

June 28, 2024

Department of Industrial Relations Accounting Unit, PAGA Administrator
455 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102
Filed online via <https://dir.govfa.net/310>

Frank Berry Designs, Inc.

Agent of Service of Process Frank M. Berry
3197 Airport Loop Drive, Building E
Costa Mesa, CA 92626

Delivered via Certified Mail: _____

Frank M. Berry, III (in his individual capacity)


Costa Mesa, CA 92627

Delivered via Certified Mail: _____

DOES 1-10

RE: McCall Henke v. Frank Berry Designs, Inc., et. al.

AMENDED PRIVATE ATTORNEYS GENERAL ACT (PAGA) NOTICE¹ FOR LWDA-CM-988861-23

California's Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code §§ 2698-2699.8) authorizes aggrieved employees who worked in/from California to file a lawsuit to pursue civil penalties on behalf of themselves, other employees, and the State of California's Labor and Workforce Development Agency ("LWDA") or any of its departments, divisions, commissions, boards, agencies, or employees for an array of Labor Code violations committed by the aggrieved employees' former or current employer. This document is McCall Henke's ("HENKE") PAGA Notice against the following Defendants: (1) Frank Berry Designs, Inc. ("FBD"); (2) Frank M. Berry, III ("BERRY"); and DOES 1-10 who are FBD **owners, directors, officers, members, and/or managing agents** who exercise control over the nature and structure of or economic control over the employment relationship, or whose action(s) violate or caused to be violated Labor Code sections 203, 226, 226.7, 500 to 558.1, 1193.6, 1194, or 2802, and/or any provision regulating minimum wages or hours and days of work in the applicable Industrial Welfare Commission (IWC) Order. All entities and individuals are collectively hereinafter referred to as "DEFENDANTS".

Pursuant to California Lab. Code §§ 2699.3(a)(1)(A), 2699.3(b)(1), and 2699.3(c)(1)(C), HENKE hereby gives notice to DEFENDANTS of the specific provisions of California's Labor Code that DEFENDANTS violated and committed against applicable aggrieved employees. This Amended PAGA Notice also includes the facts and theories to support the alleged violations. Under Lab. Code § 22, "violation" includes a failure to comply with any requirement of the Labor Code. The penalties available under PAGA are those provided in the underlying Labor Code provision that is violated or, if no penalty is listed, those provided by PAGA itself. Where the violated Labor Code section *does not* provide for a specified penalty, PAGA establishes a civil penalty of \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation. Due to wage and hour internal complaints by Adrienne Melchiorre in September of 2022 and/or Kelli Homeyer, HENKE seeks subsequent PAGA violation penalties if/when applicable. Where the violated Labor Code section *does not* provide for a penalty, PAGA establishes a civil penalty of \$200 for each aggrieved employee per pay period due to Defendants' subsequent PAGA violation(s).

¹ HENKE reserves the right to amend this PAGA notice.

I. Employer And Its Employees Can Be Held Personally Liable For Certain Wage And Hour Violations Under the PAGA Pursuit To Labor Code §§ 558 and 558.1

“In California, the Legislature has decided that both the employer and any “other person” who causes a violation of the overtime pay or minimum wage laws are subject to specified civil penalties. (§§ 558(a) [overtime], 1197.1(a) [minimum wage].) Neither of these statutes mentions the business structure of the employer, the benefits or protections of the corporate form, or any potential reason or basis for disregarding the corporate form. ...[T]he business structure of the employer is irrelevant; if there is evidence and a finding that a party other than the employer “violates, or causes to be violated” the overtime laws (§ 558(a)) or “pays or causes to be paid to any employee” less than minimum wage (§ 1197.1(a)), then that party is liable for certain civil penalties regardless of the identity or business structure of the employer.” *Atempa v. Pedrazzani* (2018) 27 Cal. App. 5th 809 at 820. Thus, California Courts are willing to hold personally liable for wage and hour violations under PAGA a company’s owners, directors, officers, and managing agents who violate or cause to be violated Labor Code sections 203, 226, 226.7, 500 to 558.1, 1193.6, 1194, or 2802, and/or any provision regulating minimum wages or hours and days of work in the applicable Industrial Welfare Commission (IWC) Order.

II. Frank Berry Designs And Frank M. Berry, III Employ/ed HENKE And Other Aggrieved Employees

California law specifies the elements necessary to define an employer. “To employ” has “three alternative definitions.” *Martinez v. Combs* (2010) 49 Cal.4th 35, 64. “It means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship.” *Id.* The broad definition of an employer includes “any person ... who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of [an employee].” *Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912, 947. An entity that controls the business enterprise may be an employer even if it did not “directly hire, fire or supervise” the employees. *Id.* at 950.

After being hired by BERRY², HENKE started working for FBD on November 20, 2017 as a paid intern at an hourly wage of \$20.00 per hour until May 13, 2018. Starting May 14, 2018, HENKE earned \$25.00 per hour until September 30, 2018. From October 1, 2018, up to and including June 9, 2019, HENKE earned \$30.00 per hour. According to Gusto Earnings Statements, HENKE earned \$40.00 per hour from June 10, 2019, up to and including January 16, 2022. Also, according to Gusto Earnings Statements, from January 17, 2022, up to and including the final day she worked for FBD, HENKE earned \$50.00 per hour. Although HENKE’s Gusto Earnings Statements make it appear HENKE’s last day working for FBD was June 19, 2023, in reality, Henke performed work after this date for FBD for which FBD failed to compensate her.

California Labor Code section 510 mandates that overtime pay is required for work in excess of eight hours per day or in excess of 40 hours per week. HENKE’s Gusto Earnings Statements clearly demonstrate that from 2018 to 2022 FBD *never* paid HENKE applicable overtime or double time wages even though HENKE’s biweekly Gusto Earnings Statements clearly prove HENKE typically worked over 8 hours in a workday and/or over 40 hours in a workweek.

HENKE’s 2022 Payroll As Mere Examples

According to her biweekly Gusto Earning Statements covering the FDB pay period from January 3, 2022 to January 16, 2022, HENKE worked 88.75 hours, for which DEFENDANTS paid HENKE only straight time at \$40.00 per hour, failing to pay her at least 8.75 hours at an overtime rate of \$60.00 per hour. Thus, DEFENDANTS owe HENKE at least an additional \$175.00 plus interest, costs, and attorney’s fees just for this two-week period. According to her biweekly Gusto Earning Statements covering the FDB pay periods from January 17, 2022 to June 19, 2022, HENKE worked 87 hours, 90.25 hours, 92.25 hours, 96.5 hours, 100.5 hours, 82 hours, 92 hours, 90.50 hours, 88.75 hours, 86 hours, and 87.75 hours, for which Defendants paid HENKE only straight time at \$50.00 per hour, failing to pay her at

² Frank M. Berry, III (“BERRY”) is the CEO, CFO, Secretary, and FBD’s sole director. BERRY is liable for all causes of actions contained within the operative complaint pursuant to Labor Code § 558.1, § 1197.1, and/or via vicarious liability.

least 113.50 hours at an overtime rate of \$75.00 per hour. Thus, FBD owes HENKE at least an additional \$2,837.50 plus interest, costs, and attorney's fees just for this five-month period.

Additional Facts Regarding HENKE's Payroll Records

The above examples equal a mere sample out of over 117 itemized wage statements proving DEFENDANTS owe HENKE unpaid wages that still remain unpaid to date. Furthermore, HENKE's Gusto Earning Statements fail to capture the numerous times HENKE worked off-the-clock, compensable time for which DEFENDANTS failed to compensate HENKE. HENKE's Gusto Earning Statements also demonstrate FBD has/d a corporation-wide policy, during HENKE's entire tenure with FBD, of not providing Aggrieved Employees, with paid sick leave per California's Labor Code §§ 246 to 249, law-mandated benefits HENKE would have used had she been able to, especially during the COVID-19 pandemic. HENKE's Gusto Earning Statements also demonstrate FBD has/d a corporation-wide policy of not paying Aggrieved Employees the premium pay required pursuant to Labor Code § 226.7(b) & (c) and § 512 for failing to provide FBD employees with Labor Code compliant meal breaks. HENKE's Gusto Earning Statements also demonstrate FBD has/d a corporation-wide policy of not paying Aggrieved Employees the premium pay required pursuant to Labor Code § 226.7 & IWC Order 4-2001, § 12 for failing to provide FBD employees with Labor Code compliant rest breaks. Lastly, HENKE's Gusto Earning Statements, or any other FBD document for this matter, also demonstrate FBD has/d a corporation-wide policy of failing to reimburse Aggrieved Employees for all necessary business expenses per Labor Code § 2802, including for (a) mileage anytime HENKE and other Aggrieved Employees used their personal vehicle to drive to client sites; and (b) the pro rata basis of Aggrieved Employees' monthly cellphone bills due to HENKE's and other Aggrieved Employees use of their personal cellphones for work-related purposes, especially when HENKE and other Aggrieved Employees were physically present at a client's site. DEFENDANTS never provided any Aggrieved Employee with a business cellphone, so it was necessary for Aggrieved Employees to use their personal cellphones for FBD phone calls, text messages, and emails with colleagues and clients while working for FBD.

HENKE's Separation From FBD

Fed up with the intolerable work conditions of/at FBD, on Saturday, June 18, 2022, via an email sent at 6:22 AM to BERRY, HENKE "resigned", actually was constructively discharged by FBD, which BERRY acknowledged and accepted that same day via an email reply to HENKE at 11:21 AM. However, HENKE's final Gusto Earnings Statement indicates FBD did not pay HENKE until June 23, 2022. Furthermore, although text messages demonstrate that HENKE's likely last day of any work for FBD was Tuesday, June 21, 2022, FBD paid HENKE only through June 19, 2022.

III. HENKE, An Aggrieved Employee, Has Standing To File This Amended PAGA Notice Against Defendants On Behalf Of Herself And Other Aggrieved Employees

On Wednesday, September 28, 2022, HENKE sent a request for records pursuant to Labor Code sections 226, 432, and 1198.5 via email to DEFENDANTS. On October 19, 2022, Snell & Wilmer responded to this request on behalf of its client(s) FBD and/or BERRY, by email to HENKE's attorney. However, the 99-page production (Bates stamped FBD000001-FBD000099) plus a cover letter was partial, lacking multiple applicable records, including but not limited to time records, thus triggering HENKE's 1-year statute of limitations for PAGA penalties for any Labor Code §§ 226, 432, and 1198.5 violations DEFENDANTS's committed against HENKE, as well as any other Labor Code violations DEFENDANTS committed against other Aggrieved Employees.

