

1 JEAN-CLAUDE LAPUYADE (SBN 248676)

2 JLAPUYADE@JCL-LAWFIRM.COM

3 **JCL LAW FIRM, APC**
4 3990 OLD TOWN AVENUE, SUITE C204
5 SAN DIEGO, CA 92110
6 TEL: (619) 599-8292
7 FAX: (619) 599-8291

8 SHANI O. ZAKAY (SBN 277924)

9 SHANI@ZAKAYLAW.COM

10 **ZAKAY LAW GROUP, ALPC**
11 5850 OBERLIN DRIVE, STE. 230A
12 SAN DIEGO, CA 92121
13 TEL: (619)892-7095
14 FAX: (858) 404-9203

15 ATTORNEYS FOR PLAINTIFFS MARK CONER ET AL.

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
07/29/2019 at 01:39:00 PM
Clerk of the Superior Court
By Melissa Reyes, Deputy Clerk

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **IN AND FOR THE COUNTY OF SAN DIEGO**

18 MARK CONNOR, RAYNA OLIVAS, and
19 SHIRLEEN MUTULO, individuals, on behalf
20 of themselves, and on behalf of all persons
21 similarly situated,

22 **PLAINTIFFS,**

23 vs.

24 ASCENDANT MARKETING GROUP, LLC,
25 a California limited liability company; and
26 Does 1 through 50, Inclusive,

27 **Defendants.**

Case No: 37-2019-00026864-CU-OE-CTL

FIRST AMENDED REPRESENTATIVE
ACTION COMPLAINT FOR:

- 1) VIOLATIONS OF THE PRIVATE ATTORNEY GENERAL ACT PURSUANT TO LABOR CODE SECTIONS 2698, et seq.

1 Plaintiffs MARK CONNOR, RAYNA OLIVAS, and SHIRLEEN MUTULO (hereinafter
2 collectively “PLAINTIFFS”), on behalf of the people of the State of California and as “aggrieved
3 employees” acting as a private attorney general under the Labor Code Private Attorney General
4 Action of 2004, § 2699, *et seq.* (“PAGA”) only, allege on information and belief, except for their
5 own acts and knowledge which are based on personal knowledge, the following:

6 **INTRODUCTION**

7 1. PLAINTIFFS brings this action against ASCENDANT MARKETING GROUP,
8 LLC (“DEFENDANT”) seeking only to recover PAGA civil penalties for themselves, and on
9 behalf of all current and former aggrieved employees that worked for DEFENDANT.
10 PLAINTIFFS do **not seek to recover anything other than penalties as permitted by California**
11 **Labor Code § 2699**. To the extent that statutory violations are mentioned for wage violations,
12 PLAINTIFFS do not seek underlying general and/or special damages for those violations, but
13 simply the civil penalties permitted by California Labor Code § 2699.

14 2. California has enacted the PAGA to permit an individual to bring an action on
15 behalf of herself and on behalf of others for PAGA penalties *only*, which is the precise and sole
16 nature of this action.

17 3. Accordingly, PLAINTIFFS seek to obtain all applicable relief for DEFENDANT’s
18 violations under PAGA and solely for the relief as permitted by PAGA – that is, penalties and any
19 other relief the Court deems proper pursuant to the PAGA. Nothing in this complaint should be
20 construed as attempting to obtain any relief that would not be available in a PAGA-only action.

21 **THE PARTIES**

22 4. Defendant ASCENDANT MARKETING GROUP, LLC (“DEFENDANT”) is a
23 limited liability company that at all relevant times mentioned herein conducted and continues to
24 conduct substantial and regular business in the state of California.

25 5. DEFENDANT provides various marketing services and operates a call center in
26 San Diego, California.

27 6. Plaintiff MARK CONNOR resides in San Diego, California and was employed by
28 DEFENDANT in San Diego as an hourly Sales Representative from October 2017 to May 2018.

1 7. Plaintiff RAYNA OLIVAS resides in San Diego, California and was employed by
2 DEFENDANT in San Diego as an hourly Sales Representative from December 2016 to
3 November 2018.

4 8. Plaintiff SHIRLEEN MUTULO resides in San Diego, California and was
5 employed by DEFENDANT in San Diego as an hourly Sales Representative from September
6 2017 until May 2018.

7 9. PLAINTIFFS, and such persons that may be added from time to time who satisfy
8 the requirements and exhaust the administrative procedures under the Private Attorney General
9 Act, bring this Representative Action on behalf of the State of California with respect to
10 themselves and all individuals who are or previously were working for DEFENDANT and
11 classified as non-exempt employees in California, (the "AGGRIEVED EMPLOYEES") during
12 the time period of April 28, 2018 until a date as determined by the Court (the "PAGA PERIOD").

