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KEITH GERLACK

Assigned for All Purposes
Judge William Claster
CX-101

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

KEITH GERLACK, in his individual and representative capacity,

Plaintiff,

vs.

CURENTA LLC, a California corporation; and DOES 1-10, Inclusive,

Defendants.

Case No. 30-2024-01417653-CU-WT-CXC

COMPLAINT FOR:

(1) INDEPENDENT CONTRACTOR MISCLASSIFICATION
(2) FAILURE TO PAY COMMISSIONS
(3) VIOLATION OF CALIFORNIA'S WHISTLEBLOWER LAWS
(4) WRONGFUL TERMINATION
(5) FAILURE TO PAY WORK-RELATED EXPENSES
(6) FAILURE TO PAY OVERTIME
(7) FAILURE TO PAY MINIMUM WAGES
(8) FAILURE TO PROVIDE PROPER MEAL PERIODS
(9) FAILURE TO PROVIDE PROPER REST PERIODS
(10) FAILURE TO PROVIDE PROPER WAGE STATEMENTS
(11) FAILURE TO TIMELY PAY WAGES UPON TERMINATION
(12) UNFAIR COMPETITION
(13) VIOLATION OF THE PRIVATE ATTORNEYS GENERAL ACT OF 2004

JURY TRIAL DEMANDED

Plaintiff KEITH GERLACK ("Plaintiff") is informed and believes and hereby alleges as follows:

FACTUAL BACKGROUND

1. Plaintiff worked for defendant CURENTA LLC ("Curenta") as a Business Development Specialist from September 2021 until he was fired on or about April 24, 2024. From September 2021 until April 2023, Curenta misclassified Plaintiff as a 1099 "independent contractor," despite exercising near complete control over him and his working conditions and not satisfying any of the three elements of the "ABC test" under California law for a bona fide independent contractor. Curenta misclassified Plaintiff and other employees as "independent contractors" to avoid complying with California wage and hour laws requiring, among other things, paying overtime wages, proving meal and rest periods, and paying or reimbursing for work-related expenses. Plaintiff repeatedly complained about Curenta's failure to pay Plaintiff his earned compensation, including his commissions which were owed, and its refusal to provide him a proper written commission agreement as required by Labor Code section 2751(a). In April 2024, Curenta fired Plaintiff in retaliation for his complaints about said wage and hour violations.

2. During Plaintiff's employment, Curenta committed an array of wage and hour violations against Plaintiff, many of which were a result of Curenta misclassifying Plaintiff as an "independent contractor" and failing to provide a proper commission agreement under Labor Code section 2751 and provide a transparent calculation of owed commissions. Curenta misclassified Plaintiff and other employees as "independent contractors" when they were in truth employees entitled to the protections as such under California law. As recognized by the California Supreme Court in *Dynamex*, "the question whether an individual worker should be properly be classified as an employee or, instead, as an independent contractor has considerable significance for workers, businesses, and the public generally." *Dynamex Operations West v. Superior Court*, 4 Cal.5th 903, 912-13, 950 fn. 20; *Garcia v. Border Transportation Group*, LLC, 28 Cal.App.5th 558, 566 (2018). Pursuant to California Labor Code 2775 and *Dynamex*, "a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that ***all of the following conditions*** are satisfied:

/ / /

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Cal. Lab. Code § 2775 (emphasis added). Here, Curenta controlled and directed Plaintiff's performance of his work, Plaintiff's work was directly within "the usual course of [Curenta's] business," i.e., selling Curenta's software and services for assisted living facilities, and Plaintiff was not "engaged in independently established trade, occupation or business," but instead Plaintiff simply sold ***Curenta's*** software and services for ***Curenta***.

3. Plaintiff worked as a non-exempt employee who spent most of his time, i.e., more than fifty percent, working at his home office. He worked a full-time schedule that regularly included time worked over eight hours per day and/or 40 hours per week. Plaintiff was not made aware of any Curenta policy allowing him to take meal periods or rest periods, and consequently he rarely took them. Plaintiff regularly incurred significant expenses in carrying out his sales duties for Curenta, including regularly driving his personal vehicle, paying for office supplies, and using his personal cellular phone without sufficient reimbursement from Curenta.

4. Curenta repeatedly changed Plaintiff's compensation structure and rates during his employment: pursuant to his initial offer letter, from September 2021 to January 2022, he was paid a "monthly salary" of $6,000 per month plus $500 "for expenses" and "20% of Gross Profit 1," but this offer letter did not comply with Labor Code section 2751 because it utterly failed to "set forth the method by which the commissions shall be computed and paid;" then, in February 2022, Curenta changed his compensation to commission only, at a rate of 35% of the gross profit of the deals he closed which it then sought to reduce to 25% without ever providing him a written commission agreement as to any of this or any detailed explanation of how it would be calculated and paid pursuant to Labor Code section 2751 constituting many more violations; in approximately May/June 2022, seeking to avoid paying Plaintiff a very large earned commission for closing the largest account in the company's history (Pacifica Escondido Assisted Living on May 23, 2022) among others, Curenta told Gerlack he would

not receive any commission on his closing and changed him to a flat payment of $4,000 month, which was later increased to $6,000 per month; and on April 1, 2023, although Mr. Gerlack's job duties remained essentially the same, Curenta changed his status to W-2 employee but kept his pay at a flat $6,000 per month, never paying him any of the commissions earned and owed from September 2021 through at least 2023.

5. As a result, Curenta committed an arrange of wage and hour violations against Plaintiff, including: (i) misclassifying him as an "independent contractor;" (ii) failing to pay or reimburse for business expenses; (iii) failing to pay earned commissions; (iv) failing to provide compliant off-duty rest periods and/or required premium wages; (v) failing to compensate Plaintiff (and other similarly situated employees paid on a commission basis) at least the minimum wage for time spent on rest breaks in violation of *Vaquero v. Stoneledge Furniture LLC*, 9 Cal.App.5th 98 (2017); (vi) failing to provide compliant off-duty meal periods and/or required premium wages; (vii) failing to pay earned minimum wages, regular wages, and/or overtime wages; (viii) based on the foregoing violations, willfully furnishing itemized wage statements to Plaintiff and many other similarly situated employees that did not accurately state, among other things, gross wages earned, total hours worked, deductions, net wages earned, hourly rates, the number of hours worked, and hourly rates as applied to hours worked; (ix) and failing to timely pay all wages due upon termination and then pay the required "waiting time" penalties; and (x) failing to comply with Labor Code section 2751 by never providing Plaintiff with a compliant commissions agreement despite agreeing to compensate Plaintiff via commissions for the majority of his tenure with Curenta. During his employment, Plaintiff made several complaints and/or raised questions about certain wage and hour violations, including complaining about not being paid certain earned commissions and not having a proper commission agreement in place. Plaintiff sought to be paid the commissions he had earned for closing treatment centers and for closing the Pacifica Escondido Assisted Living Account and other hospices and congregate homes, but Curenta rebuffed his efforts and in direct response reduced his compensation. In or about January 2024, Plaintiff submitted a written self-assessment in which he again noted certain wage and hour violations, including stating "My pay has changed 4 times in the past 1.5 years, none of which has been in writing (which goes against the handbook I am often requested to sign)." Similarly, in response to the query "What are your goals for

2024?" Plaintiff wrote: "Close the largest accounts for Curenta and get promoted to a [sic.] Director of Strategic Accounts or Strategy Division. Put a valid contact in place and have a better understanding of my bonus and commission structure."

