employment during the Class
9 Period;

10 v. Whether Defendant violated section 221 of the Labor Code by taking
11 unlawful deductions from wages during the Class Period;

12 vi. Whether Plaintiff and the Class are entitled to restitution under Business and
13 Professions Code § 17200;

14 vii. The proper formula(s) for calculating damages, interest, and restitution
15 owed to Plaintiff and the Class Members;

16 viii. The nature and extent of class-wide damages.

17 c. Typicality: Plaintiff's claims are typical of the claims of the Class. Both
18 Plaintiff and Class Members sustained injuries and damages, and were deprived of property rightly
19 belonging to them, arising out of and caused by Defendant's common course of conduct in
20 violation of law as alleged herein, in similar ways and for the same types of unpaid wages.

21 d. Adequacy of Representation: Plaintiff is a member of the Class and will
22 fairly and adequately represent and protect the interests of the Class and Class Members.
23 Plaintiff's interests do not conflict with those of Class and Class Members. Counsel who represent
24 Plaintiff are competent and experienced in litigating large wage and hour class actions, including
25 numerous cases virtually identical to this one (i.e., misclassification cases), and other employment
26 class actions, and will devote sufficient time and resources to the case and otherwise adequately
27 represent the Class and Class Members.

28 e. Superiority of Class Action: A class action is superior to other available

1 means for the fair and efficient adjudication of this controversy. Individual joinder of all Class
2 Members is not practicable, and questions of law and fact common to the Class predominate over
3 any questions affecting only individual members of the Class. Each Class Member has been
4 damaged or may be damaged in the future by reason of Defendant's unlawful policies and/or
5 practices. Certification of this case as a class action will allow those similarly situated persons to
6 litigate their claims in the manner that is most efficient and economical for the parties and the
7 judicial system. Certifying this case as a class action is superior because it allows for efficient and
8 full disgorgement of the ill-gotten gains Defendant has enjoyed by maintaining its unlawful
9 misclassification and compensation policies, and will thereby effectuate California's strong public
10 policy of protecting employees from deprivation or offsetting of compensation earned in their
11 employment. If this action is not certified as a Class Action, it will be impossible as a practical
12 matter, for many or most Class Members to bring individual actions to recover monies unlawfully
13 withheld from their lawful compensation due from Defendant's, due to the relatively small
14 amounts of such individual recoveries relative to the costs and burdens of litigation.

15 **FIRST CAUSE OF ACTION**
16 **PAGA PENALTIES FOR WILLFUL MISCLASSIFICATION OF ALL OF**
17 **DEFENDANT'S CONSTRUCTION WORKERS**
18 **[Cal. Labor Code §§ 2698 *et seq.* 2775 and 226.8(a)(1) and 226.8(b) or 226.8(c)]**
19 **On behalf of Plaintiff, the LWDA and the PAGA Aggrieved Employees**

20 38. Plaintiff re-alleges and incorporates by reference each and every allegation set forth
21 in the preceding paragraphs.

22 39. Plaintiff and similarly situated employees are "Aggrieved Employees" under the
23 PAGA as they were employed by Defendant during the applicable statutory period and suffered
24 the Labor Code violation alleged herein. At all times relevant hereto, Plaintiff and Aggrieved
25 Employees were employees for purposes of the California Labor Code, although they were
26 willfully misclassified as independent contractors.

27 40. In violation of the Labor Code provisions cited herein and in willful violation of
28 California law and public policy, Defendant intentionally misclassified Plaintiff and Aggrieved
Employees as independent contractors in violation of Labor Code § 226.8(a). This was part of a

1 pattern as practice of willful misclassification of all, or virtually all, of Defendant's construction
2 workers thereby triggering heightened penalties under sections 226.8(b) and (c).

3 41. The administrative prerequisites of PAGA will be satisfied after 66 days have
4 elapsed from April 28, 2022 (i.e., 65 days since Plaintiff's mailing of the PAGA notice with no
5 further communication from the LWDA to Plaintiff's counsel). The actionable period is one year
6 prior to the sending of the LWDA letter through the present. Plaintiff has paid the \$75.00 fee and
7 has otherwise satisfied the administrative prerequisites of PAGA, as amended.