13 10. PLAINTIFFS, on behalf of themselves and all AGGRIEVED EMPLOYEES
14 presently or formerly employed by DEFENDANT during the PAGA PERIOD, bring this
15 representative action pursuant to Labor Code § 2699, *et seq.* seeking penalties for
16 DEFENDANTS' violation of California Labor Code §§ 201, 202, 203, 204, 210, 218.5, 218.6,
17 226, 226.3, 226.7, 510, 512, 1174(d), 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 1199, and 2804
18 and the applicable Wage Order. Based upon the foregoing, PLAINTIFFS and all AGGRIEVED
19 EMPLOYEES are aggrieved employees within the meaning of Labor Code § 2699, *et seq.*

20 11. The true names and capacities, whether individual, corporate, subsidiary,
21 partnership, associate or otherwise of defendants DOES 1 through 50, inclusive, are presently
22 unknown to PLAINTIFFS who therefore sues these Defendants by such fictitious names
23 pursuant to Cal. Civ. Proc. Code § 474. PLAINTIFFS will seek leave to amend this Complaint
24 to allege the true names and capacities of Does 1 through 50, inclusive, when they are
25 ascertained. PLAINTIFFS is informed and believes, and based upon that information and belief
26 alleges, that the Defendants named in this Complaint, including DOES 1 through 50, inclusive,
27 are responsible in some manner for one or more of the events and happenings that proximately
28 caused the injuries and damages hereinafter alleged.

1 than thirty minutes, except that if the total work period per day of the employee is no more than
2 six hours, the meal period may be waived by mutual consent of both the employer and employee.
3 A second duty-free meal period of not less than thirty minutes is required if an employee works
4 more than ten hours per day, except that if the total hours worked is no more than 12 hours, the
5 second duty-free meal period may be waived by mutual consent of the employer and employee
6 only if the first meal period was not waived. Labor Code Section 512.

7 17. If an employer fails to provide an employee a duty-free meal period in accordance
8 with an applicable IWC Order, the employer must pay one additional hour of pay at the
9 employee's regular rate of pay for each workday that the meal period is not provided. IWC Orders
10 and Labor Code Section 226.7. This additional hour is not counted as hours worked for purposes
11 of overtime calculations.

12 18. In addition to DEFENDANTS' above-mentioned practice of altering employees'
13 timecards to eliminate numerous hours worked (including overtime hours), during the PAGA
14 PERIOD, DEFENDANT engaged in a company-wide systematic, pattern and practice of
15 fictitiously recording 1-hour meal periods for PLAINTIFFS and other AGGRIEVED
16 EMPLOYEES on work shifts exceeding five hours despite (1) failing to provide PLAINTIFFS
17 and the other AGGRIEVED EMPLOYEES with legally mandated thirty (30) minute duty free
18 meal periods before the end of the fifth hour of work as a result of their rigorous work schedule;
19 and (2) requiring PLAINTIFFS and other AGGRIEVED EMPLOYEES to perform substantial
20 amounts of work during their meal periods breaks but failing to compensate them for the same.

21 19. Further, DEFENDANT failed to provide PLAINTIFFS and the AGGRIEVED
22 EMPLOYEES with a second off-duty meal period for some workdays in which these employees
23 were required by DEFENDANT to work ten or more hours of work. As a result, DEFENDANT'S
24 failure to provide PLAINTIFFS and AGGRIEVED EMPLOYEES with legally required meal
25 periods is evidenced by DEFENDANT'S business records. PLAINTIFFS and other AGGRIVED
26 EMPLOYEES therefore forfeited meal breaks without additional compensation and in accordance
27 with DEFENDANTS' strict corporate policy and practice in violation of California Labor Code
28 §§ 226.7 and 512.

1 C. **Failure to Provide Legally Compliant Duty-Free Rest Periods**

2 20. IWC Wage Order No. 4 requires that employers must authorize and permit
3 nonexempt employees to take a rest period that must, insofar as practicable, be taken in the middle
4 of each work period. The rest period is based on the total hours worked daily and must be at the
5 minimum rate of a net ten consecutive minutes for each four-hour work period, or major fraction
6 thereof. The Division of Labor Standards Enforcement (DLSE) considers anything more than two
7 hours to be a “major fraction” of four. A rest period is not required for employees whose total
8 daily work time is less than three and one-half hours. The rest period is counted as time worked
9 and therefore, the employer must pay for such periods.

