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Clerk of the Superior Court
By D. Cortez ,Deputy Clerk

8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF SAN DIEGO

10 MICHAEL FUSTING,

11 Plaintiff,

12 v.

13 ADVANCED TRAINING SYSTEMS LLC;
14 ENRIQUE MAR JR. dba IMX - DSMO; and
DOES 1-100, inclusive,

15 Defendants.
16

Case No.: 24CU020681C

FIRST AMENDED COMPLAINT

1. Private Attorneys General Act Claim – LC § 2699
2. Failure to Pay Wages – LC § 1194
3. Failure to Provide Meal and Rest Periods – LC § 226.7
4. Failure to Provide Compliant Wage Statements and Keep Records – LC § 226
5. Unfair Business Practices – BPC § 17200
6. Failure to Produce Records
7. Retaliation

18 Complaint Filed: 11/01/2024
19 Dept.: C-71
Judge: Hon. Gregory W. Pollack

1 Plaintiff, MICHAEL FUSTING (hereinafter “FUSTING” or “Plaintiff”), for causes of action
2 against Defendants ADVANCED TRAINING SYSTEMS LLC (hereinafter “ADVANCED”);
3 ENRIQUE MAR JR. dba IMX – DMSO (hereinafter “MAR”); and DOES 1-100, inclusive
4 (hereinafter collectively referred to as “Defendants”), alleges as follows:

5 JURISDICTION

6 1. This action arises out of acts, representations and events occurring in the State of
7 California.

8 2. Venue is appropriate in San Diego County because at all times mentioned herein,
9 Defendants’ unlawful acts occurred in San Diego County.

10 3. Whenever in this Complaint reference is made to any act, deed, or conduct of
11 Defendants, the allegation means that Defendants engaged in the act, deed, or conduct by or through
12 one or more of their officers, directors, agents, employees, or representatives, who were actively
13 engaged in the management, direction, control, or transaction of the ordinary business and affairs of
14 Defendants.

15 4. Plaintiff is ignorant of the true names and capacities, whether individual, corporate,
16 associate or otherwise, of the Defendants sued herein as DOES 1-100, inclusive and therefore sues
17 said Defendants (the “DOE Defendants”) by such fictitious names. Plaintiff will amend this
18 Complaint to plead the true names and capacities of the DOE Defendants at such time as the
19 identities of the DOE Defendants have been ascertained.

20 5. Plaintiff is informed and believes, and thereon alleges, that ADVANCED
21 TRAINING SYSTEMS LLC; ENRIQUE MAR JR. dba IMX – DMSO; and DOES 1-100, inclusive,
22 are the partners, agents, or principals and co-conspirators of Defendants, and of each other; that
23 named Defendants and the DOE Defendants performed the acts and conduct herein alleged directly,
24 aided and abetted the performance thereof, or knowingly acquiesced in, ratified, and accepted the
25 benefits of such acts and conduct, and therefore each of the named Defendants and DOE Defendants
26 are liable to Plaintiff to the extent of the liability of the Defendants as alleged herein.

27 6. Plaintiff is further informed and believes, and thereon alleges, that at all times herein
28 material, ADVANCED TRAINING SYSTEMS LLC, and entity DOE Defendants were completely

1 dominated and controlled by ENRIQUE MAR JR. dba IMX – DMSO and unknown DOE
2 Defendants, and each was the alter ego of the other in a single enterprise. At those times, a unity of
3 interest and ownership between ADVANCED TRAINING SYSTEMS LLC and entity DOE
4 Defendants on the one hand, and ENRIQUE MAR JR. dba IMX – DMSO and other unknown DOES
5 Defendants on the other hand existed such that the separate personalities of these entities did not in
6 reality exist. Additionally, Plaintiff would suffer an inequitable harm if the actions of ADVANCED
7 TRAINING SYSTEMS LLC and entity DOE Defendants were not treated as the acts of all
8 Defendants. Plaintiff is further informed and believes, and thereon alleges, that at all relevant times
9 to this action ADVANCED TRAINING SYSTEMS LLC and entity DOE Defendants, *inter alia*,
10 failed to observe the requisite entity formalities, were inadequately capitalized, and their ownership
11 and control were inappropriately concentrated in DOE Defendants.

12 7. Plaintiff is further informed and believes, and thereon alleges, that at all times herein
13 material, each defendant, was completely dominated and controlled by its co-defendants and each
14 was the alter ego of the other. Whenever and wherever reference is made in this Complaint to any
15 conduct by Defendants, such allegations and references shall also be deemed to mean the conduct
16 of each of the Defendants, acting individually, jointly and severally. Whenever and wherever
17 reference is made to individuals who are not named as defendants in this Complaint, but were
18 employees or agents of, such individuals at all relevant times acted on behalf of Defendants named
19 in this Complaint within the scope of their respective employment.

20 8. Whenever and wherever reference is made in this Complaint to any conduct by a
21 defendant or Defendants, such allegations and references shall also be deemed to mean the conduct
22 of each of the Defendants, acting individually, jointly and severally. Whenever and wherever
23 reference is made to individuals who are not named as defendants in this Complaint, but were
24 employees or agents of, such individuals at all relevant times acted on behalf of Defendants named
25 in this Complaint within the scope of their respective employment.