6. Soon thereafter, in retaliation for Plaintiff's complaints, Curenta created and sought to impose patently unreasonable "sales goals" for the first quarter 2024 and then used them as a pretext to terminate his employment. In direct response to Plaintiff's complaints about his unpaid wages and other wage violations, Curenta created unreasonable unattainable goals about meetings, deal closures, and other items for the first quarter of 2024 that no one in the organization had ever met or ever could meet. This was the first time anything similar had been instructed of Plaintiff. Plaintiff did his best and indeed continued to perform better than anyone else in company at his position level. Nonetheless, this was an ultimate set up for a termination so that Curenta could get away without paying Plaintiff his wages altogether and avoid compliance with the wage laws and basic good faith.

PRELIMINARY ALLEGATIONS

7. This Court has jurisdiction over this matter under PAGA and this Court's general powers granted by statutory law and the California Constitution.

8. Plaintiff KEITH GERLACK is, and at relevant times was, an individual domiciled in the State of California and a citizen of the State of California who worked as a non-exempt employee at Defendants' Orange County, California location.

9. Defendant CURENTA LLC is a California Corporation doing business in Orange County, California.

10. Venue is proper because Plaintiff worked and resided in Orange County, California and a substantial portion of the events at issue in this matter occurred within Orange County, California.

11. The true names and capacities of the DOE Defendants sued herein as DOES 1 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by fictitious names. Each of the Defendants designated herein as a DOE is legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend this Complaint to reflect the true names and capacities of the Doe Defendants when such identities become known.

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12. At all relevant times, each and every Defendant was acting as an agent and/or employee of each of the other Defendants and was acting within the course and/or scope of said agency and/or employment with the full knowledge and consent of each of the Defendants. Each of the acts and/or omissions complained of herein were alleged and made known to, and ratified by, each of the other Defendants. Defendant Curenta and Doe Defendants are hereafter collectively referred to as "Defendants."

13. At all relevant times, Defendants were, and are, legally responsible for all of the unlawful conduct, policies, practices, acts and omissions complained of herein as the employer of Plaintiff and Aggrieved Employees. Further, Defendants are responsible for each of the unlawful acts or omissions complained of herein under the doctrine of *respondeat superior*. The conduct of Defendants' managers and supervisors was at all relevant times undertaken as employees of Defendants, acting within the scope of their employment or authority in all of the unlawful activities described herein.

14. Plaintiff gave written notice by certified mail of Defendant's violations of various provisions of the California Labor Code as alleged in this complaint to the Labor and Workforce Development Agency ("LWDA") and Defendant. Plaintiff's notice is attached hereto as **Exhibit A**.

15. The LWDA did not provide notice of its intention to investigate Defendants' violations.

FIRST CAUSE OF ACTION

Misclassification of Employees As "Independent Contractors" [Lab. Code §§ 226.8, 2775(b)]

(By Plaintiff Against All Defendants)

16. Plaintiff incorporates by this reference the relevant allegations contained herein as if fully set forth in this cause of action.

17. Labor Code section 226.8 prohibits any person or employer from willfully misclassifying an individual as an independent contractor.

18. Defendants intentionally classified Plaintiff as a 1099 "independent contractor" during much of his employment and maintained a uniform policy with respect to all Sales Representatives hired to work in California.

19. As recognized by the California Supreme Court in *Dynamex*, "the question whether an individual worker should be properly be classified as an employee or, instead, as an independent

contractor has considerable significance for workers, businesses, and the public generally." *Dynamex Operations West v. Superior Court*, 4 Cal.5th 903, 912-13, 950 fn. 20; *Garcia v. Border Transportation Group, LLC*, 28 Cal.App.5th 558, 566 (2018). Pursuant to California Labor Code 2775 and *Dynamex*, "a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.
>
> Cal. Lab. Code § 2775 (emphasis added).

20. Here, Curenta controlled and directed Plaintiff's performance of his work, Plaintiff's work was directly within "the usual course of [Curenta's] business," i.e., selling Curenta's software and services for assisted living facilities, and Plaintiff was not "engaged in independently established trade, occupation or business," but instead Plaintiff simply sold Curenta's software and services for Curenta.

21. Through their misclassification of Plaintiff and other employees, Defendants have engaged in a pattern and practice of willful misclassification of its employees as independent contractors for its own financial benefit.

22. Plaintiff is entitled to recover the civil penalties specified in the Labor Code for Defendants' violations of section 226.8 in an amount of not less than ten thousand dollars ($10,000) and up to twenty-five thousand dollars ($25,000) for each violation, in addition to any other penalties or fines permitted by law.

23. Plaintiff is entitled to recover his reasonable attorney fees and costs in bringing this action.

24. Defendants are subject to an order requiring it to provide public notice of its violation of Section 226.8, as required under sub-sections (e) and (f) thereof, in the event this Court determines that a violation has been committed.

SECOND CAUSE OF ACTION

Failure To Pay Commissions [Lab. Code §§ 2751, 204, 204.1]

(By Plaintiff Against All Defendants)

25. Plaintiff incorporates by this reference the relevant allegations contained herein as if fully set forth in this cause of action.

26. "Commission wages are compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof." Cal. Lab. Code § 204.1; *see also* Cal. Lab. Code §§ 200 ("'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"), 2751(c) ("As used in this section, 'commissions' has the meaning set forth in section 204.1."). The California Department of Labor Standards and Enforcement ("DLSE") position is that a commission must be paid in the pay period in which it is earned. California Labor Code section 210 provides for a penalty of $100 per employee for each failure to pay commission wages as required and a penalty of $200 plus 25 percent of the amount unlawfully withheld for each subsequent violation or any intentional or willful violation.

27. As set forth herein, Defendants have regularly failed to pay Plaintiff earned commissions by, among other things, not paying him substantial earned commissions for closing treatment centers and for closing the Pacifica Escondido Assisted Living Account and other hospices and congregate homes.

THIRD CAUSE OF ACTION

Violation Of California's Whistleblower Laws [Lab. Code §§ 1102.5, 98.6]

(By Plaintiff Against All Defendants)

28. Plaintiff incorporates by this reference the relevant allegations contained herein as if fully set forth in this cause of action.

29. At all relevant times, Labor Code section 1102.5 has precluded, among other things, retaliating "against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, . . . to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or

noncompliance . . . if the employee has reasonable cause to believe that the information discloses a violation or state or federal statute, or a violation of or noncompliance with a local, state or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." Cal. Lab. Code 1102.5(b).

30. The protections of section 1102.5 apply to employees. *See e.g., Bennett v. Ranch California Water Dist*., 35 Cal.App.5th 908, 911 (2019). To qualify as "protected activity," an employee need only disclose a suspicion of a potential legal violation that is held in good faith and reasonable, regardless of whether it ultimately proves correct. *See e.g., Diego v. Pilgrim United Church of Christ*, 231 Cal.4th 913, 922 (2014). The disclosure does not need to be the first or only report of suspected illegal activity to qualify as "protected activity." *Hager v. County of Los Angeles*, 228 Cal.4th 1538, 1551-52 (2014); and "protected activity" need not implicate nor concern a violation of public policy. *See Cardenas v. M. Fanaian, D.D.S., Inc*., 194 Cal.Rptr.3d 1, 9-10, review granted and opinion superseded sub nom. *Cardenas v. Fanaian*, 362 P.3d 431 (Cal. 2015), and review dismissed on Feb. 24, 2016.

31. A qualifying "adverse employment action" is any action or course or pattern of conduct that, taken as a whole, materially and adversely affects the terms, conditions, or privileges of employment. *See Yanowitz v. L'Oreal USA, Inc*., 36 Cal.4th 1028, 1052-56 (2005). A determination of whether an adverse employment action occurred must "take into consideration the unique circumstances of the affected employee as well as the workplace conduct of the claims." *Whitehall v. County of San Bernardino*, 17 Cal.App.5th 352, 366-67 (2017). Termination of employment plainly constitutes an adverse employment action.

