

STATEMENT OF DECISION:

The trial de novo pursuant to Labor Code section 98.2 duly came on for trial on June 1, 2011 before the Honorable Stephen D. Schuett, Judge of the Superior Court, presiding in Department 17. The four matters (Tomczak v. Ziprealty, Inc. [Case No. S-1500-CV-272234], Parsons-Adams v. Ziprealty, Inc. [Case No. S-1500-CV-272235], Kinney v. Ziprealty, Inc. [Case No. S-1500-CV-272237], and Radovicz v. Ziprealty, Inc. [Case No. S-1500-CV-272238]) were consolidated for purposes of trial. The plaintiffs were represented by David Balter, Esq., Department of Industrial Relations, State of California, Defendant was represented by Henry L. Sanchez, Esq. Evidence having been adduced and the cause argued and submitted to the Court for decision, the Court finds and determines as follows:

STATEMENT OF FACTS¹

The four plaintiffs were employed as real estate agents by defendant Ziprealty, pursuant to a written Broker-Agent Agreement. Under the terms of the agreement, plaintiffs were at-will employees who were required to devote their full-time efforts to real estate sales efforts on behalf of Ziprealty. Plaintiffs' compensation was limited to commissions and bonuses received for completed real estate sales. The specific compensation schedule is set forth in Schedule A of each plaintiff's written employment agreement. Plaintiffs were also reimbursed for employment-related expenses such as cellular telephone and high-speed internet access.

Ziprealty did not have a local office for the use of its agents. The closest physical office space was its regional office in Visalia, California, approximately 80 miles from plaintiffs' homes in Bakersfield. Instead, its business model was to have its agents work from locations outside of a traditional office. Consequently, each of the plaintiffs worked out of their homes.

Each plaintiff testified that their daily duties involved accessing the Ziprealty website (also referred to as the Zip platform) where potential clients registered. Agents were assigned potential leads or clients on the Ziprealty website. Once a lead was assigned to an agent, the agent was expected to make contact within a specified period of time and to continue to maintain contact, through phone calls or emails for a period of three months. Company policy required agents to make at least 10 phone calls and send 10 emails per day. Plaintiffs' district manager required 20 phone calls and 20 emails per day. Agents were expected to log onto the Zip platform several times a day.

Response time was a major priority. During orientation, plaintiffs were told that "new leads" required immediate attention, meaning contact within 24 hours, with 12 hours

¹ Because the facts in these four matters are similar, the Court will provide its statement of the facts related to all four matters. The specific findings and judgment with respect to each matter is separately stated below.

being optimal. (Plaintiffs' Exhibit 15.) Plaintiffs were also required to record or log their activities on the Zip platform. Agents could have thousands of leads to manage.

As part of their job duties, plaintiffs were required to answer questions, search listings, get buyers qualified, show homes to clients, and where necessary generate contracts for the purchase of a home. In order to undertake some of these duties, plaintiffs used several other websites, notably the Multiple Listing Service (MLS) website to search real estate listings, the California Association of Realtors website to obtain forms and contracts, and the DocuScan/DocuSign website to obtain electronic signatures on those forms and contracts. When showing homes to clients, plaintiffs also accessed a digital key for the home, generating a computer record whenever a home was shown.

Plaintiffs were employed by Ziprealty during the following periods: Nadine Radovicz between November 2007 through August 2010; Patrice Parsons-Adams between September 2008 through February 2009, Marilee Tomczak between September 2008 and August 2010 and Steven Kinney between September 2008 and August 2010. During their employment with Ziprealty, each of the plaintiffs received only commission and bonus income.

On November 9, 2009, the Labor Commissioner, State of California issued an Order, Decision or Award of the Labor Commissioner in favor of each of the plaintiffs in this proceeding. Defendant timely filed its request for trial de novo in each of the proceedings.

