

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

THOMAS HENNIGHAN,  
Plaintiff,  
v.  
INSPIHERE INSURANCE SOLUTIONS,  
INC, et al.,  
Defendants.

Case No. 13-cv-00638-JST

**ORDER GRANTING IN PART AND  
DENYING IN PART INSPHERE’S  
MOTION TO DISMISS**

Re: ECF No. 10

In this action, Plaintiff Thomas Hennighan sues Defendant Insphere Insurance Solutions, Inc. (“Insphere”) and other defendants<sup>1</sup> for wrongful termination in violation of public policy, and for violations of the California Labor Code. ECF No. 1. Now before the Court is Defendants’ Motion to Dismiss the Complaint. ECF No. 10. For the reasons stated below, the Court GRANTS the motion as to Plaintiff’s fifth and ninth causes of action and DENIES it as to the remaining claims.

**I. FACTS**

The Court takes the following facts as established for purposes of this motion. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).

Mr. Hennighan sold insurance as a Sales Agent for Insphere from May 2005 to April 27, 2012.<sup>2</sup> At least during his last two years with Insphere, Mr. Hennighan was one of the top Sales Agents at the company, and he earned many awards and accolades in recognition of his

<sup>1</sup> The other defendants are alleged to be owners or investors in Insphere. Because none of their alleged actions are relevant to this motion, the Court focuses its discussion solely on Insphere.

<sup>2</sup> The Complaint is unclear as to whether Mr. Hennighan was a Sales Agent during this entire time, or whether he held a different title for part of it. See Dkt. No. 10, ¶¶ 10, 15, 16, 21. The ambiguity does not affect the Court’s ruling on the present motion.

1 accomplishments.

2 During most of his time at Insphere, Mr. Hennighan believed that Insphere was not paying  
3 its sales staff properly.<sup>3</sup> Among other things, Mr. Hennighan believed that Insphere was not  
4 paying overtime when required; was not providing meal and rest breaks; was not providing  
5 vacation hours; was not reimbursing expenses necessarily incurred by employees in the  
6 performance of their duties; was not paying its employees twice a month, as required; and was not  
7 providing itemized wage statements.

8 On November 11, 2011, Mr. Hennighan filed a complaint with the California Labor  
9 Commissioner reporting these alleged labor code violations. After he filed his complaint, his  
10 direct supervisor told him he was “causing problems,” that filing it was “not a smart move,” that  
11 he would “have no friends,” and not to “throw this job away.” Mr. Hennighan had witnessed  
12 Insphere retaliate against other Insphere salespeople and managers, and he feared that Insphere  
13 would retaliate against him as well.

14 Mr. Hennighan attended a hearing to address his complaint before the Labor  
15 Commissioner on January 30, 2012.

16 On or about April 27, 2012, Insphere notified Mr. Hennighan that his “Independent  
17 Contractor Agreement” was being canceled, thereby terminating his employment. He filed a  
18 retaliation complaint with the Labor Commissioner on October 25, 2012, and with the California  
19 Labor & Workforce Development Agency on November 8, 2012.

20 Plaintiff then filed this action, alleging violation of California Labor Code sections 98.6  
21 and 1102.5 (retaliation); wrongful termination in violation of public policy; violation of Labor  
22 Code section 201 (failure to deliver final paycheck); violation of Labor Code sections 227 and  
23 227.3 (failure to deliver vacation pay); violation of Labor Code section 204 (misclassification and  
24 failure to pay wages periodically); violation of Labor Code section 226 (failure to provide  
25 itemized wage statement); violation of Labor Code sections 226.7 and 512 (failure to provide meal

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27 <sup>3</sup> In addition to Sales Agents, the sales staff at Insphere consists of Sales Leaders (who supervise  
28 Sales Agents, and also make direct sales) and Division Managers (who train and supervise Sales  
Agents and Sales Leaders).

1 breaks or rest periods); violation of Labor Code sections 510 and 1194 (failure to pay overtime);  
2 violation of Labor Code section 2802 (failure to indemnify for necessary expenditures); violation  
3 of Business & Professions Code section 17200 (unlawful, unfair, and fraudulent business  
4 practices); entitlement to penalties and fees pursuant to Labor Code sections 2698 and 2699  
5 (Labor Code Private Attorneys General Act); and entitlement to punitive damages.