On January 3, 2023, HENKE's attorney explained via email to DEFENDANT(s)'s attorney(s) with Snell & Wilmer that Labor Code section 226(b) gives HENKE the right to "...records pertaining to [her] employment...". Records pertaining to employment include, but are not limited to, payroll records. The documents commonly needed for payroll record keeping include but are not limited to the following:

- (a) Employee personal information including the employee's name, address, telephone number, e-mail address, direct deposit information, emergency contact information, date of birth, occupation, Social Security number and benefit plan enrollment information;

- (b) Employment information including offer letters, employment eligibility data, full time or part time status, background check, references, signed company policies, evaluations, and termination information;
- (c) **Timesheets**, including regular hours, overtime hours and **hours worked per day, workweek**, and pay period;
- (d) Pay information including rate(s) of pay, workweek beginning and ending dates, total hours worked, payment agreement or the employee's pay basis (e.g., hourly, salary, commission, etc.), and the employee's classification (e.g. exempt or nonexempt);
- (e) Tax documents, including federal, state and local jurisdiction tax forms such as the IRS form W-4, California's DE-4, W-2 forms, and 1099 forms;
- (f) Deduction information including benefit deductions, wage garnishment orders, union dues, and deferred compensation information;
- (g) Paid and unpaid leave records, including paid time off (PTO), vacation time balance, sick leave balance, and associated payment amounts, as well as records for other types of leave, such FMLA or CFRA, state paid leave programs, and COVID-related leave;
- (h) Direct deposit information, including financial institution name, account number and routing number;
- (i) Reimbursement forms, including expense reports for work travel, reimbursed mileage, office supplies, pro rata use of employee's cell phone for work related purposes, etc.;
- (j) Pay records including payroll registers and other documentation with payroll details, such as pay period beginning and ending dates, payment date, and type of wage payments (i.e., regular, overtime, tip credit, bonuses, commission, paid leave time, etc.).

HENKE's attorney further explained that the DLSE Policies and Interpretations Manual³ section 14.1.2 states, "Labor Code section 226[a] only sets out the employer's responsibilities in connection with the wage statement which must accompany the check or cash payment to the employee. The requirements of Section 1174 of the Labor Code and the requirements of Section 7 of the applicable IWC Order concerning payroll records also must be met by the employer. See Section 41.2 of this Manual for further discussion of those requirements. ***Labor Code Section 226(f) provides for a \$750.00 penalty for a violation of the right to inspect or receive a copy of any of the records referenced in 226(b), including time records. (See Labor Code Section 226(c)).*** DLSE Policies and Interpretations Manual section 30.7 states, "Employers have a separate record keeping requirement to keep for three years, records documenting hours worked and paid sick days accrued and used. ***Employers must also provide for access of records for an employee in the same manner as described in Section 226 and to the Labor Commissioner pursuant to Section 1174.*** When an employer does not maintain adequate records, a presumption is established that the employee is entitled to the maximum number of hours accruable unless the employer can show otherwise, by clear and convincing evidence."

Given the above, HENKE's attorney requested via email the "remainder of Ms. Henke's employment records, including Harvest time records" from DEFENDANT(S) attorney(s). However, to this date, DEFENDANTS have yet to produce the remaining records, including HENKE's Harvest time records.

PAGA "allows an "aggrieved employee"—in this case HENKE—a person affected by at least one Labor Code violation committed by an employer—which has already been established (*supra*)—to pursue penalties for all the Labor Code violations committed by that employer." *Huff v. Securitas Security Services USA, Inc.* (2018) H042852. Prior to enumerating the other Labor Code sections DEFENDANTS violated, HENKE explains who the Aggrieved Employers are that she represents.

IV. Aggrieved Employees Include FBD Employees Who Worked For DEFENDANT(S) Prior To, As Well As After FBD's Unlawful Election For An Alternative Workweek, Violative Of Labor Code Section 511

³ https://www.dir.ca.gov/dlse/DLSEManual/dlse_enfmanual.pdf

This Amended PAGA Notice is pursuant to and in compliance with the procedures specified in Lab. Code §§ 2699 and 2699.3. HENKE is an aggrieved employee according to the definition of such contained in Lab. Code § 2966(c)⁴. This Amended PAGA Notice is filed on HENKE's behalf and on behalf of "other current or former employees"—regardless of status as full-time, part-time, temporary employees, and/or misclassified as independent contractors or salaried exempt employees—employed by DEFENDANTS, employees who worked or are working anywhere within the boundaries of the State of California within the PAGA's 1-year statute of limitations and going forward for the duration of litigation, including but not limited to FBD employees who worked for DEFENDANTS prior to, as well as after FBD's unlawful alternative workweek election, such as the following twenty (20) FBD employees:

- (1) McCall Henke;
- (2) Adrienne Melchiorre;
- (3) Jenn Bloch;
- (4) Wendy Estreicher;
- (5) Kelli Homeyer;
- (6) Lorraine Carroll;
- (7) Karissa Koch;
- (8) Reilly Grenier;
- (9) Jennifer Allen;
- (10) Celeste Devine;
- (11) Jessica Mitchell;
- (12) Jenna Engstrom;
- (13) Krystal Moore;
- (14) Whitney Welgan;
- (15) Lauren Hogan;
- (16) Rebecca Brancato;
- (17) Senna Thomas;
- (18) Brooke (Curtis) Jacobs;
- (19) Lindsay (Weeks) Legrand; and
- (20) Frank M. Berry, III.

PAGA Aggrieved Employees also include, but are not limited to, Aggrieved Employees paid on any of the following basis: (1) non-exempt hourly employees; (2) Aggrieved Employees DEFENDANTS misclassified as salary exempt because these salary employees (a) are not paid enough to meet the Salary Test of any exemption; (b) not paid a predetermined amount on a weekly basis, or less frequent basis, that is not contingent on the actual days or hours worked by the employee; and/or (c) do not meet the duties test of any exemption because these employees (i) do/did not customarily and regularly exercise discretion and independent judgment; and/or (ii) were/are not primarily engaged in duties which meet the test of the exemption.

V. Specific Provisions Of The Labor Code DEFENDANTS Violated, Including The Facts And Theories To Support The Alleged Violation

Lab. Code § 201(a) & § 202(a) Violations

Labor Code § 201(a) reads in relevant part "If an employer discharges an employee, the wages^[5] earned and unpaid at the time of discharge are due and payable immediately." While under Labor Code § 202(a) "If an employee not

⁴ Under Labor Code § 2699(c), "For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

⁵ According to Labor Code §200(a) "'Wages' includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. Under § 200(b) "Labor" includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment.

having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting...”.

Fed up with the intolerable work conditions of/at FBD, on Saturday, June 18, 2022, via an email sent at 6:22 AM to BERRY, HENKE “resigned”, actually was constructively discharged by FBD. BERRY acknowledged HENKE’s email via an email reply to HENKE at 11:21 AM that same day. However, HENKE’s final Gusto Earnings Statement indicates FBD did not pay HENKE until June 24, 2022. Furthermore, although text messages demonstrate that HENKE’s likely last day of any work for FBD was Tuesday, June 21, 2022, DEFENDANTS paid HENKE only through the FBD pay period that ended June 19, 2022. Moreover, as explained above, HENKE’s Gusto Earnings Statements clearly prove DEFENDANTS paid HENKE only straight regular pay even though she clearly worked over 8 hours in a workday and/or 40 hours per week. Additionally, DEFENDANTS systematically failed to pay Aggrieved Employees overtime and/or double time wages because FBD’s had a corporation-wide policy—created and implemented by BERRY—of paying only straight time for the hours Aggrieved Employees worked, including when they worked over 8 hours in a workday and/or 40 hours per week. Finally, DEFENDANTS never cured these violations at anytime during HENKE’s tenure with FBD, especially not by/at the times mentioned in Labor Code sections 201 and 202. Therefore, DEFENDANTS failed to pay separated Aggrieved Employees all their wages per Labor Code sections 201 or 202.

Reporting Time Pay

On information and belief, DEFENDANTS also failed to pay Aggrieved Employees reporting time pay. Under the applicable Industrial Wage Order (IWO) and section, titled Reporting Time Pay, “(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee’s usual or scheduled day’s work, the employee shall be paid for half the usual or scheduled day’s work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee’s regular rate of pay, which shall not be less than the minimum wage. (B) If an employee is required to report for work a second time in any one workday and is furnished less than two (2) hours of work on the second reporting, said employee shall be paid for two (2) hours at the employee’s regular rate of pay, which shall not be less than the minimum wage. According to *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094, reporting time pay constitutes wages. Thus, failure to pay all reporting time pay due at the time of employment termination is a basis for waiting time penalties pursuant to Labor Code § 203 (*infra*). On information and belief, certain Aggrieved Employees reported for work at FBD and/or at a client location, started working or reported to work, but were not put to work or were furnished less than half these employees’ usual or scheduled day’s work, yet DEFENDANTS failed to pay these Aggrieved Employees the requisite reporting time pay. Reporting time pay constitutes wages. Thus, failure to pay all reporting time pay due at the time of employment termination is a basis for waiting time penalties pursuant to Labor Code § 203 (*infra*), and thus is also a basis for PAGA civil penalties for DEFENDANTS’ Labor Code sections 201 and 202 violations.

Premium Pay

Also, DEFENDANTS failed to immediately pay HENKE and other Aggrieved Employees all earned and unpaid premium pay due to them. These Aggrieved Employees did not have a legitimate opportunity to take Labor Code compliant meal/rest breaks because such were late, interrupted, missed, were due to DEFENDANTS misclassifying and not or mis informing Aggrieved Employee(s) who did not know he/she/they were entitled to Labor Code section compliant meal and/or rest breaks, and/or DEFENDANTS did not provide an additional meal/or rest break to employees who worked over 10 hours in a given workday. On information and belief, FBD’s policies, procedures, and/or practices—created and implemented by BERRY—do/did not comply with California’s applicable Labor Code, resulting in Labor Code §§ 201 and 202 violations. “[T]he remedy provided in Labor Code section 226.7 constitutes a wage or premium pay and is governed by a three-year statute of limitations...”, and thus are grounds for waiting time penalties pursuant to Labor Code § 203. See *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094. Also, FBD’s policy, procedure, and/or practice of off-the-clock work is memorialized in a March 6, 2022 email to HENKE from BERRY, and demonstrates the following “Off Hour Communication”:

“High Level – Text
Medium Level – Email
Low Level – Discussed Following Business Day
Personal Check-Ins if Concerning Manners Arise”

Off-The-Clock Work

This also resulted in DEFENDANTS’ failure to compensate Aggrieved Employees properly for all the time they actually worked, including wages for off-the-clock work. Off-the-clock work is not “consistent with the core statutory and regulatory purpose that employees be paid for all time worked...In light of the wage order’s remedial purpose requiring a liberal construction, its directive to compensate employees for all time worked, the evident priority it accorded that mandate notwithstanding customary employment arrangements, and its concern with small amounts of time, the *de minimis* doctrine has no application under the circumstances presented here.” *Troester v. Starbucks Corp.* at 847. FBD is an employer that requires its employees to work more than *de minimus* minutes off the clock on a regular basis or as a regular feature of the job. FBD may not evade the obligation to compensate Aggrieved Employees for that time through the federal FLSA *de minimis* doctrine. “[...]A few extra minutes of work each day can add up.” *Id.* Thus, FBD’s “Off Hour Communication” policy, procedure, and practice resulted in DEFENDANTS not complying with Labor Code §§ 201, 202, and 203 because DEFENDANTS failed to compensate Aggrieved Employees for the minutes of work off the clock for each applicable day that added up.