26 **GENERAL ALLEGATIONS**

27 9. Defendants operate a commercial training and simulator business that operates in the
28 County of San Diego, California, and elsewhere.

1 10. On or about January 17, 2020, Defendants hired FUSTING as a Simulator Engineer
2 to manufacture, produce, and repair commercial trucking and delivery vehicle simulators for
3 ADVANCED's clients. FUSTING's duties also included working for Defendants at ADVANCED's
4 facilities located at 2438 Cades Way, Vista, CA 92081.

5 11. Defendants intentionally misclassified FUSTING as an independent contractor even
6 though FUSTING was Defendants' nonexempt employee whom Defendants exercised control over
7 the wages, hours, and working conditions of. Defendants (A) controlled FUSTING's work
8 performance; (B) FUSTING performed work directly within the usual course of Defendants'
9 business of manufacturing, producing, and repairing commercial trucking and delivery vehicle
10 simulators; and (C) FUSTING was not engaged in an independently established trade, occupation,
11 or business of manufacturing, producing, and repairing simulators.

12 12. MAR, who was ADVANCED's Chief Operating Officer (COO) at all relevant times,
13 and other employees of Defendants, managed and supervised FUSTING's performance of duties
14 for Defendants.

15 13. Defendants paid FUSTING on a weekly pay period basis with checks that MAR
16 made out from IMX – DSMO which FUSTING is informed and believes may be a dba owned and
17 operated by MAR.

18 14. FUSTING estimates that FUSTING worked an average of 45 hours per week for
19 Defendants, however Defendants only paid FUSTING regular rate wages for all hours worked and
20 never overtime rates for exceeding 8 hours in a workday or 40 hours in a workweek. Defendants
21 regularly paid FUSTING wages late instead of on days designated as regularly scheduled pay
22 periods, and FUSTING regularly asked MAR for FUSTING's late pay. Defendants also paid
23 FUSTING wage by MAR sending FUSTING money through a Zelle smart phone application.

24 15. FUSTING is informed and believes that Defendants also failed to make and keep and
25 accurate record of the beginning and end of all FUSTING's work periods, including meal periods.

26 16. Defendants also regularly failed to provide FUSTING compliant off duty,
27 uninterrupted meal periods of at least 30-minutes because meal periods were provided after 5 hours
28 of work, lasted less than 30 minutes, or were not provided at all. Defendants also failed to pay

1 FUSTING an additional hour of regular rate wages for every workday with a missed meal period.

2 17. Defendants also failed to permit FUSTING to take off duty, uninterrupted meal
3 periods of at least 10-minutes, and failed to inform FUSTING that Defendants had a policy of
4 permitting rest periods or that FUSTING was allowed to take them. Defendants also failed to pay
5 FUSTING an additional hour of regular rate wages for every workday with a missed rest period.

6 18. Defendants also failed to provide FUSTING paid sick leave for qualifying reasons.

7 19. Defendants failed to maintain required payroll records and provide FUSTING
8 compliant itemized wage statements for each pay period with required accurate information
9 including, but not limited to, gross wages earned, total hours worked, all deductions, net wages
10 earned, inclusive dates of the pay period, the name and address of the legal entity that is the
11 employer, all applicable hourly rates, and accrued paid sick leave.

12 20. FUSTING regularly disclosed information about the employer's working conditions
13 to Defendants and disclosed information to Defendants which FUSTING reasonably believed
14 disclosed Defendants noncompliance with independent contractor and wage and hour laws. That
15 included, but was not limited to, FUSTING inquiring and complaining to Defendants about
16 Defendants treating FUSTING like an employee while paying FUSTING like an independent
17 contractor, and FUSTING complaining to Defendants about late pay.

18 21. On or about May 3, 2024, Defendants terminated FUSTING. FUSTING is informed
19 and believes that Defendants terminated FUSTING in retaliation because FUSTING disclosed, or
20 Defendants believed that FUSTING may disclose information about Defendants' working
21 conditions and wage and hour practices, that FUSTING reasonably believed discloses violations of
22 laws.

23 22. FUSTING is further informed and believes that in taking the actions alleged herein,
24 Defendants' managing agents including, but not limited to, MAR, acted with malice, fraud and
25 oppression, and in reckless disregard of FUSTING's rights to enjoy all the protections of
26 California's labor laws as Defendants' employee and complain about Defendants' working
27 conditions and pay practices that FUSTING reasonably believed violated of laws and rules.

28 23. As a direct and proximate result of Defendants' unlawful actions and retaliation,

1 FUSTING suffered foreseeable special damages and general damages in an amount according to
2 proof.

3 24. On or about May 6, 2024, FUSTING submitted a request to Defendants for a copy
4 of personnel and payroll records. Defendants refused to comply.

5 25. More than 30 days have passed since the earned unpaid wages alleged in this
6 complaint were due and Defendants continue to fail to pay FUSTING outstanding earned wages.
7 Defendants committed the acts stated herein knowingly and willfully by among other things
8 intentionally misclassifying FUSTING as an independent contractor, entitling FUSTING to 30 days
9 of additional daily wages as a waiting time penalty as provided by Labor Code sections 201 to 203,
10 which Defendants also have not paid to FUSTING yet.

