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County of San Diego
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By M. Guyot ,Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

FRANCO MASADA, on behalf of others similarly situated and the State of California under the Private Attorneys General Act,

Plaintiffs,

vs.

FERRY INTERNATIONAL, LLC and DOES 1 through 50, inclusive,

Defendants.

Case No. 24CU009941C

FIRST AMENDED REPRESENTATIVE ACTION COMPLAINT

1. Civil Penalties under the Private Attorneys General Act (Labor Code §§ 2698 *et seq.*)

Plaintiff FRANCO MASADA, on behalf of all others similarly situated and the State of California under the Private Attorneys General Act ("Plaintiff") brings this FIRST AMENDED REPRESENTATIVE ACTION COMPLAINT against Defendants FERRY INTERNATIONAL, LLC and DOES 1 through 50, inclusive (collectively "Defendants"), alleging as follows:

INTRODUCTION

1. This is a representative action complaint brought under the California Private Attorneys General Act (Labor Code sections 2968 *et seq*.).

2. Defendants misclassified Plaintiff and the aggrieved employees as exempt inside sales representatives when they did not meet the requirements to be inside sales representatives. As such, Defendants failed to lawfully compensate Plaintiff and the aggrieved employees for all hours worked, and at the regular rate of pay for overtime, meal and rest premiums, and sick pay as required by California Law.

3. Defendants' employment policies, practices, and payroll administration systems enabled and facilitated these violations on a company-wide basis with respect to the aggrieved employees.

4. As a result, Defendants are liable to Plaintiff and aggrieved employees for the underlying wages, interest, and penalties including waiting time, late payment of wages, and wage statement penalties in the amounts according to proof.

JURISDICTION & VENUE

5. Jurisdiction of this action is proper in this Court under Article VI, Section 10 of the California Constitution as the causes of action are premised upon violations of California law.

6. The monetary damages and restitution sought exceed the minimal jurisdiction limits of the Superior Court.

7. This Court has jurisdiction over Defendants because, upon information and belief, Defendants have sufficient minimum contacts in California, or otherwise intentionally avail themselves to the California economy so as to render the exercise of jurisdiction over them by the California courts consistent with traditional notions of fair play and substantial justice.

8. Venue is proper in this Court under Code of Civil Procedure sections 393(a), 395,

and/or 395.5 because, upon information and belief, Defendants conducted business and committed some of the alleged violations in this County.

PARTIES

A. Plaintiff Franco Masada

9. Plaintiff Masada is an individual over 18 years of age who worked for Defendants in California as a non-exempt (misclassified as inside sales exempt) employee from about March 1, 2018 to June 17, 2024. Plaintiff worked as a Sales Coach and Consultant.

10. The State of California, via the Labor and Workforce Development Agency ("LWDA"), is the real party in interest in this action. (*Kim v. Reins Int'l California, Inc.* (2020) 9 Cal. 5th 73, 81 [The "government entity on whose behalf the plaintiff files suit is always the real party in interest."]) To the extent permitted by law, including pursuant *Balderas v. Fresh Start Harvesting, Inc.*, Court of Appeals Case No. B326759 (2nd App. Dist.) ____ Cal. App. 5th _____ (Mar. 20, 2024, *as modified* Apr. 18, 2024), the PAGA claim is brought exclusively as a representative action and does not include arbitrable claims.

B. Defendants

11. Defendant Ferry International, LLC is a Delaware limited liability company that maintains operations and conducts business throughout the State of California, including in this county.

12. The true names and capacities, whether individual, corporate, or otherwise, of the parties sued as DOES 1 through 50, are presently unknown, unascertainable, or uncertain, and are sued by such fictitious names under Code of Civil Procedure section 474. Upon information and belief, each of DOES 1 through 50 constitutes a legal employer or is otherwise legally responsible in some manner for the acts and omissions alleged herein. This Complaint may be amended to reflect their true names and capacities once ascertained.

13. Upon information and belief, Defendants in this action are employers, co-employers, joint employers, and/or part of an integrated employer enterprise, as each of the Defendants exercised control over the wages, hours, and working conditions of the employees, suffered and permitted them to work, and otherwise engaged them as employees under California law.

14. Upon information and belief, at least some of the Defendants have common ownership, common management, interrelationship of operations, and centralized control over labor relations and are therefore part of an integrated enterprise and thus jointly and severally responsible for the acts and omissions alleged herein, including pursuant to Labor Code sections 558, 558.1, and 1197.1.

15. Upon information and belief, Defendants acted in all respects pertinent to this action as an alter-ego, agent, servant, joint employer, joint venturer, co-conspirator, partner, in an integrated enterprise, or in some other capacity on behalf of all other co-defendants, such that the acts and omissions of each defendant may be legally attributable to all others.

GENERAL ALLEGATIONS

16. Defendants misclassified Plaintiff and aggrieved employees as inside sales when they did not meet the requirements of the California Wage Order 4 and Labor Code section 515(a).

17. Specifically, Plaintiff and the aggrieved employees were misclassified as inside sales because they were exempt from overtime and other applicable categories throughout their entire employment without regard to the conditions required by Wage Order 4.