Conclusion

Regarding the Aggrieved Employees DEFENDANTS discharged, DEFENDANTS failed to pay the respective wages these employees earned but that remained unpaid at the time of discharge which became due and payable immediately upon separation of employment. These unpaid and still due wages include but are not necessarily limited to minimum, regular, overtime, and/or double time wages; premium wages for noncompliant meal and/or rest breaks; reporting time pay; sick leave pay; COVID-19 Supplemental Paid Sick Leave; owed bonus(es); and/or vacation pay that should have accrued due to these Aggrieved Employees (a) working off-the-clock⁶ or (b) being misclassified as independent contractors or as salary exempt employees. Thus, FBD failed to immediately pay, upon separation of employment, all wages earned by Aggrieved Employees whom FBD discharged. Consequently, FBD violated Labor Code § 201(a). Likewise, DEFENDANTS also failed to comply with Labor Code § 202(a) because DEFENDANTS failed to timely pay Aggrieved Employees who quit all earned aforementioned wages. Consequently, DEFENDANTS violated Labor Code § 201 and § 202 and are liable to relevant Aggrieved Employees for PAGA penalties under Labor Code § 2699.3(a) and § 2699.5 in accordance with § 2699.3(f)(2). Labor Code § 2699.3(f) states, “For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows: (2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation. Furthermore, DEFENDANTS meet the elements under Lab. Code § 558.1 and are liable for statutory waiting time penalties under § 203 (*infra*).

Lab. Code § 203 Civil Penalties For Lab. Code §§ 201 & 202 Willful Violations

California’s public policy favors the full and prompt payment of wages due an employee. To ensure that employers comply with the laws governing the payment of wages when an employment relationship ends, California’s Legislature enacted Labor Code § 203 to provide for the assessment of a statutory penalty against the employer when there is a willful failure to pay wages due the employee at conclusion of the employment relationship. Labor Code § 203(a) states in pertinent part, “If an employer willfully fails to pay, without abatement or reduction, in accordance with sections 201, 201.3, 201.5, 201.9, 202, and 205.5, 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

⁶ “The relevant statutes and wage order do not allow employers to require employees to routinely work for minutes off the clock without compensation.” *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 848.

commenced; but the wages shall not continue for more than 30 days. According to Labor Code § 203(b), “Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise, which is three (3) years.

All compensation is considered in determining if all wages due were paid as prescribed by law, including but not necessarily limited to the following wages/pay DEFENDANTS failed to pay HENKE and other Aggrieved Employees: minimum, regular, overtime, and/or double time wages; premium wages pursuant to Labor Code section 226.7⁷ for noncompliant meal and/or rest breaks; reporting time pay; sick leave pay; COVID-19 Supplemental Paid Sick Leave; owed bonus(es); and/or vacation pay that should have accrued.

Having worked closely with BERRY for numerous years, HENKE knows for herself, and believes in good faith for other Aggrieved Employees, that DEFENDANTS willfully failed to timely pay Aggrieved Employees all of their earned wages upon separation of employment. The settled meaning of “willful,” as used in section 203, is that an employer has intentionally failed or refused to perform an act which was required to be done. (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7-8; *Davis v. Morris* (1940) 37 Cal.App.2d 269, 274) “[T]he employer’s refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due.” (*Barnhill, supra*, 125 Cal.App.3d at p. 7; see *Davis v. Morris, supra*, 37 Cal.App.2d at p. 274.)” *Amaral v. Cintas Corp.* (2008) 163 Cal.App.4th 1157, 1201. “[T]o be at fault within the meaning of [section 203], the employer’s refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, ‘willful’ merely means that the employer intentionally failed or refused to perform an act which was required to be done.” *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 54. “In civil cases the word ‘willful’ as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.” *Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891.

In light of the fact that DEFENDANTS have failed to pay HENKE any additional wages since her separation of employment from FBD, even though FBD paid such to other employees, including Adrienne Melchiorre in September of 2022 and/or Kelli Homeyer, DEFENDANTS willfully paid HENKE all wages earned and still due at the time of HENKE’s separation of employment from FBD. On information and belief, DEFENDANTS also deliberately failed to pay other Aggrieved Employees. Thus, DEFENDANTS violate/d Labor Code § 203. As a result, Defendants are not only liable for the statutory waiting time penalties under Labor Code § 203, but also are liable for the attendant PAGA penalties to HENKE and Aggrieved Employees under Labor Code § 2699.3(a) and § 2699.5 in accordance with § 2699.3(f)(2), which states, “For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows: (2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

Labor Code § 204 Violation

Labor Code § 204(a) reads in relevant part “All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month...” Per Labor Code § 204(b)(1), “Notwithstanding any other provision of this section, all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period. Under Labor Code § 204(b)(2), “An employer is in compliance with the

⁷ “...[T]he remedy provided in Labor Code section 226.7 constitutes a wage or premium pay and is governed by a three-year statute of limitations...” See *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094.

requirements of subdivision (a) of § 226 relating to total hours worked by the employee, if hours worked in excess of normal work period during the current pay period are itemized as corrections on the paystub for the next regular pay period. Any corrections set out in a subsequently issued paystub shall state the inclusive dates of the pay period for which the employer is correcting its initial report of hours....” Labor Code § 204(d) further explains “The requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period.”

Despite the mandates of § 204, FBD did not abide by § 204(a) because FBD did not pay twice during each calendar month “[a]ll wages, other than those mentioned in § 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment...on days designated in advance by the employer as the regular paydays.” Though FBD paid HENKE and other Aggrieved Employees wages periodically, specifically biweekly, during each calendar month, DEFENDANTS failed to timely pay **all** applicable wages earned by Aggrieved Employees, including HENKE. FBD also did not abide by § 204(b) because DEFENDANTS neither paid Aggrieved Employees, including HENKE, for the hours they worked in excess of the normal work period no later than the payday for the next regular payroll period, nor itemized as corrections these hours and pay on the paystub for the next regular pay period. So, the payment of these earned wages to Aggrieved Employees certainly was not made within seven calendar days following the close of the payroll period because these earned wages remain unpaid for HENKE, and on information and belief for other Aggrieved Employees.

These unpaid wages include but are not necessarily limited to minimum, regular, overtime, and/or double time wages; premium wages pursuant to Labor Code section 226.7 for noncompliant meal and/or rest breaks; reporting time pay; sick leave pay; COVID-19 Supplemental Paid Sick Leave; owed bonus(es); and/or vacation pay that should have accrued due to these Aggrieved Employees (a) working off-the-clock; (b) being misclassified as independent contractors or salary exempt; (c) should have accrued additional vacation; (c) reporting to work but being furnished less than half the employees scheduled work hours; and (d) also possibly due to failing to pay premium pay per Labor Code § 226.7 to Aggrieved Employees subject to an alternative work schedule, whether lawful or unlawful one pursuant to L.C. § 511.

Labor Code §§ 204, 204(a), and 204(b) are not just about the frequency by which an employer pays its employees, it is also about the accuracy of those wages periodically paid. Therefore, FBD violated Labor Code § 204, § 204(a), and § 204(b) and is subject to PAGA penalties for violating each section and subsection under Labor Code § 2699.3(a) and § 2699.5 in accordance with section 2699.3(f)(2), i.e. the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

Labor Code § 210 Penalties Due To § 204 Violation & § 211 Demand

Labor Code § 210 states, “(a) In addition to, and entirely independent and apart from, any other penalty provided in this article, **every person** who fails to pay the wages of each employee as provided in §§ 201.3, **204**, 204b, 204.1, 204.2, 204.11, 205, 205.5, and 1197.5, shall be subject to a penalty as follows: (1) For any initial violation, one hundred dollars (\$100) for each failure to pay each employee. (2) For each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld. (b) The penalty shall either be recovered by the employee as a statutory penalty pursuant to § 98...(c) An employee is only entitled to either recover the statutory penalty provided for in this section or to enforce a civil penalty as set forth in subdivision (a) of § 2699, but not both, for the same violation.

Due to FBD’s violations of § 204 and § 204(b) (*supra*), FBD is subject to civil penalties under § 210(a). HENKE has yet to decide whether to pursue § 210 penalties statutorily under § 98 or as civil penalties pursuant to § 2699(a) because at this time HENKE does not know which penalties are higher. Therefore, HENKE, on behalf of herself, and other Aggrieved Employees reserves their rights to seek § 210 penalties for FBD’s violations of § 204 and § 204(b) under PAGA, while reserving the right to alternatively pursue such as a statutory penalty pursuant to § 98 instead.

Labor Code § 211 Demand

According to Labor Code § 211, a demand is a prerequisite to the bringing of any action under Labor Code § 210 or § 211. HENKE's original PAGA Notice served as the demand required by Labor Code § 211 as HENKE's Labor Code § 210 demand in which HENKE demands, on behalf of herself and other Aggrieved Employees, that FBD pays the highest calculatable penalties—whether civil or statutory—under Labor Code § 210, and DEFENDANTS pay all wages due to HENKE and Aggrieved Employees under § 204 that DEFENDANTS have failed to pay.

Labor Code § 206 Violations And Penalties

Labor Code § 206(a) states, "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him[/her/it] to be due, leaving to the employee all remedies he[/she] might otherwise be entitled to as to any balance claimed. A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact, which, if successful, would preclude any recovery on the part of the employee...Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a 'good faith dispute. 8 C.C.R. § 13520(a).

§ 206(a) Violation

After HENKE's separation of employment from FBD, DEFENDANTS hired a Human Resources person/firm to counsel it to compliance. Despite discovering various Labor Code violations, DEFENDANTS have yet to fully cure their noncompliance, including but not limited to paying HENKE the wages DEFENDANTS know or should know HENKE is owed. On information and belief, HENKE believes Adrienne Melchiorre made an internal complaint about her wages to DEFENDANTS in September 2022. Therefore, Kelli Homeyer did too. On information and belief, FBD/DEFENDANTS offered several FBD Aggrieved Employees a settlement agreement and/or asked/required Aggrieved Employees, for example Lorraine Caroll, to sign a document titled "PAYOUT ACKNOWLEDGMENT" which states in relevant part, "I, the undersigned recipient, have received my corrected paycheck from FRANK. To the best of my knowledge, there is no additional backpay owed to me by the employer at the present time." This document demonstrates DEFENDANT knew FBD owed at least one "corrected paycheck" to Aggrieved Employees, including but not limited to HENKE.

Given the allegations of Adrienne Melchiorre and/or Kelli Homeyer, if/had FBD/DEFENDANTS investigated the causes of actions voiced, which notified FBD/DEFENDANTS of various Labor Code section violations, then FBD/DEFENDANTS could have and should have ceased their unlawful behavior. Failing to do so after being put on notice of such indicates DEFENDANTS cannot dispute, in good faith, the fact DEFENDANTS owe Aggrieved Employees, including HENKE, wages. However, to this date, DEFENDANTS either unreasonably or in bad faith, have yet to pay HENKE and, on information and belief, have also yet to pay all Aggrieved Employees all of their undisputed wages or wages DEFENDANTS cannot dispute in good faith.