32. Similarly, California Labor Code section 98.6(a) prohibits an employer from discharging, discriminating, retaliating against, or taking any adverse action against any employee who, among other things, "made a written or oral complaint that ***he or she is owed unpaid wages*** . . . or because of the exercise by the employee . . . of any rights afforded him or her." (emphasis added). Section 98.6(b) provides that any employee who is discharged, retaliated against, or subject to an adverse action for any conduct delineated in Chapter 4 of the Labor Code [which includes section 98.6(a)] "shall be entitled to

reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer."

33. Plaintiff complained to Defendants regarding violations of California wage and hour laws, including having his earned commissions effectively taken by management and to have Defendants comply with the requirements of the California Labor Code. Defendants responded by continuing to withhold Plaintiff's commissions on deals he had originated and helped close, imposing additional and unwarranted deductions on his commissions, and purporting to "change" Plaintiff's commission plan to his detriment, among other things.

34. Plaintiff's employment was terminated by Defendants in or about April 2024 in direct retaliation for his actions.

35. As a direct and proximate result of Defendants' illegal termination of Plaintiff's employment, Plaintiff suffered substantial harm. Plaintiff suffered economic and non-economic damages and continues to suffer humiliation, emotional distress, and mental and physical pain and anguish.

36. Plaintiff has incurred and continues to incur legal expenses and attorney's fees. Pursuant to Labor Code section 1102.5 and/or other applicable law, Plaintiff is entitled to be reimbursed said legal expenses and attorney's fees.

37. Defendants are also liable for a $10,000 per violation penalty pursuant to Labor Code section 1102.5 and/or other applicable law.

38. The acts of Defendants alleged above were done maliciously and/or oppressively. The foregoing acts directed toward Plaintiff were carried out by managerial employees, officers and directors, and were directed and ratified by Defendants, with a conscious disregard of Plaintiff's rights and with the intent to vex, injury, and annoy Plaintiff, such as to constitute oppression, fraud or malice pursuant to California Civil Code section 3294, entitling Plaintiff to punitive damages in an amount appropriate to punish and set an example of said Defendants.

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FOURTH CAUSE OF ACTION

Wrongful Termination

(By Plaintiff Against All Defendants)

39. Plaintiff incorporates by this reference the relevant allegations contained herein as if fully set forth in this cause of action.

40. In California, it is well settled that a termination motivated by an employer's intent to avoid paying wages or in retaliation to an employee's reasonable claim for wages (even if mistaken) violates California public policy. *See e.g., Gould v. Maryland Sound Indus., Inc.*, 31 Cal.App.4th 1137, 1148 (1995); *Barbosa v. IMPCO Technologies, Inc.*, 179 Cal.App.4th 1116, 1123 (2009); *Vasquez v. Franklin Management Real Estate Fund, Inc.*, 222 Cal.App.4th 819, 830-31 (2013); *Stevenson v. Superior Court*, 16 Cal.4th 880, 909 (1997).

41. In taking the actions as set forth above, Defendants wrongfully terminated Plaintiff's employment because he requested that Defendants comply with the California Labor Code.

42. As a direct and proximate result of Defendants' illegal termination of Plaintiff's employment, Plaintiff suffered substantial harm. Plaintiff suffered economic and non-economic damages and continues to suffer humiliation, emotional distress, and mental and physical pain and anguish.

43. The acts of Defendants alleged above were done maliciously and/or oppressively. The foregoing acts directed toward Plaintiff were carried out by managerial employees, officers, and directors, and were directed and ratified by Defendants, with a conscious disregard of Plaintiff's rights and with the intent to vex, injury, and annoy Plaintiff, such as to constitute oppression, fraud, or malice pursuant to California Civil Code section 3294, entitling Plaintiff to punitive damages in an amount appropriate to punish and set an example of said Defendants.

FIFTH CAUSE OF ACTION

Failure To Pay Work-Related Expenses [Lab. Code §§ 510, 558, 1194]

(By Plaintiff Against All Defendants)

44. Plaintiff incorporates by this reference the relevant allegations contained herein as if fully set forth in this cause of action.

45. Labor Code section 2802 provides that "[a]n employer shall indemnify an employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties . . . ." Subsection (c) of Labor Code section 2802 further provides that "[f]or purposes of this section, the terms necessary expenditures or losses" shall include all reasonable costs, including but not limited to, attorneys' fees incurred by the employee enforcing the rights granted by this section." *See also, Cochran v. Schwan's Home Services, Inc*., 228 Cal.App.4th 1137 (2014).

46. As set forth herein, Defendants required Plaintiff to incur, without payment or reimbursement, various work-related expenses including, among other things, regularly and consistently using his own personal cellular phone and personal vehicle without reimbursement. Such costs were incurred in direct consequence of the employees' discharge of his or her duties and they were reasonable and necessary. Such costs should have been, but never were, reimbursed.

47. Pursuant to section 2802 and other applicable law, Plaintiff is entitled to recover from Defendants reimbursement of all necessary expenditures or losses, interest, penalties, and attorneys' fees, among other things.

SIXTH CAUSE OF ACTION

Failure To Pay Overtime Wages [Lab. Code §§ 510, 558, 1194]

(By Plaintiff Against All Defendants)

48. Plaintiff incorporates by this reference the relevant allegations contained herein as if fully set forth in this cause of action.

49. Defendants have failed to maintain a policy that compensates Plaintiff and other non-exempt employees for all hours worked, including overtime.

50. Defendants have required Plaintiff to work hours qualifying him for significant overtime compensation but has not paid him overtime compensation. As a result, Plaintiff has been denied "the unpaid balance of the full amount of this . . . overtime compensation" as required by Labor Code section 1194.

51. As a result of these violations and violations of the Labor Code sections 510, 558, 1194, and applicable Industrial Welfare Commission Wage Orders for failure to pay overtime, Plaintiff and other non-exempt employees are entitled to wages, penalties, interest and attorney's fees.

<u>SEVENTH CAUSE OF ACTION</u>

Failure To Pay Minimum and/or Straight Wages [Lab. Code §§ 204, 1182.12, 1194, 1194.2, 1197, 1197.1]

(By Plaintiff Against All Defendants)

52. Plaintiff incorporates by this reference the relevant allegations contained herein as if fully set forth in this cause of action.

53. Defendants regularly failed to pay Plaintiff earned minimum wages and straight time wages by, among other things, failing to pay them for work done during meal periods and before and after work shifts as required by Labor Code sections 1182.12, 1194, 1194.2, 1197, 1197.1, and applicable wage orders. All hours must be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation.

54. Defendants also regularly failed to compensate Plaintiff (and other similarly situated employees paid on a commission basis) at least the minimum wage for time spent on rest breaks in violation of *Vaquero v. Stoneledge Furniture LLC,* 9 Cal.App.5th 98 (2017). As a result of violations of Labor Code sections 1182.12, 1194, 1194.2, 1197, 1197.1, 1199 and applicable wage orders for failure to pay minimum wage, Employer is liable for civil penalties pursuant to Labor Code sections 558, 1197.1, and 2698 *et seq*.

<u>EIGHTH CAUSE OF ACTION</u>

Failure To Provide Proper Meal Periods [Lab. Code §§ 226.7, 512, 1194]

(By Plaintiff Against All Defendants)

55. Plaintiff incorporates by this reference the relevant allegations contained herein as if fully set forth in this cause of action.