8 42. Plaintiff by this action seeks to recover, on behalf of himself and all other current
9 and former Aggrieved Employees of Defendant, the civil penalties provided by PAGA, as
10 specified in Labor Code § 2699(f). Plaintiff seeks to recover the PAGA civil penalties through a
11 representative action as permitted by PAGA and the California Supreme Court in *Arias v. Superior*
12 *Court*, 46 Cal. 4th 969(2009). Therefore, class certification of the PAGA claims is not required.

13 **SECOND CAUSE OF ACTION**
14 **FAILURE TO PAY OVERTIME WAGES**
15 **[Cal. Labor Code § 510]**
On behalf of Plaintiff and the Class

16 43. Plaintiff re-alleges and incorporates by reference each and every allegation set forth
17 in the preceding paragraphs.

18 44. The actionable period for this cause of action is three years prior to the filing of the
19 Complaint through the present, and on-going until the violations are corrected, or the Class is
20 certified.

21 45. Labor Code § 510 provides that any work in excess of eight hours on any day, as
22 well as all hours worked on the seventh consecutive day of a workweek, shall be compensated at
23 the rate of no less than 1.5 times the regular rate of pay. See also Section 3(A) of IWC Wage Order
24 No. 16.

25 46. Here, On a regular basis, Plaintiff and the Class worked more than 8 hours in a day
26 and more than 40 hours in a week; however, Defendant failed to pay overtime wages altogether.
27 Therefore, Defendant violated Labor Code § 510 and Section 3(A) of the applicable IWC Wage
28 Order by failing to pay overtime.

THIRD CAUSE OF ACTION
FAILURE TO PROVIDE COMPLIANT WAGE STATEMENTS
[Cal. Labor Code § 226(a)]
On behalf of Plaintiff and the Wage Statement and Penalty Subclass

47. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

48. The actionable period for this cause of action is one year prior to the filing of this Complaint through the present, and on-going until the violations are corrected, or the subclass is certified.

49. Section 226(a) of the California Labor Code provides, in relevant part:

Every employer shall...furnish each of his or her employees...an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all -deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee...

50. As set forth above, through the Class Period, due to misclassification, Defendant failed to issue wage statements to its construction workers in California, including Plaintiff, that complied with Labor Code Section 226(a).

51. Defendant's violation of Labor Code § 226 was knowing and intentional. *See Garnett v. ADT LLC* 139 F. Supp. 3d 1121, 1131 (E.D. Cal. Oct. 6, 2015) (finding that the defendant knowingly and intentionally violated Labor Code § 226 because the "[d]efendant knew that it was not providing total hours worked to plaintiff or other employees paid on commission" even though it believed that employees paid solely on commission or commission and salary "are exempt and therefore we do not record hours on a wage statement") and/or the passage of Section 226.2.

1 52. As a result of Defendant's failure to issue itemized wage statements to Plaintiff and
2 members of the wage statement and penalty subclass (i.e., those members of the class who were
3 employed by Defendant during the actionable period for this cause of action) in violation of
4 section 226(a) of the California Labor Code, Plaintiff and the Class are each entitled to recover an
5 initial penalty of \$50, and subsequent penalties of \$100, up to an amount not exceeding an
6 aggregate penalty of \$4,000 per Plaintiff and per every member of the Class from Defendant
7 pursuant to section 226(e) of the Labor Code, costs and reasonable attorneys' fees.

8 **FOURTH CAUSE OF ACTION**
9 **WAITING TIME PENALTIES FOR**
10 **FAILURE TO PAY WAGES DUE ON TERMINATION**
 [Cal. Labor Code §§ 201-203]
11 **On Behalf of Plaintiff and the Waiting Time Penalty Subclass**

12 53. Plaintiff re-alleges and incorporates by reference each and every allegation set forth
13 in the preceding paragraphs.

14 54. The actionable period for this cause of action is three years prior to the filing of the
15 Complaint through the present, and on-going until the violations are corrected, or the subclass is
16 certified.

17 55. Sections 201 and 202 of the California Labor Code require Defendant to pay all
18 compensation due and owing to former construction workers in the Class during the actionable
19 period for this cause of action, at or around the time that their employment is terminated.

20 56. Section 203 of the California Labor Code provides that if an employer willfully
21 fails to pay compensation promptly upon discharge or resignation, as required by Sections 201 and
22 202, then the employer is liable for penalties in the form of continued compensation up to thirty
23 (30) workdays.

