

JENNIFER SCHWARTZ, ESQ. (SBN 135932)
MENAKA FERNANDO, ESQ. (SBN 271380)
OUTTEN & GOLDEN LLP
One California Street, 12th Floor
San Francisco, CA 94111
Telephone: (415) 638-8800
Facsimile: (415) 638-8810
Email: jschwartz@outtengolden.com

Attorneys for Plaintiff
DAVID W. FERMINO

ENDORSED
FILED
San Francisco County Superior Court

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Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

DAVID W. FERMINO, an individual,

PLAINTIFF,

v.

KASOWITZ BENSON & TORRES LLP; and
DOES 1 through 20, inclusive,

DEFENDANTS.

Case No. **CGC-20-582116**

COMPLAINT FOR DAMAGES AND
DEMAND FOR JURY TRIAL

1. BREACH OF CONTRACT
2. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING
3. FAILURE TO TIMELY PAY WAGES DUE UPON SEPARATION OF EMPLOYMENT (CAL. LAB. CODE, §§ 201, subd. (a) & 203 subd. (a))
4. FAILURE TO TIMELY PAY WAGES DUE DURING EMPLOYMENT (CAL. LAB. CODE, § 204, subd. (a))
5. DISCRIMINATION BASED UPON RACE IN VIOLATION OF FEHA (CAL. GOV. CODE, § 12940, subd. (a))
6. DISCRIMINATION BASED UPON SEXUAL ORIENTATION IN VIOLATION OF FEHA (CAL. GOV. CODE, § 12940, subd. (a))
7. FAILURE TO TAKE REASONABLE STEPS TO PREVENT OR CORRECT DISCRIMINATION AND HARASSMENT IN VIOLATION OF FEHA (CAL. GOV. CODE, § 12940, subd. (k))
8. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
9. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
10. WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY
11. DEFAMATION

UNLIMITED JURISDICTION
Amount in Controversy Exceeds \$25,000

David Fermino (“Plaintiff”) alleges the following:

NATURE OF THE ACTION

1. This is an individual breach of contract and civil rights action brought by Plaintiff David Fermino against his former employer, Kasowitz Benson Torres LLP (“Defendant,” “Kasowitz,” or “the Firm,” and together with Does 1 through 20, “Defendants”).

2. Plaintiff is an experienced, talented, successful and widely-respected 58-year-old openly gay, African American attorney, who has over twenty-five years of experience representing individuals and corporate clients in white-collar and other types of criminal and regulatory matters.

3. In or around late fall of 2016, Plaintiff began negotiating with Defendant to leave his then current firm to join Kasowitz’s San Francisco office. Ultimately, the parties agreed that Plaintiff would join Kasowitz as a non-equity partner and be paid a pre-set salary of \$400,000 per year, prorated for the time he worked in 2017 and 2018. The parties memorialized this agreement in an offer of employment (“Offer Letter”), dated May 5, 2017, which clearly stated that Plaintiff would join the Firm as a “Partner” and would be paid a base annual salary of \$400,000 for the remainder of the 2017 and the 2018 calendar years. The Offer Letter also stated that, in January 2019, Plaintiff would, for the first time, be expected to make a capital contribution in the amount of \$50,000.

4. The Kasowitz partnership agreement (“Partnership Agreement”) provides for two levels of partnership, the first being an equity partner with an “interest” or equity stake in the Firm and the second being a “Special Partner.” The Partnership Agreement provides that the terms of a Special Partner’s employment shall be documented in a separate agreement between the Special Partner and the Firm and that the Special Partner’s “partnership” shall not be subject to the terms and conditions of the Partnership Agreement. Pursuant to the Partnership Agreement, Special Partners have no equity interest in the Firm, no voting rights, no rights to distributions of Firm income beyond the compensation set forth in a separate agreement, and no responsibility for Firm debt.

5. In short, Kasowitz Special Partners, despite their title as “Partner,” have no equity interest in the Firm, no points under the Firm’s point system (used to allocate funds to partners), and

1 no voting rights. As a Special Partner, Plaintiff's employment was subject to the terms of the Offer
2 Letter, including the salary amount and term.

3 6. Plaintiff began his employment with Kasowitz on June 5, 2017 and almost
4 immediately realized that he – the only African American and openly gay partner in the San
5 Francisco office – was treated differently than other white and straight partners. Kasowitz blatantly
6 failed to provide Plaintiff with the same business opportunities, professional support and
7 professional courtesies and benefits that it provided to similarly-situated white and straight partners.
8 Plaintiff also overheard racist comments about African Americans on a number of occasions
9 throughout his employment.

10 7. During the course of 2018, the Firm reneged on numerous promises to assist Plaintiff
11 in developing business and to supply him with billable legal work. Worse, less than a year into
12 Plaintiff's employment, Kasowitz, without notice, began reducing the monthly wages it paid to
13 Plaintiff, telling him that he would be "trued up" later in his employment. In mid-2018, without
14 "truing up" or otherwise making up for the diminished compensation, Kasowitz terminated
15 Plaintiff's employment without any notice, let alone a prior conversation about his work, clients,
16 billable hours or his performance, again denying Plaintiff the opportunity, professional respect and
17 courtesy common in the profession that Kasowitz afforded straight and white partners. At the time
18 Kasowitz terminated Plaintiff's employment, it had not made up its deficient salary payments to
19 Plaintiff and refused to pay him more than \$190,000 in unpaid salary owed to him for 2017 and
20 2018.