56. For the relevant time period, Defendants were required to provide Plaintiff with meal periods that comply with the California Labor Code and applicable regulations and wage orders, including Labor Code sections 226.7 and 512.

57. Defendants regularly failed to provide, and in fact denied, Plaintiff with statutorily compliant meal periods. Among other things, Defendants: (i) regularly designed and staffed shifts in a way that did not allow Plaintiff to timely take adequate off-duty meal periods mandated by law,

including the requisite second meal period during work shifts; (ii) failed to pay Plaintiff the premium compensation mandated by Labor Code section 226.7; and (iii) discouraged the taking of proper meal breaks via a companywide, systematic policy.

58. Plaintiff is informed and believes and thereon alleges that Defendants willfully failed to pay Plaintiff the proper meal period premium wages for all non-compliant or missed meal periods.

NINTH CAUSE OF ACTION

Failure To Provide Proper Rest Periods [Lab. Code §§ 226.7, 512, 1194]

(By Plaintiff Against All Defendants)

59. Plaintiff incorporates by this reference the relevant allegations contained herein as if fully set forth in this cause of action.

60. For the relevant time period, Defendants were required to provide Plaintiff with rest periods that comply with the Labor Code and applicable regulations and Wage Orders, including Labor Code section 226.7.

61. Defendants also regularly failed to compensate Plaintiff (and other similarly situated employees paid on a commission basis) at least the minimum wage for time spent on rest breaks in violation of *Vaquero v. Stoneledge Furniture LLC*, 9 Cal.App.5th 98 (2017).

62. Defendants regularly failed to provide, and in fact denied, Plaintiff with statutorily compliant rest periods. Among other things, Defendants: (i) regularly designed and staffed shifts in a way that did not allow Plaintiff to timely take adequate off-duty rest periods mandated by law; (ii) failed to pay Plaintiff the premium compensation mandated by Labor Code section 226.7; and (iii) otherwise deterred and prevented employees from taking paid 10-minute rest breaks as mandated under California law. Plaintiff is informed and believes and thereon alleges that Defendants willfully failed to pay Plaintiff the proper rest period premium wages for all non-compliant or missed rest periods.

TENTH CAUSE OF ACTION

Failure to Provide Accurate Wage Statements [Labor Code §§ 226, 226.3]

(By Plaintiff Against All Defendants)

63. Plaintiffs incorporate by this reference the relevant allegations contained herein as if fully set forth in this cause of action.

64. California Labor Code section 226(a) sets forth reporting requirements for Employers when they pay wages: “Every Defendants shall . . . at the time of each payment of wages, furnish each of his or her employees . . . an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee . . . (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.” Cal. Lab. Code § 226(a). “An employee suffering injury as a result of a knowing and intentional failure by an Defendants to comply with subdivision (a) shall be 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.” Cal. Lab. Code § 226(e)(1). “An employee is deemed to suffer injury for purposes of this subdivision if the Defendants fails to provide accurate and complete information as required by . . . subdivision (a) . . . .”

65. During the relevant time period, Defendants have not furnished Plaintiff with timely itemized wage statements accurately showing, among other things, gross wages earned, total hours worked, net wages earned, and/or all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate of Plaintiff.

66. Defendants intentionally failed to furnish Plaintiff accurate wage statements upon each payment of wages, in violation of California Labor Code section 226(a). Plaintiff was injured and damaged by these failures because, among other things, these failures led him to believe he was not entitled to overtime wages or paid premium pay wages for non-compliant meal periods and rest periods, although he was so entitled.

67. Pursuant to Labor Code sections 204, 218.5, and 226, or other applicable law, Plaintiff is entitled to recover his regular wages, as well as penalties, interest, injunctive relief, costs, and attorneys’ fees.

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ELEVENTH CAUSE OF ACTION

Failure to Pay Wages Upon Termination [Labor Code §§ 201-203, 227.3, 1199]

(By Plaintiff Against All Defendants)

68. Plaintiff incorporates by this reference the relevant allegations contained herein as if fully set forth in this cause of action.

69. Labor Code section 201 provides "if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. Labor Code section 202 provides "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 intention to quit, in which case the employee is entitled to his wages at the time of quitting." Labor Code section 208 requires that all final wages be paid to an employee who is terminated at the place of discharge and to an employee who voluntarily resigns at the place where the employee has been working.

70. Defendants have violated Labor Code sections 201 and 202 by willfully failing to timely pay all compensation due and owing to Plaintiff at the time employment was terminated because of, as noted herein, said unpaid overtime wages, regular wages, minimum wages, one-hour penalties for missed, interrupted, or untimely meal periods and rest periods, and unreimbursed work-related expenses, among others.

71. Labor Code sections 201 and 227.3 requires an employer who discharges an employee to pay all compensation due and owing to that employee immediately upon discharge. Labor Code section 202 requires an employer to pay all compensation due and owing to an employee who quits within 72 hours of that employee quitting, unless the employee provides at least 72 hours' notice of quitting, in which case all compensation is due at the end of the employee's final day of work. Labor Code section 203 provides that if an employer willfully fails to pay compensation promptly upon discharge, as required by sections 201 or 202, then the employer is liable for waiting time penalties in the form of continued compensation of up to 30 work days.

72. Defendants willfully failed to pay Plaintiff all compensation due upon termination of employment as required under Labor Code sections 201 and 202. Pursuant to sections 203 and 256 of

the Labor Code, Plaintiff is now entitled to recover up to thirty (30) days of wages due to Defendants' willful failure to comply with the statutory requirements of sections 201 and 202 of the Labor Code.

TWELFTH CAUSE OF ACTION

Unfair Competition [Bus. & Prof. Code § 17200]

(By Plaintiff Against All Defendants)

73. Plaintiff incorporates by this reference the relevant allegations contained herein as if fully set forth in this cause of action.

74. Defendants' acts constitute a continuing and ongoing unlawful activity prohibited by the Business and Professions Code section 17200 ("UCL") and justifies the issuance of an injunction, restitution, and other equitable relief pursuant to California Business and Professions Code section 17203.

75. California Labor Code section 90.5 articulates the public policy of California to vigorously enforce minimum labor standards, including the requirements to properly classify employees pursuant to Labor Code section 2775, pay employees' work-related expenses pursuant to Labor Code section 2802, pay commissions pursuant to Labor code section 204, pay overtime wages pursuant to Labor Code section 510, pay minimum wages pursuant to Labor Code section 1197, and provide adequate meal and rest periods pursuant to Labor Code sections 226.7 and 512, among other things.

76. Defendants' conduct directly violates state law, constitutes unfair competition and unlawful and unfair acts and practices within the meaning of the UCL. In addition, Defendants' failure to comply with Labor Code section 2751 and provide the detailed explanation of how Plaintiff's commissions would be calculated, including via a signed writing, resulted in many unpaid wages which were due and owing at the time of Plaintiff's termination.

77. For the four (4) years preceding this lawsuit, Defendants engaged and continued to engage in unfair and unlawful business practices in California by practicing, employing and utilizing the employment practices outlined above.

78. Defendants' use of such unlawful and unfair business practices constitutes unfair competition and provides an unfair advantage over its competitors.

/ / /

79. Defendants' wrongful business practices have caused injury to Plaintiff and others, depriving them of the minimum working standards and conditions due them under California law and the Industrial Welfare Commission wage orders.

80. Pursuant to section 17203 of the California Business and Professions Code, Plaintiff seeks an order of this court enjoining Defendants from continuing to engage in unlawful, unfair, or deceptive business practices and any other act prohibited by law, including those set forth in the complaint. Plaintiff also seeks an order requiring Defendants to make full restitution of all moneys it wrongfully obtained and withheld from Plaintiff.