18. Plaintiff and aggrieved employees regularly did not satisfy all three conditions of the inside sales exemption. For example, Plaintiff's wage statement for the pay period from 04/22/2024 to 05/05/2024 shows that Plaintiff *did not* earn more than 50% of his total compensation in commissions in this pay period. During this pay period, Plaintiff earned $2,115.38 in regular pay. However, Plaintiff only received $1,200 in commissions. This shows that Plaintiff and the aggrieved employees did not earn more than 50% of their total compensation in commissions each workweek, as required to be classified as inside sales. On information and belief, the aggrieved employees had similar experiences.

19. Defendants failed to lawfully pay Plaintiff and aggrieved employees at the lawful minimum wage for all hours worked due to their misclassification as inside sales. Specifically, Plaintiff and the aggrieved employees were routinely paid for 8 hours a day or 40 hours a week, regardless of the hours actually worked due to their misclassification.

20. For example, Defendants would schedule calls for Plaintiff and the aggrieved employees to complete once or twice a week outside of their regular working hours. Plaintiff estimates

he and the aggrieved employees worked an additional 4-6 hours on holidays and weekends, which were unpaid.

21. Plaintiff and the aggrieved employees were entitled to payment for all hours worked each time they did not satisfy the exemption conditions.

22. Due to Defendants' misclassification of aggrieved employees as inside sales rather than lawful non-exempt employees, Defendants failed to pay Plaintiff and the aggrieved employees overtime wages at the lawful rate of pay as required by Labor Code section 510, resulting in unpaid overtime wages.

23. As discussed above, Plaintiff and the aggrieved employees were not paid for all hours worked. Plaintiff and the aggrieved employees often worked over 40 hours in a week completing calls scheduled by Defendants and working additional hours on holidays and weekends.

24. Due to Defendants' misclassification, Defendants failed to comply with California's paid sick leave laws with respect to the aggrieved employees. Defendants failed to provide Plaintiff and the aggrieved employees any paid sick leave as they were misclassified as inside sales exempt employees.

25. Also due to Defendants' misclassification, Defendants failed to provide compliant meal periods to Plaintiff and the aggrieved employees. Defendants also failed to pay meal period premiums as the regular rate of compensation in violation of Labor Code section 226.7.

26. First, Plaintiff and aggrieved employees routinely experiences missed, late, short, and interrupted meal periods in order to keep up with the high demands of the job. Specifically, Defendants put a lot of pressure on Plaintiff and the aggrieved employees to obtain sales. Plaintiff and the aggrieved employees were scheduled back-to-back calls and were unable to leave their desk to take a compliant meal period. If Plaintiff and the aggrieved employees wanted to take their meal period, they would be required to find someone else to cover the scheduled call. However, there was rarely someone available to cover due to their own scheduled calls. This resulted in missed meal periods in violation of Labor Code section 512.

27. Additionally, to the extent that Plaintiff and the aggrieved employees were able to take a meal period, they were consistently interrupted. Plaintiff and the aggrieved employees were often

required to cut their meal periods short to answer phone calls scheduled by Defendants during their meal periods.

28. Second, Defendants failed to properly tract Plaintiff's and the aggrieved employees' meal periods as they were not required to clock out as a result of their misclassification.

29. Dure to Defendants' misclassification of Plaintiff and the aggrieved employees, they were not provided compliant meal periods. Each time Plaintiff and the aggrieved employees experienced a noncompliant meal period, they were owed a meal period premium. As a matter of policy and practice, Plaintiff and the aggrieved employees were not provided meal period premiums in lieu of missed meal periods as required by Labor Code section 226.7.

30. Similarly, and as a matter of common policy and practice, Defendants failed to provide all rest periods to which Plaintiff and the aggrieved employees were entitled. As mentioned above, the nature of the work Plaintiff and the aggrieved employees did often require them to continue working without any time to take a complaint break. When Plaintiff and the aggrieved employees were able to take a rest period, this would only be for about five minutes to go to the restroom but not the lawful 10-minute paid rest period.

31. Due to Defendants' misclassification of Plaintiff and the aggrieved employees, they were not provided rest periods. When Plaintiff and other aggrieved employees experienced these missed and interrupted rest periods, Defendants failed to pay rest period premiums at the regular rate as required by Labor Code section 226.7.

32. Defendants' failure to pay all wages each period or upon separation of employment, rendered the payments untimely and subject to civil penalties for the violations committed against the aggrieved employees under Labor Code sections 201 through 203.

33. Defendants failed to provide accurate itemized wage statements to the aggrieved employees each pay period.

34. Defendants failed to provide accurate itemized wage statements to the aggrieved employees each pay period as a result of the policies and practices set forth in this notice. Defendants violated Labor Code section 226(a)(1) and (5) by not listing the correct "gross wages earned" or "net wages earned," as the employees earned wages and premiums that were not paid, resulting in an

inaccurate reflection, and recording of "gross wages earned" on those wage statements.

35. Likewise, in violation of Labor Code section 226(a)(9), Defendants failed to state on employee wage statements each pay period the applicable hourly rates in effect and the number of hours worked at that rate, as Defendants failed to pay all wages and premiums owed to employees. The amounts stated are instead depreciated and underpaid, resulting in an inaccurate reflection on the pay stub.

36. Defendants violated Labor Code section 226(a)(2) by failing to accurately list employees' "total hours worked," as the wage statements did not accurately include the uncompensated time Plaintiff and other aggrieved employees worked due to Defendants' misclassification of Plaintiff and the aggrieved employees.

