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ALAMEDA COUNTY

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By ALICIA ESPINOZA Deputy

1 Mark R. Thierman, Cal. SBN 72913
2 Joshua D. Buck, Cal. SBN 258325
3 Joshua R. Hendrickson, Cal. SBN 282180
4 THIERMAN BUCK LLP
5 7287 Lakeside Drive
6 Reno, Nevada 89511
7 Tel: (775) 284-1500
8 Email: mark@thiermanbuck.com
9 Email: josh@thiermanbuck.com
10 Email: joshh@thiermanbuck.com

11 *Attorneys for Plaintiff and all others similarly situated*

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **FOR THE COUNTY OF ALAMEDA**

14 ELIZABETH FENLEY, individually, and
15 on behalf of all persons similarly situated;

16 Plaintiff,

17 v.

18 DREAM TEAM REAL ESTATE
19 CONSULTANTS, INC., dba KELLER
20 WILLIAMS ENCINO-SHERMAN OAKS;
21 KELLER WILLIAMS REALTY, INC.; and
22 DOES 1 through 100, inclusive,

23 Defendants.

CASE NO.: **RG19014318**

CLASS ACTION COMPLAINT, CCP §382:

- 1) Failure to Reimburse for Necessary Expenses and Losses in Violation of Labor Code § 2802;
- 2) Failure to Provide Accurate Wage Statements in Violation of Labor Code § 226;
- 3) Failure to Timely Pay All Wages Due and Owing in Violation of Labor Code § 203; and
- 4) Unfair Business Practices in Violation of Business and Professions Code § 17200.

JURY TRIAL DEMAND

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1 Comes now Plaintiff ELIZABETH FENLEY, on behalf of herself and all others similarly
2 situated (hereinafter “Plaintiffs”) and hereby complains and alleges against Defendants DREAM
3 TEAM REAL ESTATE CONSULTANTS, INC., dba KELLER WILLIAMS ENCINO-
4 SHERMAN OAKS and KELLER WILLIAMS REALTY, INC. (collectively “Defendants”) as
5 follows:

6 **I.**

7 **JURISDICTION AND VENUE**

8 1. The Superior Court of the State of California, for the County of Alameda, has
9 original jurisdiction over the state law claims alleged herein pursuant to the California Constitution.

10 2. Venue is proper in this Court because Defendant Keller Williams Realty, Inc. has
11 failed to designate a principal office in California and has conducted business in the state of
12 California; and Defendant Keller Williams Realty, Inc. regularly conducts business in Alameda
13 County. *Easton v. Sup.Ct. (Schneider Bros., Inc.)* (1970) 12 CA3d 243, 246-247, 90 CR 642, 644.

14 **II.**

15 **PARTIES**

16 3. Representative Plaintiff, ELIZABETH FENLEY, is a resident of California and
17 worked for Defendants as a sales associate during the applicable statute of limitations period.

18 4. Defendant KELLER WILLIAMS REALTY, INC. (“Keller Williams”) is a foreign
19 corporation incorporated in the state of Texas, with a principal place of business at 1221 S Mopac
20 Expy Ste. 400, Austin, TX, 78746.

21 5. Defendant DREAM TEAM REAL ESTATE CONSULTANTS, INC., dba
22 KELLER WILLIAMS ENCINO-SHERMAN OAKS (“Dream Team”) is a California corporation,
23 with a principal place of business at 16820 Ventura Blvd., Encino, CA 91436.

24 6. At all times relevant, Defendants, and each of them, acted as Plaintiff’s “employer,”
25 as defined by the Cal. Code Regs., tit. 8, § 11140, subd. 2(C) and interpreted in *Martinez v. Combs*,
26 49 Cal. 4th 35, 231 P.3d 259 (2010), *as modified* (June 9, 2010), and were actively engaged in the
27 conduct described herein. Throughout the relevant period, Defendants employed Plaintiff and
28 similarly-situated employees within the meaning of the California Labor Code.

1 successfully implement the business model by providing, among other things, customized business
2 “systems, training, technology and marketing materials.” See
3 <https://www.kwworldwide.com/frequently-asked-questions> (last visited April 4, 2019).