THIRTEENTH CAUSE OF ACTION

Violation of Private Attorneys General Act [Lab. Code § 2698 *et seq*.]

(By Plaintiff Against All Defendants)

81. Plaintiff incorporates by this reference the relevant allegations contained herein as if fully set forth in this cause of action.

82. Plaintiff is an "Aggrieved Employee" under PAGA, as he was employed by Defendants during the applicable statutory period and suffered one or more of the Labor Code violations set forth herein. Accordingly, Plaintiff seeks to recover on behalf of himself and all other current and former Aggrieved Employees, the civil penalties provided by PAGA, plus reasonable attorney's fees and costs.

83. Plaintiff seeks to recover the PAGA civil penalties through a representative action permitted by PAGA and the California Supreme Court in *Arias v. Superior Court*, 46 Cal 4th 969 (2009). Therefore, class certification of the PAGA claims is not required.

84. Plaintiff seeks civil penalties pursuant to PAGA for Defendants' unlawful wage and hour practices, including but not limited to, as stated herein: (i) misclassifying employees as "independent contractors;" (ii) failing to provide proper commission agreement; (iii) failing to pay commissions; (iv) failing to pay and/or reimburse employees for costs incurred for business-related expenses; (v) failing to pay overtime; (vi) failing to pay minimum wages and straight wages; (vii) failing to provide uninterrupted off-duty meal periods and/or required penalties; (viii) failing to provide uninterrupted off-duty rest periods and/or required penalties; (ix) failing to maintain adequate records; (x) failing to furnish

accurate wage statements; (xi) failing to timely pay all wages due upon termination and (xii) failing to comply with Labor Code section 2751 pertaining to commissions which were due and owing.

85. Plaintiff seeks PAGA penalties as forth and allowed under Labor Code section 2699(f) and/or other applicable sections.

86. Labor Code violations alleged in this PAGA action include the following:

a. California Labor Code sections 226.8, 2775(b) (misclassification of employees as independent contractors);
b. California Labor Code section 2751(a) (failure to provide proper commission agreement);
c. California Labor Code sections 2751, 204, and 204.1 (failure to pay commissions);
d. California Labor Code section 2802 (failure to pay work-related expenses);
e. California Labor Code section 1198 (standard conditions of labor);
f. California Labor Code section 510 (failure to pay overtime/double-time);
g. California Labor Code sections 1194, 1194.2, 1197 and 1197.1 (failure to pay minimum wages);
h. California Labor Code sections 226.7 and 512(a) (unpaid meal period premiums);
i. California Labor Code sections 226.7 (unpaid rest break premiums);
j. California Labor Code sections 204, 210 (payment of wages);
k. California Labor Code sections 1174, Industrial Wage Orders (failure to maintain records);
l. California Labor Code section 558 (failure to comply with requirements regulating hours and days of work);
m. California Labor Code sections 226(a) and 226.3 (non-compliant wage statements);
n. California Labor Code sections 201, 202 and 203 (wages not timely paid upon termination);
o. Labor Code section 2751;

87. Accordingly, Plaintiff respectfully requests that the Court award judgment and relief in his favor as described herein.

88. Pursuant to section 2699(g) of the Labor Code, or other applicable law, Plaintiff is entitled to recover statutory penalties, interest, injunctive relief, costs, and attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment as follows:

1. Applicable statutory and/or civil penalties pursuant to PAGA;
2. Reasonable attorneys' fees and costs pursuant to California Labor Code section 2699(g) and other applicable law;
3. Wages, civil penalties, and applicable statutory penalties;
4. General and compensatory damages;
5. Pre-judgment and post-judgment interest;
6. Attorneys' fees and costs reasonably incurred, including without limitation under Labor Code sections 218.5, 1102.5, 1194(a), 204, 226(e), and 2802(c);
7. Punitive and/or exemplary damages, if allowed;
8. Equitable relief in the nature of declaratory relief, injunctive relief, and/or restitution as applicable;
9. Such other relief that the Court deems proper.

Dated: August 2, 2024

HARDIN LAW GROUP, APC

By: ______________________________
James Hardin
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury of all claims and causes of action so triable in this lawsuit.

Dated: August 2, 2024

HARDIN LAW GROUP, APC

By: ______________________________

James Hardin

Attorneys for Plaintiff

EXHIBIT A

HARDIN LAW GROUP

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May 20, 2024

<u>Via Certified U.S. Mail</u>

California Labor & Workforce
Development Agency
Attn: PAGA Administrator
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
(Via Online Submission)

Curenta LLC
ATTN: Amir Michel Barsoum Mikhail
23141 Verdugo Dr Ste. 103
Laguna Hills, CA 92653

Re: <u>PAGA Notice Pursuant to California Labor Code § 2699: Keith Gerlack v. Employer(s) (Curenta LLC)</u>

Dear Sir or Madam:

Please be advised that Keith Gerlack ("Plaintiff" or "Mr. Gerlack") has retained Hardin Law Group, APC to represent him and other aggrieved employees for wage and hour claims against their current and/or former employer Curenta LLC and/or any other responsible entities or affiliates (collectively "Employer" or "Curenta"). This notice is being provided via certified mail to the Employer at their principal place of business and agent for service of process (if any) and is being filed with the California Labor and Workforce Development Agency ("LWDA") via the LWDA's electronic filing system under Section 2699.3(b) of the Labor Code. Plaintiff requests that the LWDA regard this Notice as written notice of his intent to seek civil penalties against Employer.

<u>The Employer</u>

Employer sells software for assisted living facilities with one or more locations in California, including a location at 23141 Verdugo Drive, #103, Laguna Hills, CA 92653("Headquarters"). Employer hired various employees to perform services at or from the Headquarters who were subjected to the violations alleged herein("Aggrieved Employees"). Plaintiff is informed and believes that Employer has generally employed more than twenty-five (25) employees working within California.

Employer has violated or caused to be violated several Labor Code provisions and is therefore liable for civil penalties under Labor Code sections 2698-2699.5, *et seq*. Plaintiff respectfully requests

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that your agency investigate the claims alleged against it herein. This letter will serve as notice of these allegations pursuant to the Private Attorney Generals Act of 2004 ("PAGA"). Cal. Lab. Code § 2699.3.

<u>Factual Background – Plaintiff and Aggrieved Employees</u>

At all relevant times, Plaintiff was an aggrieved employee, as defined in Labor Code section 2699(c) as: "any person who was employed by the alleged violator and against whom one or more violations was committed." Plaintiff seeks recovery for the Labor Code and Wage Order violations set forth herein on behalf of himself and other current and former employees, including but not limited to all similarly situated employees in the State of California within one year of the filing of this Notice and who were subject to the same or similar Labor Code and Wage Order violations as Plaintiff.

<u>First</u>, Employer misclassified Plaintiff and its other sales representatives, i.e., Aggrieved Employees, as "independent contractors" when they were in truth employees entitled to the protections as such under California law. Mr. Gerlack worked for Curenta as a Business Development Specialist from September 2021 until he was fired on or about April 24, 2024. From September 2021 until April 2023, Curenta misclassified Mr. Gerlack as a 1099 independent contractor, despite exercising near complete control over him. Because Employer cannot establish prongs A, B, or C of the *Dynamex* test, *see Dynamex Operations West v. Superior Court*, 4 Cal.5th 903, 912-13, 950 fn. 20, Cal. Lab. Code § 2775, Employee and other salespersons were in fact employees that Employer misclassified as "independent contractors," which violates California Labor Code section 226.8, triggering civil penalties ranging from $5,000 to $25,000 per violation. Moreover, as a result of said misclassification(s).