11 26. FUSTING is informed and believes that Defendants employed many other aggrieved
12 employees as Simulator Engineers or similar roles whom Defendants engaged in the same Labor
13 Code violations against as the Labor Code violations FUSTING suffered and alleged throughout
14 this complaint.

15 27. FUSTING is informed and believes that Defendants' managing agents, such as MAR
16 and unknown DOES, were the persons who directed Defendants to engage in unlawful wage and
17 hour practices and unlawfully retaliate against FUSTING. Further, FUSTING is informed and
18 believes that MAR and unknown DOES caused to be violated provisions regulating minimum wages
19 or hours and days of work in Wage Orders and caused to be violated sections 203, 226, 226.7,
20 1193.6, 1194, and 2802 of the Labor Code, and are therefore personally liable to FUSTING pursuant
21 to Labor Code section 558.1.

22 28. Defendants' violations were all knowing and willful in disregard of the Labor Code
23 and Wage Orders. Accordingly, FUSTING is entitled to pursue individual and non-individual Labor
24 Code Private Attorneys General Act of 2004 ("PAGA") claims to recover civil penalties for
25 Defendants' violations of the Labor Code and Wage Orders against FUSTING and other aggrieved
26 employees whom Defendants employed as Simulator Engineers or as other similar manufacturing
27 or repair jobs, including people Defendants classified as independent contractors or employees,
28 during the statute of limitations period for intentional misclassification, failure to timely pay all

1 earned wages on regularly scheduled pay days, failure to pay overtime wages, failure to provide
2 meal and rest periods, failure to pay an additional one hour of premium wages for each workday
3 with a missed meal period and each workday with a missed rest period, failure to provide paid sick
4 leave, failure to provide compliant wage statements and keep records, failure to timely pay all earned
5 wages after employment ended, failure to produce records, and retaliation pursuant to Labor Code
6 sections 98.6, 201, 202, 203, 204, 210, 226, 226.3, 226.7, 226.8, 232.5, 246, 256, 510, 512, 558,
7 558.1, 1102.5, 1174.5, 1194, 1197.1, 1198.5, 2699, et al.; and Wage Order 1-2001 sections 3, 4, 7,
8 11, 12, and 20.

9 29. On or about November 1, 2024, FUSTING filed a PAGA claim notice with the Labor
10 and Workforce Development Agency (“LWDA”) by uploading it to the Department of Industrial
11 Relations (“DIR”) website. FUSTING also sent copies by certified U.S. mail to the named
12 Defendants. More than 65 days have passed since Fusting filed the PAGA claim notice. A true and
13 correct copy of the PAGA claim notice is attached hereto as Exhibit 1.

14 **FIRST CAUSE OF ACTION**

15 **(Private Attorneys General Act Claim – LC § 2699)**

16 **(Against all Defendants)**

17 30. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this
18 section as though fully set forth herein.

19 31. Labor Code section 2699 states that, “(a) Notwithstanding any other provision of
20 law, any provision of this code that provides for a civil penalty to be assessed and collected by the
21 Labor and Workforce Development Agency or any of its departments, divisions, commissions,
22 boards, agencies, or employees, for a violation of this code, may, as an alternative be recovered
23 through a civil action brought by an aggrieved employee on behalf of himself or herself and other
24 current or former employees pursuant to the procedures specified in Section 2699.3.”

25 32. As a result of the unlawful acts alleged throughout this complaint, Plaintiff brings
26 this PAGA action for individual and non-individual claims on behalf of the State of California to
27 pursue civil penalties for Defendants’ violations of the Labor Code and Wage Orders against
28 Plaintiff and other aggrieved employees whom Defendants’ violations were all knowing and willful

1 in disregard of the Labor Code and Wage Orders. Accordingly, FUSTING is entitled to pursue
2 individual and non-individual Labor Code Private Attorneys General Act of 2004 (“PAGA”) claims
3 to recover civil penalties for Defendants’ violations of the Labor Code and Wage Orders against
4 FUSTING and other aggrieved employees whom Defendants employed as Simulator Engineers or
5 as other similar manufacturing or repair jobs, including people Defendants classified as independent
6 contractors or employees, during the statute of limitations period for intentional misclassification,
7 failure to timely pay all earned wages on regularly scheduled pay days, failure to pay overtime
8 wages, failure to provide meal and rest periods, failure to pay an additional one hour of premium
9 wages for each workday with a missed meal period and each workday with a missed rest period,
10 failure to provide paid sick leave, failure to provide compliant wage statements and keep records,
11 failure to timely pay all earned wages after employment ended, failure to produce records, and
12 retaliation pursuant to Labor Code sections 98.6, 201, 202, 203, 204, 210, 226, 226.3, 226.7, 226.8,
13 232.5, 246, 256, 510, 512, 558, 558.1, 1102.5, 1174.5, 1194, 1197.1, 1198.5, 2699, et al.; and Wage
14 Order 1-2001 sections 3, 4, 7, 11, 12, and 20.