37. Specifically, Defendants had a policy and practice of failing to list Plaintiff's and other aggrieved employees' hourly rate and respective hours worked. An illustrative example of this is shown in Plaintiff's wage statement for the pay period 04/22/2024 to 05/05/2024. Here, Plaintiff's records show Plaintiff's hourly rate is inaccurate because Defendants listed $2,115.38 as the rate when instead this was the total amount paid to Plaintiff. Additionally, Plaintiff's records show Plaintiff's hours worked is inaccurate because Defendants listed 80 hours worked each pay period despite Plaintiff completing calls scheduled by Defendants outside of his regular hours and working additional hours on holidays and weekends.

38. Due to the misclassification, Defendants failed to maintain accurate records as required under Labor Code section 1174.

39. Defendants violated Labor Code section 432.5 with respect to Plaintiff and other aggrieved employees by requiring they agree to an unlawful term or condition in writing during their employment.

40. Specifically, Defendants required that Plaintiff and the aggrieved employees agree to work as employees but misclassified them as inside sales exempt employees. Defendants only paid Plaintiff and the aggrieved employees for 8 hours a day or 40 hours a week without additional compensation for their time worked. Defendants imposed work requirements on Plaintiff and the aggrieved employees that subjected them to perform uncompensated work.

41. Because of the policies and practices set forth in the PAGA notice, including the failure to accurately account for all wages earned or hours worked, Defendants failed to accurately maintain records in accordance with Labor Code section 1174 and the IWC Wage Orders.

FIRST CAUSE OF ACTION

CIVIL PENALTIES UNDER THE PRIVATE ATTORNEYS GENERAL ACT

Violation of Labor Code §§ 2698 *et seq.*

(By Plaintiff on Behalf of the State and the Aggrieved Employees Against All Defendants)

42. All outside paragraphs of this Complaint are incorporated into this section.

43. Plaintiff brings this cause of action as a proxy for the State of California on behalf of the following "aggrieved employees" pursuant to the Private Attorneys General Act ("PAGA"), codified as Labor Code section 2698 *et seq.*:

a. All current and former non-exempt employees who worked for Defendants in California at any time from one year prior to the postmark date of the initial PAGA notice through date of trial.

44. Plaintiff reserves the right to amend, supplement, or add to this description of the aggrieved employees, according to proof.

45. The State of California, via the Labor and Workforce Development Agency ("LWDA"), is the real party in interest in this action with respect to this cause of action. (*Kim v. Reins Int'l California, Inc.* (2020) 9 Cal. 5th 73, 81 [The "government entity on whose behalf the plaintiff files suit is always the real party in interest."])

46. Labor Code section 2699(a) provides: "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 the employee and other current or former employees against whom a violation of the same provision was committed pursuant to the procedures specified in Section 2699.3."

47. Any allegations regarding violations of the IWC Wage Orders are enforceable as

violations of Labor Code section 1198, which states: “[t]he employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.”

48. Labor Code section 2699.3 sets forth the procedure for commencing an action for civil penalties under the PAGA.

49. On or about **August 27, 2024**, Plaintiff paid the requisite PAGA filing fee and provided written notice (by online electronic filing with the LWDA and by certified mail to Defendants) of Defendants’ alleged Labor Code violations, including the facts and theories to support the alleged violations.

50. A true and correct copy of Plaintiff’s written PAGA notice, entitled “Notice of Labor Code Violations” is attached hereto as Exhibit 1 and incorporated by reference as though fully set forth herein (the “PAGA notice”).

51. To date, neither Plaintiff nor Plaintiff’s counsel has received a response to Plaintiff’s written PAGA notice from the LWDA.

52. Within 33 calendar days of the postmark date of the notice sent by Plaintiff, neither Plaintiff nor Plaintiff’s counsel has received written notice by certified mail from any defendant providing a description of any actions taken to cure the alleged violations.

53. Now that at least 65 days have passed from Plaintiff notifying Defendants of these violations, without notice of cure from Defendants or notice from the LWDA of its intent to investigate the alleged allegations and issue the appropriate citations to Defendants, Plaintiff exhausted all prerequisites and commenced this civil action under Labor Code section 2699 *et seq.*

54. As set forth in the PAGA notice attached as Exhibit 1 and incorporated into this Complaint, Defendants committed the following violations and are liable for all corresponding civil penalties:

a. ***Unpaid Hours Worked/Minimum Wage.*** Violation of Labor Code §§ 1194, 1197, 1198; IWC Wage Orders.

b. ***Unpaid Overtime***. Violation of Labor Code §§ 510, 1194, 1198; IWC Wage Orders.

c. ***Unpaid Paid Sick Leave.*** Violation of Labor Code §§ 246 through 248.7.

d. ***Unpaid Meal Period Premium Wages.*** Violation of Labor Code §§ 226.7, 512, 1198; IWC Wage Orders.

e. ***Unpaid Rest Period Premium Wages.*** Violation of Labor Code §§ 226.7, 516, 1198; IWC Wage Orders.

f. ***Untimely Payment of Wages During Employment.*** Violation of Labor Code §§ 204, 204b, 210.

g. ***Untimely Payment of Wages Upon Separation of Employment.*** Violation of Labor Code §§ 201, 202, 203, 256.

h. ***Non-Compliant Wage Statements.*** Violation of Labor Code §§ 226, 226.3.

i. ***Unreimbursed Employee Expenses.*** Violation of Labor Code §§ 2802, 2804.

j. ***Failure to Maintain Accurate Records.*** Violation of Labor Code § 1174; IWC Wage Orders.

k. ***Unlawful Employment Condition.*** Violation of Labor Code § 432.5.