<u>Second</u>, Plaintiff and Aggrieved Employees are owed minimum wages, regular wages, and overtime wages for not being paid for "all time worked," including those whom Employer misclassified as independent contractors. As an employee, Mr. Gerlack was non-exempt because he regularly worked more than half of his time at his home office. Accordingly, Mr. Gerlack is owed significant amounts for unpaid minimum wages and overtime wages during the 2.5 years he worked long hours for Curenta, as he regularly worked more than eight hours per day, more than forty hours per week, and worked through lunches without ever being paid overtime wages. He also was often not paid regular wages or minimum wages for his work for Curenta. Indeed, Curenta also regularly failed to compensate Plaintiff (and other similarly situated employees paid solely on a commission basis) at least the minimum wage for time spent on rest breaks in violation of *Vaquero v. Stoneledge Furniture LLC*, 9 Cal.App.5th 98 (2017).

<u>Third</u>, Employer violated Labor Code section 2751(a) by imposing terms of a commission plan that were neither written nor signed, and it also failed to pay Plaintiff and Aggrieved Employees earned commissions. In February 2022, Employer changed Plaintiff's compensation to commission only, at a rate of 35% of the gross profit of the deals he closed which it then sought to reduce to 25% without ever providing him a written commission agreement. In approximately May/June 2022, seeking to avoid paying Gerlack a very large, earned commission for closing the largest account in the company's history (Pacifica Escondido Assisted Living on May 23, 2022) among others, Curenta told Gerlack he ***would not*** receive any commission on this closing and changed him to a flat payment of $4,000 month.

<u>Fourth</u>, Plaintiff and Aggrieved Employees, including those misclassified as independent contractors, were not "provided" the requisite 10-minute rest periods because Employer did not schedule nor offer 10-minute rest periods, and Employer often failed to pay the requisite one-hour wage penalty for such non-compliant rest periods.

<u>Fifth</u>, Plaintiff and Aggrieved Employees, including those misclassified as independent contractors, and therefore were not "provided" the requisite 30-minute meal periods for shifts greater than 5 hours, and Employer often failed to pay the requisite one-hour wage penalty for such non-compliant meal periods.

<u>Sixth</u>, Plaintiff and Aggrieved Employees are owed reimbursement for the cost of having to regularly use their personal cell phones, personal vehicles, including Plaintiff regularly driving thousands of miles per year in his own vehicle, and incurring home office expenses without full reimbursement.

<u>Seventh</u>, Employer violated section Labor Code section 226(a) by willfully failing to furnish Plaintiff and Aggrieved Employees with accurate wage statements on most pay periods, in that the itemized wage statements provided did not accurately state, among other things, gross wages earned, total hours worked, deductions, net wages earned, hourly rates, the number of hours worked, and hourly rates as applied to hours worked.

<u>Eighth</u>, given Employer's wage and hour violations noted herein, Employer failed to pay all wages due to Plaintiff and Aggrieved Employees upon termination.

Thus, at all relevant times, Employer regularly fails to pay and/or provide Plaintiff and Aggrieved Employees: (1) earned minimum wages, regular wages, and/or overtime wages; (2) compliant commission contracts; (3) earned commission wages due; (4) compliant off-duty rest periods and/or required premium wages; (5) compliant off-duty meal periods and/or required premium wages; (6) reimbursement for business expenses such as use of personal cellular phones; (7) proper and/or accurate wage statements; (8) all wages due upon termination; (9) the required "waiting time" penalties; and (10) adequate recordkeeping as required by Labor Code.

<u>Labor Code Violations</u>

<u>Misclassification of Employees as "Independent Contractors"</u>

Employer misclassified Plaintiff and Aggrieved Employees as "independent contractors" when they were in truth employees entitled to the protections as such under California law. As recognized by the California Supreme Court in *Dynamex*, "the question whether an individual worker should properly be classified as an employee or, instead, as an independent contractor has considerable significance for workers, businesses, and the public generally." *Dynamex Operations West v. Superior Court*, 4 Cal.5th 903, 912-13, 950 fn. 20; *Garcia v. Border Transportation Group, LLC*, 28 Cal.App.5th 558, 566 (2018). Pursuant to California Labor Code 2775 and *Dynamex*, "a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
(B) The person performs work that is outside the usual course of the hiring entity's business.
(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Cal. Lab. Code § 2775 (emphasis added).

Prong A considers whether "[t]he person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact." Cal. Lab. Code §2775(A). The hiring entity need not control "the precise manner or details of the work" to be an employer, *Dynamex*, at 955; the focus should be in hirer's "right to exercise" control, not just the control actually exercised. *See Salinas v. Cornwell Quality Tools Co.*, 2022 WL 16735359, *7, 5:19-cv-02275-FLA (SPx) (C.D. Cal. Oct. 17, 2022) (internal citations omitted). Applied here, Employee always worked under the control and direction of Employer and its owner, who had the right to control Plaintiff and exercised that right on a daily and weekly basis.

Prong B considers whether "[t]he person performs work that is outside the usual course of the hiring entity's business." Cal. Lab. Code § 2775(B); *see also Garcia*, at 569 ("Part B asks whether the worker can reasonably be viewed as working in the hiring entity's business."). "Analytically, courts have framed the Prong B inquiry in several ways. They have considered whether the work of the employee is necessary to or merely incidental to that of the hiring entity, whether the work of the employee is continuously performed for the hiring entity, and what business the hiring entity proclaims to be in." *Vasquez v. Jan-Pro Franchising Int'l, Inc.*, 986 F.3d 1106, 1122 (9th Cir. (CA) Feb 2, 2021). Under any formulation, Plaintiff's work was in no way "outside of the usual course of [Employer's] business." In short, Employer's business is to sell sells software for assisted living facilities, and Employer used Plaintiff (and other salespeople) to sell its software. Everything Plaintiff did was in the usual course of Employer's business.

Prong C considers whether "[t]he person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." Cal. Lab. Code § 2775(C). Part C asks whether the worker 'independently has made the decision to go into business for himself or herself.' This factor can be proven with evidence that the worker has 'take[n] the usual steps to establish and promote his or her independent business – for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like.' Critically, . . . this part requires that the worker is engaged in an independent business, not that he or she could have become so engaged." *Garcia*, 570, citing *Dynamex*, at 962 (emphasis in original). Plaintiff was simply hired to sell Employer's software – he was clearly not "engaged in an independently established trade, occupation, or business."

Because Employer cannot establish prongs A, B, or C, let alone all of them, Plaintiff and other Aggrieved Employees were in fact employees that Employer misclassified as "independent contractors." As a result of Employer's violation of Labor Code section 226.8, Employer is liable for civil penalties pursuant to Labor Code sections 226.8 and 2698 *et seq*.

Unlawful Failure to Pay Minimum Wages, Regular Wages, and Overtime Wages Due to Illegal Time Rounding and Timekeeping System

Because Employer misclassified Employee and Aggrieved Employees as "independent contractors," Employee and Aggrieved Employees are owed minimum wages, regular wages, and overtime wages for not being paid for "all time worked." Employee and Aggrieved Employees regularly worked more than eight hours per day, more than forty hours per week, and worked through lunches without ever being paid overtime wages. Employee and Aggrieved Employees were often not paid regular wages or minimum wages for their work at Curenta LLC.

