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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DON AGUILAR, et al.,
Plaintiffs,

v.

ZEP INC., et al.,
Defendants.

Case No. 13-cv-00563-WHO

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF
MANNION’S MOTION FOR PARTIAL
SUMMARY JUDGMENT FOR
LIABILITY FOR VIOLATION OF
LABOR CODE § 2802**

Re: Dkt. Nos. 91, 99, 100

INTRODUCTION

Plaintiff Dan Mannion has moved for partial summary judgment on defendant Zep Inc.’s liability for failing to reimburse him for reasonable business expenses between 2006 and 2011, in violation of California Labor Code Section 2802.¹ For the reasons stated below, the Court GRANTS IN PART and DENIES IN PART Mannion’s motion for partial summary judgment.

BACKGROUND

Mannion has been employed by Zep as an outside sales representative since February 1989. Dkt. No. 91-16 (“Mannion Decl.”) ¶ 2; Dkt. No. 95-1 (“Mannion Depo.”), 37:14-20. In February 1989, Mannion entered into a Sales Representative’s Exclusive Account Contract with

¹ Mannion is not moving for summary judgment as to his damages for Zep’s alleged violation of Section 2802, just Zep’s liability.

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Zep. Dkt. No. 91-17 (Mannion Decl. Ex. A, the “Sales Representative Contract”). The Sales Representative Contract provides that:

[Mannion] agrees that all expenses incurred by [Mannion] in connection with employment hereunder, including but not limited to, expenses of travel, entertainment, and solicitation, and other sales expenses, shall be paid by [Mannion] and shall not be reimbursed by [Zep].

Id. ¶ 4(d).

Mannion’s role as an outside sales representative requires him to develop new business, which entails making sales calls and driving to those calls “to generate and maintain customer business.” Mannion Decl. ¶ 7. As a result, Mannion incurs automobile insurance, gas and maintenance expenses. *Id.* ¶¶ 5-7. Mannion also incurs cell phone and computer expenses for communicating with potential clients and Zep management on the road and placing orders and accessing Zep information online. *Id.*

Mannion claims that his business-related expenses “far exceeded” \$500 per month. *Id.* ¶ 17. He has submitted what he refers to as a “schedule of the actual and necessary expenses” incurred in performing his duties from December 2006 to June 2011. Dkt. No. 91-18. The schedule claims approximately \$15,000 to \$20,000 in expenses per year, consisting of \$12,000 to \$18,000 per year in mileage expenses, and other smaller expenses attributed to “internet,” “Sprint,” “Timewise” and other expenses. *Id.* Mannion claims a total of \$74,889.51 in expenses from December 2006 through June 2011. *Id.*

Mannion has paid for his business expenses directly with his own funds. Mannion Decl. ¶ 13. Zep has not required Mannion to submit proof of his various business related expenses and Mannion has not been advised by Zep that he was being reimbursed for business expenses. *Id.* ¶¶ 12, 19. Zep did not have a written reimbursement policy that applied to Mannion between December 2006 and June 2011. Dkt. No. 97-2 (“Grossman Depo. II”), 37:14-21. Mannion’s payments from Zep are in the form of payroll checks. Mannion Decl. ¶ 19, Ex. C. There is no indication on the checks that a portion of Mannion’s payments are reimbursements for business expenses. *Id.*

1 On occasion, sales representatives have requested that Zep confirm to third parties, such as
2 the IRS, that Zep does not reimburse its sales representatives for business expenses, such as
3 automobile and telephone expenses. For example, a 2009 letter from Zep to the IRS stated that

4 This letter serves as notification that Thomas Fowler, a Zep Sales
5 Representative, is fully responsible for all expenses connected with
6 the performance of his job duties including car expense, motels,
entertainment, gifts, etc.

7 Mr. Fowler drives his own vehicle in the performance of his job
8 responsibilities and is not reimbursed for maintenance, gasoline,
9 repairs, etc., connected with the operation of this vehicle. Zep does
not reimburse sales representatives for any expenses.

10 Dkt. No. 93-2.

11 At his deposition, Zep's corporate designee, director of sales, Mark Grossman, testified
12 that Zep's "commission structure is elevated over and above what normal commissions are for a
13 lot of our competitors which allows you to be able to pay some of your expenses or all your
14 expenses." Dkt. No. 95-2 ("Grossman Depo. I") at 79:18-21. He testified that "[a]pproximately 10
15 percent" of Mannion's "earnings are to cover his day-to-day expenses." *Id.* at 83:18-22.