21 8. When Plaintiff asked to be paid the salary amounts due and owing pursuant to the
22 Offer Letter, Kasowitz began making false and defamatory statements both internally and externally
23 about Plaintiff's performance in an effort to intimidate him and silence his efforts to obtain funds
24 that were contractually due him.

25 9. Plaintiff now alleges breach of contract, breach of the covenant of good faith and fair
26 dealing, and violations of Labor Code sections 201, 203, and 204. Plaintiff also alleges violations of
27 the Fair Employment and Housing Act ("FEHA") based upon race and sexual orientation
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1 discrimination, failure to prevent discrimination from occurring, wrongful termination in violation of
2 public policy, defamation, and intentional and negligent infliction of emotional distress.

3 **PARTIES**

4 10. Plaintiff is an individual and at all times relevant to this litigation was a resident of
5 the County of San Francisco, California. At all times relevant to this Complaint, Plaintiff was an
6 employee within the meaning of California Government Code sections 12940 and 12945.

7 11. Plaintiff is informed and believes and thereon alleges that Defendant KASOWITZ
8 BENSON TORRES LLP is a New York-based limited liability partnership licensed to do business in
9 California, with an office in the County of San Francisco, California, where Plaintiff performed his
10 duties. Defendant Kasowitz hired Plaintiff, retained the right to and did fire him, supervised
11 Plaintiff's work, required Plaintiff to report to more tenured partners in the San Francisco office, and
12 paid him a set salary. Plaintiff's employment and compensation was subject to the terms of an Offer
13 Letter establishing a set annual compensation. Because Plaintiff did not share in the profits, losses
14 and/or liabilities of the Kasowitz partnership, Kasowitz was Plaintiff's employer within the meaning
15 of California Government Code sections 12926, 12940, and 12945.

16 12. Plaintiff is ignorant of the true names or capacities of the Defendants sued here under
17 the fictitious names DOES 1 through 20, inclusive. Plaintiff is informed and believes and thereon
18 alleges that each of the Doe Defendants was responsible in some manner for the occurrences and
19 injuries alleged in this Complaint.

20 13. Plaintiff is informed and believes and thereon alleges that at all times mentioned
21 herein, Defendants were acting on their own behalf and as agents or employees of each of the other
22 Defendants. The acts described herein were done in the course and scope of such agency or
23 employment with the consent, permission, and authorization of each of the other Defendants, as well
24 as on Defendants' own behalf.

25 **JURISDICTION AND VENUE**

26 14. The unlawful and discriminatory employment practices complained of herein
27 occurred in San Francisco County, California.

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16. On August 28, 2019, the DFEH issued to Plaintiff a notice of right to bring a civil action against Defendants based upon the charges described herein. A copy of Plaintiff's notice of his Right To Sue is attached hereto as **Exhibit A** and incorporated by reference as though fully set forth herein. In addition, Plaintiff complied in a timely manner with the requirements of California Government Code section 12962 by serving Defendants with the DFEH Charges and Right To Sue Letter by certified mail with return receipt requested, upon the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice.

17. Plaintiff David Fermino is a 58-year-old openly gay, African American attorney, who has over twenty-five years of experience representing individuals and corporate clients in white-collar and other types of criminal regulatory matters. Plaintiff is highly regarded within the California legal community and has served as the Chair and Vice-Chair of the California Judicial Nominee Evaluation Commission for the State Bar of California. Plaintiff has argued before the United States Supreme Court, the Court of Appeals for the Ninth Circuit (*en banc*) as well as numerous three judge panels, the California Supreme Court and the California Courts of Appeal, resulting in many significant published opinions. Throughout his multidecade career, Plaintiff has worked in the public sector and in private practice and has served as appointed counsel in both trial and appellate matters pursuant to the Criminal Justice Act. In 2019, Mr. Fermino was honored with the prestigious California Association of Black Lawyers' Loren D. Miller Lawyer of the Year Award.

1 18. In addition, Mr. Fermino has served as a member of the Board of Directors of the
2 ACLU of Northern California, the Board of Governors of the California Attorneys for Criminal
3 Justice, and as a member of the Board of Directors of California Poets in Schools – a non-profit that
4 trains and coordinates a multicultural network of published poets, who bring their passion and craft
5 to public and private schools, juvenile halls, hospitals, libraries and other community settings.

6 19. Mr. Fermino has written articles for Law 360, The Daily Journal, the Recorder, and
7 the Marijuana Industry News on cutting edge criminal law issues, including the intersection of
8 encryption technology and the Fifth Amendment and developments in the emergent cannabis
9 industry. He is a yearly contributing author to the CEB book “Scientific Evidence and Expert
10 Testimony in California” for which he co-authors a chapter on “Digital Forensics in Corporate
11 Environments.”