4 12. Defendants’ business model relies in large part on the hiring of sales associates to
5 rent, buy, and sell real estate for clients. Sales associates work closely with clients to develop and
6 implement a renting, buying, or selling plan for the client. Sales associate then assist the client
7 through the many legal and contractual aspects of the purchase or sale.

8 13. Through its “detailed business model” and franchise agreements with franchisees,
9 Keller Williams exercises control over the wages, hours, and working conditions of sales
10 associates employed by franchisee brokerages, such as Dream Team. For example, Keller
11 Williams controls the hiring of sales associates by dictating the legal relationship that its
12 franchisees must have with their sales associates. Specifically, Keller Williams requires that
13 franchisees contract with their sales associates to provide work as independent contractors, not as
14 employees. Keller Williams does not allow franchisees to hire sales associates as employees. Once
15 hired, Keller Williams directly controls how sales associates must perform their jobs, including
16 among other things, how sales associates may market themselves to the public. Defendants further
17 control job performance through mandatory education classes, provided by Keller Williams, which
18 sales associates pay for out of their own pocket. In other words, Keller Williams directly controls
19 the type, nature, and identity of the legal relationships that its franchisees are allowed to have with
20 their sales associates.

21 **Defendants Uniformly Misclassified Sales Associates as Independent Contractors**

22 14. Keller Williams’ control over the legal relationships between its franchisees and
23 affiliated sales associates is particularly significant in the context of California’s test for
24 determining whether workers in California should be classified as employees or as independent
25 contractors for purposes of the wage orders adopted by California’s Industrial Welfare
26 Commission (“IWC”). While Keller Williams dictates that its franchisee brokerages must hire
27 sales associates on an independent contractor basis, and all sales associates affiliated with
28 Defendants were hired on that basis, California’s real estate licensing laws preclude sales
associates from qualifying as independent contractors as a matter of law.

1 15. To establish that a worker is an independent contractor who was not intended to be
2 included within the applicable wage order’s coverage, a hiring entity must establish each of the
3 following three factors, commonly known as the “ABC test”: (A) that the worker is free from the
4 control and direction of the hiring entity in connection with the performance of the work, both
5 under the contract for the performance of the work and in fact; and (B) that the worker performs
6 work that is outside the usual course of the hiring entity’s business; and (C) that the worker is
7 customarily engaged in an independently established trade, occupation, or business of the same
8 nature as the work performed. *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903
9 (2018).

10 16. Under California law, real estate sales associates are licensed to a specific broker,
11 who is responsible for supervising their work. Licensed sales associates are not allowed to perform
12 work for any other broker. *See, e.g.*, 10 CCR § 2752 (governing process for change of responsible
13 broker and mandating that sales associates must terminate relationship with predecessor
14 responsible broker before beginning work with new responsible broker); 10 CCR § 2753
15 (responsible broker must physically retain a sales associate’s license certificate “at the main
16 business office of the real estate broker to whom the salesperson is licensed”).

17 17. Given these restrictions, it is impossible for a sales associate to be “customarily
18 engaged [or for that matter, engaged at all] in an independently established trade, occupation, or
19 business of the same nature as the work performed” for the responsible broker in compliance with
20 *Dynamex’s* third prong. Based on this fact alone, licensed real estate sales associates cannot be
21 hired as independent contractors in California.

22 18. Similarly, a responsible broker is required by California law to control and direct
23 the work performed by a licensed sales associate under their supervision. *See* 10 CCR § 2725
24 (summarizing requirements). Accordingly, it is likewise impossible for a sales associate to be
25 employed as an independent contractor in California in compliance with *Dynamex’s* first prong.
26 Defendants in fact controlled and directed the work performed by their licensed sales associates
27 through numerous restrictions and requirements governing the performance of their work.
28

1 19. And finally, sales associates do not perform work that “is outside the usual course
2 of the hiring entity’s business.” Sales associates are hired to perform work related to the renting,
3 buying, and selling real estate, which also constitutes the core of the Defendants’ business.