10 21. If an employer fails to provide an employee a rest period in accordance with an
11 applicable IWC Order, the employer shall pay the employee one additional hour of pay at the
12 employee’s regular rate of pay for each workday that the rest period is not provided. Labor Code
13 Section 226.7. Thus, if an employer does not provide all of the rest periods required in a workday,
14 the employee is entitled to one additional hour of pay for that workday, not one additional hour
15 of pay for each rest period that was not provided during that workday.

16 22. At all times material hereto, DEFENDANT violated IWC Wage Order No. 4 and
17 Labor Code Section 226.7 by consistently failing to provide PLAINTIFFS and the other
18 AGGRIEVED EMPLOYEES with their legally mandated rest periods. During the PAGA
19 PERIOD, PLAINTIFFS and other AGGRIVED EMPLOYEES were denied, from time-to-time
20 as a result of their rigorous work schedule, their first duty-free rest period of at least ten (10)
21 minutes on shifts worked of at least two (2) to four (4) hours, a first and second duty-free rest
22 period of at least ten (10) minutes on shifts worked between six (6) and eight (8) hours, and a first,
23 second and third duty-free rest period of at least ten (10) minutes on shifts worked of ten (10)
24 hours or more from time to time. Moreover, PLAINTIFFS and other AGGRIEVED
25 EMPLOYEES were not provided with one-hour wages in lieu of their legally mandated duty-free
26 meal and rest periods.

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1 **D. Failure to Provide Accurate Itemized Wage Statements**

2 23. California Labor Code Section 226 provides that every employer shall furnish each
3 of his or her employees with an accurate itemized wage statement in writing showing, among
4 other things, gross and net wages earned, all applicable hourly rates in effect during the pay period
5 and the corresponding number of hours worked at each hourly rate, accurate number of total hours
6 worked and all applicable hourly rates in effect during the pay period and the corresponding
7 amount of time worked at each hourly rate.

8 24. When DEFENDANT failed to provide PLAINTIFFS and other AGGRIEVED
9 EMPLOYEES with (a) all minimum, regular and overtime wages due, (b) legally mandated duty-
10 free meal periods and (c) legally mandated duty-free rest periods, DEFENDANTS also knowingly
11 and intentionally failed to provide PLAINTIFFS and the other AGGRIEVED EMPLOYEES with
12 complete and accurate wage statements which failed to show, among other things, all applicable
13 hourly rates in effect during the pay period and the corresponding number of hours worked at each
14 hourly rate, accurate gross and net wages earned, accurate number of total hours worked in
15 violation of California Labor Code Section 226. As a result, DEFENDANT from time to time
16 provided PLAINTIFFS and the other members of the AGGRIEVED EMPLOYEES with wage
17 statements which violated Cal. Lab. Code § 226.

18 25. As a direct result of DEFENDANT’S failure to provide PLAINTIFFS and other
19 AGGRIEVED EMPLOYEES all minimum, regular and overtime wages owed and due, timely
20 and compliant meal and rest periods, as well as pay all meal and rest period premium wages, the
21 records maintained by DEFENDANT for PLAINTIFFS and the other AGGRIEVED
22 EMPLOYEES are incomplete and inaccurate and fail to comply with the requirements of Labor
23 Code § 1174(d) and the Records section of the applicable IWC Wage Order.

24 **E. Failure to Pay Wages When Due**

25 26. DEFENDANT willfully failed to pay PLAINTIFFS and other AGGRIEVED
26 EMPLOYEES in California by the times set forth by Labor Code §§ 201, 202, and 204 because
27 Defendants failed to pay PLAINTIFFS and other aggrieved employees all minimum, regular and
28 overtime wages and all meal and rest period premium wages earned and owed during their

1 employment. Consequently, PLAINTIFFS and the AGGRIEVED EMPLOYEES are entitled to
2 waiting time penalties pursuant to Labor Code § 203. Some or all, of the conduct and violations
3 alleged herein occurred during the PAGA PERIOD.

4 **JURISDICTION AND VENUE**

5 27. This Court has jurisdiction over this Action pursuant to California Code of Civil
6 Procedure, Section 410.10.

7 28. Venue is proper in this Court pursuant to California Code of Civil Procedure,
8 Sections 395 and 395.5, because DEFENDANT (i) currently maintains and at all relevant times
9 maintained offices and facilities in this County and/or conduct substantial business in this
10 County, and (ii) committed the wrongful conduct herein alleged in this County against
11 PLAINTIFFS and the AGGRIEVED EMPLOYEES.