16 In contrast, Mannion has filed a declaration stating he was never told by anyone at Zep that
17 part of his commission was "intended to cover expenses or that part of [his] commissions were
18 intended to reimburse [him] for business-related expenses." Mannion Decl. ¶ 6. On the contrary,
19 from his review of the Sales Representative Contract and from his discussions with Zep
20 management at the time of his hire and various times since then, Mannion understood that he
21 would be fully responsible for paying all expenses associated with performing his duties "and that
22 [he] would not be reimbursed at all by the company." *Id.* ¶ 11.

23 Mannion has at times received a draw (or advance) against his commission. Mannion
24 Depo. at 38:24-39:1. Zep's corporate designee testified that these draws were part of the elevated
25 commission structure, and, as such, were intended to cover Mannion's expenses. Grossman Depo.
26 I at 98:11-14 ("It was a draw against future commissions earned, and those commissions, as we
27 discussed, because of the commission structure, yes, he would pay his own day-to-day
28 expenses."). In contrast, according to Mannion, no one ever informed him that the draws were

1 intended to reimburse him for his expenses. Dkt. No. 97-12 ¶¶ 6, 13-14.

2 Zep twice paid for airfare and hotel costs associated with Mannion attending industry trade
3 shows in Las Vegas.² Mannion Depo. at 47:18-48:6.

4 At some point during Mannion’s employment, Zep implemented an electronic/phone order
5 program “designed to incentivize representatives to place their orders electronically as opposed to
6 over the phone.” Dkt. No. 95-3 (“Henson Decl.”) ¶ 15. As part of this program, sales
7 representatives were charged \$10 for orders they placed by phone, as opposed to those placed over
8 the internet. Dkt. No. 95-4 (“Stadler Decl.”) ¶ 14; Mannion Decl. ¶¶ 6-7. “Zep allocated \$50 per
9 month for each sales representative to reimburse representatives for some or all of the phone
10 orders they placed and were charged for that month.” Stadler Decl. ¶ 14. At his deposition,
11 Mannion testified that these credits “were a spiff³ to encourage guys to use the electronic system
12 as opposed to phone in and faxing.” Mannion Depo. at 100:22-101:8. Neither side has provided
13 evidence indicating how much money Mannion was allocated under this program. Mannion
14 testified that “[i]t was something that appeared sometimes and didn’t appear” Mannion
15 Depo. at 101:18-19.

16 In June 2011, Zep terminated the Sales Representative Contract and adopted a new
17 compensation policy that apportioned 10% of sales representatives’ commission to cover their
18 expenses. Mannion Decl. ¶¶ 10, 18, 20; Dkt. No. 97-8 (Supp. Answer to Special Interrogatory No.
19 142).

20 **LEGAL STANDARD**

21 Summary judgment is proper “if the movant shows that there is no genuine dispute as to
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23 ² Mannion argues that Zep paid for these costs up front, so they do not constitute reimbursements.
24 In his deposition, he used the term “reimbursement,” (Mannion Depo. at 47:18-48:6), but
25 Grossman testified: “I don’t even know, honestly, if it was in a reimbursement. I think we would
26 have bought him a plane ticket or make arrangements for him to have the hotel room, and we
27 would cover his meals while he was with us.” Grossman Depo. II at 61:25-62:3.

28 ³ The parties have not defined the term “spiff” for the Court, which must resort, to its chagrin, to
using Wikipedia as a source. “A spiff or spiv is an immediate bonus for a sale. Typically, ‘spiffs’
are paid, either by a manufacturer or employer, directly to a salesperson for selling a specific
product. Originally comes from ‘Special Performance Incentive Fund.’”
en.wikipedia.org/wiki/Spiff

1 Cal. Lab. Code § 2802(a). “Necessary expenditures or losses” include all “reasonable costs.” Cal.
2 Lab. Code. § 2802(c). “To demonstrate that an employer has violated Section 2802, a plaintiff
3 must show that: (1) he or she is an employee; (2) he or she incurred necessary expenses either in
4 the discharge of his or her duties or in obeying the employer’s directions; and (3) the employer
5 failed to reimburse the plaintiff for such expenses.” *Desimone v. Allstate Ins. Co.*, 96-cv-03606
6 CW, 1999 WL 33226248, *7 (N.D. Cal. Sept. 14, 1999); *Gattuso v. Harte–Hanks Shoppers, Inc.*,
7 169 P.3d 889, 897 (Cal. 2007). In addition, the employer “must either know or have reason to
8 know that the employee has incurred [the] expense.” *Marr v. Bank of Am.*, 09-cv-05978 WHA,
9 2011 WL 845914, *1 (N.D. Cal. Mar. 8, 2011) *aff’d sub nom. Marr v. Bank of Am., NA*, 506 F.
10 App’x 661 (9th Cir. 2013).