On April 29, 2011, plaintiffs each filed their amended Notice of Claim to allege the following claims:

1. Violation of Labor Code section 510 and IWC Order 4-2001, Section 3 for the failure of Ziprealty to pay overtime to plaintiffs;
2. Violation of Labor Code section 1197 and IWC Order 4-2001, Section 4 for failure of Ziprealty to pay minimum wage to each plaintiff. Plaintiffs also seek liquidated damages equal to the unpaid minimum wages pursuant to Labor Code section 1194.2;
3. For accruing interest pursuant to Labor Code section 98.1;
4. For reimbursable expenses incurred by plaintiffs pursuant to Labor Code section 2802;
5. For statutory damages pursuant to Labor Code section 226(e) for Ziprealty's knowing and willful failure to provide plaintiffs with wage statements that complied with Labor Code section 226; and
6. For statutory penalties pursuant to Labor Code section 203 for Ziprealty's failure to pay all wages due at the time of the termination of plaintiffs' employment.

The success of plaintiffs' claims turns on whether they were correctly or incorrectly classified by Ziprealty as exempt employees under the outside salesperson exemption.

THE OUTSIDE SALESPERSON EXEMPTION

Labor Code section 1171 and Wage Order section 1(C) provide an exemption from the overtime payment requirement for outside salespersons. Wage Order section 2 defines an "outside salesperson":

"Outside salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

The interpretation of this section begins with the Supreme Court's discussion of the scope of the exemption in *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794-95:

In interpreting the scope of an exemption from the state's overtime laws, we begin by reviewing certain basic principles. First, "past decisions ... teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702 [166 Cal.Rptr. 331, 613 P.2d 579].) Thus, under California law, exemptions from statutory mandatory overtime provisions are narrowly construed. (Citations.) Moreover, the assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption. (Citations.)

In *Ramirez*, the court also made clear the determination of whether an employee fell within the exemption is to be based on a quantitative determination of whether the employee is actually working more than half the working time selling or obtaining orders or contracts. *Id.* at p. 797. This entails a two-step inquiry. First, the court examines in an individualized fashion the work actually performed by the employee to determine how much of that work is exempt. Second, the court determines whether the employee's work was consistent with the employer's expectation and whether those expectations were realistic.

Before undertaking that analysis, the Court must first determine the site of the employer's workplace. Defendant has argued that the workplace should be considered to be the regional office of Ziprealty in Visalia, California. Given that the plaintiffs all worked from their homes, defendant asserts that the plaintiffs were truly outside salespersons given the nature of their work as real estate salespersons. Plaintiffs argue that because there was no traditional office for them to work out of, the quantitative determination

must consider that their homes were essentially their place of business for purposes of determining how much time they spent away from the employer's place of business.

Since there is no definition of the employer's place of business in either the Labor Code or the California Code of Regulations, plaintiffs point to the provisions of 29 Code of Federal Regulations section 541.502 as support for their position that their homes should be considered the employer's place of business in this case. That section provides:

An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business." The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (i.e., one or two weeks) should not be considered as the employer's place of business. (Emphasis added.)

Defendant argues that the federal standard should not apply because this regulation does not contemplate real estate sales employees.

Finding no California case law, statute or regulation dealing with this specific question, the Court finds that reliance on the federal standard in this instance is justified.² As pointed out in *Ramirez, supra*, 20 Cal. 4th 785 at 794, under California law, exemptions from statutory mandatory overtime provisions are narrowly construed. Reliance on the federal standard furthers that policy by designating place of business consistent with the business model of defendant in this case, i.e. that its agents would work out of their homes rather than a traditional real estate office. In defendant's Exhibit C, District Operational Standards, Meetings and Communications at page 3-02, Ziprealty notes that "[a] successful work-from-home culture consists of agents who are motivated, inspired,

² In *Ramirez, supra*, 20 Cal.4th 785, the California Supreme Court criticized the lower court for relying on the federal regulations defining the scope of the federal outside salesman exemption in determining the meaning of the state exemption. The Supreme Court noted that because the federal exemption defines the exemption in terms of the employee's primary function, i.e. a qualitative analysis, rather than determining how many hours the employee spent selling, i.e. a quantitative analysis, the lower court improperly relied on the federal regulatory language because of the inconsistent approaches. However, in that both the quantitative and qualitative approach require the determination of what is the employer's place of business, there is no inconsistency in using the federal regulation as guidance.

supported and recognized by their District Directors.” It is clear that Ziprealty anticipated and expected its agents to be working from their homes. Consequently, designation of the plaintiffs’ homes as the employer’s place of business in this matter is consistent with the practice of the defendant and with the narrow construction of the exemption from overtime.