12 **FIRST CAUSE OF ACTION**

13 **VIOLATION OF THE PRIVATE ATTORNEYS GENERAL ACT**

14 **(Cal. Lab. Code §§ 2698 et seq.)**

15 (Alleged by PLAINTIFF against all Defendants)

16 29. PLAINTIFFS reallege and incorporates by this reference, as though fully set forth
17 herein, the prior paragraphs of this Second Amended Complaint.

18 30. PAGA is a mechanism by which the State of California itself can enforce state
19 labor laws through the employee suing under the PAGA who does so as the proxy or agent of
20 the state's labor law enforcement agencies. An action to recover civil penalties under PAGA is
21 fundamentally a law enforcement action designed to protect the public and not to benefit private
22 parties. The purpose of the PAGA is not to recover damages or restitution, but to create a means
23 of "deputizing" citizens as private attorneys general to enforce the Labor Code. In enacting
24 PAGA, the California Legislature specified that "it was ... in the public interest to allow aggrieved
25 employees, acting as private attorneys general to recover civil penalties for Labor Code
26 violations ..." (Stats. 2003, ch. 906, § 1). Accordingly, PAGA claims cannot be subject to
27 arbitration.
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1 31. PLAINTIFFS, and such persons that may be added from time to time who satisfy
2 the requirements and exhaust the administrative procedures under the Private Attorney General
3 Act, brings this Representative Action on behalf of the State of California with respect to
4 themselves and all individuals who are or previously were employed by DEFENDANT and
5 classified as non-exempt employees in California during the time period of February 4, 2018
6 until the present (the "AGGRIEVED EMPLOYEES").

7 32. On April 28, 2019, PLAINTIFFS gave written notice by certified mail to the Labor
8 and Workforce Development Agency (the "Agency") and the employer of the specific
9 provisions of this code alleged to have been violated as required by Labor Code § 2699.3. On
10 May 24, 2019, PLAINTIFFS amended the claim and gave written notice by certified mail to the
11 Agency and the employer. See Exhibit #1, attached hereto and incorporated by this reference
12 herein. The statutory waiting period for PLAINTIFF to add these allegations to the Complaint
13 has expired. As a result, pursuant to Section 2699.3, PLAINTIFFS may now commence a
14 representative civil action under PAGA pursuant to Section 2699 as the proxy of the State of
15 California with respect to all AGGRIEVED EMPLOYEES as herein defined.

16 33. The policies, acts and practices heretofore described were and are an unlawful
17 business act or practice because Defendant (a) failed to provide PLAINTIFFS and other
18 AGGRIEVED EMPLOYEES legally required meal and rest breaks, (b) failed to provide accurate
19 itemized wage statements, and (c) failed to timely pay wages, all in violation of the applicable
20 Labor Code sections listed in Labor Code §2699.5, including but not limited to Labor Code §§
21 201, 202, 203, 204, 210, 218.5, 218.6, 226, 226.3, 226.7, 510, 512, 1174(d), 1174.5, 1194,
22 1194.2, 1197, 1197.1, 1198, 1199, and 2804 and the applicable Industrial Wage Order(s), and
23 thereby gives rise to statutory penalties as a result of such conduct. PLAINTIFFS hereby seek
24 recovery of civil penalties as prescribed by the Labor Code Private Attorney General Act of 2004
25 as the representative of the State of California for the illegal conduct perpetrated on
26 PLAINTIFFS and the other AGGRIEVED EMPLOYEES.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment against each Defendant, jointly and severally, as follows:


1. On behalf of the State of California and with respect to all AGGRIEVED EMPLOYEES:

a. Recovery of civil penalties as prescribed by the Labor Code Private Attorneys General Act of 2004; and

b. An award of penalties, attorneys' fees and costs of suit, as allowable under the law.

Dated: May 24, 2019

Respectfully Submitted,
JCL LAW FIRM, A.P.C.

By: 
Jean-Claude Lapuyade
Attorneys for PLAINTIFFS

DEMAND FOR JURY TRIAL

PLAINTIFFS demand a jury trial on all issues triable to a jury.

Dated: May 24, 2019

Respectfully Submitted,
JCL LAW FIRM, A.P.C.