11 Mannion is moving for summary judgment as to Zep’s liability only. To establish liability,
12 Mannion “need not introduce evidence of every expenditure; rather, [he] must submit evidence
13 that [he] incurred expenses in each of the categories of necessary expenses for which [he] seek[s]
14 to recover.” *Desimone*, 1999 WL 33226248, *7. If he succeeds in demonstrating that he incurred
15 necessary expenses, he will be required to present evidence regarding the extent of such
16 expenditures at the damages phase of the action. *Id.*

17 Zep argues that Mannion has not presented sufficient evidence i) that Mannion has
18 incurred expenses, ii) that his expenses were incurred as a direct consequence of the discharge of
19 his duties, iii) that his expenses were reasonable and necessary, or iv) that he has been
20 inadequately reimbursed.⁵ The Court addresses each argument in turn. As explained below, there
21 is no genuine dispute that Mannion incurred at least *some* amount of reasonable and necessary
22 automobile expenses as a direct consequence of his employment. The real issue is whether Zep
23 can create a material issue of fact as to whether it paid an elevated commission rate to Mannion,
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25 ⁵ Zep also argues that Mannion cannot rely on communications from Zep to other sales
26 representatives or on the Sales Representative Contract to establish that Zep did not reimburse
27 Mannion. Zep is correct that those materials do not conclusively establish that Zep did not
28 reimburse Mannion. Those materials do, however, confirm that at least some amount of business
expenses were reasonable and necessary as a direct consequence of Mannion’s employment,
which Zep has not controverted.

1 because if it did, there would be a question whether Mannion had been reimbursed. Because it is
2 undisputed that Zep never conveyed to Mannion that he was receiving an elevated commission,
3 Zep cannot make such a showing. *See Gattuso*, 169 P.3d at 901.

4 **A. Mannion incurred business expenses.**

5 Mannion claims that his business expenses include “auto expenses (gasoline, registration,
6 insurance, maintenance, etc.), cell phone, computer, internet, customer entertainment, etc.”
7 Mannion Decl. ¶ 13; *see also id.* ¶ 7. Mannion submitted a “schedule of the actual and necessary
8 expenses” which lists purported expenses for “miles,” “internet,” “Sprint,” “Timewise,”
9 “McAfee,” “Dell,” “BestBuy,” and other expenses. Dkt. No. 91-18 at 3. Mannion claims that he
10 incurred \$74,889.51 in expenses from December 2006 through June 2011. *Id.*

11 Zep argues that Mannion has not shown that he has incurred expenses because he “has
12 offered the Court no basis by which to examine the qualitative and quantitative nature of the
13 alleged expenses, the amounts of the individual expenses, or how to allocate those expenses
14 between Zep and non-Zep use.” Dkt. No. 94 at 18. At oral argument, counsel for Zep restated this
15 argument: if Mannion did not incur business expenses beyond the personal expenses which he
16 incurred irrespective of his employment, then he did not incur any business expenses and there can
17 be no liability under Section 2802. In other words, according to Zep, if Mannion spent \$100 a
18 month for his personal cell phone and internet use, and the use of his cell phone and internet for
19 Zep-related activities did not result in additional expenses, then Mannion did not incur any
20 business expenses from his cell phone and internet use.