§ 206(b) Penalty

Under § 206(b) "If, after an investigation and hearing, the Labor Commissioner has determined the validity of any employee's claim for wages, the claim is due and payable within 10 days after receipt of notice by the employer that such wages are due. Any employer having the ability to pay who willfully fails to pay such wages within 10 days shall, **in addition to any other applicable penalty, pay treble the amount of any damages accruing to the employee as a direct and foreseeable consequence of such failure to pay.**" Pursuant to Labor Code § 2699(a), "Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency **or** any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of herself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

HENKE, on behalf of herself and other Aggrieved Employees, through this PAGA Notice steps into the role of the Labor Commission to pursue civil penalties on behalf of the LWDA, Labor Commission, and/or the State of California, and through discovery will investigate the claims alleged in this PAGA Notice and her operative complaint filed with the Superior Court of California, County of Orange. Upon determining the validity of any Aggrieved Employee's claim for wages, i.e. HENKE's and/or that of other Aggrieved Employees, the claim(s) is/are due and payable within 10 days after receipt of notice by FBD/DEFENDANTS that such wages are due. If FBD/DEFENDANTS, having the ability to pay, willfully fail to pay such wages within 10 days shall, in addition to any other applicable penalty, pay treble the amount of any damages accruing to the Aggrieved Employee(s) as a direct and foreseeable consequence of such failure to pay. HENKE, on behalf of herself and other Aggrieved Employees, shall seek DEFENDANTS' payment of the penalty of treble the amount of any "damages accruing to" Aggrieved Employees including HENKE, as a direct and foreseeable consequence of FBD's/DEFENDANTS' failure to timely pay such wages. On information and belief, according to its LinkedIn profile, FBD employs numerous employees and has an annual revenue of approximately \$2 million minimum. At this time, BERRY's net worth is unknown. However, FBD and/or DEFENDANTS should have the financial ability to pay HENKE and other Aggrieved Employees the wages DEFENDANTS owe them.

Due to FBD's/DEFENDANTS' violation of Labor Code § 206(a) explained above, FBD/DEFENDANTS is/are subject to PAGA penalty of treble wage damages of Aggrieved Employees pursuant to Labor Code § 2699(a) and pursuant to the procedures specified in Section 2699.3.

Labor Code § 206.5 Violation

Labor Code § 206.5(a) states in relevant part, "(a) An employer shall not require the execution of a release of a claim or right on account of wages due, or to become due...unless payment of those wages has been made. A release required or executed in violation of the provisions of this section shall be null and void as between the employer and the employee...(b) ..."execution of a release" includes requiring an employee, as a condition of being paid, to execute a statement of the hours he or she worked during a pay period which the employer knows to be false."

As detailed above, after HENKE's separation of employment from FBD, DEFENDANTS hired a Human Resources person/firm to counsel it to compliance. Despite discovering various Labor Code violations, DEFENDANTS have yet to fully cure their noncompliance, including but not limited to paying HENKE the wages DEFENDANTS know or should know HENKE is owed. On information and belief, HENKE believes Adrienne Melchiorre made an internal complaint about her wages to DEFENDANTS in September 2022. Therefore, Kelli Homeyer did too. On information and belief, FBD/DEFENDANTS offered several FBD Aggrieved Employees a settlement agreement and/or asked/required Aggrieved Employees, for example Lorraine Carroll, to sign a document titled "PAYOUT ACKNOWLEDGMENT" which states in relevant part, "I, the undersigned recipient, have received my corrected paycheck from FRANK. To the best of my knowledge, there is no additional backpay owed to me by the employer at the present time." This document demonstrates DEFENDANT knew FBD owed at least one "corrected paycheck" to Aggrieved Employees, including but not limited to HENKE. Given the allegations of Adrienne Melchiorre and/or Kelli Homeyer, if/had FBD/DEFENDANTS investigated the causes of actions voiced, which notified FBD/DEFENDANTS of various Labor Code section violations, then FBD/DEFENDANTS could have and should have ceased their unlawful behavior. Failing to do so after being put on notice of such indicates DEFENDANTS cannot dispute, in good faith, the fact DEFENDANTS owe Aggrieved Employees, including HENKE, wages. However, to this date, DEFENDANTS either unreasonably or in bad faith, have yet to pay HENKE and, on information and belief, have also yet to pay all Aggrieved Employees all of their undisputed wages or wages DEFENDANTS cannot dispute in good faith.

On information and belief, FBD/DEFENDANTS have specifically required the execution of a release of a claim or right on account of unpaid wages due to applicable Aggrieved Employees. Assuming this is true, FBD's/DEFENDANTS' Labor Code § 206.5 violation means, in addition to a null and void release, FBD/DEFENDANTS are also liable to HENKE and other Aggrieved Employees for attendant PAGA penalties under Labor Code § 2699.3(a) and § 2699.5 in accordance with § 2699.3(f)(2), i.e. the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

Labor Code § 208 Violation and § 2699(f)(2) Penalties

Labor Code § 208 mandates “Every employee who is discharged shall be paid at the place of discharge, and every employee who quits shall be paid at the office or agency of the employer in the county where the employee has been performing labor. **All payments shall be made in the manner provided by law.**” Given the plain meaning of the mandatory language “[a]ll payments shall be made in the manner provided by law”, California’s Legislator did not intend Labor Code § 208 to narrowly pertain only to the place at which an employer pays final wages to its employees. Otherwise, California’s Legislature could have drafted Labor Code § 208 to state “All payments shall be made in the manner provided by this section” or “All payments shall be made at the location provided by this section.” Instead, Labor Code § 208 pertains generally to Chapter 1 of California’s Labor Code titled Payment of Wages, i.e. Labor Code §§ 200-273. Therefore, the “manner” of payment encompasses time, place, and accuracy, or rather in inaccuracy in this case such as the underpayment of wages HENKE and Aggrieved Employees have suffered due to FBD’s/DEFENDANTS’ wrongful conduct because the law provides for such in which the payment of wages is done or happens.

Although HENKE does not know whether FBD/DEFENDANTS paid other Aggrieved Employees at the appropriate place(s) enumerated in Labor Code § 208, due to the other wage payment(s) violations detailed in this PAGA Notice, for example 201, 202, 203, 226, etc., FBD/DEFENDANTS nevertheless failed to make all payments “in the manner provided by law”, including timely, accurate and complete payments of the wages owed to applicable Aggrieved Employees for the reasons already detailed in this PAGA Notice.

As a result of failing to provide “all payments” to Aggrieved Employees “in the manner provided by law”, FBD/DEFENDANTS violated Labor Code § 208 and are liable to HENKE and other Aggrieved Employees for attendant PAGA penalties under Labor Code § 2699.3(a) and § 2699.5, which specifically enumerated Labor Code § 208, in accordance with § 2699.3(f)(2), i.e. the civil penalty is \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation.

Labor Code § 213(d) Violation

HENKE and Aggrieved Employees seek PAGA penalties pursuant to Labor Code § 2699.3, as well as § 2699.5 which specifically enumerates § 213(d) under PAGA. Under Labor Code § 213(d), an employer is not prohibited “from depositing wages due or to become due or an advance on wages to be earned in an account in any bank, savings and loan association, or credit union of the employee’s choice with a place of business located in this state, provided that the employee has voluntarily authorized that deposit. If an employer discharges an employee or the employee quits, the employer may pay the wages earned and unpaid at the time the employee is discharged or quits by making a deposit authorized pursuant to this subdivision, **provided that the employer complies with the provisions of this article relating to the payment of wages upon termination or quitting of employment.**”, i.e. Labor Code §§201 and/or 202:

- Labor Code § 201: “(a) If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately”;
- Labor Code § 202: (a) If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.

On information and belief, HENKE’s believes, FBD/DEFENDANTS made direct deposits of final wages to Aggrieved Employees who quit or FBD/DEFENDANTS discharged, however such deposits did not comply with Labor Code §§ 201 and § 202 as explained above (*supra*) because FBD/DEFENDANTS failed to pay the wages earned and unpaid at the time FBD/DEFENDANTS discharged Aggrieved Employees or at the time the Aggrieved Employees quit. As a result, FBD/DEFENDANTS violated Labor Code § 213 and are liable to Aggrieved Employees for attendant PAGA civil penalties under Labor Code § 2699.3(a) and § 2699.5, which specifically enumerated Labor Code § 213, in accordance with § 2699.3 subdivision (f)(2), i.e. the civil penalty is \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation.

Labor Code § 216 Violation

Under Labor Code § 216, “In addition to any other penalty imposed by this article, any person, or an agent, manager, superintendent, or officer thereof is guilty of a misdemeanor, who: (a) Having the ability to pay, willfully refuses to pay wages due and payable after demand has been made. (b) Falsely denies the amount or validity thereof, or that the same is due, with intent to secure for herself, his employer or other person, any discount upon such indebtedness, or with intent to annoy, harass, oppress, hinder, delay, or defraud, the person to whom such indebtedness is due.” Though HENKE and other Aggrieved Employees cannot criminally prosecute DEFENDANTS for a misdemeanor under Labor Code § 223 for subsection (a) and/or (b), this component of the PAGA Notice is to establish standing for HENKE and other Aggrieved Employees to pursue penalties pursuant to Labor Code § 225.5.

As noted above, FBD generates an annual revenue of a minimum of \$2 million dollars, again indicating FBD has the ability to pay Aggrieved Employees their owed wages. Should FBD/DEFENDANTS, for example in a responsive pleading, falsely deny the amount or validity thereof, or that the same is due, with intent to secure for FBD/DEFENDANTS or any other person, any discount upon such indebtedness, or with intent to annoy, harass, oppress, hinder, delay, or defraud, HENKE and/or Aggrieved Employees to whom such indebtedness is due, then such false denial will be considered a willful refusal to pay wages due and payable after Henke’s Labor Code §§ 210 and/or 211 demand(s) (*supra*).

As a result, FBD/DEFENDANTS is/are liable to HENKE and other Aggrieved Employees for attendant PAGA penalties pursuant to either Lab. Code Lab. § 225.5 or Lab. Code § 2699(f) and § 2699.3(c). Under Lab. Code § 2699(f)(2), “For all provisions of this code [PAGA] except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows: If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

Labor Code § 223 Violation

Under Labor Code § 223⁸ “Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract.” Under California law, HENKE and other Aggrieved employees are/were entitled to compensation for all hours worked. DEFENDANTS were statutorily required to pay at least minimum wage pursuant to Labor Code § 1182.12, as well as obligated to pay HENKE and other Aggrieved Employees their contractually agreed upon wages which were at least minimum wage. DEFENDANTS were contractually obligated to pay HENKE and other Aggrieved Employees agreed rates in excess of California’s minimum wage for all hours worked. However, due to any off-the-clock work FBD failed to compensate HENKE and other Aggrieved Employees the wages designated by statute or by contract that DEFENDANTS owe Aggrieved Employees, resulting in DEFENDANTS effectively unlawfully secretly having paid a lower hourly wage for all hours worked by Aggrieved Employees than to which these Aggrieved Employees were contractually and/or statutorily entitled. Thus, DEFENDANTS secretly paid HENKE and Aggrieved Employees a lower wage while purporting to pay the wage scale designated by statute, i.e. California’s minimum wage statute and overtime wage statute(s), or by contract. See *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314.

⁸ Under Labor Code § 225.5, “In addition to, and entirely independent and apart from, any other penalty provided in this article, every person who unlawfully withholds wages due any employee in violation of Section 212, 216, 221, 222, or 223 shall be subject to a civil penalty as follows: (a) For any initial violation, one hundred dollars (\$100) for each failure to pay each employee. (b) For each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld. The penalty shall be recovered by the Labor Commissioner as part of a hearing held to recover unpaid wages and penalties or in an independent civil action. The action shall be brought in the name of the people of the State of California and the Labor Commissioner and attorneys thereof may proceed and act for and on behalf of the people in bringing the action. Twelve and one-half percent of the penalty recovered shall be paid into a fund within the Labor and Workforce Development Agency dedicated to educating employers about state labor laws, and the remainder shall be paid into the State Treasury to the credit of the General Fund.