6 Insphere then filed this motion to dismiss. ECF No. 10.

7 **II. LEGAL STANDARDS**

8 On a motion to dismiss, the Court accepts the material facts alleged in the  
9 complaint, together with reasonable inferences to be drawn from those facts, as true.  
10 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). However, “the tenet that a court  
11 must accept a complaint’s allegations as true is inapplicable to threadbare recitals of a  
12 cause of action’s elements, supported by mere conclusory statements.” *Ashcroft v. Iqbal*,  
13 556 U.S. 662, 678 (2009). To be entitled to the presumption of truth, a complaint’s  
14 allegations “must contain sufficient allegations of underlying facts to give fair notice and  
15 to enable the opposing party to defend itself effectively.” *Starr v. Baca*, 652 F.3d 1202,  
16 1216 (9th Cir. 2011), cert. *den’d*, --- U.S. ----, 132 S.Ct. 2101 (2012).

17 To survive a motion to dismiss, a plaintiff must plead “enough facts to state a  
18 claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S.  
19 544, 570 (2007). Plausibility does not mean probability, but it requires “more than a  
20 sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S., at 678. “A  
21 claim has facial plausibility when the plaintiff pleads factual content that allows the court  
22 to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
23 *Id.* “If there are two alternative explanations, one advanced by [D]efendant and the other  
24 advanced by [P]laintiff, both of which are plausible, [P]laintiff’s complaint survives a  
25 motion to dismiss under Rule 12(b)(6). Plaintiff’s complaint may be dismissed only  
26 when [D]efendant’s plausible alternative explanation is so convincing that [P]laintiff’s  
27 explanation is implausible.” *Starr*, 652 F.3d at 1216. Dismissal is appropriate given the  
28 lack of a cognizable legal theory or the absence of sufficient facts alleged under a

1 cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533–34  
2 (9th Cir.1984).

3 If the court dismisses a claim for failure to meet these standards, it should grant  
4 leave to amend unless it is clear that no amendment could possibly cure the complaint.  
5 *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998).

6 **III. ANALYSIS**

7 Hennighan alleges that Insphere violated the California Labor Code by retaliating  
8 against him for reporting violations to the Labor Commissioner, failing to pay him his  
9 final paycheck, and treating him as an independent contractor rather than an employee,  
10 thereby failing to comply with several provisions of the Labor Code. Hennighan also  
11 brings a common law claim for wrongful termination in violation of public policy as well  
12 as violations of the Private Attorney General Act (“PAGA”) and California’s Unfair  
13 Competition Law (“UCL”). Those claims derive from the Labor Code violations.

14 Insphere moves to dismiss Mr. Hennighan’s complaint on the grounds that he has  
15 failed to state a prima facie claim for (1) retaliation, (2) failure to pay wages, (3) each of  
16 the Labor Code misclassification violations, and (4) the common law wrongful  
17 termination claim. Because Insphere argues that each Labor Code claim must be  
18 dismissed, it also argues that Mr. Hennighan’s derivative statutory claims must also be  
19 dismissed. Finally, Insphere moves to dismiss Plaintiff’s claim for punitive damages.

20 The Court now examines each of these in turn.

21 **A. Violations of California Labor Code**

22 **i. Retaliation (Sections 98.6 and 1102.5)**

23 To plead a prima facie case of retaliation under California Labor Code sections 98.6 and  
24 1102.5, Mr. Hennighan must allege that (1) he engaged in a protected activity, that (2) Insphere  
25 subjected him to an adverse action, and that (3) there is a “causal link” between the two. See  
26 *Patten v. Grant Joint Union High Sch. Dist.*, 134 Cal. App. 4th 1378, 1384 (Cal. Ct. App. 2005).  
27 Insphere does not dispute that Hennighan has satisfied the first two requirements, but argues that  
28 his allegations regarding the causal link between the two “could hardly be more conclusory.” ECF

1 No. 10 at 5.

2 Plaintiffs may prove retaliation via direct evidence, circumstantial evidence, or both.  
3 Crucially, “[t]he causal link may be established by an inference derived from circumstantial  
4 evidence, ‘such as the employer’s knowledge that the [employee] engaged in protected activities  
5 and the proximity in time between the protected action and allegedly retaliatory employment  
6 decision.’” *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 615 (Cal. Ct. App. 1989)  
7 (citing *Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir.1988)).