QUANTITATIVE ANALYSIS OF THE PLAINTIFFS’ WORK

Having determined the employer’s place of business is the respective home of each of the plaintiffs, the Court must undertake the quantitative analysis of the work performed by plaintiffs and whether they spent more than half their working time away from that place of business. Because plaintiffs were classified by Ziprealty as exempt, no time records were maintained by either plaintiffs or Ziprealty. The parties introduced records showing when plaintiffs logged onto and off of certain computer systems related to their work. These included the Zap platform records of access, Multiple Listing Service records of access, Docuscan/Docusign access records for each plaintiff, as well as summaries of the overlap in many of these computer records.

A. NONE OF THE PLAINTIFFS SPENT MORE THAN HALF OF THEIR WORK TIME OUTSIDE THE EMPLOYER’S PLACE OF BUSINESS

Each plaintiff testified that the vast majority of their daily working time was taken up by maintaining the required standards for responding to new leads or following up with emails or phone calls to existing leads. This activity was generally done at home.

In the case of plaintiff Nadine Radovicz, she testified that she spent approximately 1.5 hours per week in the field showing homes. This was based on the lock box access records, indicating when she had accessed the lock box system to open a home for a showing to prospective buyers. (Plaintiffs’ Exhibit 44.) Plaintiff Radovicz testified she generally worked at least 8 hours a day 6 days a week. (Plaintiffs’ Exhibit [insert].)

In the case of plaintiff Pat Parsons, she testified that she spent approximately 2 hours per week in the field showing homes. Again, this was based on the lock box access records for her access to the lock box system. (Plaintiffs’ Exhibit 45.) Plaintiff Parsons testified she worked at least 8 hours a day 7 days a week. (Plaintiffs’ Exhibit 54A.)

In the case of plaintiff Steven Kinney, he testified that he spent approximately 9 hours a month in field showing homes. Again, this was based on the lock box access records for his access to the lock box system. (Plaintiffs’ Exhibit 47.) Plaintiff Kinney testified he worked 7 days per week. According to Mr. Kinney, he spent an average of 10.63 hours on the Zip platform, 22.5 minutes per day on the MLS and Docuscan/Docusign websites and about 20 minutes per day on average showing homes.

In the case of plaintiff Marilee Tomczak, she testified that she spent approximately 2 hours per week, exclusive of drive time, in the field showing homes. Again, this was

based on the lock box access records for her access to the lock box system. (Plaintiff's Exhibit 46. Plaintiff Tomczak estimated that she would spend an additional half hour for driving time. Plaintiff Tomczak testified she worked 8 hours per day 7 days per week. (Plaintiffs' Exhibit 55.)

As discussed in more detail below, the Court has reviewed the claims of plaintiffs in light of the computer access records and made some adjustment to the claimed hours to more accurately reflect what is shown by those records. Nevertheless, even with those adjustments, none of the plaintiffs worked more than half their working time away from their place of business.

As an example, on June 22, 2009, plaintiff Tomczak accessed the electronic lock box 5 times, indicating she showed 5 homes. Those times were between 1:45 p.m. and 3:36 p.m. Assuming drive time is accounted for, those 5 home showings would have been approximately two and a half hours. Her access records for the Zip platform show a total of 6.7 hours. Subtracting out time which overlapped her house showing activity still leaves 6 hours of activity on the Zip platform. So even when plaintiffs were out showing homes, the amount of time is still considerably less than half of their working time. Therefore, the Court finds that none of the plaintiffs spent more than half of their working time outside their place of business.