24 57. By virtue of its willful misclassification, Defendant willfully failed to pay Plaintiff
25 and other members of the waiting time penalty Subclass (i.e., those members of the Class whose
26 employment with Defendant ended the actionable period for this cause of action) who are no
27 longer employed by Defendant overtime wages as required by California Labor Code §§ 201 and
28 202.

1 58. As a result, Defendant is liable to Plaintiff and other members of the waiting time
2 penalty subclass who are no longer employed by Defendant for waiting time penalties amounting
3 to thirty (30) days wages for Plaintiff and each such subclass member pursuant to California Labor
4 Code § 203. See, e.g., DLSE Manual, 4.3.4 (Failure to pay any sort of wages due upon termination
5 entitles an employee to recover waiting time penalties).

6 **FIFTH CAUSE OF ACTION**
7 **DEFENDANT’S UNLAWFUL DEDUCTION FROM WAGES**
8 **[Cal. Labor Code § 221]**
9 **On behalf of Plaintiff and the Class**

10 59. Plaintiff re-alleges and incorporates by reference each and every allegation set forth
11 in the preceding paragraphs.

12 60. Labor Code § 221 prohibits employees from collecting or receiving from an
13 employee any part of wages therefore paid by said employer to said employee.

14 61. Here, Defendant charged the cost of construction materials for its construction jobs
15 to Plaintiff and the Class and deducted the costs of construction materials from their wages in
16 violation of Labor Code § 221.

17 **SIXTH CAUSE OF ACTION**
18 **UNFAIR COMPETITION LAW VIOLATIONS**
19 **(BUS. & PROF. CODE § 17200, ET SEQ.)**
20 **On Behalf of Plaintiff and the Class**

21 62. Plaintiff re-alleges and incorporates by reference each and every allegation set forth
22 in the preceding paragraphs.

23 63. Section 17200 of the California Business & Professions Code prohibits any
24 unlawful, unfair, or fraudulent business practices. Business & Professions Code § 17204 allows
25 “any person who has suffered injury in fact and has lost money or property” to prosecute a civil
26 action for violation of the UCL. Such a person may bring such an action on behalf of himself and
27 others similarly situated who are affected by the unlawful, unfair, or fraudulent business practice.

28 64. Under section 17208 of the California Business and Professions Code, the statute of
limitations for a claim under Section 17200 is four years. Accordingly, the actionable period for
this cause of action is four years prior to the filing of this Complaint through the present, and on-

1 going until the violations are corrected, or the Class is certified.

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

7 66. As a direct and proximate result of Defendant's unlawful business practices,
8 Plaintiff and the Class Members have suffered economic injuries. Defendant has profited from its
9 unlawful, unfair, and/or fraudulent acts and practices.

10 67. Plaintiff and similarly situated Class Members are entitled to monetary relief
11 pursuant to Business & Professions Code §§ 17203 and 17208 for all unpaid overtime from at least
12 four years prior to the filing of this complaint through to the date of such restitution, at rates
13 specified by law. Defendant should be required to disgorge all the profits and gains it has reaped
14 and restore such profits and gains to Plaintiff and Class Members, from whom they were
15 unlawfully taken.

16 68. Through its actions alleged herein, Defendant has engaged in unfair competition
17 within the meaning of section 17200 of the California Business & Professions Code, because
18 Defendant's conduct, as herein alleged has damaged Plaintiff and the Class Members by
19 wrongfully denying them overtime, and therefore was substantially injurious to Plaintiff and the
20 Class Members.

21 69. Defendant's course of conduct, act, and practice in violation of the California laws
22 mentioned above constitute independent violations of sections 17200 et seq. of the California
23 Business and Professions Code.

24 70. Plaintiff and similarly situated Class Members are entitled to enforce all applicable
25 penalty provisions of the Labor Code pursuant to Business & Professions Code § 17202.

26 71. Plaintiff has assumed the responsibility of enforcement of the laws and public
27 policies specified herein by suing on behalf of themselves and other similarly situated Class
28 Members previously or presently employed by Defendant in California. Plaintiff's success in this

1 action will enforce important rights affecting the public interest. Plaintiff will incur a financial
2 burden in pursuing this action in the public interest. Therefore, an award of reasonable attorneys'
3 fees to Plaintiff is appropriate pursuant to Code of Civil Procedure §1021.5.