8 Mr. Hennighan alleges that he complained to the Labor Commissioner in November 2011  
9 for what he, in good faith, believed were violations of the California Labor Code, and that  
10 Insphere terminated his employment a few months later, in April 2012. Plaintiff also alleges that  
11 his direct supervisor knew and disapproved of his decision to file that complaint. From those  
12 allegations, it is plausible to conclude that Insphere terminated Plaintiff in retaliation for filing his  
13 complaint. Plaintiff’s allegations are therefore sufficient to sustain a claim of violation of section  
14 1102.5.<sup>4</sup>

15 **ii. Failure to Pay Wages (Section 201)**

16 Defendant moves to dismiss Plaintiff’s section 201 claim for failure to pay wages because,  
17 according to Defendant, Plaintiff must specify the amount of unpaid wages at issue in the  
18 complaint, and Plaintiff has failed to do so.

19 The Court is not persuaded by that argument. Plaintiff alleges that Insphere failed to pay  
20 him his final paycheck, which are sufficient facts “from which the amount of the claimed penalty  
21 can be computed.” *Oppenheimer v. Moebius*, 151 Cal. App. 2d 818, 820 (Cal. Ct. App. 1957).  
22 That allegation is sufficient for Insphere to compute the wages Plaintiff seeks, which is all that is  
23 required. *Id.*

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25 \_\_\_\_\_  
26 <sup>4</sup> Insphere also argues that Plaintiff has failed to exhaust his administrative remedies with respect  
27 to his retaliation claim. Because Insphere raised this argument for the first time in its reply brief,  
28 the Court declines to consider it. “It is improper for a moving party to introduce new facts or  
different legal arguments in the reply brief than those presented in the moving papers.” *U.S. ex  
rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000).

1           **iii. Misclassification Violations (Sections 227, 227.3, 204, 226.7, 510, 512, 1194)**

2           Defendants next assert that several of Plaintiff’s Labor Code claims merely recite the  
3           statutory elements of each claim and are inadequate to put Defendants on notice of the claims  
4           against them. These arguments apply to Mr. Hennigan’s claims that Insphere failed to: pay him  
5           vacation pay (sections 227 and 227.3); pay him his wages twice a month (section 204); furnish an  
6           itemized statement, in writing, of his wages (section 226); permit him to take meal and rest breaks  
7           (section 226.7); pay him overtime pay (sections 510 and 1194); and indemnify him for necessary  
8           expenditures incurred by him in discharging his duties (section 2802).

9           The crux of each of Plaintiff’s misclassification claims is that the nature of Plaintiff’s  
10          employment rendered him an employee, rather than an independent contractor, for purposes of the  
11          California Labor Code. If Hennigan was an employee, then Insphere’s failure to afford him the  
12          rights and protections listed above could expose it to liability; if he was an independent contractor,  
13          Plaintiff will not be able to prevail on his misclassification claims.

14          California law presumes an employer/employee relationship once evidence has been  
15          presented that an individual provided services for an employer. The burden then shifts to the  
16          employer to prove, if it can, that the presumed employee was an independent contractor. See  
17          Narayan v. EGL, Inc., 616 F3d 895, 900 (9th Cir. 2010). That legal question turns on the  
18          “economic reality” of Plaintiff’s employment and is a context-specific and fact-intensive question.  
19          See Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 755 (9th Cir. 1979) (“Economic  
20          realities, not contractual labels, determine employment status . . .”).

21          Several factors enter into the question, including the employer’s right to control the  
22          manner and means of performance, whether the employment relationship may be terminated at  
23          will, whether the worker engages in an occupation or business distinct from the employer’s, the  
24          degree of supervision the employer exercises over the employee, the skill required to perform the  
25          work, who provides the instrumentalities and place of work, the length of time for which services  
26          are performed, whether the employee may hire and fire others, and how payment for services is  
27          calculated. See S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations, 48 Cal. 3d 341, 548;  
28          Division of Labor Standards Enforcement 2002 Enforcement Policies & Interpretations Manual §

1 28.3.2.1 (setting forth factors for determining employment status).