B. PLAINTIFFS' ACTUAL WORK PRACTICES WERE WITHIN THE REALISTIC EXPECTATIONS OF THE EMPLOYER

The second prong of the analysis required the Court to determine whether the employee's work was consistent with the employer's expectation and whether those expectations were realistic. Defendant argues that plaintiffs fail on this part of the analysis because company policy dictates that agents spend a minimum of 60% of their time in the field. Defendant claims that plaintiffs' performance was substandard because they each failed to meet this directive.

Each plaintiff testified that he or she was never told by Bob Parker, their team leader, to be out in the field more. On direct examination Parker testified that he had no authority to discipline and was not aware that any of the plaintiffs had been disciplined for failing to meet the 60% expectation. Ziprealty's district director, John Schubert, testified that there were no criteria for the number of home showings to be made by agents and that there were no reports generated which showed the number of hours an agent spent showing homes. He received reports on mileage and the number of home showings made on a weekly basis. Schubert testified that none of the plaintiffs were disciplined for failure to meet the 60% directive. Both Parker and Schubert testified that showing homes was the only way to make money but never expressed that the 60% directive was a standard that was emphasized or enforced.

On the other hand, Parker testified that responding to new leads was the agent's top priority. He also set specific standards for how many calls and emails needed to be made each day, the response requirement for new contacts, and the frequency of computer

access. Training sessions for the plaintiffs when they began working for Ziprealty emphasized contacting leads required immediate attention. (Plaintiffs' Exhibit 15.) Agents would receive a "Zap Hawk" if they had not met the response time standards. (Plaintiffs' Exhibit 58.)

Emails from Mr. Parker to his agents show an emphasis on the need to respond to client requests within company and district policy. (Defendant's Exhibit AD.) These emails generally contained a chart indicating the agents calls, emails, response time, visits, offers, opens, personal contacts, pool contacts, Zip notify, and Rising Star numbers. Reminders were included regarding company standards for response times. In some cases, agents were singled out for either good or poor performance. For example, in his email dated May 9, 2009, Mr. Parker states:

Well some bad news, one of our agents got Zap Hawked again, This is totally uncalled for, you must respond to Priority Contacts, request for Info and new registrants with in company standards and if you log in on your platform at least twice a day this will not occur.

On the contrary, there were no discussions in these emails from their team leader regarding any standards or requirements for agents to be out in the field.

Given the emphasis on the response to leads and recording all their activities in the Zip program, the corresponding lack of interest by Ziprealty in the 60% directive leads the Court to find that the directive was not a realistic expectation with respect to the plaintiffs' job performance. Additionally, the plaintiffs testified that the leads that were received through the Zip website contained a significant number of people with credit issues, were unemployed or were otherwise unlikely to qualify for a loan to purchase a home. As a practical matter it was unrealistic to expect the agents to obtain enough quality leads, i.e. someone ready, willing and able to purchase a home, to generate home showings that would have them in the field more than 60% of their time and maintain the standards for responding to new lead and client requests.

DETERMINATION OF HOURS WORKED

Employees seeking to recover unpaid wages bear the initial burden of proving that they performed work for which they were not properly compensated. *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727. The rule as stated by that court insofar as the plaintiffs' burden of proof is as follows:

Although the employee has the burden of proving that he performed work for which he was not compensated, public policy prohibits making that burden an impossible hurdle for the employee. ... 'In such situation ... an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the

employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.' (*Id.* p. 727, internal citation omitted.)

With respect to these plaintiffs, Ziprealty did not maintain records of hours worked. Plaintiffs produced the records of their access to the Zap platform, the Multiple Listing Service (MLS) website, the DocuScan/DocuSign website and the lock box access records. Plaintiffs also testified to the time they estimated they spent working each day and prepared calendars³ indicating their estimate of the time spent working for defendant. Plaintiffs have met their burden of proof with respect to the fact that they performed work for Ziprealty for which they were not compensated.

Nevertheless, the Court must review the records and testimony to determine whether the estimates made by plaintiffs are reasonable. "It is the trier of fact's duty to draw whatever reasonable inferences it can from the employee's evidence where the employer cannot provide accurate information." (*Hernandez, supra*, 199 Cal.App.3d at p. 728, internal citation omitted.)