As a result of violations of the Labor Code sections 510, 1194, 1197 and applicable Wage Orders for failure to pay overtime, Employer is liable for civil penalties pursuant to Labor Code sections 558 and 2699 *et seq*. Employer has also failed to compensate Plaintiff and Aggrieved Employees an amount equal to or greater than the minimum wage for all hours worked, as required by Labor Code sections 1182.12, 1194, 1197, 1197.1, and applicable Wage Orders. All hours must be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation. As a result of violations of Labor Code sections 1182.12, 1194, 1197, 1197.1, 1198 and applicable Wage Orders for failure to pay minimum wage, Employer is liable for civil penalties pursuant to Labor Code sections 558, 1197.1, and 2699 *et seq*.

Unlawful Failure to Provide Proper Commission Agreement

Labor Code section 2751 provides that whenever an employer contracts with an employee to payment method "involves commissions, the contract shall be in writing and shall set forth the method by which the commissions ***shall be computed and paid***." Cal. Lab. Code § 2751(a)(emphasis added). In addition, "[t]he employer shall give a signed copy of the [commission] contract to every employee who is a party thereto and shall obtain a signed receipt for the contract from each employee."

Here, Employer violated the above by failing to provide Plaintiff and Aggrieved Employees a signed written commission agreement sufficient to show how commissions "shall be computed and paid" for a substantial period of time during the employment(s) of Plaintiff and Aggrieved Employees.

Unlawful Failure to Pay Earned Commissions

"Commission wages are compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof." Cal. Lab. Code § 204.1; *see also* Cal. Lab. Code § 2751(c) ("As used in this section, 'commissions' has the meaning set forth in section 204.1."). The position of the California Department of Labor Standards and Enforcement is that a commission must be paid in the pay period in which it is earned. Labor Code section 210 provides for a penalty of $100 per employee for each failure to pay commission wages as required and a penalty of $200 plus 25 percent of the amount unlawfully withheld for each subsequent violation or any intentional or willful violation.

Here, Employer has regularly failed to pay Plaintiff and Aggrieved Employee earned commissions by, among other things, not paying them commissions earned on sales, deals, jobs, and/or projects, paying them less than the agreed upon commission percentages or amounts, applying improper and not agreed upon deductions from the commissions paid, and paying certain commissions late and/or not in the pay period(s) earned.

Unlawful Failure to Provide Uninterrupted Off-Duty Rest Periods

Labor Code section 226.7 and Wage Orders require every California employer to authorize and permit all non-exempt employees to take rest periods at the rate of ten (10) minutes net rest time per four (4) hours, or a major fraction thereon. Under subdivision (a), an employer shall not require an employee to work during rest periods mandated by state law. Subdivision (c) provides that "[i]f an employer fails to provide an employee a rest period in compliance with an applicable statute, wage order, etc. . . the employer shall pay the employee one (1) additional hour of pay at the employee's regular rate of compensation for each workday that the rest . . . period is not provided."

Because Employer misclassified Employee and Aggrieved Employees as "independent contractors," Employer has, among other things, failed to: (1) maintain a policy that provides Plaintiff and Aggrieved Employees with off-duty rest periods as required by California law; (2) provide Plaintiff and Aggrieved Employees with a reasonable opportunity to take compliant rest periods at the appropriate times; and (3) failed to pay Plaintiff and Aggrieved Employees an additional hour of pay at their regular rate of pay for each missed or late rest period. Among other things, Plaintiff and Aggrieved Employees were regularly not provided compliant rest periods and were not paid an additional hour of pay at their regular rate of for each such rest period.

As a result of Employer's violations of Labor Code sections 226.7, 226.7(b), and 512, Employer is liable for civil penalties pursuant to Labor Code sections 558 and 2698 *et seq*.

Unlawful Failure to Provide Uninterrupted Off-Duty Meal Periods

Labor Code section 512 and Wage Orders require every California employer to provide all non-exempt employees a duty-free meal period of not less than 30 minutes, for a work period of more than five (5) hours, "except that if the total work period per day is not more than six (6) hours, the meal period may be waived by mutual consent of the employer and employee. An employer may not employ an employee for a work period of more than ten (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 work 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." Under subdivision (a) of Labor Code section 226.7, an employer shall not require an employee to work during meal periods mandated by state law. Subdivision (c) provides that "[i]f an employer fails to provide an employee a meal . . . period in compliance with an applicable statute, wage order, etc. . . . the employer shall pay the employee one (1) additional hour of pay at the employee's regular rate of compensation for each workday that the meal . . . period is not provided."

Because Employer misclassified Employee and Aggrieved Employees as "independent contractors," Employer has, among other things, failed to: (1) maintain a policy that provides Plaintiff

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and Aggrieved Employees with off-duty meal periods as required by California law; (2) provide Plaintiff and Aggrieved Employees with a reasonable opportunity to take compliant meal periods at the appropriate times; and (3) failed to pay Plaintiff and Aggrieved Employees an additional hour of pay at their regular rate of pay for each missed or late meal period. Among other things, Plaintiff and Aggrieved Employees were regularly not provided compliant meal periods and were not paid an additional hour of pay at their regular rate of for each such meal period.

As a result of Employer's violations of Labor Code sections 226.7, 226.7(b), 512, and 1198, Employer is liable for civil penalties pursuant to Labor Code sections 558 and 2698 *et seq*.

<u>Unlawful Failure to Reimburse Business Expenses</u>

Labor Code section 2802 provides that "[a]n employer shall indemnify an employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties . . . ." Labor Code section 2802(c) provides that '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" and section 2802(d) provides that "citations or civil penalties shall be the same as those set forth in Section 1197.1." *See also Cochran v. Schwan's Home Services, Inc.*, 228 Cal.App.4th 1137 (2014).

Among other things, Employer required Plaintiff and Aggrieved Employees to incur out-of-pocket expenses, such as use of their own cellular telephones or personal vehicles, including Employee driving thousands of miles per year in his own vehicle, for business-related functions for Employer without sufficient reimbursement, in part because they were improperly deemed "independent contractors" when they were actually employees of Employer.

As a result of Employer's violations of Labor Code section 2802, Employer is liable for civil penalties pursuant to Labor Code sections 2802, 1197.1, and 2699 *et seq*.

<u>Unlawful Failure to Furnish Accurate Wage Statements</u>

Labor Code section 226 requires an employer to provide employees with accurate itemized wage statements showing (1) gross wages earned, (2) total hours worked by an non-exempt employee, (3) piece rates, if applicable, (4) all deductions, (5) net wages earned, (6) the inclusive dates of the period for which the employee is being paid, (7) the name of the employee and his or her social security number or identification number, (8) the name and address of the legal entity that is the employer, and (9) all hourly rates in effect and the corresponding number of hours worked. In addition, any payment made in cash must be accompanied by an itemized wage statement that meets the conditions set forth above. Wage Order 5, section 7(B) requires an employer to provide the same information.

Labor Code 226.3 provides that "any employer who violates subdivision (a) of section 226 shall be subject to a civil penalty in the amount of two-hundred and 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 in subdivision (a) of section 226. The penalties provided for in this section are in addition to any other penalty provided by law."

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Employer has violated Labor Code section 226(a) by willfully failing to furnish Plaintiff and Aggrieved Employees with any itemized statements on many pay periods, and on other pay periods the itemized wage statements provided did not accurately state, among other things, gross wages earned, total hours worked, deductions, net wages earned, hourly rates and number of hours worked, and the legal entity that is the employer. As a result of violations of Labor Code section 226(a), Employers are liable for civil penalties pursuant to Labor Code sections 226.3 and 2698 *et seq*.

<u>Unlawful Failure to Timely Pay Wages Owed Including those Due Upon Termination</u>

Labor Code section 201 provides "if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. Labor Code section 202 provides "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 intention to quit, in which case the employee is entitled to his wages at the time of quitting." Labor Code section 208 requires that all final wages be paid to an employee who is terminated at the place of discharge and to an employee who voluntarily resigns at the place where the employee has been working.