2           Against this legal backdrop, the Court finds that Mr. Hennighan’s factual allegations are  
3 sufficient to survive a motion to dismiss. Plaintiff alleges that he was employed by Insphere, that  
4 he was paid by commission (8.5% from 2005 to 2010, and then 6%), that those commissions were  
5 paid as loans representing advances on unconsummated sales, that Insphere told him he was an  
6 independent contractor, that for at least two years he held the title of “Sales Agent,” and that  
7 Insphere: (1) transfers, promotes, and fires Sales Agents; (2) determines all sales territories;  
8 (3) prohibits employees from business associations with other insurance companies unless they  
9 have a pre-existing contractual relationship with one; (4) restricts which products its employees  
10 can sell; (5) requires employees to attend weekly meetings, make regular call-ins, file regular  
11 reports, meet performance goals, attend out-of-town training, and attend out-of-town reunions;  
12 (6) refuses to mail commission checks so that its salespeople will come to the office in person;  
13 (7) controls the approval of content and timing of advertising; (8) controls which products are  
14 offered; (9) determines commissions and commission rates; (10) requires commissions to be  
15 turned over to Insphere, which then has the right to redistribute commissions “as it sees fit”;  
16 (11) owns and controls all sales prospects and clients and requires salespeople to purchase leads  
17 from Insphere; (12) determines whether to accept insurance applications brought in by  
18 salespeople; (13) calculates employee wages and commissions using a formula based on the  
19 anticipated profits of a newly accepted insurance application; (14) offers stock options and 401(K)  
20 plans to employees, which benefits are forfeit if employees “associate” with other insurance  
21 companies; (15) tells employees they may be terminated without cause at any time; (16) provides  
22 performance and conduct “guidelines,” and requires employees to follow them; (17) requires  
23 performance reviews to be conducted on supervising salespeople; (18) requires employees to sign  
24 a non-compete agreement; and (19) requires employees to indemnify Insphere for all torts, fraud,  
25 and statutory violations.

26           In addition, Mr. Hennighan alleges: that Insphere maintains and uses employment  
27 contracts that provide for vacation pay, but did not pay him vacation pay; that Insphere did not pay  
28 him twice a month; that Insphere never provided him with itemized wages statements; that

1     Insphere never provided him meal and rest breaks; and that Insphere never paid him overtime pay.

2             With respect to most of Plaintiff’s claims, his allegations are highly factual and specific,  
3     exceeding Plaintiff’s pleading burden. Plaintiffs are not required to allege the non-existence of  
4     something, such as vacation pay and overtime pay, with any greater specificity than  
5     Mr. Hennighan has done here. “[T]here is no more factual content Plaintiff could have alleged.”  
6     Yuckming Chiu v. Citrix Sys., Inc., No. 11-cv-1121-DOC, 2011 WL 6018278, at \*3 (C.D. Cal.  
7     Nov. 23, 2011) (original emphasis).<sup>5</sup> Except as set forth below, the motion to dismiss his Labor  
8     Code claims will therefore be denied.

9             However, Insphere is correct that Plaintiff has failed to state a claim based on a violation of  
10     the indemnification requirement in the Labor Code. Apart from the bare allegation that Insphere  
11     violated California Labor Code section 2802, which pertains to an employer’s indemnification of  
12     an employee for necessary job-related expenditures, Plaintiff does not identify any expenditures he  
13     made that would support a claim under section 2802, and the Court therefore DISMISSES that  
14     claim with leave to amend.

15             Insphere also argues that Plaintiff’s fifth cause of action, based on Labor Code section 204,  
16     which requires employers to pay employees twice a month, does not create a private right of  
17     action. Mr. Hennighan concedes the point, but argues correctly that PAGA, Cal. Lab. Code §  
18     2698, et seq., created a private right of action for employees to seek civil penalties for violations of  
19     the Labor Code, including section 210, which authorizes civil penalties for violations of section  
20     204, (as alleged in Plaintiff’s eleventh cause of action). The Court therefore DISMISSES Mr.  
21     Hennighan’s fifth cause of action, but recognizes that he may still seek the civil penalties for  
22     violations of Labor Code section 204 provided for in Labor Code section 210.

23             Finally, Insphere argues that Plaintiff’s section 226 itemized wage statement claim must  
24     fail because Hennighan does not allege a “knowing and intentional failure” to provide such  
25     statements, and because Plaintiff fails to allege any injury as a result of the wage statement

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27     \_\_\_\_\_  
28     <sup>5</sup> Insphere’s cases do not hold otherwise. Those courts considered complaints that recited the  
   statutory elements of the claims and alleged nothing more. See, e.g., Weigele v. FedEx Ground  
   Package Sys., Inc., No. 06-cv-1330, 2010 WL 4723673 \*3 (S.D. Cal. Nov. 15, 2010).