55. Plaintiff seeks to collect all recoverable civil penalties for the Labor Code violations alleged in this Complaint and the PAGA notice (including amendments thereto) against Defendants pursuant to Labor Code section 2699(a) and (f), in addition to attorneys' fees, costs, and interest to the extent permitted by law, including under Labor Code section 2699(k)(1).

PRAYER

Plaintiff prays for judgment as follows:

a. For recovery of damages in amount according to proof;

b. For all recoverable pre- and post-judgment interest;

c. For this action to be maintained as a representative action under the PAGA;

d. For Plaintiff and counsel of record to be provided with all enforcement capability as if the action were brought by the State of California or the California Division of Labor Enforcement;

e. For recovery of all civil penalties and other recoverable amounts under the PAGA;

f. For reasonable attorneys' fees and costs of suit, including expert fees, to the extent permitted by law, associated with the PAGA claims pursuant to Labor Code § 2699, and Code of Civil Procedure section 1021.5 and any other applicable sections; and

g. For such other relief the Court deems just and proper.

Dated: November 1, 2024

Ferraro Vega Employment Lawyers, Inc.

Nicholas J. Ferraro

Nicholas J. Ferraro
Attorneys for Plaintiff Franco Masada

<u>EXHIBIT 1</u>

Notice of Labor Code Violations

FERRARO VEGA
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August 27, 2024

NOTICE OF LABOR CODE VIOLATIONS
CALIFORNIA LABOR CODE SECTIONS 2698 *et seq.*

VIA CERTIFIED U.S. MAIL
- Electronic Return Receipt -

Ferry International, LLC
6 Hutton Center Drive, Suite 700
Santa Ana, CA 92707

- PAGA Notice & Filing Fee -
Submitted electronically to the Labor and Workforce Development Agency

Dear LWDA Officer and Company Representatives:

This letter serves as written notice under Labor Code section 2699.3 on behalf of **FRANCO MASADA** ("Plaintiff") and all other "aggrieved employees" of the following "Defendants":

FERRY INTERNATIONAL, LLC

Defendants shall mean and include the foregoing in addition to any other related employer entities, individuals under Labor Code sections 558 and 558.1, and all others who may be later added upon further investigation and discovery as liable employers.

This office serves as legal counsel for Plaintiff. If the California Labor and Workforce Development Agency ("LWDA") does not investigate the facts, allegations, and violations set forth in this notice within the statutorily prescribed 65-day period under Labor Code section 2699.3, Plaintiff intends to commence a civil action against Defendants as a proxy and agent of the State of California under the Private Attorneys General Act ("PAGA"). "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) 23 Cal. App. 5th 745, 751; *Kim v. Reins International California, Inc.* (2020) 9 Cal. 73, 79. Plaintiff maintains standing to pursue these claims against Defendants, as Plaintiff experienced one or more of the alleged violations during the relevant statutory period, which continue through the present date. *Cf. Johnson v. Maxim Healthcare Servs., Inc.*, 281 Cal. Rptr. 3d 478, 481 (Cal. Ct. App. 2021).

Through this notice, Plaintiff requests that Defendants complete an internal investigation and audit of the wage and hour and employment practices at issue and make a good faith effort to correct any violations. Plaintiff attempts to identify the non-compliant policies and practices affecting the aggrieved employees so that the parties may resolve the underlying damages and penalties in judgment or settlement approved by the Superior Court of California under Labor Code section 2699(k). Defendants are notified that any attempt to resolve this case should be conducted in coordination with Plaintiff's counsel to protect the interests of Plaintiff, the aggrieved employees, and the State of California via the LWDA. Plaintiff advises Defendants this letter should be also considered a reasonable attempt at settlement of this matter, subject to an exchange of additional documents and information. *Graham v. Daimler Chrysler Corp.* (2004) 24 Cal. 4th 553, 561.

- BACKGROUND -

Defendants employed Plaintiff during the PAGA Period in the position of Sales Coaching Consultant from about March 2018 to June 2024. During their employment Plaintiff and the other aggrieved employees were subject to the wage and hour and employment protections set forth in the California Labor Code and IWC Wage Orders.

Through this notice, Plaintiff informs the LWDA of the Labor Code violations set forth herein. The "aggrieved employees" include Plaintiff and the following individuals:

> All current and former non-exempt employees who worked for Defendants in the State of California during one-year period preceding the date of this notice through the current date and the date of trial in any pending action (the "aggrieved employees" and the "PAGA Period").

Plaintiff reserves the right to expand or narrow the definition of the "aggrieved employees" in the forthcoming civil action. Furthermore, Plaintiff seeks all recoverable civil penalties for Defendants' violations and reserves the right to supplement this notice as further investigation is completed and further facts, witnesses, and violations are uncovered.

- PAGA CLAIMS -

Misclassification of Employment
Violation of Labor Code § 515(a) and Wage Order 4

Defendants violated Labor Code § 515(a) and Wage Order 4 with respect to the aggrieved employees.

Labor Code § 515(a) states that the Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid pursuant to Sections 510 and 511 for executive, administrative, and professional employees, if the employee is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.

In California and under Wage Order 4, the inside sales representative exemption is used to determine whether a worker is considered exempt from overtime wages. Under the inside sales representative exemption, a worker is considered an exempt inside sales employee if the hiring entity satisfies all three of the following conditions: (1) The worker works in an industry covered by Wage Order 4 or Wage Order 7; (2) the worker earns more than 1.5 times the state minimum wage for each hour worked; **and** (3) the worker earns more than 50% of their total compensation in commissions each workweek.