21 Because it is undisputed that Mannion incurred automobile-related business expenses that
22 were not reimbursed (other than through the so-called “elevated commission” structure, addressed
23 in section D, below), the Court need not reach whether Section 2802 requires an employer to
24 reimburse an employee for necessary business expenses which are wholly subsumed within the
25 employee’s personal expenses. In his sworn declaration, Mannion stated that when he was hired
26 by Zep, he was told that his duties as an outside sales representative would require him to have an
27 automobile and, at his expense, maintain business-use automobile insurance on all vehicles he
28 used in connection with his employment. Mannion Decl. ¶ 5. Mannion further stated that during

1 his employment with Zep, he was “instructed to make sales calls and to develop new business,
2 requiring [him] to drive to and from those calls.” *Id.* ¶ 7. He stated that he paid for his own
3 business related automobile expenses, including gasoline, registration, insurance and maintenance.
4 *Id.* ¶ 13. Mannion claims that he drove approximately 25,000 to 35,000 miles per year between
5 2007 and June 2011 in the discharge of his duties. *Id.* ¶ 17, Ex. B. Zep’s corporate designee
6 concedes that Mannion’s position as an outside sales representative could reasonably require him
7 to drive “far greater” than 100 miles per month (Grossman Depo. II at 201:18-202:8), for which
8 Mannion would necessarily have incurred automobile expenses unrelated to the personal use of his
9 automobile. While Zep takes issue with the amount of business expenses claimed by Mannion, it
10 does not dispute that Mannion’s employment required him to maintain an automobile and incur
11 associated expenses.

12 There is no argument that Mannion’s business-related automobile expenses were fully
13 subsumed within his personal automobile expenses. The Sales Representative Contract between
14 Zep and Mannion states that “all expenses incurred by [Mannion] in connection with employment
15 hereunder, including but not limited to, expenses of travel, entertainment, and solicitation, and
16 other sales expenses, shall be paid by [Mannion].” Sales Representative Contract ¶ 4(d). Zep’s
17 corporate designee testified that approximately 10% of Mannion’s earnings are intended to “cover
18 his day-to-day expenses,” conceding that Mannion incurs substantial business expenses beyond
19 his personal expenses. Grossman Depo. I at 81:15-18; 83:14-19. The Court accordingly finds that
20 Mannion has adequately established that he incurred automobile business expenses. The
21 “qualitative and quantitative nature” of those expenses relates to the reasonableness and necessity
22 of those expenses and, ultimately, to the scope of Zep’s liability; not whether the expenses were
23 incurred in the first instance.⁶

26 ⁶ As noted below, because the Court finds that Mannion has not presented sufficient evidence that
27 his other alleged expenses exceeded his reimbursements from Zep or were reasonable and
28 necessary, the Court does not address whether Mannion adequately demonstrated that he incurred
such expenses in the first instance.

1 **B. Mannion’s expenses were a direct consequence of the discharge of his duties.**

2 Zep argues that there is a genuine question of fact as to whether Mannion incurred the
3 alleged expenses as a direct consequence of the discharge of his duties because he has “admitted
4 that the vehicles, phone and internet connection that he allegedly used for business purposes were
5 also used for personal purposes.” Dkt. No. 94 at 21. For the reasons stated above, Mannion has
6 sufficiently shown that at least some amount of his automobile expenses were incurred as a direct
7 consequence of the discharge of his duties. The precise portion of those expenses which were
8 incurred as a direct consequence of his duties will be addressed in the damages phase of this
9 action.

10 **C. Mannion’s expenses were reasonable and necessary.**

11 “Whether a business expense incurred is ‘necessary’ for purposes of applying Cal. Labor
12 Code § 2802 ‘is ordinarily a question of fact, but the issue may be determined as a question of law
13 when the material facts are undisputed and no conflicting inferences are possible.’” *Takacs v.*
14 *A.G. Edwards & Sons, Inc.*, 444 F.Supp.2d 1100, 1124-25 (S.D. Cal. 2006) (quoting *Jacobus v.*
15 *Krambo Corp.*, 78 Cal.App.4th 1096, 1103, 93 Cal.Rptr.2d 425 (2000)). Zep argues that since
16 Mannion “admitted using his vehicle for both personal and business purposes, the portion of miles
17 used for personal purposes would clearly be unreasonable and unnecessary.” Dkt. No. 94 at 23.
18 While that is true, it is also true that at least some portion of miles used for business purposes
19 would be reasonable and necessary.

20 It is uncontroverted that Mannion’s job required him to use his personal automobile.
21 Accordingly, as with Zep’s argument regarding whether each expense was incurred as a direct
22 result of his employment, whether the expenses were reasonable and necessary relates largely to
23 Mannion’s damages. It is sufficient that there is no genuine dispute that Mannion incurred some
24 level of reasonable and necessary expenses. Zep will have an opportunity to challenge the
25 reasonableness and necessity of Mannion’s expenses during the damages phase of this action.