15 33. Accordingly, Plaintiff seeks civil penalties, interest, attorney fees, and costs
16 pursuant to Labor Code section 2699 et al.

17 **SECOND CAUSE OF ACTION**

18 **(Failure to Pay Wages – LC § 1194)**

19 **(Against all Defendants)**

20 34. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this
21 section as though fully set forth herein.

22 35. Pursuant to Labor Code section 200, “wages” includes all amounts for labor
23 performed by employees of every description, whether the amount is fixed or ascertained by the
24 standard of time, task, piece, commission basis or other method of calculation. Under California law
25 through Labor Code sections 1182.12 and 1194, and Wage Order 5-2001 section 4, every employer
26 shall pay to each employee wages not less than the applicable minimum wage for all hours worked.

27 36. Pursuant to Wage Order 5-2001 section 3(A) and Labor Code sections 200, 500,
28 510, and 1198, Defendants were required to compensate Plaintiff and other aggrieved employees

1 for all overtime, which is calculated at one and one-half (1.5) times the regular rate of pay for hours
2 worked in excess of eight (8) hours in one workday and forty (40) hours in any one workweek, and
3 for the first eight (8) hours on the seventh consecutive workday in any one workweek; with double
4 (2) time after eight (8) hours on the seventh day of any workweek, or after twelve (12) hours in any
5 workday.

6 37. At all relevant Plaintiff was a non-exempt employee entitled to at least minimum
7 wage for all hours worked and overtime rates when appropriate. Defendants intentionally
8 misclassified Plaintiff as an independent contractor to employ Plaintiff to manufacture and repair
9 Defendants' commercial truck and delivery van simulators, failed to timely pay Plaintiff all earned
10 wages, failed to pay Plaintiff overtime rates for overtime worked, failed to pay 1-hour premium
11 wages for each workday with a missed meal period and each workday with a missed rest period,
12 and failed to pay Plaintiff all earned wages when Defendants terminated Plaintiff on or about May
13 3, 2024. More than 30 days have passed since the wages were due and Defendants continue to fail
14 to pay Plaintiff outstanding earned wages. Defendants committed the acts stated herein knowingly
15 and willfully, entitling Plaintiff to 30 days of additional daily wages as a waiting time penalty as
16 provided by Labor Code sections 201 to 203, which Defendants also have not paid to Plaintiff yet.

17 38. Accordingly, Plaintiff seeks damages, interest, penalties, attorney fees, and costs
18 available pursuant to Labor Code sections 201, 202, 203, 204, 204.1, 210, 215, 218.5, 218.6, 221,
19 222, 223, 224, 226.2, 226.7, 246, 510, 512, 558, 558.1, 1182.11, 1182.12, 1194, 1194.2, 1194.3,
20 1197.1, 2751, 2802; Civil Code section 3289; the Wage Orders; and common law.

21 **THIRD CAUSE OF ACTION**

22 **(Failure to Provide Meal and Rest Periods – LC § 226.7)**

23 **(Against all Defendants)**

24 39. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this
25 section as though fully set forth herein.

26 40. Pursuant to Labor Code sections 226.7 and 512, and Wage Order 5-2001 section 11,
27 duty-free meal periods of no less than thirty (30) minutes are required for all non-exempt employees
28 within every five (5) hour work period if an employee works a period exceeding five (5) hours.

1 Pursuant to Wage Order 5-2001 section 7, employers must keep time records showing when the
2 employee begins and ends each work period, including meal periods.

3 41. Pursuant to Labor Code section 226.7 and Wage Order 5-2001, section 12,
4 employers must also provide non-exempt employees a paid ten (10) minute duty-free rest period
5 within every four (4) hours worked.

6 42. Pursuant to Labor Code section 226.7, an employer who fails to provide duty-free
7 meal periods or rest periods must pay the employee an additional one (1) hour of regular rate pay
8 for each workday in which a required duty-free meal or rest period is not provided.

9 43. Plaintiff was a non-exempt employee for Defendants at all relevant times and
10 entitled to meal and rest periods. Defendants regularly failed to provide Plaintiff compliant off duty
11 meal and rest periods. Defendants also failed to record the beginning and end of all periods Plaintiff
12 worked for Defendants, including meal periods. Defendants did not even inform Plaintiff that
13 Plaintiff had a right to take rest periods. Defendants further failed to pay Plaintiff an additional one
14 (1) hour of regular rate pay for every workday with a missed meal period and every workday with
15 a missed rest period.

16 44. Accordingly, Plaintiff seeks damages, interest, penalties, attorney fees, and costs
17 available pursuant to Labor Code sections 201, 202, 203, 204, 204.1, 210, 215, 218.5, 218.6, 221,
18 222, 223, 224, 226.2, 226.7, 246, 510, 512, 558, 558.1, 1182.11, 1182.12, 1194, 1194.2, 1194.3,
19 1197.1, 2751, 2802; Civil Code section 3289; the Wage Orders; and common law.

20 **FOURTH CAUSE OF ACTION**

21 **(Failure to Provide Complaint Wage Statements and Keep Records – LC § 226)**

22 **(Against all Defendants)**

23 45. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this
24 section as though fully set forth herein.