Here, Plaintiff and the aggrieved employees were misclassified as inside sales because they were exempt from overtime and the other applicable categories throughout their entire employment without regard to the conditions above. Plaintiff and the aggrieved employees regularly did not satisfy all three conditions of the inside sales exemption.

For example, Plaintiff's wage statement below shows Plaintiff **did not** earn more than 50% of their total compensation in commissions in this period. On information and belief, the aggrieved employees had similar experiences.

Ferry International 6 Hutton Centre Dr Santa Ana, CA 92707	**Period Beginning Date** 4/22/2024	**Pay Date** 5/10/2024	**Co.** F7D	**Clock**	**Home Dept** 000110
Franco Masada [redacted]	**Period Ending Date** 5/5/2024	**WGPS Advance Pay Date**	**File #** 001071	**Number** 00190006	**Worked In Dept** 000110

Gross Pay			$ 3,315.38
Regular	Rate: 2,115.3800	Hours: 80.00	$ 2,115.38
Commission (field 3)			$ 1,200.00
Total Hours Worked: 80			
Basis of Pay: SALARY			

Extract from Plaintiff's wage statement for pay period 04/22/2024 to 05/05/2024 showing that he earned $2,115.38 in regular pay and only $1,200.00 in commissions.

During this pay period, Plaintiff earned $2,115.38 in regular pay. However, Plaintiff only received $1,200.00 in commissions. This shows that Plaintiff and the aggrieved employees did not earn more than 50% of their total compensation in commissions each workweek.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code § 515(a) and Wage Order 4 along with all other civil penalties permitted by law.

Unpaid Hours Worked/Minimum Wage
Violation of Labor Code §§ 1194, 1197, 1198; IWC Wage Orders

Defendants violated Labor Code sections 1194, 1197, and 1198, along with the California Minimum Wage Order, the applicable local minimum wage ordinances, and the "Hours and Days of Work" and "Minimum Wages" sections of the applicable IWC Wage Orders with respect to the aggrieved employees.

Labor Code section 1194 renders it unlawful for an employee to receive less than the legal minimum wage for hours worked in California. Labor Code section 1197 further mandates that "[t]he minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful." Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful. The California Minimum Wage Order and the applicable sections of the IWC Wage Orders further require payment of minimum wages for all hours worked. The "Minimum Wages" sections of the applicable IWC Wage Order provide that "[e]very employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise." The foregoing California wage laws require payment of "not less than the applicable minimum wage *for all hours worked* in the payroll period" and California law does not allow averaging of pay over the hours worked in the pay period, even if the total pay results in an average above the minimum wage. *Armenta v. Osmose, Inc.* (2005) 135 Cal. App. 3d 314, 324.

Defendants failed to pay Plaintiff and the aggrieved employees at the lawful minimum wage rate for all hours worked, resulting in unpaid minimum wages. Plaintiff and the aggrieved employees were routinely paid for 8 hours a day or 40 hours a week, regardless of the hours they actually worked due to their misclassification.

For example, Defendants would schedule calls for Plaintiff and the aggrieved employees to complete once or twice a week outside of their regular working hours. Plaintiff estimates he and the aggrieved employees worked an additional 4-6 hours on holidays and weekends, which were unpaid.

Plaintiff and the aggrieved employees were entitled to payment for all hours worked each time they did not satisfy the exemption conditions.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code sections 558 ($50/$100), 1197.1 ($100/$250), 1199 / "Penalties" section of the IWC Wage Orders ($50/$100), and 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Unpaid Overtime
Violation of Labor Code §§ 510, 1194, 1198; IWC Wage Orders

Defendants violated Labor Code sections 510, 1194, and 1198, along with the "Hours and Days of Work" sections of the applicable IWC Wage Orders with respect to the aggrieved employees.

Labor Code section 510 requires "[a]ny 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;" and "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;" and "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." Labor Code section 1194 renders it unlawful for an employee to receive less than the legal overtime rate for overtime hours worked in California. Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful. The IWC Wage Orders further require payment of overtime wages for all overtime hours worked, including the "Hours and Days of Work" sections.

Defendants failed to pay Plaintiff and the aggrieved employees overtime wages and the lawful rate of pay for overtime hours worked, resulting in unpaid overtime wages.

As discussed above, Plaintiff and the aggrieved employees were not paid for all hours worked. Plaintiff and the aggrieved employees often worked over 40 hours a week completing calls scheduled by Defendants and working additional hours on holidays and weekends.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code sections 558 ($50/$100), 1199 / "Penalties" section of the IWC Wage Orders) ($50/$100), and 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Unpaid Paid Sick Leave
Violation of Labor Code §§ 246 through 248.7

Defendants violated Labor Code sections 246 through 248.7 with respect to the aggrieved employees.

Labor Code section 246 requires employers to provide paid sick leave to its workforce on the terms set forth in the statute. Employers must comply with the accrual, use, and notice provisions of Labor Code sections 246, 246.5, 247, and must further ensure that they maintain the paid sick leave records required by Labor Code section 247.5. Employers have the option of providing 24 hours of paid sick leave to employees or to allow employees to accrue paid sick leave each pay period. If an employer chooses the accrual method, employees must accrue sick leave at a rate of one hour for every thirty hours worked in a given pay period as set forth in Labor Code section 246(b)(1). Under the accrual method, employees must begin accruing paid sick leave at the commencement of employment.