The combined force of California Labor Code sections 221, 222, and 223 clearly prohibits an employer from receiving from the employee, withholding from the employee, or secretly paying to the employee, some amount less than the employee's contractual or statutory wages for work performed by the employee. *Armenta v. Osmose, Inc.* (2005) 37 Cal.Rptr.3d 460, 465. Because HENKE and other Aggrieved Employees were employed at agreed rates in excess of California's minimum wage (Labor Code § 1182.12), DEFENDANTS effectively 'reduced' or 'withhold' a portion of Aggrieved Employees' respective contractual or statutory wages through the simple device of requiring work in excess of the daily or weekly hours DEFENDANTS actually compensated Aggrieved Employees without paying such additional owed compensation. California Labor Code sections 221, 222, and 223 prevent DEFENDANTS from using any part of the wage payments that are required under contract for activities that are compensated in an amount that equals or exceeds the minimum wage, as a credit for satisfying minimum wage obligations for those activities that are compensated at less than the minimum wage or under contractual rates. Thus, FBD/DEFENDANTS violated Labor Code § 223 and is/are subject to PAGA penalties for so doing pursuant to Labor Code § 225.5.

§ 225.5 Penalty For Violating The Provisions Of §§ 216 And 223

Under Labor Code § 225.5, "In addition to, and entirely independent and apart from, any other penalty provided in this article, every person who unlawfully withholds wages due any employee in violation of § 212, 216, 221, 222, or 223 shall be subject to a civil penalty as follows: (a) For any initial violation, one hundred dollars (\$100) for each failure to pay each employee. (b) For each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld. The penalty shall be recovered by the Labor Commissioner as part of a hearing held to recover unpaid wages and penalties or in an independent civil action. The action shall be brought in the name of the people of the State of California and the Labor Commissioner and attorneys thereof may proceed and act for and on behalf of the people in bringing the action. Twelve and one-half percent of the penalty recovered shall be paid into a fund within the Labor and Workforce Development Agency dedicated to educating employers about state labor laws, and the remainder shall be paid into the State Treasury to the credit of the General Fund.

HENKE and Aggrieved Employees, in the name of the people of the State of California and the Labor Commissioner, seek the civil penalty under § 225.5. As explained, FBD/DEFENDANTS violated § 223 (*supra*). HENKE and Aggrieved Employees seek to recover these civil penalties in an independent civil action brought in the name of the people of the State of California and the Labor Commissioner with 12.5% of the penalty recovered paid into a fund within the LWDA dedicated to educating employers about state labor laws, and the remainder, minus HENKE's and other Aggrieved Employees' 25% under the PAGA, paid into the State Treasury to the credit of the General Fund.

Labor Code § 226(a) Violation

Under Labor Code § 226(a) "Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee...(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...(9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee and ...The deductions made from payment of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. For purposes of this subdivision, "copy" includes a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information required by this subdivision."

HENKE's and, on information and belief, that of other Aggrieved Employees' pay records reconciled against their Harvest Time Tracking time records, plus (a) interrupted, late, and/or missed meal and/or rest breaks triggering premium pay; (b) as well as off-the-clock work, for example "Off Hour Communication", performed by HENKE and other Aggrieved Employees; (c) in addition to unaccounted for sick pay—including Supplemental COVID leave—and (d) vacation that should have accrued, all demonstrate DEFENDANTS' unlawfully failed to accurately, completely, and/or properly compensate HENKE and other Aggrieved Employees all of their respective wages. Thus, also demonstrating that DEFENDANTS failed to provide HENKE and other Aggrieved Employees with accurately written itemized statements showing "(1) gross wages earned, (2) total hours worked by the employee...(5) net wages earned, ...[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" because DEFENDANTS failed to accurately pay HENKE and other Aggrieved Employees for various reasons.

Labor Code § 226(e) Remedy For Violation of Labor Code § 226(a)

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

An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:

- (i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).
- (ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).
- (iii) The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer during the pay period.
- (iv) 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.

(C) For purposes of this paragraph, "promptly and easily determine" means a reasonable person would be able to readily ascertain the information without reference to other documents or information.

HENKE and other Aggrieved Employees have suffered injury pursuant to § 226(e)(2)(B) because, per § 226(e)(2)(B)(i), FBD/DEFENDANTS failed "to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of" § 226(a) (*supra*) and HENKE and the other Aggrieved Employees cannot promptly and easily determine from the wage statement alone the amount of the gross wages and/or net wages that should have been paid to them during the applicable pay period or any of the other information required to be provided on the itemized wage statement pursuant § 226(a), specifically "(1) gross wages earned, (2) total hours worked by the employee...(5) net wages earned,..[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."

HENKE and other Aggrieved Employees must refer to other documents and information, including but not limited to time records, phone records, text messages, and other proof of work such as emails, to reconstruct the time they worked to account for their unpaid work, including but not necessarily limited to (1) their inaccurate Harvest time (clock-in and clock-out) records; (2) the average amount of time it took/takes HENKE and other Aggrieved Employees to complete certain tasks; (3) work during rest and meal breaks because Aggrieved Employees did not have a legitimate opportunity to take such at all, timely, and/or uninterrupted; and (4) any proof of adherence to FBD's "Off Hour Communication[s]" policy, procedure, and/or practice.

Therefore, in addition to the § 226(e) statutory penalties for violating § 226(a), DEFENDANTS are also liable to HENKE and other Aggrieved Employees for attendant PAGA penalties pursuant to Lab Code §2699.3(a) and § 2699.5.

Labor Code § 226(c) Violation and Labor Code § 226(f) Penalty

Under Labor Code § 226(b) "An employer that is required by this code or any regulation adopted pursuant to this code to keep the information required by subdivision (a) shall afford current and former employees the right to inspect or receive a copy of records pertaining to their employment, upon reasonable request to the employer..." Under subsection (c) "An employer who receives a written or oral request to inspect or receive a copy of records pursuant to subdivision (b) pertaining to a current or former employee shall comply with the request as soon as practicable, but no later than 21 calendar days from the date of the request..."

On Wednesday, September 28, 2022, HENKE sent a request for records pursuant to Labor Code sections 226, 432, and 1198.5 via email to DEFENDANTS. On October 19, 2022, Snell & Wilmer responded to this request on behalf of its client(s) FBD and/or BERRY, by email to HENKE's attorney. However, the 99-page production (Bates stamped FBD000001-FBD000099) plus a cover letter was partial, lacking multiple applicable records, including but not limited to time records, thus triggering HENKE's 1-year statute of limitations for PAGA penalties for any Labor Code §§ 226, 432, and 1198.5 violations DEFENDANTS's committed against HENKE, as well as any other Labor Code violations DEFENDANTS committed against other Aggrieved Employees.

On January 3, 2023, HENKE's attorney explained via email to DEFENDANT(s)'s attorney(s) with Snell & Wilmer that Labor Code section 226(b) gives HENKE the right to "...records pertaining to [her] employment...". Records pertaining to employment include, but are not limited to, payroll records. The documents commonly needed for payroll record keeping include but are not limited to the following:

- (a) Employee personal information including the employee's name, address, telephone number, e-mail address, direct deposit information, emergency contact information, date of birth, occupation, Social Security number and benefit plan enrollment information;
- (b) Employment information including offer letters, employment eligibility data, full time or part time status, background check, references, signed company policies, evaluations, and termination information;
- (c) **Timesheets**, including regular hours, overtime hours and **hours worked per day, workweek**, and pay period;
- (d) Pay information including rate(s) of pay, workweek beginning and ending dates, total hours worked, payment agreement or the employee's pay basis (e.g., hourly, salary, commission, etc.), and the employee's classification (e.g. exempt or nonexempt);
- (e) Tax documents, including federal, state and local jurisdiction tax forms such as the IRS form W-4, California's DE-4, W-2 forms, and 1099 forms;
- (f) Deduction information including benefit deductions, wage garnishment orders, union dues, and deferred compensation information;
- (g) Paid and unpaid leave records, including paid time off (PTO), vacation time balance, sick leave balance, and associated payment amounts, as well as records for other types of leave, such FMLA or CFRA, state paid leave programs, and COVID-related leave;
- (h) Direct deposit information, including financial institution name, account number and routing number;

- (i) Reimbursement forms, including expense reports for work travel, reimbursed mileage, office supplies, pro rata use of employee's cell phone for work related purposes, etc.;
- (j) Pay records including payroll registers and other documentation with payroll details, such as pay period beginning and ending dates, payment date, and type of wage payments (i.e., regular, overtime, tip credit, bonuses, commission, paid leave time, etc.).

HENKE's attorney further explained that the DLSE Policies and Interpretations Manual⁹ section 14.1.2 states, "Labor Code section 226[a] only sets out the employer's responsibilities in connection with the wage statement which must accompany the check or cash payment to the employee. The requirements of Section 1174 of the Labor Code and the requirements of Section 7 of the applicable IWC Order concerning payroll records also must be met by the employer. See Section 41.2 of this Manual for further discussion of those requirements. ***Labor Code Section 226(f) provides for a \$750.00 penalty for a violation of the right to inspect or receive a copy of any of the records referenced in 226(b), including time records. (See Labor Code Section 226(c)).*** DLSE Policies and Interpretations Manual section 30.7 states, "Employers have a separate record keeping requirement to keep for three years, records documenting hours worked and paid sick days accrued and used. ***Employers must also provide for access of records for an employee in the same manner as described in Section 226 and to the Labor Commissioner pursuant to Section 1174.*** When an employer does not maintain adequate records, a presumption is established that the employee is entitled to the maximum number of hours accruable unless the employer can show otherwise, by clear and convincing evidence."

Given the above, HENKE's attorney requested via email the "remainder of Ms. Henke's employment records, including Harvest time records" from DEFENDANT(S) attorney(s). However, to this date, DEFENDANTS have yet to produce the remaining records, including HENKE's Harvest time records.

Given HENKE's own experience with only a partially fulfilled request pursuant to Lab. Code § 226, with records including but not limited to time records that appear to have been deliberately withheld by FBD/DEFENDANTS in violation of Labor Code sections § 226 and § 1198.5 (*infra*), HENKE believes FBD/DEFENDANTS could have also violated the § 226(b) and § 226(c) rights of other Aggrieved Employees. Even if other Aggrieved Employees have not, Defendants are nevertheless liable for PAGA penalties pursuant to Labor Code § 2699.3(c) and § 2699(f) (*supra*) in addition to owing HENKE the penalty under Labor Code § 226(f) for non-compliance with § 226(b) and § 226(c).

Under § 226(f), "A failure by an employer to permit a current or former employee to inspect or receive a copy of records within the time set forth in subdivision (c) entitles the current or former employee or the Labor Commissioner to recover a seven-hundred-fifty-dollar (\$750) penalty from the employer." On information and belief, DEFENDANTS have similarly acted with other Aggrieved Employees, in particular with those Aggrieved Employees who have sued or desire/d to sue FBD/DEFENDANTS.