25 46. Pursuant to Labor Code section 226(a), “An employer, semimonthly or at the time
26 of each payment of wages, shall furnish to their employee, either as a detachable part of the check,
27 draft or voucher paying the employee’s wages, or separately if wages are paid by personal check or
28 cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours

1 worked by the employee, except as provided in subdivision (j), (3) the number of piece-rate units
2 earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions,
3 provided that all deductions made on written orders of the employee may be aggregated and shown
4 as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is
5 paid, (7) the name of the employee and only the last four digits of their social security number or an
6 employee identification number other than a social security number, (8) the name and address of the
7 legal entity that is the employer and, if the employer is a farm labor contractor, as defined in
8 subdivision (b) of Section 1682, the name and address of the legal entity that secured the services
9 of the employer, and (9) all applicable hourly rates in effect during the pay period and the
10 corresponding number of hours worked at each hourly rate by the employee and, beginning July 1,
11 2013, if the employer is a temporary services employer as defined in Section 201.3, the rate of pay
12 and the total hours worked for each temporary services assignment. The deductions made from
13 payment of wages shall be recorded in ink or other indelible form, properly dated, showing the
14 month, day, and year, and a copy of the statement and the record of the deductions shall be kept on
15 file by the employer for at least three years at the place of employment or at a central location within
16 the State of California...”

17 47. Plaintiff is informed and believes that as a result of Defendants intentionally
18 misclassifying Plaintiff as an independent contractor, failing to pay overtime rates for overtime
19 work, failing to provide meal and rest periods, failing to pay meal and rest period premiums, failing
20 to record the beginning and end of every work period Plaintiff worked for Defendants, and failing
21 to provide paid sick leave, Defendants failed to provide Plaintiff compliant wage statements
22 accurately showing total hours worked, gross wages earned, and the applicable pay rates. Further,
23 Defendants never provided Plaintiff any wage statements at all.

24 48. As a result of this failure, Plaintiff is informed and believes that Defendants also
25 failed to maintain additional required records in violation of Labor Code sections 246, 1174, 1198.5,
26 and Wage Order 1-2001 section 7.

27 49. Accordingly, Plaintiff seeks damages, interest, penalties, attorney fees, and costs
28 available pursuant to Labor Code sections 226, 246, and 1174; the Wage Orders; and common law.

FIFTH CAUSE OF ACTION
(Unfair Business Practices – LC § 17200)
(Against all Defendants)

50. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this section as though fully set forth herein.

51. The acts, omissions, and practices of Defendants as alleged throughout this Complaint for violations of the Labor Code constitute unlawful and unfair business acts and practices within the meaning of sections 17200, et seq. of the California Business & Professions Code.

52. Plaintiff is informed and believes Defendants have engaged in “unlawful” business acts and practices with their non-exempt employees, like Plaintiff, through Defendants’ intentional misclassification, failure to timely pay all earned wages on regularly scheduled pay days, failure to pay overtime wages, failure to provide meal and rest periods, failure to pay an additional one hour of premium wages for each workday with a missed meal period and each workday with a missed rest period, failure to provide paid sick leave, failure to provide compliant wage statements and keep records, failure to timely pay all earned wages after employment ended, failure to produce records, and retaliation pursuant to Labor Code sections 98.6, 201, 202, 203, 204, 210, 226, 226.3, 226.7, 226.8, 232.5, 246, 256, 510, 512, 558, 558.1, 1102.5, 1174.5, 1194, 1197.1, 1198.5, 2699, et al.; and Wage Order 1-2001 sections 3, 4, 7, 11, 12, and 20.

53. Defendants’ “unfair” business acts and practices, alleged above, caused harm to Plaintiff and other aggrieved employees which outweighs the utility of such conduct. Such conduct offends public policy, is unethical and dishonest, caused and continues to cause substantial injury to Plaintiff and Defendants’ other employees, and provides Defendants with an unfair competitive advantage over those employers that abide by the law, properly timely pay all earned wages, properly provide required meal and rest periods or premiums in lieu thereof, properly provide compliant wage statements and keep required records, provide paid sick leave, and refrain from unlawful retaliation during the course of employment.

54. As a result of the conduct described above, Defendants have been and will be

1 unjustly enriched at the expense of Plaintiff and other aggrieved employees. Specifically,
2 Defendants have been unjustly enriched by the retention of a significant sum of dollars in wages
3 earned and wrongfully withheld from Plaintiff and other aggrieved employees.

4 55. Pursuant to section 17203 of the California Business & Professions Code, Plaintiff
5 requests that this Court order Defendants to disgorge all ill-gotten gains and award Plaintiff and
6 other aggrieved employees full restitution of all monies wrongfully acquired by Defendants by such
7 “unfair” business act and practices as outlined herein above, plus interest and attorneys’ fees
8 pursuant to, *inter alia*, section 1021.5 of the California Code of Civil Procedure. Plaintiff
9 additionally request that such funds be impounded by the Court or that an asset freeze or constructive
10 trust be imposed upon such revenues and profits to avoid dissipation or fraudulent transfers or
11 concealment of such monies by Defendants. Plaintiff may be irreparably harmed or denied an
12 effective and complete remedy if such an order is not granted.