4 20. As demonstrated above, Defendants’ sales associates cannot be considered
5 independent contractors under *Dynamex*. While the *Dynamex* court declined to expressly state
6 whether the opinion applies retroactively, “the Supreme Court denied later requests to modify the
7 opinion to apply the ABC test only prospectively” and subsequent courts have recognized probable
8 retroactive application. *See, e.g., Garcia v. Border Transportation Grp., LLC*, 28 Cal. App. 5th
9 558, 572, (Ct. App. 2018), as modified on denial of reh’g (Nov. 13, 2018).

10 21. However, even if Defendants incorrectly contend that *Dynamex* does not determine
11 the employment relationship alleged herein, the conclusion would not be any different under prior
12 standards. The professional restrictions and facts alleged above also weigh in favor of finding an
13 employment relationship under the multifactor standard set forth in *S. G. Borello & Sons, Inc. v.*
14 *Dep’t of Indus. Relations*, 48 Cal. 3d 341, 351, 769 P.2d 399, 404 (1989). Specifically, Defendants
15 held and exercised the “the right to control the manner and means of accomplishing the result
16 desired,” and, (a) sales associates were not engaged in a distinct occupation or business; (b) the
17 occupation of sales associates in California is required to be performed under the direction and
18 supervision of a responsible broker; (c) the skill required does not exceed that of a typical
19 employee; (d) Defendants controlled the instrumentalities, tools, and the place of work for the
20 person doing the work; (e) Plaintiff was employed to perform services over an indefinite rather
21 than limited length of time; and the work is a part of the regular business of Defendant, among
22 other considerations.

23 **Defendants Failed to Reimburse Sales Associates for Necessary Expenditures and**
24 **Losses**

25 22. As employees, Plaintiff and putative class members are entitled to reimbursement
26 for “all necessary expenditures or losses incurred by the employee in direct consequence of the
27 discharge of his or her duties, or of his or her obedience to the directions of the employer, even
28 though unlawful, unless the employee, at the time of obeying the directions, believed them to be
unlawful.” Labor Code § 2802.

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CLASS ACTION ALLEGATIONS

29. Pursuant to California Code of Civil Procedure (“CCP”) §382 and the common law related thereto, a case should be treated as a class action when a court finds: (a) that the predominant issues raised in the case are of a common interest; (b) that the parties are so numerous that it is impracticable to bring them all before this Court; (c) that the proposed Class and Subclass are clearly and easily ascertainable; (d) that the named representatives’ claims are typical of the claims of the proposed classes; (e) that the Class representatives will adequately represent the interests of the classes; and (e) that a class action is superior to other methods of adjudicating the claims alleged herein. Plaintiff herein allege that each and every one of the foregoing can and will be demonstrated at the time for hearing on Plaintiff’ motion for class certification.

30. Plaintiff brings this suit as a class action pursuant to CCP §382, on behalf of the Class of individuals:

All individuals who currently work, or have worked, for Defendants as a sales associate in the state of California at any time within the preceding four years from the date of the filing of this complaint.

31. Plaintiff further seeks Certification of the following Subclasses: (a) **Wage Statement Subclass:** All members of the Class who were employed at any time within the preceding 1-year from the date of filing the complaint; and (b) **Waiting Time Penalty Subclass:** All members of the Class who are former employees and who were employed at any time within the preceding 3-years from the date of filing the complaint.¹

32. Members of the Class and Subclasses will hereinafter be referred to as “class members.”

33. Plaintiff reserves the right to redefine the Class and Subclasses and to add additional subclasses as appropriate based on further investigation, discovery, and specific theories of liability.

¹ The Itemized Wage Statement and Waiting Time Penalty Subclasses are comprised of the same persons as the Class but are limited in time (a 3-year statute of limitations for Waiting Time Penalty claims and a 1-year statute of limitations for an Itemized Wage Statement claim) and employee classification (Waiting Time Penalty claims are only available to former employees).

1 34. **Numerosity:** Plaintiff is informed and believes and based on such information and
2 belief, allege that, in conformity with CCP § 382, the potential membership in the Class and each
3 subclass is so numerous that joinder of all members is impractical. While the exact number of
4 members in each of the classes is presently unknown to Plaintiff, she estimates membership in the
5 Class to exceed 100. The exact number and specific identities of the members of the Class and the
6 subclasses may be readily ascertained through inspection of Defendants’ business records.
7 Moreover, the disposition of class members’ claims by way of a class action will provide substantial
8 benefits to the parties and the Court.