Civil Penalty Under Labor Code § 226.3 For Violation and § 226(a) Violation

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

Though DEFENDANTS provided HENKE and other Aggrieved Employees with wage deduction statements, on information and belief, such statements were inaccurate. Furthermore, FBD/DEFENDANTS "fail[ed] to keep the records required in subdivision (a) of Section 226" because FBD's/DEFENDANTS' Section 226 records are inaccurate. Therefore, HENKE on behalf of herself and other Aggrieved Employees seeks § 226.3 civil penalties pursuant to PAGA.

⁹ https://www.dir.ca.gov/dlse/DLSEManual/dlse_enfmanual.pdf

Labor Code § 226.7(b) Violation and § 226.7(c) Premium Pay

According to Labor Code § 226.7(b), “An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.” Under Labor Code § 226.7(c) “If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each workday that the meal or rest or recovery period is not provided.” Under Labor Code § 226.7(d), “A rest or recovery period mandated pursuant to a state law, including, but not limited to, an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, shall be counted as hours worked, for which there shall be no deduction from wages. This subdivision is declaratory of existing law. Under Labor Code § 226.7(e), “This section shall not apply to an employee who is exempt from meal or rest or recovery period requirements pursuant to other state laws, including, but not limited to, a statute or regulation, standard, or order of the Industrial Welfare Comm.

“...[E]mployers must relieve their employees of all duties and relinquish any control over how employees spend their break time.” See *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1038-1039 and *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 259. Employee meal and rest periods are to be duty free, timely, and uninterrupted. DEFENDANTS failed to provide HENKE and other Aggrieved Employees with legitimate opportunities to take Labor Code compliant meal (§ 512) and rest (IWO 4-2001 § 12) breaks each workday because meal and rest breaks were on-the-clock, interrupted, late, and/or missed. FBD/DEFENDANTS expected HENKE and other Aggrieved Employees to work during their meal and/or rest breaks, especially to accommodate FBD client’s and/or FBD/client projects, including but not limited to travel time during what should have been a meal or rest break for applicable Aggrieved Employees. As another result, Defendants violated Cal. Code Regs., tit. 8, § 11040, subdivision 7(A)(3), which states “Every employer shall keep accurate information with respect to each employee including the following: (3) Time records showing when the employee begins and ends each work period. *Meal periods, split shift intervals and total daily hours worked shall also be recorded* [emphasis added]. Meal periods during which operations cease and authorized rest periods need not be recorded.”

Therefore, DEFENDANTS are liable to HENKE and other Aggrieved Employees for “one additional hour of pay at the employee’s regular rate of compensation for each workday that the meal or rest or recovery period [was/]is not provided.” This includes Aggrieved Employees who worked part-time or an alternative workweek schedule, and were entitled to meal and/or Labor Code compliant meal and/or rest breaks but did not receive from DEFENDANTS a legitimate opportunity to take such. Additionally, this includes Aggrieved Employees who worked over 10 hours in a workday who were entitled to a second meal break and/or a third rest break.

Most importantly for purposes of this PAGA Notice, Defendants are also liable to HENKE and other Aggrieved Employees for attendant PAGA penalties under Labor Code § 2699.3(a) and § 2699.5 pursuant to § 2699.3(f)(2), i.e. the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

Labor Code § 432.5 Violation

Under Labor Code § 432.5 “No employer, or agent, manager...or officer thereof, shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer, or agent, manager...or officer thereof to be prohibited by law.” On information and belief, FBD and/or BERRY require Aggrieved Employees to agree to work a 4/10 alternative workweek even through FBD’s election is unlawful as explained *infra* under **Labor Code § 511 Violation**. As a result, FBD/DEFENDANTS violated Labor Code § 432.5. Therefore, FBD/DEFENDANTS is/are liable to HENKE and other Aggrieved Employees for attendant PAGA penalties pursuant to Lab Code §2699.3(a) and § 2699.5.

Labor Code § 510(a) Violation

Per Labor Code § 510(a), “Eight hours of labor constitutes a day’s work. 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. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee...”

As explained elsewhere and throughout this PAGA Notice, FBD/DEFENDANTS failed to accurately and fully compensate HENKE and other Aggrieved Employees all the wages they are owed, including but not limited to overtime and possible double time wages. As a result, Defendants, are liable to HENKE and other Aggrieved Employees for attendant PAGA penalties pursuant to Lab Code §2699.3(a) and § 2699.5.

Aggrieved Employees Misclassified As Salary Exempt

Generally, California workers are statutorily entitled to overtime compensation for working in excess of an eight-hour workday or in excess of a 40-hour workweek, unless they are properly classified as falling within one of the narrow exemption categories. See Labor Code § 510 and § 515. The Industrial Wage Commission (IWC) promulgated numerous wage orders—one concerning the state minimum wage and the balance covering workers employed in various industries. See California Code of Regulations, title 8, §§ 11000-11170. IWC wage order No. 4-2001 (Wage Order 4), codified at § 11040, governs professional workers. Workers employed in an executive, administrative or professional capacity are exempt from sections 3 through 12 of Wage Order 4, which include provisions concerning overtime compensation, meal and rest periods, and related recordkeeping requirements, among other things. Cal. Code Regs., tit. 8, § 11040, subd. 1.(A). According to the applicable IWO, “in determining whether an employee’s duties meet the test to qualify for [the Executive] exemption,...A person employed in an executive capacity means any employee:

(a) Whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; **and**

(b) Who customarily and regularly directs the work of two or more other employees therein; **and**

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; **and**

(d) Who customarily and regularly exercises discretion and independent judgment; **and**

(e) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-116. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer’s realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(f) Such an employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code Section 515(c) as 40 hours per week.”

Job Duties Test

Exemptions are applicable only to those employees “plainly and [unmistakably] within their terms and spirit.”¹⁰ “[U]nder California law, exemptions from statutory mandatory overtime provisions are narrowly construed.”¹¹ Moreover, exemptions are affirmative defenses, and therefore, *the employer bears the burden of proving an employee is properly designated as exempt.*¹² In order for an employee to legally be exempt from California’s overtime and double time compensation laws, both a “duties test” and a “salary test” apply.

The duties test focuses on the duties actually performed, not on the job title or on the duties that an employer/joint employers write(s) into a job description. “No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles.”¹³ “A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee’s salary and duties meet the requirements of the regulations...”¹⁴ Exemption depends “upon what an employee actually does on the job”.¹⁵ Exemption must be based on how an employee actually spends his or her time, not on an idealized job description.¹⁶

Facts And Theories To Support The § 510(a) Violation

On information and belief, HENKE believes FBD/DEFENDANTS has misclassified as salary-exempt Aggrieved Employees because they do not meet the salary test for exemption, and/or also do not meet the Duties test for any exemption because (1) misclassified salary-exempt Aggrieved Employees definitely lacked “the authority to hire or fire other employees”. It is also unlikely that the “suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees” of these misclassified as salary-exempt Aggrieved Employees would be “given particular weight”. These misclassified as salary-exempt Aggrieved Employees, again, were outranked by BERRY or other more senior employees. This is just an example of not meeting duties. Misclassified as salary-exempt Aggrieved Employees were not primarily engaged in duties which meet the test of the exemption. As a result, FBD/DEFENDANTS violated Labor Code § 432.5 and are liable to HENKE and other Aggrieved Employees for attendant PAGA penalties pursuant to Lab Code §2699.3(a) and § 2699.5.

Labor Code § 511 Violation

Under Labor Code § 511(a), “Upon the proposal of an employer, the employees of an employer may adopt a regularly scheduled alternative workweek that authorizes work by the affected employees for no longer than 10 hours per day within a 40-hour workweek without the payment to the affected employees of an overtime rate of compensation pursuant to this section. A proposal to adopt an alternative workweek schedule shall be deemed adopted *only if* it receives approval in a secret ballot election by at least two-thirds of affected employees in a readily identifiable work unit. The regularly scheduled alternative workweek proposed by an employer for adoption by employees may be a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose. Notwithstanding subdivision (c) of § 500, the menu of work schedule options may include a regular schedule of eight-hour days that are compensated in accordance with subdivision (a) of § 510. Employees who adopt a menu of work schedule options may, with employer consent, move from one schedule option to another on a weekly basis.

Furthermore, Industrial Wage Order No. 4, provides additional guidance/requirements to have a valid alternative workweek, including a valid election for such by following Election Procedures, and states in pertinent part under Alternative Workweek Schedules as follows:

¹⁰ *Bothell v. Phase Metrics, Inc.* (9th Cir. 2002) 299 F.3d 1120, 1125; accord, *Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 562.

¹¹ *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794).

¹² *Taylor v. United Parcel Service, Inc.* (2010) 190 Cal.App.4th 1001, 1010.

¹³ *Taylor v. United Parcel Service, Inc.* (2010) 190 Cal.App.4th 1001, 1015.

¹⁴ 29 C.F.R. § 541.2

¹⁵ *Mies v. Sephora U.S.A., Inc.* (2015) 234 Cal.App.4th 967, 978.

¹⁶ *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 330.

“(1) No employer shall be deemed to have violated the daily overtime provisions by instituting, pursuant to the election procedures set forth in this wage order, a regularly scheduled alternative workweek schedule of not more than ten (10) hours per day within a 40 hour workweek without the payment of an overtime rate of compensation. All work performed in any workday beyond the schedule established by the agreement up to 12 hours a day or beyond 40 hours per week shall be paid at one and one-half (1 1/2) times the employee’s regular rate of pay. All work performed in excess of 12 hours per day and any work in excess of eight (8) hours on those days worked beyond the regularly scheduled number of workdays established by the alternative workweek agreement shall be paid at double the employee’s regular rate of pay. Any alternative workweek agreement adopted pursuant to this section shall provide for not less than four (4) hours of work in any shift. Nothing in this section shall prohibit an employer, at the request of the employee, to substitute one day of work for another day of the same length in the shift provided by the alternative workweek agreement on an occasional basis to meet the personal needs of the employee without the payment of overtime. No hours paid at either one and one-half (1 1/2) or double the regular rate of pay shall be included in determining when 40 hours have been worked for the purpose of computing overtime compensation.

(2) If an employer whose employees have adopted an alternative workweek agreement permitted by this order requires an employee to work fewer hours than those that are regularly scheduled by the agreement, the employer shall pay the employee overtime compensation at a rate of one and one-half (1 1/2) times the employee’s regular rate of pay for all hours worked in excess of eight (8) hours, and double the employee’s regular rate of pay for all hours worked in excess of 12 hours for the day the employee is required to work the reduced hours.

(3) An employer shall not reduce an employee’s regular rate of hourly pay as a result of the adoption, repeal or nullification of an alternative workweek schedule.

(4) An employer shall explore any available reasonable alternative means of accommodating the religious belief or observance of an affected employee that conflicts with an adopted alternative workweek schedule, in the manner provided by subdivision (j) of Section 12940 of the Government Code.

(5) An employer shall make a reasonable effort to find a work schedule not to exceed eight (8) hours in a workday, in order to accommodate any affected employee who was eligible to vote in an election authorized by this section and who is unable to work the alternative workweek schedule established as the result of that election.

(6) An employer shall be permitted, but not required, to provide a work schedule not to exceed eight (8) hours in a workday to accommodate any employee who is hired after the date of the election and who is unable to work the alternative workweek schedule established by the election. ...”