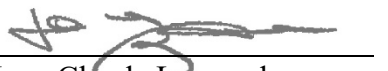
By: 
Jean-Claude Lapuyade
Attorneys for PLAINTIFFS

EXHIBIT 1



Jean-Claude Lapuyade, Esq.
jlapuyade@jcl-lawfirm.com

3990 Old Town Avenue, Suite C204
San Diego, CA 92110
Tel: 619-599-8292
Fax: 619-599-8291
Toll Free: 1-888-498-6999
www.jcl-lawfirm.com

Ben Greenberg, Of Counsel.
bgreenberg@jcl-lawfirm.com

May 24, 2019

Labor & Workforce Development Agency
Attn. PAGA Administrator
1515 Clay Street, Ste. 801
Oakland, CA 94612
PAGA@dir.ca.gov
Via Online Submission

ASCENDANT MARKETING GROUP, LLC
c/o Josh Wickman
4025 Camino Del Rio S, Suite 105
San Diego, CA 92108
Via U.S. Certified Mail No. 7018 3090 0000 5110 2441

Re: Amended Notice of Violations of California Labor Code Sections §§ 201, 201.3, 202, 203, 204, 210, 218.5, 218.6, 226, 226.3, 226.7, 510, 512, 558, 1174(d), 1174.5, 1194, 1197, 1197.14, 1198, 1199, 2802, and 2804 Applicable Industrial Welfare Commission Wage Orders, and Pursuant to California Labor Code Section 2699.3.

Dear Sir/ Madam:

This office represents MARK CONNOR, RAYNA OLIVAS, and SHIRLEEN MUTULO (“Clients”) and other aggrieved employees in a class action against ASCENDANT MARKETING GROUP, LLC, (“Defendant”). This office intends to file the enclosed Class Action Complaint on behalf of Clients and other similarly situated employees. The enclosed proposed complaint includes additional facts describing the claim and theories in greater detail than the previously served complaint. The purpose of this correspondence is to provide the Labor and Workforce Development Agency with notice of alleged violations of the California Labor Code and certain facts and theories in support of the alleged violations in accordance with Labor Code section 2699.3.

Clients were employed by Defendant as Sales Representatives in California. Clients were paid on an hourly basis and entitled to legally required meal and rest periods. At all times during their employment, Defendant failed to, among other things, provide Clients, and all those similarly situated, with all legally mandated off-duty meal and rest periods and, overtime compensation at one-and-one-half times the regular rate of pay.

As a consequence, Clients contend that Defendant failed to fully compensate them, and other similarly situated and aggrieved employees, for all earned wages and failed to provide

accurate wage statements. Accordingly, Clients contend that Defendant's conduct violated Labor Code sections §§ 201, 201.3, 202, 203, 204, 210, 218.5, 218.6, 226, 226.3, 226.7, 510, 512, 558, 1174(d), 1174.5, 1194, 1197, 1197.14, 1198, 1199, 2802, and 2804 and applicable wage orders, and is therefore actionable pursuant to section 2698 *et seq.*

A true and correct copy of the proposed Complaint for the class action is attached hereto. The Complaint (i) identifies the alleged violations, (ii) details the facts and theories which support the alleged violations, (iii) details the specific work performed by Clients, (iv) sets forth the people/entities, dates, classifications, violations, events, and actions which are at issue to the extent known to the Clients and (v) sets forth the illegal practices used by Defendant. Clients therefore incorporate the allegations of the attached Complaint into this letter as if fully set forth herein.

If the agency needs any further information, please do not hesitate to ask. The class action lawsuit consists of a class of other aggrieved employees. As class counsel, our intention is to vigorously prosecute the class wide claims as alleged in the Complaint, and to procure civil penalties as provided by the Private Attorney General Act of 2004 on behalf of Clients and all aggrieved California employees and Class Members

Your earliest response to this notice is appreciated. If you have any questions or concerns, please do not hesitate to contact me at the above number and address.

Sincerely,
JCL LAW FIRM, APC

A handwritten signature in black ink, appearing to read 'Jean-Claude Lapuyade', with a stylized flourish at the end.

Jean-Claude Lapuyade, Esq.

Enclosure (1)

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Ascendant Marketing Group, LLC
c/o Josh Wickman
4025 Camino Del Rio S., Suite 103
San Diego, CA 92108



9590 9402 4720 8344 8163 35

2. Article Number (Transfer from service label)

7018 3090 0000 5110 2441

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

Agent

Addressee

B. Received by (Printed Name)

C. Date of Delivery

6-10-19

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

Connor 5.24.19

3. Service Type

- Adult Signature
- Adult Signature Restricted Delivery
- Certified Mail®
- Certified Mail Restricted Delivery
- Collect on Delivery
- Collect on Delivery Restricted Delivery

- Priority Mail Express®
- Registered Mail™
- Registered Mail Restricted Delivery
- Return Receipt for Merchandise
- Signature Confirmation™
- Signature Confirmation Restricted Delivery

Restricted Delivery