4 **SEVENTH CAUSE OF ACTION**
5 **LABOR CODE PRIVATE ATTORNEY GENERAL ACT**
6 **PAGA PENALTIES FOR LABOR CODE VIOLATIONS OTHER THAN**
7 **MISCLASSIFICATION**
8 **(Labor Code §§ 2698-2699.5)**
9 **On Behalf of Plaintiff and the PAGA Aggrieved Employees and LWDA**

10 72. Plaintiff re-alleges and incorporates by reference each and every allegation set forth
11 in the preceding paragraphs.

12 73. Plaintiff and those members of the class who were employed by Defendant within
13 the last year are, “aggrieved employees” under PAGA as they were employed by Defendant during
14 the applicable statutory period and suffered the Labor Code violations alleged herein; specifically,
15 violations of §§ 201, 202, 203, 221, 226, and 510 of the Labor Code. Plaintiff was employed by
16 Defendant during the one year preceding the submission of a PAGA letter to the LDWA on or
17 around April 28, 2022. As such, he seeks to recover, on behalf of himself and all other current and
18 former aggrieved employees of Defendant, the civil penalties provided by PAGA.

19 74. Under Labor Code §§ 2699(f)(2) and 2699.5, for each such violation, Plaintiff and
20 all other aggrieved employees are entitled to penalties in an amount to be shown at the time of trial
21 subject to the following formula:

22 \$100 for the initial violation per employee per pay period; and

23 \$200 for each subsequent violation per employee per pay period.

24 These penalties will be allocated 75% to the Labor Workforce Development Agency and 25% to
25 the affected employees.

26 75. The aggrieved employees are all individuals who hold or held the title of
27 construction worker or in any other similar capacity, and who are or have been classified as
28 independent contractors by Defendant in California during the PAGA Period. These employees
were subject to the aforementioned Labor Code violations, during the period of time from one year
prior to the submission of Plaintiff’s letter to the LDWA on April 28, 2022 through the present

1 (i.e., from April 28, 2021 to now) and on-going.

2 76. Further, Plaintiff, as an Aggrieved Employee, need not demonstrate or prove that
3 Defendant's conduct in refusing to provide accurate and itemized wage statements was knowing,
4 intentional, or willful. *Lopez v. Friant & Assocs., LLC*, cited above; *see also Willner v. Manpower*
5 *Inc.* 35 F. Supp. 3d 1116, 1136 (N.D. Cal. 2014) (To obtain judgment on a PAGA claim, "all
6 [plaintiff] needs to establish is a violation of section 226(a), which she has done, as discussed
7 above."); *McKenzie v. Fed. Exp. Corp.* 765 F.Supp.2d 1222, 1232 (C.D. Cal. 2011) (holding that
8 "for the purposes of recovering PAGA penalties, one need only prove a violation of Section
9 226(a), and need not establish a Section 226(e) injury."); *Aguirre v. Genesis Logistics*, 2013 U.S.
10 Dist. LEXIS 189815, at *28 (C.D. Cal. July 3, 2013) ("Plaintiff do not need to establish a Cal. Lab.
11 Code § 226(e) injury to recover penalties under § 2699(f) of PAGA.").

12 77. Plaintiff seeks to recover the PAGA civil penalties through a representative action
13 as permitted by PAGA and the California Supreme Court in *Arias v. Superior Court* (2009), 46
14 Cal.4th 969. Therefore, class certification hereby of the PAGA claims is not required, but Plaintiff
15 may choose to seek certification of the PAGA claims.

16 78. Pursuant to Labor Code § 2699.3 (a), on April 28, 2022, Plaintiff gave written
17 notice by certified mail to Defendant, and to the Labor and Workforce Development Agency
18 ("LWDA") of his claims, including the facts and theories supporting all claims outlined in this
19 Complaint. Accordingly, Plaintiff fulfilled all administrative prerequisites to the pursuit of his
20 PAGA claim on behalf of himself and all other current and former aggrieved employees of
21 Defendant after 65 days have elapsed from April 28, 2022.