9 35. **Commonality:** Plaintiff is informed and believes and based on such information
10 and belief alleges that numerous questions of law and/or fact are common to all members of the
11 class, including, without limitation:

- 12 a. Whether Defendants should be treated as joint employers of Plaintiff and the
13 Class members;
- 14 b. Whether Defendants uniformly misclassified Plaintiff and the Class members as
15 independent contractors;
- 16 c. Whether Plaintiff and the Class members incurred necessary expenditures and
17 losses for which they were not reimbursed by Defendants;
- 18 d. Whether Defendants complied with the wage reporting requirements of Labor
19 Code § 226 (a)(9);
- 20 e. Whether Defendants failed to timely pay Plaintiff and putative Class members
21 the wages due them during their employment;
- 22 f. Whether Defendants failed to timely pay wages due to Plaintiff and Class
23 members upon their discharge;
- 24 g. Whether Defendants’ failure to pay all wages due in accordance with the
25 California Labor Code was willful or reckless;
- 26 h. Whether Defendants engaged in unfair business practices in violation of
27 California Business & Professions Code §§ 17200, et seq.;
- 28 i. Whether Defendants failed to pay Representative Plaintiff and Class members
all compensation rightfully owed; and

1 j. The appropriate amount of damages, restitution, or monetary penalties resulting
2 from Defendants' violations of law.

3 36. **Typicality**: Representative Plaintiff's claims are typical of those of the class
4 members, because Representative Plaintiff suffered the violations set forth in this Complaint.

5 37. **Adequacy**: Representative Plaintiff will adequately protect the interests of class
6 members. Representative Plaintiff has no interests that are adverse to or in conflict with class
7 members and she is committed to the vigorous prosecution of this lawsuit. To that end,
8 Representative Plaintiff has retained counsel who are competent and experienced in handling class
9 actions on behalf of employees.

10 38. **Predominance/Superiority**: The numerous common questions of law and fact set
11 forth in the commonality discussion above predominate over individual questions because
12 Defendants' alleged underlying activities and the impact of their policies and practices affected
13 Class members in the same manner: they were uniformly misclassified as indecent contractors and
14 were subjected to a uniform policy of non-reimbursement for necessary expenses and losses. A
15 class action is superior to all other available methods for the fair and efficient adjudication of this
16 controversy, since joinder of all members is impracticable. Furthermore, as the amount suffered by
17 individual class members may be relatively small, the expense and burden of individual litigation
18 would likely make it impossible for members of the Class to individually redress the wrongs done
19 to them. There will be no inordinate difficulty in the management of this case as a class action. The
20 class is geographically disbursed throughout California but Defendants' policies and decisions
affecting the class applied statewide.

21 39. Representative Plaintiff is informed and believes and based on such information and
22 belief alleges that this action is properly brought as a class action, not only because the prerequisites
23 of CCP §382 and common law related thereto are satisfied (as outlined above), but also because of
24 the following:

- 25 a. The prosecution of separate actions by or against individual members of the Class
26 would create risk of inconsistent or varying adjudications with respect to individual
27 members of the Class which would establish incompatible standards of conduct for
28 the party opposing the Class;

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1. For an order certifying this action as a class action on behalf of the proposed Classes;
2. For an order appointing Plaintiff as the Representative of the Class and her counsel as Class Counsel;
3. For damages according to proof for reimbursement of necessary expenses and losses under California law;
4. For liquidated damages;
5. For waiting time penalties;
6. For civil penalties;
7. For interest as provided by law at the maximum legal rate;
8. For restitution for all unlawfully retained monies by Defendants;
9. For an injunction against future violations of the California Labor Code;
10. For reasonable attorneys' fees authorized by statute;
11. For costs of suit incurred herein;
12. For pre-judgment and post-judgment interest, as provided by law, and
13. For such other and further relief as the Court may deem just and proper.

DATED: April 8, 2019

THIERMAN BUCK LLP


Mark R. Thierman
Joshua D. Buck
Leah L. Jones

Attorneys for Plaintiff