Because each plaintiff testified that much of their working time was spent on the computer on the Zip platform, the Court has relied on the access records to that platform to confirm whether the amount of time claimed by each plaintiff is reasonable in light of those records. The Court has also reviewed and taken into consideration the computer access records related to their accessing the MLS website, the DocuScan/DocuSign website and lock box access records.

The Zip platform and other data base log in records contain significant overlap. Plaintiffs could have several systems running at the same time and well as open other browsers in the Zip platform so that multiple sessions could be running simultaneously. Defendant has provided a summary of the overlapping time (Defendant's Exhibits Y, Z, AA and AB) for each plaintiff accounting for the overlapping time on the Zip platform. In addition, the Court has also reviewed selected time periods to confirm the accuracy of the summary of overlapping time as well as to be able to put into perspective the plaintiffs' use of the other data bases and their access to the lock box program to determine patterns of activity for home showing.⁴

³ Plaintiffs Radovicz, Parson-Adams, and Tomczak, provided calendars (Plaintiffs' Exhibits 53, 54A and 55, respectively) Plaintiff Kinney did not provide a calendar.

⁴ For plaintiff Radovicz, the Court reviewed selected weeks in March, May, June, August and October, 2008, February, May, June, September and November, 2009, and April and June 2010. For plaintiff Parson-Adams, the Court reviewed selected weeks in each of the months she was employed by Zip Realty – October 2008 through February 2009. For plaintiff Tomczak, the Court reviewed selected weeks in the months of October and November, 2008, March, June, September and November, 2009, and June 2010. For plaintiff Kinney, the Court reviewed selected weeks in October, 2008, February, May, July and October 2009, and March and May, 2010.

Accordingly, the Court makes the following findings with respect to the time worked for each plaintiff.

A. NADINE RADOVICZ

In reviewing the Zip platform access records, accounting for the overlap in time, those periods reviewed by the Court showed that the time spent on the Zip platform was relatively constant, ranging from a high of 6.6 hours per day in June 2008 to a low of 4.2 hours in August 2008. The average for the months reviewed by the Court was 5.6 hours per day. Ms. Radovicz' testimony was that she estimated 6 hours per day, which is reasonable based on the sample of time reviewed by the Court.

Ms. Radovicz further testified that her MLS access records indicated an average of 12 hours per week. Ms. Radovicz testified that, based on her lock box access records, she estimated an average of 1.5 hours per week spent showing homes. The Court determines these estimates to be reasonable. Plaintiff also testified that she would spend time making telephone calls, attending meetings, keeping up with the real estate market and other activities that would not be reflected in any of the computer access records. Based on the testimony of plaintiff, it is reasonable to include an additional time for these activities. Therefore, the Court finds an average of 8 hours per day is reasonable estimation of the time she worked.

B. PATRICE PARSONS-ADAMS

In reviewing the Zip platform access records, accounting for the overlap in time, those periods reviewed by the Court showed that the time spent on the Zip platform was an average of 5.8 hours per day.⁵

Plaintiff also testified that she spent 2 hours per day on the phone and time sending emails. Showing homes entailed approximately 2 hours per week on average. Accessing the MLS website averaged another 14 hours per week. Additional time was spent on the Docusing/Docuscan website creating the package of documents necessary for the sale of a home. Based on this evidence the Court finds an average of 8 hours per day is reasonable estimation of the time she worked.

C. MARILEE TOMCZAK

In reviewing the Zip platform access records, accounting for the overlap in time, those period reviewed by the Court showed a disparity in the average usage of the Zip platform over time. For the period October 2008 through June 2009, the Zip platform usage averaged 5.2 hours. Plaintiff testified that her average MLS access time was 2.5 hours per week, and her access to the electronic lock box averaged 2 hours per week exclusive of drive time. Plaintiff also testified her normal day included making phone calls and

⁵ Defendant's Exhibit U reflects an average of 6.9 hours of time spent on the Zip platform. Certain entries reflect time in excess of 24 hours in a day, so those calculations do not necessarily reflect a reasonable estimate of the time spent on the Zip platform by plaintiff Parsons-Adams.

making appointments off line. Based on this evidence the Court finds an average of 8 hours per day is a reasonable estimation of the time she worked during that time frame. However, from July 2009, through the end of her Ziprealty employment in August 2010, her Zip platform access times dropped significantly. For example, in September 2009 her access averaged 2.5 hours per day, in November 2009 it averaged 2.0 hours per day and in June 2010 it averaged 2.0 hours per day. Based on this change in Zip platform access, the Court finds that the average work time for the time between July 2009 and August 2010 should be reduced to an average of 4 hours per day.