13 56. Also pursuant to section 17203, Plaintiff further seeks an order of this Court for
14 equitable or injunctive relief in the form of requiring Defendants to correct their unfair business acts
15 and practices and comply with both the Labor Code and Wage Orders.

16 57. Accordingly, Plaintiff seeks injunctive relief, restitution, damages, interest,
17 penalties, attorneys’ fees, and costs available pursuant to the Business & Professions Code section
18 17200 et al., Civil Code section 1021.5, and the Wage Orders.

19 **SIXTH CAUSE OF ACTION**

20 **(Failure to Produce Records)**

21 **(Against all Defendants)**

22 58. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this
23 section as though fully set forth herein.

24 59. Pursuant to Labor Code sections 226(c) and (f), an employer must provide an
25 employee a copy of payroll records within 21 calendar days of an employee requesting the records,
26 and failure for an employer to comply entitles the employee to a \$750 penalty from the employer.

27 60. Pursuant to Labor Code sections 1198.5(a) and (k), an employee is entitled to a \$750
28 penalty from an employer that does not produce a copy of an employee’s personnel records within

1 30 calendar days after receiving a request for the personnel records.

2 61. On May 6, 2024, Plaintiff asked Defendants for payroll and personnel records more
3 than 30 days ago. Defendants refused to provide Plaintiff copies of the records. As a result, Plaintiff
4 is entitled to two \$750 penalties from Defendants.

5 62. As a result, Plaintiff seeks penalties, damages, interest, attorneys' fees and costs
6 pursuant to Labor Code sections 226, 1174, and 1198.5 et al.

7 **SEVENTH CAUSE OF ACTION**

8 **(Retaliation)**

9 **(Against all Defendants)**

10 63. Plaintiff re-alleges and incorporates herein by reference all paragraphs outside this
11 section as though fully set forth herein.

12 64. Pursuant to Labor Code 98.6(a), "A person shall not discharge an employee or in
13 any manner discriminate, retaliate, or take any adverse action against any employee or applicant for
14 employment because the employee or applicant engaged in any conduct delineated in this chapter,
15 including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with
16 Section 1101) of Part 3 of Division 2, or because the employee or applicant for employment has
17 filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or
18 relating to their rights that are under the jurisdiction of the Labor Commissioner, made a written or
19 oral complaint that they are owed unpaid wages, or because the employee has initiated any action
20 or notice pursuant to Section 2699, or has testified or is about to testify in a proceeding pursuant to
21 that section, or because of the exercise by the employee or applicant for employment on behalf of
22 themselves or others of any rights afforded them."

23 65. Pursuant to Labor Code section 1102.5(b), "An employer, or any person acting on
24 behalf of the employer, shall not retaliate against an employee for disclosing information, or because
25 the employer believes that the employee disclosed or may disclose information, to a government or
26 law enforcement agency, to a person with authority over the employee or another employee who
27 has authority to investigate, discover, or correct the violation of noncompliance, or for providing
28 information to, or testifying before, any public body conducting an investigation, hearing, or inquiry,

1 if the employee has reasonable cause to believe that the information discloses a violation of state or
2 federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation,
3 regardless of whether disclosing the information is part of the employee's job duties."

4 66. Labor Code section 232.5(c) provides that an employer may not, "[d]ischarge,
5 formally discipline, or otherwise discriminate against an employee who discloses information about
6 the employer's working conditions."

7 67. On several occasions Plaintiff disclosed information about the employer's working
8 conditions to Defendants and disclosed information to Defendants which Plaintiff reasonably
9 believed disclosed Defendants noncompliance with independent contractor and wage and hour laws.
10 That included, but was not limited to, Plaintiff inquiring and complaining to Defendants about
11 Defendants treating Plaintiff like an employee while paying Plaintiff like an independent contractor,
12 and Plaintiff complaining to Defendants about late pay.

13 68. On or about May 3, 2024, Defendants terminated Plaintiff. Plaintiff is informed and
14 believes that Defendants terminated Plaintiff in retaliation because Plaintiff disclosed, or Defendants
15 believed that Plaintiff may disclose information about Defendants' working conditions and wage
16 and hour practices that Plaintiff reasonably believed discloses violations of laws.

17 69. Plaintiff is further informed and believes that in taking the actions alleged herein,
18 Defendants' managing agents including, but not limited to, MAR who was ADVANCED's COO at
19 all relevant times, acted with malice, fraud and oppression, and in reckless disregard of Plaintiff's
20 rights to enjoy all the protections of California's labor laws as Defendants' employee and complain
21 about Defendants' working conditions and pay practices that Plaintiff reasonably believed violated
22 of laws and rules.

23 70. As a direct and proximate result of Defendants' unlawful actions and retaliation,
24 Plaintiff suffered foreseeable special damages and general damages in an amount according to proof.

25 71. As a result, Plaintiff seeks injunctive damages, interest, attorneys' fees and costs
26 pursuant to Labor Code sections 98.6, 232.5, 1102.5, et al, and under common law.