Employers must pay sick leave in accordance with one of the three permissible methods provided in Labor Code section 246(l): (1) "the same manner as the regular rate of pay for the workweek;" (2) "by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days;" or (3) "for exempt employee … in the same manner as the employer calculates wages for other forms of paid leave time." Labor Code sections 248.6 and 248.7 similarly require paid sick leave to be paid at a regular rate-based calculation in excess of the base hourly rate and at the lawful accrual rate.

Under Labor Code section 246(i), employers must provide employees "with written notice of the amount of paid sick leave available … for use on either the employee's itemized wage statement … or in a separate writing provided on the designated pay date with the employee's payment of wages."

Defendants failed to comply with California's paid sick leave laws with respect to the aggrieved employees. Defendants failed to provide Plaintiff and the aggrieved employees any paid sick leave as they were misclassified as inside sales exempt employees.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees as provided under Labor Code section 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Unpaid Meal Period Premium Wages
Violation of Labor Code §§ 226.7, 512, 1198; IWC Wage Orders

Defendants violated Labor Code sections 226.7, 512, and 1198, along with the related sections of the IWC Wage Orders with respect to the aggrieved employees.

Labor Code section 512 and the IWC Wage Orders require that employers provide an uninterrupted 30-minute meal period after no more than five hours of work and a second meal period after no more than 10 hours of work. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1049. Labor Code section 226.7 requires that if a meal period is late, missed, short, or interrupted, the employer must pay one additional hour of pay at the employee's "regular rate" of compensation. *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 862 ("We hold that the terms are synonymous: "regular rate of compensation" under section 226.7(c), like "regular rate of pay" under section 510(a), encompasses all nondiscretionary payments, not just hourly wages"). "[T]ime records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage." *Donohue v. AMN Services, LLC* (2021) 11 Cal. 5th 58, 61. Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful. The IWC Wage Orders, including Section 11 (Meal Periods), further require one uninterrupted 30-minute meal period after no more than five hours of work and a second meal period after no more than 10 hours of work and an additional hour of pay at the employee's regular rate of compensation for each workday that a compliant meal period is not provided. Pursuant to Section 11(A) of the IWC Wage Orders, the California Supreme Court has held that the on-duty meal period exception is "exceedingly narrow" and applies only when (1) "the nature of the work prevents the employee from being relieved of all duty" and (2) *both* "the employer and employee have agreed, in writing, to the on-duty meal period." *Augustus v. AMB Security Services, Inc.* (2016) 2 Cal. 5th 257, 266-276 (emphasis added). If these two requirements are not met, then the employer owes the employee one hour of premium pay for each non-compliant meal period taken under the purported on-duty meal arrangement. *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal. 5th 444, 459.

First, Plaintiff and the aggrieved employees routinely experienced missed, late, short, and interrupted meal periods in order to keep up with the high demands of the job. Specifically, Defendants put a lot of pressure on Plaintiff and the aggrieved employees to obtain sales. Plaintiff and the aggrieved employees were scheduled back-to-back calls and were unable to leave their desk to take a compliant meal period. If Plaintiff and the aggrieved employees wanted to take their meal period, they would be required to find someone else to cover the scheduled call. However, there was rarely someone available to cover due to their own scheduled calls. This resulted in missed meal periods in violation of Labor Code 512.

Additionally, to the extent Plaintiff and the aggrieved employees were able to take a meal period, they were consistently interrupted. Plaintiff and the aggrieved employees were often required to cut their meal periods short to answer phone calls scheduled by Defendants during their meal periods.

Second, Defendants failed to properly track Plaintiff's and the aggrieved employees' meal periods as they were not required to clock out as a result of their misclassification

Due to Defendants' misclassification of Plaintiff and the aggrieved employees, they were not provided compliant meal periods. Each time Plaintiff and the aggrieved employees experienced a noncompliant meal period, they were owed a meal period premium. As a matter of policy and practice, Plaintiff and the aggrieved employees were not provided meal period premiums in lieu of missed meal periods as required by Labor Code section 226.7.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees as provided under Labor Code section 2699

($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Unpaid Rest Period Premium Wages
Violation of Labor Code §§ 226.7, 516, 1198; IWC Wage Orders

Defendants violated Labor Code sections 226.7, 516, and 1198, and the related sections of the IWC Wage Orders with respect to Plaintiff and the aggrieved employees.

Labor Code sections 226.7 and 516 and the IWC Wage Orders require that employers authorize and permit an uninterrupted 10-minute rest period for each four-hour period (or major fraction thereof) that an employee works. Labor Code section 226.7 requires that if a rest period is non-compliant, the employer must pay one additional hour of pay at the employee's "regular rate" of compensation. *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 862 ("We hold that the terms are synonymous: "regular rate of compensation" under section 226.7(c), like "regular rate of pay" under section 510(a), encompasses all nondiscretionary payments, not just hourly wages"). Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful. The IWC Wage Orders, including Section 12 (Rest Periods), further require one uninterrupted 10-minute rest period for each four-hour period (or major faction thereof) worked and an additional hour of pay at the employee's regular rate of compensation for each workday that a compliant rest period is not authorized or permitted.