D. STEVE KINNEY

In reviewing the Zip platform access records, accounting for the overlap in time, those periods reviewed by the Court showed that the time spent on the Zip platform was typically at a high level, some months exceeding 10 hours per day on average. The lowest average among the time periods reviewed by the Court was an average of 5.9 hours per day. Mr. Kinney also testified that his MLS access average about 18 minutes per day and his use of the DocuScan/DocuSign website averaged about 4.5 minutes per day. His average time per day spent showing homes was 20 minutes per day. Based on this evidence the Court finds an average of 8 hours per day is reasonable estimate of the time he worked.

MINIMUM WAGE LIABILITY.

The requirement for payment of minimum wages is found in both the Labor Code (at section 1197) and in the provisions of the Industrial Welfare Commission Order No. 4-2001, Regulating Wages, Hours and Working Conditions in the Professional, Technical, Clerical, Mechanical and Similar Occupations ("Wage Order"). Under the terms of the Wage Order "hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so. The Wage Order requires that not less than the minimum wage be paid on the regular payday for all hours worked.

In this case, Ziprealty utilized a weekly payroll system with a work week which started on Monday and continued through the following Sunday. Payday was on the following Friday, 5 days after the end of the payroll period. Payments made for commissions earned for the sale of real estate are credits for that payroll period only.

For those payroll periods for which plaintiffs did not earn commission income in excess of the otherwise applicable minimum wage, the Court finds the plaintiffs are entitled to be paid the minimum wage. The specific amount determined for each plaintiff is set out below.

LIABILITY FOR LIQUIDATED DAMAGES ON MINIMUM WAGES.

Subsection (a) of Labor Code section 1194.2 provides for an award of liquidated damages on minimum wage violations:

In any action under Section 1193.6 or Section 1194 to recover wages because of the payment of a wage less than the minimum wage fixed by an order of the commission, an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon. Nothing in this subdivision shall be construed to authorize the recovery of liquidated damages for failure to pay overtime compensation.

However, a good faith defense exception exists under subsection (b) of section 1194.2:

Notwithstanding subdivision (a), if the employer demonstrates to the satisfaction of the court that the act or omission giving rise to the action was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of any provision of the Labor Code relating to minimum wage, or an order of the commission, the court may, in its discretion, refuse to award liquidated damages or award any amount of liquidated damages not exceeding the amount specified in subdivision (a).

The Court determines that Ziprealty's misclassification of these employees as exempt does not fall within the good faith exception under Labor Code section 1194.2(b).

A similar provision exists in the Fair Labor Standards Act in 29 U.S.C. section 260:

[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages

In that the provisions of 29 U.S.C. section 260 and Labor Code section 1194.2 are substantively identical, the interpretations of the federal regulation are relevant to the consideration of the application of Labor Code section 1194.2.

In order to meet the good faith requirement under the federal regulation, courts require that "the employer must sustain the plain and substantial burden of persuading the court by proof that his failure to obey the Fair Labor Standards Act was both in good faith and predicated upon such reasonable ground that it would be unfair to impose upon him more than a compensatory judgment." *Mulder v. Mendo Wood Products, Inc.* (1964) 225 Cal.App.2d 619, 631. To satisfy this standard, the employer must prove a subjective element ("good faith") and an objective element ("reasonable belief"). *Chao v. A-One Medical Services, Inc.* (9th Cir. 2003) 346 F.3d 908, 920. "[T]o carry his burden, a defendant employer must show that he took affirmative steps to ascertain the Act's

requirements, but nonetheless, violated its provisions.” *Martin v. Cooper Elec. Supply Co.* (3d Cir. 1991) 940 F.2d 896, 908. In the present case, defendant failed to meet this burden.