27 **PRAYER**

28 WHEREFORE, Plaintiff requests a trial by jury and prays for judgment against Defendants

1 in an amount exceeding \$25,000 as follows:

- 2 1. For civil penalties in an amount to be proven at trial
- 3 2. For compensatory damages in an amount to be proven at trial;
- 4 3. For punitive damages in an amount to be proven at trial;
- 5 4. For liquidated damages in an amount to be proven at trial;
- 6 5. For penalties in an amount to be proven at trial;
- 7 6. For attorneys' fees in an amount to be proven at trial;
- 8 7. For costs of suit in an amount to be proven at trial;
- 9 8. For interest;
- 10 9. For restitution;
- 11 10. For injunctive relief;
- 12 11. For declaratory relief; and
- 13 12. For such other and further and relief as the court may deem just and proper.

14 Respectfully submitted,

15 Date: 01/06/2025



16 _____
17 Jason Whooper (SBN 279972)
18 W LAW
19 Counsel for Plaintiff Michael Fusting
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27
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EXHIBIT 1

November 1, 2024

UPLOADED VIA DIR WEBSITE

Department of Industrial Relations
Accounting Unit
455 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102
dir.ca.gov

W LAW
1916 3rd Ave
San Diego, CA 92101
Tel: (619) 432-2836
Fax: (619) 717-2111
Email: jason@wlawinc.com

Re: PAGA Claim Notice for Michael Fusting v. Advanced Training Systems LLC; Enrique Mar Jr. dba IMX – DSMO; and Does 1-100, inclusive

To Whom It May Concern:

I, Jason Whooper, of the law firm W Law, represent Plaintiff MICHAEL FUSTING (hereinafter “FUSTING” or “Plaintiff”), for causes of action against Defendants ADVANCED TRAINING SYSTEMS LLC (hereinafter “ADVANCED”); ENRIQUE MAR JR. dba IMX – DSMO (hereinafter “MAR”); and DOES 1-100, inclusive (hereinafter collectively referred to as “Defendants”).

Pursuant to Labor Code section 2699.3, this letter constitutes written notice of Defendants’ violations of the Labor Code and Wage Orders, and of our intent to recover civil penalties under the Labor Code Private Attorney General Act (“PAGA”) of 2004 for both individual and non-individual PAGA claims.

GENERAL ALLEGATIONS

1. Defendants operate a commercial training and simulator business that operates in the County of San Diego, California, and elsewhere.

2. On or about January 17, 2020, Defendants hired FUSTING as a Simulator Engineer to manufacture, produce, and repair commercial trucking and delivery vehicle simulators for ADVANCED’s clients. FUSTING’s duties also included working for Defendants at ADVANCED’s facilities located at 2438 Cades Way, Vista, CA 92081.

3. Defendants intentionally misclassified FUSTING as an independent contractor even though FUSTING was Defendants’ nonexempt employee whom Defendants exercised control over the wages, hours, and working conditions of. Defendants (A) controlled FUSTING’s work performance; (B) FUSTING performed work directly within the usual course of Defendants’ business of manufacturing, producing, and repairing commercial trucking and delivery vehicle simulators; and (C) FUSTING was not engaged in an independently established trade, occupation, or business of manufacturing, producing, and repairing simulators.

4. MAR, who was ADVANCED’s Chief Operating Officer (COO) at all relevant times, and other employees of Defendants, managed and supervised FUSTING’s performance of duties for Defendants.

5. Defendants paid FUSTING on a weekly pay period basis with checks that MAR made out from IMX – DSMO which FUSTING is informed and believes may be a dba owned and operated by MAR.

6. FUSTING estimates that FUSTING worked an average of 45 hours per week for Defendants, however Defendants only paid FUSTING regular rate wages for all hours worked and

never overtime rates for exceeding 8 hours in a workday or 40 hours in a workweek. Defendants regularly paid FUSTING wages late instead of on days designated as regularly scheduled pay periods, and FUSTING regularly asked MAR for FUSTING's late pay. Defendants also paid FUSTING wage by MAR sending FUSTING money through a Zelle smart phone application.

7. FUSTING is informed and believes that Defendants also failed to make and keep and accurate record of the beginning and end of all FUSTING's work periods, including meal periods.

8. Defendants also regularly failed to provide FUSTING compliant off duty, uninterrupted meal periods of at least 30-minutes because meal periods were provided after 5 hours of work, lasted less than 30 minutes, or were not provided at all. Defendants also failed to pay FUSTING an additional hour of regular rate wages for every workday with a missed meal period.

9. Defendants also failed to permit FUSTING to take off duty, uninterrupted meal periods of at least 10-minutes, and failed to inform FUSTING that Defendants had a policy of permitting rest periods or that FUSTING was allowed to take them. Defendants also failed to pay FUSTING an additional hour of regular rate wages for every workday with a missed rest period.

10. Defendants also failed to provide FUSTING paid sick leave for qualifying reasons.

11. Defendants failed to maintain required payroll records and provide FUSTING compliant itemized wage statements for each pay period with required accurate information including, but not limited to, gross wages earned, total hours worked, all deductions, net wages earned, inclusive dates of the pay period, the name and address of the legal entity that is the employer, all applicable hourly rates, and accrued paid sick leave.