22 JURY DEMAND

23 79. Plaintiff hereby demands trial by jury of his and the Class's claims against
24 Defendant, except for his PAGA and UCL claims which are properly tried to the Court.

25 PRAYER FOR RELIEF

26 Wherefore, Plaintiff, on behalf of himself and the members of the Class, prays for
27 judgment against Defendant as follows:

- 28 1. An Order that this action may proceed and be maintained as a class action;

1 2. On the First Cause of Action:

2 a. That the Court find that Defendant violated California Labor Code §§
3 226.8(a)(1) by willfully misclassifying Plaintiff and Aggrieved Employees as independent
4 contractors.

5 b. That Plaintiff and other Aggrieved Employees be awarded penalties, at a
6 minimum, as specified in Labor Code §226.8(b).

7 c. That the Court find, additionally, the Defendant engaged in a pattern or
8 practice of willful misclassification of Plaintiff and the Aggrieved Employees.

9 d. That Plaintiff and other Aggrieved Employees be awarded penalties, upon a
10 finding of a pattern or practice, as specified in Labor Code § 226.8(c) in lieu of the
11 penalties in 226.8(b).

12 e. That the Court award attorneys' fees and costs pursuant to Labor Code §
13 2699(g)(1).

14 3. On the Second Cause of Action:

15 a. A Declaratory judgment that Defendant has violated California Labor Code
16 § 510;

17 b. An award to Plaintiff and the other members of the Class in the amount of
18 their unpaid overtime compensation for worked performed, plus interest and/or liquidated
19 damages during the Class Period;

20 4. On the Third Cause of Action:

21 a. A declaratory judgment that Defendant violated California Labor Code §226
22 by issuing inaccurate and/or incomplete wage statements that failed to include total hours
23 worked and all applicable hourly rates in effect during the pay period and the
24 corresponding number of hours worked at each hourly rate to Plaintiff and the wage
25 statement and penalty subclass members;

26 b. An award to Plaintiff and Class Members of \$50 for each initial pay period
27 in which a violation of Section 226 occurred and \$100 for each subsequent pay period in
28 which a violation of Section 226 occurred, not to exceed \$4,000 for each member of the

Class, as well as an award of costs and reasonable attorney's fees, pursuant to Labor Code § 226(e).

5. On the Fourth Cause of Action:

a. A declaratory judgment that Defendant violated California Labor Code §§201 through 203;

b. Pursuant to Cal. Labor Code §§ 201 through 203, an award to Plaintiff and the waiting time penalty subclass members for waiting time penalties in the amount of 30 days' wages per waiting time penalty subclass Class Member.

6. On the Fifth Cause of Action:

a. A declaratory judgment that Defendant violated California Labor Code § 221;

7. On the Sixth Cause of Action:

a. That the Court find and declare that Defendant has violated the UCL and committed unfair and unlawful business practices by misclassifying Plaintiff and Class Members, by failing to pay overtime;

b. Restitution, including, but not limited to, the relief permitted by sections 510 of the California Labor Code (i.e., pay as specified for overtime to Plaintiff and the members of the Class during the Class Period);

8. On the Seventh Cause of Action:

a. A civil penalty against Defendant in the amount of \$100 for the initial violation and \$200 for each subsequent violation as specified in section 2699(f)(2) of the California Labor Code for Plaintiff and for member of the Wage Statement and PAGA Penalty Subclass during all of the pay periods in the one year preceding the filing of this Complaint through the present and on-going until the violations are corrected, or this subclass is certified;

b. An award of reasonable attorney's fees against Defendant as specified in Labor Code § 2699(g)(1), for all the work performed by the undersigned counsel in connection with the PAGA claims;

1 c. An award of all costs incurred by the undersigned counsel for Plaintiff in
2 connection with Plaintiff's and Class Members' PAGA claim against Defendant, as
3 provided for in Labor Code § 2699(g)(1); and

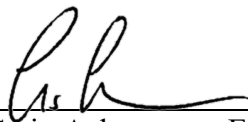
4 9. All other relief as this Court deems proper.

5
6 Dated: August 1, 2022

Respectfully,

7 **ACKERMANN & TILAJEF, P.C.**

8
9
10 By: _____



Craig Ackermann, Esq.

*Attorney for Plaintiff, the Class, the LWDA, and
the Aggrieved Employees*