Nor can the defendant meet the second prong of the test, i.e. a subjective belief that it was not violating the provisions of the Labor Code. Even where an interpretation may not be unreasonable, the employer must explain how or why it believed it was in compliance. *Block v. City of L.A.* (9th Cir. 2001) 253 F.3d 410, 420. Again, defendant provided no evidence of its subjective belief regarding the classification of these agents as exempt employees.

OVERTIME PAY LIABILITY

The Labor Code section 510 and the Wage Order also contain requirements for payment of an overtime pay premium. This overtime pay requirement is essentially that work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek shall be paid at the rate of one and one-half times the regular rate of pay. Based on the work schedules of the plaintiffs, and the number of hours worked in a workweek, plaintiffs are entitled to overtime pay. The specific amount awarded to each plaintiff is set out below.

WAITING TIME PENALTIES

Labor Code section 203 provides a penalty of up to 30 days pay for failure of an employer to pay all wages due at the time of termination. In these cases, defendant Ziprealty has failed to pay the plaintiffs for the work for which they were entitled to minimum wages. Therefore, the Court finds that waiting time penalties should be awarded in each case for those pay periods in which they earned but were not paid minimum wage.

INTEREST, ATTORNEY’S FEES AND COSTS

Subsection (a) of Labor Code section 1194 provides in relevant part:

Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.

Therefore, plaintiffs are entitled to an award of interest on the unpaid balance of the minimum wage and overtime liability together with reasonable attorney’s fees and costs of suit. An award of interest and attorney’s fees is also permitted under Labor Code sections 98.1 and 98.2.

AWARD OF DAMAGES

The Court awards judgment to each plaintiff and against defendant Ziprealty, Inc. in each case as follows:

1. Marilee Tomczak – Case No. S-1500-CV-272234

- a. Minimum wages in the amount of \$31,337.00;
- b. Overtime premium pay in the amount of \$2,848.00;
- c. Liquidated damages in the amount of \$31,337.00;
- d. Interest in the amount of \$12,602.70;
- e. Damages pursuant to Labor Code §203 in the amount of \$1,920.00;
- f. Damages pursuant to Labor Code §226(e) in the amount of \$4,000.00;
- g. Attorney's fees; and
- h. Costs of suit.

2. Patrice Parsons-Adams – Case No. S-1500-CV-272235

- a. Minimum wages in the amount of \$7,104.00;
- b. Overtime premium pay in the amount of \$992.00;
- c. Liquidated damages in the amount of \$7,104.00;
- d. Interest in the amount of \$4,205.80;
- e. Damages pursuant to Labor Code §203 in the amount of \$1,920.00;
- f. Damages pursuant to Labor Code §226(e) in the amount of \$1,950.00;
- g. Attorney's fees; and
- h. Costs of suit.

3. Steve Kinney – Case No. S-1500-CV-272237

- a. Minimum wages in the amount of \$41,536.00;
- b. Overtime premium pay in the amount of \$6,464.00;
- c. Liquidated damages in the amount of \$41,536.00
- d. Interest in the amount of \$17,460.09;
- e. Damages pursuant to Labor Code §203 in the amount of \$1,920.00;
- f. Damages pursuant to Labor Code §226(e) in the amount of \$4,000.00
- g. Attorney's fees; and
- h. Costs of suit.

4. Nadine Radovicz – Case No. S-1500-CV-272238

- a. Minimum wages in the amount of \$40,360.00;
- b. Overtime premium pay in the amount of \$3,326.00;
- c. Liquidated damages in the amount of \$40,360.00;
- d. Interest in the amount of \$20,255.43;
- e. Damages pursuant to Labor Code §203 in the amount of \$1,664.00;
- f. Damages pursuant to Labor Code §226(e) in the amount of \$4,000.00;
- g. Attorney's fees; and
- h. Costs of suit.

Plaintiffs' counsel to prepare the form of the judgment for each case.