Employer has violated Labor Code sections 201 and 202 by willfully failing to timely pay all compensation due and owing to Plaintiff and all former Aggrieved Employees at the time employment was terminated because of, as noted herein, said unpaid vacation/PTO wages, one-hour penalties for missed, interrupted, or untimely meal periods and rest periods, and unreimbursed work-related expenses, among others. Labor Code sections 201 and 227.3 require an employer who discharges an employee to pay all compensation due and owing to that employee immediately upon discharge. Labor Code section 202 requires an employer to pay all compensation due and owing to an employee who quits within 72 hours of that employee quitting, unless the employee provides at least 72-hours' notice of quitting, in which case all compensation is due at the end of the employee's final day of work. Labor Code section 203 provides that if an employer willfully fails to pay compensation promptly upon discharge, as required by sections 201 or 202, then the employer is liable for waiting time penalties in the form of continued compensation of up to 30 workdays.

Pursuant to Labor Code section 1199, "Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not less than one hundred dollars ($100) or by imprisonment for not less than 30 days, or by both, who does any of the following: (a) Requires or causes any employee to work for longer hours than those fixed, or under conditions of labor prohibited by an order of the commission. (b) Pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission. (c) Violates or refuses or neglects to comply with any provision of this chapter or any order or ruling of the commission."

Employer willfully failed to pay Aggrieved Employees no longer employed by it all compensation due upon termination of employment as required under Labor Code sections 201 and 202. Pursuant to sections 203 and 256 of the Labor Code, Plaintiff and similarly situated individuals are now entitled to recover up to thirty (30) days of wages due to Employer's willful failure to comply with the statutory requirements of sections 201 and 202 of the Labor Code. In addition, because

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Employer violated Labor Code sections 201, 202, and 203, Employer is liable for civil penalties pursuant to Labor Code section 2699 *et seq*.

Unlawful Violation of Labor Code Section 1199

Under Labor Code sections 1199(a) and (c) and 2699.5 *et seq*., an employer who "requires or causes an employee to work for longer hours than those fixed" or "violates or refuses or neglects to comply with any provision of" the Labor Code regarding employees' wages, hours, and working conditions is subject to PAGA penalties. Employers have violated the Labor Code in various ways set forth herein.

Unlawful Failure to Maintain Adequate Records

Labor Code section 1174 states, in pertinent part, that "[e]very person employee labor in this state shall . . . (c) Keep a record showing the names and addresses of all employees employed . . . [and] (d) Keep, at a central location in the state . . . 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 . . . establishments. These records shall be kept . . . in a file for not less than three years. . . Likewise, Wage Order 5, section 7 requires that "(A) [e]very employer shall keep accurate information with respect to each employee including the following: (1) the full name, home address, occupation and social security number (2) Birth date . . . (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 . . . (5) Total hours worked in the payroll period and the applicable rates of pay. This information shall be made readily available to the employee upon reasonable request . . . ." In addition, Labor Code section 353 also requires employers to keep accurate records of all gratuities or tips they receive, directly or indirectly, which may not be collected by "managers" or owners under Labor Code section 351. Labor Code section 1174.5 provides that "any person employing labor who willfully fails to maintain the records required under subdivision (c) of section 1174 or accurate or complete records required by subdivision (d) of section 1174 . . . shall be subject to a civil penalty of five hundred dollars ($500). Subdivision (d) of section 1174.5 states that "[a]ny person, or officer or agent thereof, is guilty of a misdemeanor who fails to keep any of the records required by section 1174.

For the reasons and bases noted here, Employer has, among other things, willfully failed to maintain adequate records regarding Plaintiff and Aggrieved Employees.

Conclusion

Based on the above, Employer is in violation of California Labor Code section 2699.5 including but limited to the following[1]:

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[1] Without limitation, Plaintiff, if permitted, will seek any and all penalties otherwise capable of being collected by the Commission. This includes each of the following that are applicable, as is set forth in Labor Code Section 2699.5, which states:

> The provisions of subdivision (a) of Section 2699.3 apply to any alleged violation of the following provisions: subdivision (k) of Section 96, Sections 98.6, 201, 201.3, 201.5, 201.7, 202,203, 203.1, 203.5, 204, 204a, 204b, 204.1, 204.2, 205, 205.5, 206, 206.5, 208, 209, and 212, subdivision (d) of Section 213, Sections 221, 222, 222.5, 223, and 224, subdivision (a) of Section 226, Sections 226.7, 227, 227.3, 230,

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1. California Labor Code § 2775 (misclassification of employees as independent contractors)
2. California Labor Code § 2751 (commission agreements);
3. California Labor Code §§ 226(a) and 226.3 (non-compliant wage statements);
4. California Labor Code § 1198 (standard conditions of labor);
5. California Labor Code § 510 (failure to pay overtime/doubletime);
6. California Labor Code § 1197 (failure to pay minimum wages);
   California Labor Code §§ 201, 202 and 203 (wages not timely paid upon termination);
7. California Labor Code § 226.7 (unpaid rest break premiums);
8. California Labor Code §§ 226.7 and 512(a) (unpaid meal period premiums);
9. California Labor Code §§ 204 and 210 (payment of wages);
10. California Labor Code § 1174, Industrial Wage Orders (failure to maintain records);
11. California Labor Code § 558 (failure to comply with requirements regulating hours and days of work);
12. California Labor Code § 2802 *et seq*. (failure to reimburse for business expenses); and
13. California Labor Code §§ 1194, 1194.2, 1197 and 1197.1 (unpaid minimum wages).

Plaintiff requests that the agency investigate the above allegations and provide notice of the allegations pursuant to PAGA's provision. Alternatively, Plaintiff requests the agency inform them if it does not intend to investigate these violations so that he may include in their lawsuit the violations discussed in this letter.

Very truly yours,

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230.1, 230.2, 230.3, 230.4, 230.7, 230.8, and 231, subdivision (c) of Section 232, subdivision (c) of Section 232.5, Sections 233, 234, 351, 353, and 403, subdivision (b) of Section 404, Sections 432.2, 432.5, 432.7, 435, 450, 510, 511, 512, 513, 551, 552, 601, 602, 603, 604, 750, 751.8, 800, 850, 851, 851.5, 852, 921, 922, 923, 970, 973, 976, 1021, 1021.5, 1025, 1026, 1101, 1102, 1102.5, and 1153, subdivisions (c) and (d) of Section 1174, Sections 1194, 1197, 1197.1, 1197.5, and 1198, subdivision (b) of Section 1198.3, Sections 1199, 1199.5, 1290, 1292, 1293, 1293.1, 1294, 1294.1, 1294.5, 1296, 1297, 1298, 1301, 1308, 1308.1, 1308.7, 1309, 1309.5, 1391, 1391.1, 1391.2, 1392, 1683, and 1695, subdivision (a) of Section 1695.5, Sections 1695.55, 1695.6, 1695.7, 1695.8, 1695.9, 1696, 1696.5, 1696.6, 1697.1, 1700.25, 1700.26, 1700.31, 1700.32, 1700.40, and 1700.47, paragraphs (I), (2), and (3) of subdivision (a) of and subdivision (e) of Section 1701.4, subdivision (a) of Section 1701.5, Sections 1701.8, 1701.10, 1701.12, 1735, 1771, 1774, 1776, 1777.5, 1811, 1815, 2651, and 2673, subdivision (a) of Section 2673.1, Sections 2695.2, 2800, 2801, 2802, 2806, and 2810, subdivision (b) of Section 2929, and Sections 3095, 6310, 6311, and 6399.