12. FUSTING regularly disclosed information about the employer's working conditions to Defendants and disclosed information to Defendants which FUSTING reasonably believed disclosed Defendants noncompliance with independent contractor and wage and hour laws. That included, but was not limited to, FUSTING inquiring and complaining to Defendants about Defendants treating FUSTING like an employee while paying FUSTING like an independent contractor, and FUSTING complaining to Defendants about late pay.

13. On or about May 3, 2024, Defendants terminated FUSTING. FUSTING is informed and believes that Defendants terminated FUSTING in retaliation because FUSTING disclosed, or Defendants believed that FUSTING may disclose information about Defendants' working conditions, that FUSTING reasonably believed discloses violations laws.

14. FUSTING is further informed and believes that in taking the actions alleged herein, Defendants' managing agents including, but not limited to, MAR, acted with malice, fraud and oppression, and in reckless disregard of FUSTING's rights to enjoy all the protections of California's labor laws as Defendants' employee and complain about Defendants' working conditions and pay practices that FUSTING reasonably believed violated of laws and rules.

15. As a direct and proximate result of Defendants' unlawful actions and retaliation, FUSTING suffered foreseeable special damages and general damages in an amount according to proof.

16. On or about May 6, 2024, FUSTING submitted a request to Defendants for a copy of personnel and payroll records. Defendants refused to comply.

17. More than 30 days have passed since the earned unpaid wages alleged in this complaint were due and Defendants continue to fail to pay FUSTING outstanding earned wages. Defendants committed the acts stated herein knowingly and willfully by among other things intentionally misclassifying FUSTING as an independent contractor, entitling FUSTING to 30 days of additional daily wages as a waiting time penalty as provided by Labor Code sections 201 to 203, which Defendants also have not paid to FUSTING yet.

18. FUSTING is informed and believes that Defendants employed many other

aggrieved employees as Simulator Engineers or similar roles whom Defendants engaged in the same Labor Code violations against as the Labor Code violations FUSTING suffered and alleged throughout this complaint.

19. FUSTING is informed and believes that Defendants' managing agents, such as MAR and unknown DOES, were the persons who directed Defendants to engage in unlawful wage and hour practices and unlawfully retaliate against FUSTING. Further, FUSTING is informed and believes that MAR and unknown DOES caused to be violated provisions regulating minimum wages or hours and days of work in Wage Orders and caused to be violated sections 203, 226, 226.7, 1193.6, 1194, and 2802 of the Labor Code, and are therefore personally liable to FUSTING pursuant to Labor Code section 558.1.

20. Defendants' violations were all knowing and willful in disregard of the Labor Code and Wage Orders. Accordingly, FUSTING is entitled to pursue individual and non-individual Labor Code Private Attorneys General Act of 2004 ("PAGA") claims to recover civil penalties for Defendants' violations of the Labor Code and Wage Orders against FUSTING and other aggrieved employees whom Defendants employed as Simulator Engineers or as other similar manufacturing or repair jobs, including people Defendants classified as independent contractors or employees, during the statute of limitations period for intentional misclassification, failure to timely pay all earned wages on regularly scheduled pay days, failure to pay overtime wages, failure to provide meal and rest periods, failure to pay an additional one hour of premium wages for each workday with a missed meal period and each workday with a missed rest period, failure to provide paid sick leave, failure to provide compliant wage statements and keep records, failure to timely pay all earned wages after employment ended, failure to produce records, and retaliation pursuant to Labor Code sections 98.6, 201, 202, 203, 204, 210, 226, 226.3, 226.7, 226.8, 232.5, 246, 256, 510, 512, 558, 558.1, 1102.5, 1174.5, 1194, 1197.1, 1198.5, 2699, et al.; and Wage Order 1-2001 sections 3, 4, 7, 11, 12, and 20.

REQUEST TO THE LWDA

Accordingly, FUSTING respectfully requests that the Labor & Workforce Development Agency ("LWDA") authorize FUSTING to pursue a PAGA action against Defendants on behalf of the State of California. If the LWDA declines to pursue enforcement, FUSTING intends to litigate the PAGA claims with a Superior Court action for individual claims and non-individual claims on behalf of California for all PAGA aggrieved employees whom Defendants employed as Simulator Engineers or as other similar manufacturing or repair jobs, including people Defendants classified as independent contractors or employees, during the statute of limitations period for civil penalties pursuant to various regulations and statutes including, but not limited to, Labor Code sections 98.6, 201, 202, 203, 204, 210, 226.3, 226.7, 226.8, 232.5, 246, 256, 510, 512, 558, 558.1, 1102.5, 1174.5, 1194, 1197.1, 1198.5, 2699, et al.; and Wage Order 1-2001 sections 3, 4, 7, 11, 12, and 20.

If you have any questions or concerns regarding the above, please do not hesitate to contact my office. Thank you for your attention to this matter.

Sincerely,



Jason Whooper

cc:

SENT VIA CERTIFIED U.S. MAIL

Advanced Training Systems LLC

2438 Cades Way

Vista, CA 92081

Enrique Mar Jr.

Dbá IMX - DSMO

4353 Citrus Drive

Fallbrook, CA 92028