26 **D. Mannion has not been adequately reimbursed.**

27 Zep argues that there are “disputed issues of material fact as to whether [Mannion’s]
28 expenses exceeded the various reimbursements he received from Zep in the form of Zep’s

1 enhanced compensation structure (the elevated commission rate), monthly draw [part of the
2 commission], electronic credit program, and separate reimbursements.” Dkt. No. 94 at 24-25.
3 The Court addresses each of the supposed “various reimbursements” below.

4 Zep has not provided any evidence of the total amount of the “various reimbursements”
5 that Mannion purportedly received; rather, Zep argues that Mannion has not provided sufficient
6 evidence that Mannion’s reasonable and necessary business expenses exceed whatever amount of
7 reimbursements he received. The problem with Zep’s argument is that Zep did not reimburse
8 Mannion *at all* for at least one category of Mannion’s reasonable and necessary business expenses:
9 his automobile expenses.⁷ Zep argues that Mannion received an “elevated commission” which
10 covered his expenses, presumably including his automobile expenses.⁸ But as explained below,
11 as a matter of law, Zep cannot establish that it utilized an “elevated commission” (and the monthly
12 draws against the commission) under Section 2802 to reimburse Mannion’s expenses.

13 1. Elevated commission rate and advances against commission

14 The California Supreme Court has held that an employer may discharge its obligation
15 under Section 2802 “through an increase in base salary or in commission rates.” *Gattuso*, 169
16 P.3d at 900. However, to do so, “the employer must provide some method or formula to identify
17 the amount of the combined employee compensation payment that is intended to provide expense
18 reimbursement.” *Id.* Using that method or formula, the employee “can readily determine whether
19 the employer has discharged all of its legal obligations as to both wages and business expense
20 reimbursement.” *Id.* As the California Supreme Court explained, the requirement that an

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22 ⁷ To get summary judgment as to Zep’s liability, Mannion must establish that his expenses exceed
23 his reimbursements; he does not need to establish that he is entitled to \$75,000 at this stage—that
24 is a question for the damages phase. *See* Desimone, 1999 WL 33226248, *7 (“To establish
25 liability [under Section 2802], however, Plaintiffs need not introduce evidence of every
26 expenditure; rather, they must submit evidence that they incurred expenses in each of the
27 categories of necessary expenses for which they seek to recover. If Plaintiffs succeed in
28 demonstrating that they incurred necessary expenses, they will be required to present evidence
regarding the extent of such expenditures at the damages phase of the action.”).

⁸ The other purported reimbursements do not relate to automobile expenses. The electronic credit
program relates specifically to Mannion’s phone and internet use for placing orders and the only
“separate reimbursements” identified by Zep relate to payments for airfare and perhaps lodging for
Mannion to attend trade shows in Las Vegas.

1 employer “communicate to its employees the method or basis for apportioning any increases in
2 compensation between compensation for labor performed and business expense reimbursement
3 . . . is necessary for effective enforcement of section 2802’s reimbursement provisions and, thus,
4 implicit in the statutory scheme. *Id.* at 901.

5 Zep argues that Mannion “received an elevated commission rate, under which 10% of his
6 commissions were intended to cover his out-of-pocket business related expenses.” Dkt. No. 94 at
7 17. In support, Zep cites the deposition testimony of its corporate designee,⁹ who testified that
8 Mannion’s “commission structure allowed him to pay expenses.” Grossman Depo. I at 79:14.
9 Grossman explained that Zep’s “commission structure is elevated over and above what normal
10 commissions are for a lot of our competitors which allows you to be able to pay some of your
11 expenses or all your expenses.” *Id.* at 79:18-21. Grossman testified that approximately 10% of
12 Mannion’s “earnings are to cover his day-to-day expenses.” *Id.* at 83:18-22. Asked whether it
13 was exactly 10%, Grossman responded

14 Well, they’re within -- I mean, it could be less. It really depends on
15 the earnings and the scenario and how much expense they had, but
16 10 percent of that earnings would normally more than cover the day-
to-day expenses, in my mind.

17 *Id.* at 140:1-5.