1 violation. Section 226 forecloses both arguments.

2 First, Plaintiff alleges that Insphere classified him as an independent contractor  
3 purposefully. The statute itself provides only that “a ‘knowing and intentional failure’ does not  
4 include an isolated and unintentional payroll error due to a clerical or inadvertent mistake,”  
5 making clear that an allegation of purposeful misclassification is required. Cal. Lab. Code §  
6 226(e)(3). That allegation is all the statute requires, and Plaintiff has so alleged.

7 Second, the statute provides that “[a]n employee is deemed to suffer injury for purposes of  
8 this subdivision if the employer fails to provide a wage statement.” Cal. Lab. Code  
9 § 226(e)(2)(A). Plaintiff alleges that he did not receive any wage statements. That allegation is  
10 sufficient.

11 In summary, the Court DENIES Defendant’s motion to dismiss Plaintiff’s misclassification  
12 claims except for his Labor Code section 2802 claim, which is DISMISSED with leave to amend,  
13 and his section 204 claim, which is DISMISSED with prejudice.

14 **B. Wrongful Termination in Violation of Public Policy**

15 Insphere moves to dismiss Plaintiff’s common law claim and argues that he has failed  
16 adequately to plead a claim for wrongful termination in violation of public policy, the elements of  
17 which are essentially identical to those of Plaintiff’s section 1102.5 retaliation claim. For the  
18 reasons discussed above, Insphere’s motion to dismiss the common law claim is DENIED.  
19 Plaintiff has pled sufficient facts to make out a claim for wrongful termination in violation of  
20 public policy.

21 **C. Violation of California’s Unfair Competition Law and the Private Attorney  
22 General Act (Section 2698)**

23 The parties agree that Plaintiff’s statutory claims under California’s UCL, Bus. & Prof.  
24 Code § 17200, and PAGA, Cal. Lab. Code § 2698, are entirely derivative of his Labor Code  
25 claims. Because the Court denies Insphere’s motion to dismiss the bulk of those claims, the Court  
26 also DENIES Insphere’s motion to dismiss the UCL and PAGA claims.

27 **D. Punitive Damages**

28 Insphere and Mr. Hennighan agree the only claims in his complaint for which punitive

1 damages are available are the retaliation claims (Labor Code section 1102.5 and common law  
2 wrongful termination in violation of public policy). Insphere moves to dismiss the punitive  
3 damages prayer on those claims based on the pleading standards set out by Twombly and Iqbal.

4 District courts in this circuit have disagreed over whether the pleading standards may be  
5 used to dismiss a prayer for punitive damages. Compare *Kelley v. Corrections Corp. of America*,  
6 750 F. Supp. 2d 1132, 1136 (E.D. Cal. 2010) (“dismissing” punitive damages from complaint),  
7 with *Putini v. Blair Corp.*, 09-cv-2729-W, 2010 WL 1797019, at \*2–3 (S.D. Cal. May 3, 2010)  
8 (declining to extend *Iqbal* to punitive damages claims).

9 This Court is not persuaded that *Twombly* and *Iqbal* apply to claims for punitive damages.  
10 Even if they did, however, the Court finds that Plaintiff has satisfied his burden of specifically  
11 alleging the facts that would support an award of punitive damages. The Court therefore DENIES  
12 Insphere’s motion to dismiss Plaintiff’s prayer for punitive damages.

13 **IV. CONCLUSION**

14 For the reasons discussed above, the Court orders as follows:

- 15 1. Plaintiff’s fifth cause of action based on violations of California Labor Code section  
16 205 is hereby DISMISSED with prejudice.
- 17 2. Plaintiff’s ninth cause of action based on violations of California Labor Code section  
18 2802 is hereby DISMISSED with leave to amend.
- 19 3. In all other respects, Defendant Insphere’s Motion to Dismiss Plaintiff’s Complaint is  
20 DENIED.
- 21 4. Plaintiff shall have thirty days to file his First Amended Complaint.

22 **IT IS SO ORDERED.**

23 Dated: April 24, 2013

24   
25 JON S. TIGAR  
26 United States District Judge

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