As a matter of common policy and practice, Defendants failed to provide all rest periods to which Plaintiff and the aggrieved employees were entitled. As mentioned above, the nature of the work Plaintiff and the aggrieved employees did often required them to continue working without any time to take a compliant break. When Plaintiff and the aggrieved employees were able to take a rest period, this would only be for about five minutes to go to the restroom but not the lawful 10-minute paid rest period.

Due to Defendants' misclassification of Plaintiff and the aggrieved employees, they were not provided rest periods. When Plaintiff and other aggrieved employees experienced these missed and interrupted rest periods, Defendants failed to pay rest period premiums at the regular rate as required by Labor Code section 226.7.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code section 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

<u>Untimely Payment of Wages During Employment</u>
Violation of Labor Code §§ 204, 204b, 210

Defendants violated Labor Code sections 204 and/or 204b and 210, as applicable, with respect to Plaintiff and the aggrieved employees.

<u>Labor Code section 204(a)</u> requires payment of "all wages" for non-exempt employees at least twice each calendar month. <u>Labor Code section 204(d)</u> states all wages due must be paid "not more than seven calendar days following the close of the payroll period." <u>Labor Code section 204b</u> applies to employees paid on a weekly basis and also requires the payment for all labor within the required pay periods. <u>Labor Code section 210</u> provides "every person who fails to pay the wages of an employee as provided in Section … 204 … shall be subject to a civil penalty" of $100 for an initial violation and $200 plus 25% of the amount unlawfully withheld for a subsequent violation.

Because Defendants failed to pay all wages and premiums in each pay period in which such wages were earned at the lawful rate, Defendants violated Labor Code section 204 and/or 204b (for weekly employees, as applicable). Defendants violated Labor Code sections 204 and 204b by failing to pay all wages and premiums owed on the regular pay days scheduled each pay period within seven calendar days of the close of the payroll period, as a result of the policies and practices set forth in this notice.

Due to Defendants' misclassification of Plaintiff and the aggrieved employees, it also failed to pay all wages and premiums in each pay period in which such wages were earned at the lawful rate, Defendants violated Labor Code section 204 and/or 204b (for weekly employees, as applicable). Defendants violated Labor Code sections 204 and 204b by failing to pay all wages, sick leave, and premiums owed on the regular pay days scheduled each pay period within seven calendar days of the close of the payroll period, as a result of the policies and practices set forth in this notice. Indeed, Defendants failed to pay all premiums, overtime, regular, sick leave, and other earnings on time each pay day.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees as provided under Labor Code section 2699 ($100/$200) per violation per pay period per employee, and Labor Code section 210 ($100/$200) per violation per pay period, along with all other civil penalties permitted by law.

<u>Untimely Payment of Wages Upon Separation of Employment</u>
Violation of Labor Code §§ 201, 202, 203, 256

Defendants violated Labor Code sections 201, 202, and 203 with respect to the aggrieved employees by failing to pay all wages and premiums owed upon termination of employment.

<u>Labor Code section 201</u> requires that if an employer fires an employee, the wages must be paid immediately. <u>Labor Code section 202</u> requires that if an employee quits without

providing 72 hours' notice, his or her wages must be paid no later than 72 hours thereafter. Labor Code section 202 states that if an employee provides 72 hours' notice, the final wages are payable upon his or her final day of employment. Labor Code section 203 requires an employer who fails to comply with Labor Code sections 201 or 202 to pay a waiting time penalty for each employee, up to a period of 30 days additional compensation.

Defendants failed to pay all wages and premiums owed to aggrieved employees during their employment as set forth in this notice, and also failed to timely pay those amounts to departing employees upon separation of employment. Defendants did not pay waiting time penalties for the late payments. As a result, Defendants violated Labor Code sections 201, 202, and 203.

As a result, Plaintiff may recover civil penalties on behalf of aggrieved employees and the State of California as provided under Labor Code section 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Non-Compliant Wage Statements
Violation of Labor Code §§ 226, 226.3

Defendants violated Labor Code sections 226(a) and 226.3 with respect to the aggrieved employees by failing to furnish itemized wage statements each pay period that accurately list all information required by Labor Code section 226(a)(1) through (9).

Labor Code section 226(a) requires an employer to furnish wage statements to employees semimonthly or at the time of each payment of wages, "an accurate itemized statement in writing showing:" (1) gross wages earned, (2) total hours worked, (3) the number of piece rate units earned and applicable piece-rate in effect, (4) all deductions, (5) net wages earned, (6) the inclusive dates of the pay period, (7) the name of the employee and last four digits of SSN or an EIN, (8) the name and address of the legal name of the employer, and (9) all applicable hourly rates in effect during the pay period and the number of hours worked at each hourly rate by the employee.

Defendants failed to provide accurate itemized wage statements to the aggrieved employees each pay period as a result of the policies and practices set forth in this notice. Defendants violated Labor Code section 226(a)(1) and (5) by not listing the correct "gross wages earned" or "net wages earned," as the employees earned wages and premiums that were not paid, resulting in an inaccurate reflection, and recording of "gross wages earned" on those wage statements.

Likewise, in violation of Labor Code section 226(a)(9), Defendants failed to state on employee wage statements each pay period the applicable hourly rates in effect and the number of hours worked at that rate, as Defendants failed to pay all wages and premiums owed to employees. The amounts stated are instead depreciated and underpaid, resulting in an inaccurate reflection on the pay stub.