18 It is insufficient under *Gattuso* that Mannion’s commission “allowed” him to cover his
19 business expenses, or that 10% of his commission would “cover” his day-to-day expenses. To
20 satisfy *Gattuso*, an employer must i) provide some method or formula to identify the amount of
21 the commission that is intended to provide expense reimbursement and ii) communicate the
22 method or formula to its employees. 169 P.3d at 900-01. Zep has not done so.

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24 _____
25 ⁹ Mannion objects to various portions of the deposition testimony of Grossman offered by Zep in
26 support of its opposition to the motion for partial summary judgment. Dkt. No. 99. To the extent
27 that the Court relies on that testimony in this Order, the objections are OVERRULED. Since
28 Grossman testified as Zep’s corporate designee under Federal Rule of Civil Procedure 30(b)(6),
his lack of personal knowledge is not a basis to exclude his testimony. *See* Fed. R. Civ. P.
30(b)(6). Zep’s objections to the portions of Grossman’s deposition transcript submitted with
Mannion’s reply brief are also OVERRULED. Dkt. No. 100. To the extent that that portion of
the transcript is cited in this Order, the Court finds that Mannion appropriately responded to
arguments raised in Zep’s opposition that Mannion could not have anticipated.

1 Even assuming that Mannion’s commission was in fact “elevated” 10% to cover his
2 expenses,¹⁰ it is uncontroverted that no one ever communicated this “method or formula to
3 identify the amount of the combined employee compensation payment that is intended to provide
4 expense reimbursement” to Mannion. *Id.* at 900. Mannion declared unambiguously that no one at
5 Zep ever told him that part of his commissions “were intended to cover expenses or that part of
6 [his] commissions were intended to reimburse [him] for business-related expenses” and that he
7 “was never given any type of method and/or formula informing [him] what portion, if any, of the
8 payments made to [him] by ZEP were intended as reimbursement for business related expenses
9 incurred in performing [his] duties for ZEP.” Mannion Decl. ¶¶ 6, 18. For his part, Grossman
10 testified that he did not know whether anyone at Zep ever told Mannion that 10% of his
11 commission was intended to reimburse him for expenses. Grossman Depo. I at 140:6-10. At oral
12 argument, counsel for Zep confirmed that there is no evidence in the record that anyone at Zep
13 ever told Mannion that 10% of his commission was intended to reimburse him for expenses. Dkt.
14 No. 105 at 2:21-3:9.

15 Nor was there a written policy during the relevant time stating that any portion of
16 Mannion’s commission was allocated for expense reimbursement. Grossman Depo. II at 37:17-21
17 (“Q: During the period of time December 2006 through June 30th, 2011, to your knowledge, did
18 Zep have a written expense reimbursement policy that would have applied to Dan Mannion? A:
19 Not to -- no, not that I would be aware of.”). On the contrary, the Sales Representative Contract
20 governing Mannion’s employment with Zep specifically stated that “all expenses incurred by
21 [Mannion] in connection with employment . . . shall be paid by [Mannion] and *shall not be*
22 *reimbursed by Company.*” Sales Representative Contract ¶ 4(d) (emphasis added). Based in part
23 on that contract, Mannion understood that he would be fully responsible for paying all expenses
24 associated with performing his duties for Zep “and that [he] would not be reimbursed at all by the
25 company.” Mannion Decl. ¶ 11.

26 _____
27 ¹⁰ Tellingly, Grossman testified that his understanding that Zep paid Mannion an “elevated”
28 commission to cover expenses was not based on any policy or other information from Zep, but
“from talking to people in various industries and just asking questions.” Grossman Depo. II at
207:20-21.

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At oral argument, counsel for Zep argued that, under *Gattuso*, Zep’s failure to communicate the elevated commission structure to Mannion implicates Section 226, which requires employers to provide employees itemized wage statements, but not Section 2802. Counsel argued that:

[T]he communication issue is one that is perhaps a 226 violation, or issue. But not one under 2802, because the actual inquiry under 2802 should be whether or not reimbursement occurred. And that the requirement or the suggestion that communication take place was a direction from the *Gattuso* court about how to comply with 226.

Dkt. No. 105 at 3:17-22.