“(C) Election Procedures

Election procedures for the adoption and repeal of alternative workweek schedules require the following:

(1) Each proposal for an alternative workweek schedule shall be in the form of a written agreement proposed by the employer. The proposed agreement must designate a regularly scheduled alternative workweek in which the specified number of work days and work hours are regularly recurring. The actual days worked within that alternative workweek schedule need not be specified. The employer may propose a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose. If the employer proposes a menu of work schedule options, the employee may, with the approval of the employer, move from one menu option to another.

(2) In order to be valid, the proposed alternative workweek schedule must be adopted in a secret ballot election, before the performance of work, by at least a two-thirds (2/3) vote of the affected employees in the work unit. The election shall be held during regular working hours at the employees’ work site. For purposes of this subsection, —affected employees in the work unit may include all employees in a readily identifiable work unit, such as a division, a department, a job

classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection are met.

(3) Prior to the secret ballot vote, any employer who proposed to institute an alternative workweek schedule shall have made a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Such a disclosure shall include meeting(s), duly noticed, held at least 14 days prior to voting, for the specific purpose of discussing the effects of the alternative workweek schedule. An employer shall provide that disclosure in a non-English language, as well as in English, if at least five (5) percent of the affected employees primarily sFBD that non-English language. The employer shall mail the written disclosure to employees who do not attend the meeting. Failure to comply with this paragraph shall make the election null and void.

(4) Any election to establish or repeal an alternative workweek schedule shall be held at the work site of the affected employees. The employer shall bear the costs of conducting any election held pursuant to this section. Upon a complaint by an affected employee, and after an investigation by the labor commissioner, the labor commissioner may require the employer to select a neutral third party to conduct the election.

(5) Any type of alternative workweek schedule that is authorized by the Labor Code may be repealed by the affected employees. Upon a petition of one-third (1/3) of the affected employees, a new secret ballot election shall be held and a two-thirds (2/3) vote of the affected employees shall be required to reverse the alternative workweek schedule. The election to repeal the alternative workweek schedule shall be held not more than 30 days after the petition is submitted to the employer, except that the election shall be held not less than 12 months after the date that the same group of employees voted in an election held to adopt or repeal an alternative workweek schedule. However, where an alternative workweek schedule was adopted between October 1, 1999 and October 1, 2000, a new secret ballot election to repeal the alternative workweek schedule shall not be subject to the 12-month interval between elections. The election shall take place during regular working hours at the employees' work site. If the alternative workweek schedule is revoked, the employer shall comply within 60 days. Upon proper showing of undue hardship, the Division of Labor Standards Enforcement may grant an extension of time for compliance.

(6) Only secret ballots may be cast by affected employees in the work unit at any election held pursuant to this section. The results of any election conducted pursuant to this section shall be reported by the employer to the Office of Policy, Research and Legislation within 30 days after the results are final, and the report of election results shall be a public document. The report shall include the final tally of the vote, the size of the unit, and the nature of the business of the employer.

(7) Employees affected by a change in the work hours resulting from the adoption of an alternative workweek schedule may not be required to work those new work hours for at least 30 days after the announcement of the final results of the election.

(8) Employers shall not intimidate or coerce employees to vote either in support of or in opposition to a proposed alternative workweek. No employees shall be discharged or discriminated against for expressing opinions concerning the alternative workweek election or for opposing or supporting its adoption or repeal. However, nothing in this section shall prohibit an employer from expressing his/her position concerning that alternative workweek to the affected employees. A violation of this paragraph shall be subject to Labor Code Section 98 et seq."

According to a letter received by the Division of Labor Standards Enforcement (DLSE) on September 20, 2022, which appears to be signed by BERRY, "THIS LETTER IS TO NOTIFY YOU OF AN ALTERNATIVE WORKWEEK ADOPTION BY OUR EMPLOYEE(S) AT FRANK BERRY DESIGNS ON SEPTEMBER 15, 2022. THIS COMPANY IS AN INTERIOR DESIGN COMPANY IN ORANGE COUNTY, CA. THE ELECTION IN FAVOR OF AN ALTERNATIVE WORKWEEK PASSED BY A VOTE OF 100% IN SUPPORT AND 0% AGAINST. THE BALLOT WAS A WRITTEN SECRET BALLOT AND IT PASSED BY AT LEAST TWO-THIRDS OF THE VOTE. A TOTAL OF 6 EMPLOYEES VOTED, OUT OF 6 ELIGIBLE TO VOTE IN THIS ELECTION. THE ALTERNATIVE WORKWEEK SCHEDULE THAT WAS PROVIDED TO EMPLOYEES IN ADVANCE OF THE ELECTION, AND

WAS THE SUBJECT OF THE ELECTION IS AS FOLLOWS: WORKWEEK: 4/10 (EMPLOYEES WORK FOUR 10-HOUR DAYS IN A WORKWEEK) HOURS: 8:30AM-6:30PM”.

Although HENKE ceased working for FBD/DEFENDANTS prior to the date FBD adopted its alternative 4/10 workweek, given HENKE’s own experience in working overtime and possibly double time hours, and not being compensated for all such hours worked, on information and belief, HENKE believes other Aggrieved Employees subject to FBD’s/DEFENDANTS’s alternative workweek schedule continued to be inadequately compensated, especially because given the Election documents to which HENKE possesses, it appears FBD/DEFENDANTS failed to adhere to the Election Procedures detailed above, and thus have a void/unlawful 4/10 alternative workweek schedule, and owe affected Aggrieved Employees overtime and/or double time pay. More specifically, FBD/DEFENDANTS disclosure to FBD employees is inadequate. Consequently, FBD/DEFENDANTS violated Labor Code § 511 and are liable for unpaid overtime and/or double time pay to Aggrieved Employees subject to FBD’s alternative workweek schedule.

To maintain this action under PAGA, HENKE does/did not have to be employed by FBD and governed by its alternative workweek schedule. PAGA “allows an “aggrieved employee”—a person affected by at least one Labor Code violation committed by an employer—to pursue penalties for all the Labor Code violations committed by that employer.” *Huff v. Securitas Security Services USA, Inc.* (2018) H042852. Having violated Labor Code § 511, FBD/DEFENDANTS are also liable to Aggrieved Employees for attendant PAGA penalties pursuant to Labor Code § 2699.3(a) and § 2699.5 in the applicable amount(s) specified per § 558(a), i.e. (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages or (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. This is in addition to unpaid wages.

Labor Code § 512 Violations and § 226.7(c) Pay

Under Labor Code § 512(a), “An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.” As noted earlier in this PAGA Notice, DEFENDANTS did not provide Aggrieved Employees Labor Code compliant meal and/or rest breaks because such were interrupted, missed, or untimely. As already mentioned, due to FBD’s/DEFENDANTS’ corporation wide policy, procedure, and/or practice of “Off Hour Communications”, the unlawful alternative workweek, and/or a workload that overly accommodated FBD clients, Aggrieved Employees, including HENKE were not afforded a legitimate opportunity by FBD/DEFENDANTS to take Labor Code compliant meal and/or rest breaks.

Consequently, FBD/DEFENDANTS are liable to HENKE and other Aggrieved Employees for premium pay pursuant to § 226.7(c) which states, “If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each workday that the meal or rest or recovery period is not provided.” More importantly for purposes of this PAGA Notice, DEFENDANTS are also liable to HENKE and other Aggrieved Employees for attendant PAGA penalties pursuant to Lab Code § 2699.3(a) and § 2699.5 for violating Labor Code § 512 and § 226.7(c) in the applicable amount(s) prescribed by Labor Code § 558(a) (*infra*).

Labor Code § 558 Civil Penalties and § 218.6 Interest

Under Labor Code § 558(a) “Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter [§§ 500-558] or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. (3) Wages recovered pursuant to this section shall be paid to the affected employee. (d) The civil penalties provided for in this section are in addition to any other civil or criminal penalty provided by law. In violating Labor Code section §§ 510, 511, 512 (*supra*), and the applicable Industrial Wage Order, Employers are liable for § 558 civil penalties in addition to an amount sufficient to recover underpaid wages for Aggrieved Employees, as well as PAGA penalties for violating § 558(a).

DEFENDANTS did not compensate HENKE and other Aggrieved Employees for all time that they worked. As previously mentioned, DEFENDANTS willfully failed to pay HENKE and other Aggrieved Employees all earned wages, including but not necessarily limited to minimum, regular, overtime, double time and/or premium wages as well as reporting time, sick leave, and/or vacation pay. Employees must be fully compensated for all the time they actually work.

FBD/DEFENDANTS are liable under § 558 for violating, or causing to be violated, a section of this chapter [§§ 500-558] or any provision regulating hours and days of work in the applicable IWO as above (*supra*), as well as liable to pay interest on these unpaid wages because under Labor Code § 218.6, in any action brought for the nonpayment of wages, the court shall award interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the Civil Code [10 percent per annum], which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2. Defendants, including Defendants are also liable for PAGA penalties pursuant to Labor Code § 2699.3(c) and § 2699(f) (*supra*).

Labor Code § 558.1 Civil Penalties

Under Labor Code § 558.1(a) “Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation. (b) For purposes of this section, the term “other person acting on behalf of an employer” is limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term “managing agent” has the same meaning as in subdivision (b) of Section 3294 of the Civil Code. (c) Nothing in this section shall be construed to limit the definition of employer under existing law.

FBD/DEFENDANTS did not compensate HENKE and other Aggrieved Employees for all time worked as previously explained. Therefore Defendants are liable under § 558 for violating, or causing to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802. Defendants, including Defendants and its CEO, are also liable for PAGA penalties pursuant to Labor Code § 2699.3(c) and § 2699(f) (*supra*).

Labor Code § 1174(d) Violation & Labor Code § 1174.5 Civil Penalty

Under Labor Code § 1174(d) “Every person employing labor in this state shall... keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to...employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.” Under state law, employers must maintain and preserve accurate records showing, *inter alia*, when the employee begins and ends work each day; the total number of hours worked on a daily

basis; and all meal periods and split shift intervals. *See* Labor Code § 1174(d) and IWC Wage Order 4-2001 § 7. Under California law, “[h]ours worked means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” IWC Wage Order 4-2001 § 2(K). This includes donning and doffing required uniforms, protective gear, and other equipment off-the-clock. California law does not permit *any* time to be uncompensated. *Carrillo v. Schneider Logistics, Inc.*, 823 F. Supp. 2d 1040, 1044 (C.D. Cal. 2011) citing *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 317, 324.

Due to FBD’s/ DEFENDANTS’ violation of Labor Code § 226(a) (*supra*), there is no doubt DEFENDANTS failed to maintain and make available accurate payroll records showing the hours worked daily by and the wages paid to HENKE and Aggrieved Employees a central location. FBD has not kept the required payroll or production records and did not make those records available to HENKE upon her request for her Labor Code sections 226 and 1198.5 records. Thus, FBD/ DEFENDANTS failed to maintain and make available accurate records as required by Labor Code § 1174.