Defendant violated Labor Code section 226(a)(2) by failing to accurately list employees' "total hours worked," as the wage statements did not accurately include the uncompensated time Plaintiff and other aggrieved employees worked due to Defendants' misclassification of Plaintiff and the aggrieved employees.

Specifically, Defendants had a policy and practice of failing to accurately list Plaintiff's and other aggrieved employees' hourly rate and respective hours worked. An illustrative example of this is shown below:

Ferry International 6 Hutton Centre Dr Santa Ana, CA 92707	**Period Beginning Date** 4/22/2024	**Pay Date** 5/10/2024	**Co.** F7D	**Clock**	**Home Dept** 000110
Franco Masada [redacted]	**Period Ending Date** 5/5/2024	**WGPS Advance Pay Date**	**File #** 001071	**Number** 00190006	**Worked In Dept** 000110

Gross Pay			$ 3,315.38
Regular	Rate: 2,115.3800	Hours: 80.00	$ 2,115.38
Commission (field 3)			$ 1,200.00
Total Hours Worked: 80			
Basis of Pay: SALARY			

Extract from Plaintiff's wage statement for pay period 04/22/2024 to 05/05/2024.

Here, Plaintiff's records show Plaintiff's hourly rate is inaccurate because Defendants listed $2,115.38 as the rate when instead this was the total amount paid to Plaintiff. Additionally, Plaintiff's records show Plaintiff's hours worked is inaccurate because Defendants listed 80 hours worked each pay period despite Plaintiff completing calls scheduled by Defendants outside of his regular hours and working additional hours on holidays and weekends.

Plaintiff and other aggrieved employees cannot promptly and easily determine from the wage statement alone the wages paid or earned without reference to other documents or information. Indeed, these wage statement violations are significant because they sow confusion among Plaintiff and other aggrieved employees with respect to what amounts were owed and paid, at what rates, the number of hours worked, and how those amounts were or should be calculated. The wage statements reflect a false statement of earnings and concealed the underlying problems and underpayments of employee wages.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code sections 226.3 ($250/$1,000) and 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

<u>Failure to Maintain Accurate Records</u>
Violation of Labor Code § 1174; IWC Wage Orders

Defendants violated Labor Code sections 1174 and the IWC Wage Orders by failing to maintain accurate employee payroll records with respect to Plaintiff and other aggrieved employees.

<u>Labor Code section 1174</u> requires that employers maintain accurate "payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments." <u>Section 7(A)</u> of the <u>IWC Wage Orders</u>, which may be enforced through Labor Code section 1198, mandates similar recordkeeping obligations.

Because of the policies and practices set forth in this notice, including the failure to accurately account for wages earned or hours worked, Defendants failed to accurately maintain records in accordance with Labor Code section 1174 and the IWC Wage Orders.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code section 1174.5 ($500) and 2699 ($100/$200), along with all other civil penalties permitted by law.

<u>Unlawful Employment Condition</u>
Violation of Labor Code § 432.5

Defendants violated Labor Code section 432.5 with respect to Plaintiff and other aggrieved employees by requiring that they agree to an unlawful term or condition in writing during their employment.

Labor Code section 432.5 states that "[n]o employer, or agent, manager, superintendent, 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, superintendent, or officer thereof to be prohibited by law."

Defendants required Plaintiff and the aggrieved employees to work as employees but misclassified them as inside sales exempt employees. Defendants only paid Plaintiff and the aggrieved employees for 8 hours a day or 40 hours a week without additional compensation for their time worked. Defendants imposed work requirements on Plaintiff and the aggrieved employees that subjected them to perform uncompensated work.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code section 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

<u>Attorneys' Fees and Costs</u>
Labor Code § 2699(g)

Plaintiff has been compelled to retain the services of counsel to protect the interests of other aggrieved employees and the State of California. Plaintiff continues to incur attorneys' fees and costs, which are recoverable under California law, including Labor Code section 2699(g).

- LITIGATION HOLD NOTICE –

This letter imposes a duty upon all defendants and their respective employees, officers, directors, executives, attorneys, human resource and payroll personnel, accountants, and other agents to preserve all physical and electronic evidence, including electronically stored information and emails, which relate to the employment of Plaintiff and the aggrieved employees specified in this notice. Evidence includes, but is not limited to, Defendants' written employment and payroll policies and handbooks; the aggrieved employees' personnel files and payroll records, such as paystubs, time records, wage statements, compensation reports, as well as the underlying electronically data in Excel or similar format. Memoranda and internal and external correspondence relating to the subject matter of this notice shall also be maintained. Failure to preserve and retain relevant evidence may constitute spoliation of evidence and result in an adverse inference or sanctions.

If you have any questions regarding the scope of your obligations to preserve evidence, please consult your legal counsel and always err on the side of caution. Periodic or regularly scheduled purges or deletions of information covered by this hold <u>must be suspended immediately</u>.

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- CONCLUSION -

If the LWDA does not pursue enforcement, Plaintiff intends to bring representative claims on behalf of the State of California and the aggrieved employees seeking civil penalties for violations of the Labor Code and the IWC Wage Orders, along with attorneys' fees, costs, interest, and other appropriate relief.

Please advise if the LWDA intends to investigate any of the factual or legal allegations set forth in this notice. Defendants may contact Plaintiff's counsel with any questions regarding this letter or the forthcoming lawsuit.

Sincerely,

Nicholas J. Ferraro

Nicholas J. Ferraro

Cc Plaintiff Franco Masada
Barbara Duron, Director of HR
bduron@tomferry.com