The Court disagrees. As noted above, in *Gattuso*, the California Supreme Court concluded that an employer may satisfy Section 2802 through increases in base salary or increases in commission rates, or both. *Gattuso* referred to Section 226, but only to reject the argument that satisfying Section 2802 through increases in base salary or increases in commission rates ran afoul of Section 226’s obligation to itemize employee compensation payments. *Gattuso*, 169 P.3d at 901 (“We next consider plaintiffs’ argument that providing section 2802 automobile expense reimbursement through enhanced employee compensation, in the form of increases in base salary and/or commission rates, would violate or be inconsistent with an employer’s obligation under section 226, subdivision (a), to itemize employee compensation payments.”). Counsel is correct that *Gattuso* provides “direction . . . about how to comply with 226”: employers that satisfy Section 2802 through increases in commission rates “should, in providing the documentation required by section 226, subdivision (a), separately identify the amounts that represent payment for labor performed and the amounts that represent reimbursement for business expenses.” *Id.* at 901 n.6. The requirement in Section 226 that employers separately *identify the amounts* that represent payment and reimbursement is separate from the requirement that an employer communicate to its employees the *method or basis* for apportioning any increases in compensation between compensation for labor and expense reimbursement. Indeed, the court explained that the requirement that an employer communicate the method or basis for apportioning any increases in compensation between labor and expense reimbursement “is necessary for effective enforcement

1 of section 2802’s reimbursement provisions and, thus, implicit in the statutory scheme.” *Id.*

2 As it is uncontroverted that Zep did not “communicate to [Mannion] the method or basis
3 for apportioning any increases in compensation between compensation for labor performed and
4 business expense reimbursement,” Zep’s purported “elevated” commission does not satisfy
5 Section 2802. Given that the “elevated” commission—and the draws against the commission—is
6 the only purported reimbursement related to Mannion’s automobile expenses, Mannion has
7 sufficiently established that he was never reimbursed for any automobile expenses during the
8 relevant time period. The Court thus finds that Mannion’s motion for partial summary judgment
9 should be granted as to Zep’s liability for failure to reimburse Mannion’s automobile expenses
10 under Section 2802.

11 2. Electronic Credit Program

12 Mannion concedes that on occasion he received credits from Zep as part of the electronic
13 credit program to incentivize him to place orders online instead of over the phone. Mannion
14 Depo. at 100:22-101:8. Mannion also notes that he was docked \$10 on several occasions for
15 placing orders over the phone. Mannion Decl. ¶ 6; Dkt. No. 98 at 16. Mannion testified that the
16 credit “was something that appeared sometimes,” (Mannion Depo. at 101:18-19), but neither side
17 has provided evidence indicating how much money Mannion received under this program.

18 Mannion claims that he incurred approximately \$100 in expenses every month in phone
19 and internet expenses. Dkt. No. 91-18. However, Mannion admits that he also used the phone
20 and internet for personal purposes. Mannion Depo. at 7:17-21, 98:1-25. As a consequence, the
21 Court cannot determine which portion of the \$100 was reasonable, necessary and incurred as a
22 direct consequence of Mannion’s duties, and there is a question of fact whether his computer and
23 phone expenses exceed any credits received from Zep. Summary judgment as to Zep’s failure to
24 reimburse Mannion’s cell phone and internet expenses is not appropriate.

25 3. Separate reimbursements

26 Zep argues that Mannion’s receipt of various “separate reimbursements,” in combination
27 with the other reimbursements mentioned above, creates a disputed issue of material fact as to
28 whether Mannion’s expenses exceed his reimbursements. But the only specific “separate”

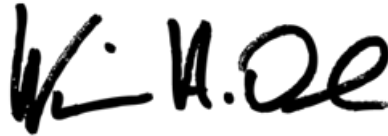
1 reimbursements that Zep identifies are payments for Mannion’s airfare and lodging in connection
2 with his attendance at two industry trade shows in Las Vegas. Dkt. No. 94 at 9 (citing Mannion
3 Depo. at 47:18-48:6). As Mannion does not appear to claim that he is owed any expenses from
4 these trips, these “separate reimbursements” are irrelevant to this motion.

5 **CONCLUSION**

6 For the reasons stated, the Court GRANTS Mannion’s motion for partial summary
7 judgment as to Zep’s liability under California Labor Code Section 2802 for failure to reimburse
8 Mannion’s business-related automobile expenses only. The amount of Mannion’s damages
9 remains to be determined. The Court DENIES Mannion’s motion for partial summary judgment
10 as to all other categories of Mannion’s alleged business expenses because there are material facts
11 in dispute.

12
13 **IT IS SO ORDERED.**

14 Dated: October 10, 2013



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WILLIAM H. ORRICK
United States District Judge