There is no private right of action under Labor Code § 1174. Because § 1174 does not provide for direct means of recovery by employees, a right of action to recover civil penalties under this statute only exists under PAGA. *Noe v. Superior Court* (2015) 237 Cal. App. 4th 316, 339. Therefore, in violating § 1174(d), Defendants is liable to HENKE and other Aggrieved Employees for attendant PAGA civil penalties pursuant to Labor Code § 2699.3(a) and § 2699.5 in the amount enumerated in Labor Code § 1174.5. Labor Code § 1174.5 states, “Any person employing labor who willfully fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete records required by subdivision (d) of Section 1174, or to allow any member of the commission or employees of the division to inspect records pursuant to subdivision (b) of Section 1174, shall be subject to a civil penalty of five hundred dollars (\$500).

Labor Code § 1182.12 & PAGA Civil Penalties Pursuant To Labor Code § 2699.3(c)

According to the relevant part(s) of Labor Code § 1182.12(a), “Notwithstanding any other provision of this part, ...on and after January 1, 2016, the minimum wage for all industries shall be not less than ten dollars (\$10) per hour. According to the relevant part(s) of Labor Code § 1182.12(b), “Notwithstanding subdivision (a), the minimum wage for all industries shall not be less than the amounts set forth in this subdivision, except when the scheduled increases in paragraphs (1) and (2) are temporarily suspended under subdivision (d).

- (1) For any employer who employs 26 or more employees, the minimum wage shall be as follows:
 - (A) From January 1, 2017, to December 31, 2017, inclusive,—ten dollars and fifty cents (\$10.50) per hour.
 - (B) From January 1, 2018, to December 31, 2018, inclusive,—eleven dollars (\$11) per hour.
 - (C) From January 1, 2019, to December 31, 2019, inclusive,—twelve dollars (\$12) per hour.
 - (D) From January 1, 2020, to December 31, 2020, inclusive,—thirteen dollars (\$13) per hour.
 - (E) From January 1, 2021, to December 31, 2021, inclusive,—fourteen dollars (\$14) per hour.
 - (F) From January 1, 2022, and until adjusted by subdivision (c)—fifteen dollars (\$15) per hour.

According to the relevant part(s) of Labor Code § 1182.12(b)(3), “For purposes of this subdivision, “employer” means any person who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person. Though detailed earlier in this PAGA Notice, DEFENDANTS failed to pay HENKE and other Aggrieved Employees the applicable minimum wage rates enumerated in Labor Code § 1182.12 subdivisions (a) and (b) from 2016 to present for all hours worked.

Consequently, Defendants violated Labor Code § 1182.12 and is liable to Aggrieved Employees for PAGA penalties under Labor Code § 2699.3(c) in accordance with § 2699.3(f)(2). Labor Code § 2699.3(f) states, “For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows: (2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

Labor Code §§ 1194(a) and 1197 Violations, And Additional Remedy Under § 1197.1

Under Labor Code § 1194(a) “Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or 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 minimum wage or overtime compensation, *including interest thereon, reasonable attorney’s fees, and costs of suit.* Under Labor Code § 1197 “The minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful.”

As explained above, DEFENDANTS failed to compensate overtime pay to Aggrieved Employees and failed to pay Aggrieved Employees minimum wage, let alone their actual regular hourly wages, for off-the-clock work, thus violating minimum wage and over-time compensation laws. Accordingly, DEFENDANTS are liable for the unpaid balance of the full amount of this minimum wage and/or overtime/double-time compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.

Under Labor Code § 1197.1(a) “Any employer or other person acting either individually or as an officer, agent, or employee of another person, who pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission shall be subject to a civil penalty, restitution of wages, liquidated damages payable to the employee, and any applicable penalties imposed pursuant to Section 203 as follows: (1) For any initial violation that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee is underpaid. This amount shall be in addition to an amount sufficient to recover underpaid wages, liquidated damages pursuant to Section 1194.2¹⁷, and any applicable penalties imposed pursuant to Section 203. (2) For each subsequent violation for the same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed. This amount shall be in addition to an amount sufficient to recover underpaid wages, liquidated damages pursuant to Section 1194.2, and any applicable penalties imposed pursuant to Section 203. (3) Wages, liquidated damages, and any applicable penalties imposed pursuant to Section 203, recovered pursuant to this section shall be paid to the affected employee.” In light of FBD’s and/or DEFENDANTS’ multiple Labor Code violations noticed above, HENKE and other Aggrieved Employees seek the additional remedy provided under § 1197.1 and attendant PAGA penalties pursuant to Labor Code § 2699.3(a) and § 2699.5.

Labor Code § 1198 Violation

Under Labor Code § 1198 “The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.” As discussed above, Defendants and/or Defendants did not properly compensate HENKE and other Aggrieved Employees for all time worked. As previously mentioned, FBD and/or DEFENDANTS willfully failed to pay HENKE and other Aggrieved Employees all earned wages, including but not necessarily limited to minimum, regular, overtime, double time and/or premium wages as well as reporting time, sick leave, and/or vacation pay due. Also, Aggrieved Employees did not have a legitimate opportunity to take Labor Code compliant meal/rest breaks. Therefore, DEFENDANTS additionally violated Labor Code § 1198 and are liable for attendant PAGA penalties pursuant to Labor Code § 2699.3(a) and § 2699.5.

¹⁷ Pursuant to Labor Code § 1194.2(a) In any action under Section 98, 1193.6, 1194, or 1197.1 to recover wages because of the payment of a wage less than the minimum wage fixed by an order of the commission or by statute, an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid *and interest thereon...*”

Lab. Code § 2802(a) Violation

Under Labor Code § 2802(a), “An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer...(b) All awards made by a court or by the Division of Labor Standards Enforcement for reimbursement of necessary expenditures under this section shall carry interest at the same rate as judgments in civil actions. Interest shall accrue from the date on which the employee incurred the necessary expenditure or loss. (c) For purposes of this section, the term “necessary expenditures or losses” shall include all reasonable costs, including, but not limited to, attorney’s fees incurred by the employee enforcing the rights granted by this section. Section 2802 is a nonwaivable right.

HENKE and Aggrieved Employees constantly worked while using their personal cell phones for work related purposes. However, FBD and/or Defendants failed to reimburse Aggrieved Employees for the pro rata basis of their cells phones as dictated by *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal. App. 4th 1137, which ruled that employers must reimburse employees for work-related calls on their personal cellphones, even when the employee has “unlimited minutes”. FBD and/or Defendants failed to reimburse HENKE and other Aggrieved Employees for mileage in using their personal vehicles for business travel.

FBD and/or Defendants failed to comply with § 2802 when FBD and/or Defendants failed to accurately reimburse Aggrieved Employees, including HENKE, for all miles driven, for the pro rata cost of employee’s respective cell phone plans for necessary work-related calls, for required uniform shoes. Thus, FBD and/or Defendants violated Labor Code § 2802(a) and owes PAGA penalties in addition to interest and attorneys’ fees.

Reporting Time Pay

On information and belief, Defendants and/or Defendants also failed to pay reporting time pay in violation of the applicable Industrial Wage Order as explained earlier in this PAGA Notice, triggering additional PAGA penalties HENKE and seeks on behalf of herself and other Aggrieved Employees.¹⁸

VI. Amendment(s)

Violation Of California’s Healthy Workplaces, Healthy Families Act of 2014 (L.C. §§ 245-249)

California’s Healthy Workplaces, Healthy Families Act of 2014 (L.C. §§ 245-249) was passed the same year as FBD’s incorporation of September 9, 2014, and went into effect on July 1, 2015. Despite over two years lapsing prior to hiring HENKE, who started working for FBD on November 20, 2017, FBD never complied with the paid sick leave requirements of Labor Code §§ 246, 246.5, 247, 247.5, and 248.5 with regard to any and all FBD employees during HENKE’s entire employment by FBD. This also includes pay under any law, ordinance, regulation and/or statute pertaining to pay relating to COVID, such as “COVID-19 supplemental paid sick leave”, if applicable given the number of employees FBD employs. The evidence for this cause of action are FBD’s Gusto Earnings Statements that lack an itemization for sick pay. Thus FBD’s failure to provide paid sick leave to FBD employees is/was not an isolated and unintentional payroll error or written notice error that is a clerical or an inadvertent mistake regarding the accrual or available use of paid sick leave. FBD had not even adopted a set of policies, procedures, and practices that fully comply with California’s Healthy Workplaces, Healthy Families Act of 2014.

¹⁸ “Although the employee has the burden of proving that he performed work for which he was not compensated, public policy prohibits making that burden an impossible hurdle for the employee. . . . ‘In such situation . . . an employee has carried out his burden 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. The burden then shifts to the Employers to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s evidence. If the Employers fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.’” (*Hernandez, supra*, 199 Cal.App.3d at p. 727, internal citation omitted.)

FBD did not offer HENKE and/or the Sick Pay Class members a paid leave policy or paid time off policy in which FBD made available an amount of leave applicable to employees that could have been used for the same purposes and under the same conditions as specified in L.C. section 246. Also, FBD did not have a policy that satisfied the accrual, carryover, and use requirements of L.C. section 246.

California's Healthy Workplaces, Healthy Families Act of 2014 mandates that an employer provide employees with "Paid sick days", which means time that is compensated at the same wage as the employee normally earns during regular work hours and is provided by an employer to an employee for the purposes described in Section 246.5. *See* L.C. section 245.5(e).

Pursuant to L.C. section 248.5(e), "The Labor Commissioner or the Attorney General may bring a civil action in a court of competent jurisdiction against the employer or other person violating this article and, upon prevailing, shall be entitled to collect legal or equitable relief on behalf of the aggrieved as may be appropriate to remedy the violation, including reinstatement, backpay, the payment of sick days unlawfully withheld, the payment of an additional sum, not to exceed an aggregate penalty of four thousand dollars (\$4,000), as liquidated damages in the amount of fifty dollars (\$50) to each employee or person whose rights under this article were violated for each day or portion thereof that the violation occurred or continued, plus, if the employer has unlawfully withheld paid sick days to an employee, the dollar amount of paid sick days withheld from the employee multiplied by three; or two hundred fifty dollars (\$250), whichever amount is greater; and reinstatement in employment or injunctive relief; and further shall be awarded reasonable attorney's fees and costs, provided, however, that any person or entity enforcing this article on behalf of the public as provided for under applicable state law shall, upon prevailing, be entitled only to equitable, injunctive, or restitutionary relief, and reasonable attorney's fees and costs."

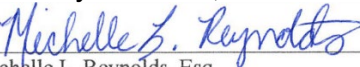
In her original PAGA Notice, HENKE inadvertently did not plead L.C. section 248.5(e) violations, and will therefore amend her PAGA Notice to correct this error. This additional cause of action is considered valid only after HENKE exhausts further administrative remedies with the LWDA.

The provisions of California's Healthy Workplaces, Healthy Families Act of 2014 are in addition to and independent of any other rights, remedies, or procedures available under any other law and do not diminish, alter, or negate any other legal rights, remedies, or procedures available to an aggrieved person. L.C. section 245.

VII. Conclusion

All of the above constitutes HENKE's Amended PAGA Notice to FBD and Defendants, and to the PAGA Administrator/ LWDA.

Respectfully submitted,

By: 
Michelle L. Reynolds, Esq.

Attorney for MCCALL HENKE

THE Legal Advocate

2110 K Street, 124

Sacramento, CA 95816

Phone: (714) 474-8097

AttorneyMichelleReynolds@gmail.com