12 20. In or around late fall of 2016, Plaintiff began negotiating with Kasowitz to leave his
13 then-firm where he was a respected partner, to join Kasowitz’s white-collar practice in the San
14 Francisco office. During the negotiations, Kasowitz represented that, in addition to the work
15 Plaintiff told Kasowitz he would bring to the Firm, Plaintiff would be provided work on other
16 matters that the Firm would assign him. Ultimately the parties decided that Plaintiff would join
17 Kasowitz as a non-equity partner and be paid a set salary of \$400,000 per year for the remainder of
18 the 2017 and 2018 calendar years. Plaintiff was told that, in January of 2019, he would be required
19 to make a capital contribution in order to enjoy the benefits of equity partnership.

20 21. On May 5, 2017, Kasowitz presented Plaintiff with an Offer Letter attached hereto as
21 **Exhibit B** and incorporated by reference as though fully set forth herein. The Offer Letter specified
22 that Plaintiff would:

23 . . . join [Kasowitz] as a Partner with full rights and responsibilities under the
24 Partnership Agreement, and its resolutions and procedures except as modified herein.
25 *Your annualized base compensation of \$400,000* will be prorated for the balance of the
26 2017 calendar year, and remain at \$400,000 for the 2018 calendar year. In January
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1 2019, you will be expected to make a capital contribution in the amount of \$50,000.

2 (Emphasis added.)

3 22. At Kasowitz's suggestion, shortly after he received the Offer Letter, Plaintiff attended
4 a telephone conference with Firm management, including Executive Director Alan Capilupi, to
5 discuss the Offer Letter and address any questions that Plaintiff had. On that call, Mr. Capilupi told
6 Plaintiff, in sum and substance, "this is the standard agreement" and "everyone signs it." Also on
7 that call, Mr. Capilupi told Plaintiff, in response to his question about funds to make the \$50,000
8 capital contribution in January 2019, that other Kasowitz partners had successfully obtained
9 financing for the payment from Citibank.

10 23. Plaintiff also discussed with Lyn Agre – a primary agent involved the hiring
11 negotiations with Plaintiff – the terms of the Offer Letter. Ms. Agre reiterated that the compensation
12 structure in Plaintiff's Offer Letter, *i.e.*, serving as a non-equity partner for a period of time, being
13 paid a set salary during that time, and thereafter transitioning to become an equity partner required to
14 make capital contributions, was "standard" for new Kasowitz partners. She explained that only new
15 partners who were bringing to the Firm a substantial book of business were offered a different
16 arrangement.

17 24. Based on these assurances, Plaintiff executed the Offer Letter on May 9, 2017.

18 25. The compensation structure set forth in the Offer Letter purposefully protected both
19 parties against downside risks, *to wit*, the Firm would not have to share profits with Plaintiff and
20 Plaintiff would not be entitled to profits, but also would be guaranteed a salary.

21 26. Plaintiff was presented with the Partnership Agreement for the first time on his first
22 day of employment. No representative or agent of Kasowitz discussed with Plaintiff the terms of the
23 Partnership Agreement. Plaintiff was asked to immediately execute the agreement, which he did on
24 June 5, 2017.

25 27. Although the Offer Letter states that Plaintiff was to join Kasowitz as a Partner with
26 full rights and responsibilities under the Partnership Agreement, this simply was not true. In fact,
27 Plaintiff was afforded none of the significant rights under the Partnership Agreement. Plaintiff was
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1 not paid a partnership draw pursuant to the partnership “points” formula set forth in the Partnership
2 Agreement, but instead was to be paid the salary set forth in the Offer Letter. He was not given any
3 voting rights. When Plaintiff’s employment was terminated, he was not provided notice of
4 involuntary removal from the Kasowitz partnership as required by the Partnership Agreement.

5 28. While the Offer Letter did not use the term “Special Partner,” Plaintiff’s employment
6 was clearly dictated by that provision of the Partnership Agreement, which states:

7 Upon the determination of the Managing Partner and the concurrence of the Executive
8 Committee, an individual may be admitted to the Partnership as a non-equity partner
9 (“Special Partner”) *subject to the terms and conditions of a separate agreement between the*
10 *Partnership and such individual.* The status of an existing equity Partner may likewise be
11 changed to that of a non-equity partner by the Managing Partner and the Executive
12 Committee subject to the terms and conditions of a separate agreement between the
13 Partnership and such individual without a vote of the Partnership. *The rights of Partners set*
14 *for by this Partnership Agreement do not relate to Special Partners. The relationship*
15 *between Special Partners and the Partnership (and the individual Partners thereof) shall be*
16 *governed and controlled by the separate agreements entered into between Special Partners*
17 *and the partnership.* (Emphasis added.)

18 29. Neither the Offer Letter nor the simultaneous negotiations leading up to it made
19 Plaintiff’s salary contingent on his or the Firm’s performance or any other metrics such as realization
20 rate, profits, revenues, associate leverage, or billable hours.

21 30. Plaintiff was the only African American and openly gay partner in the San Francisco
22 office. When Mr. Fermino joined the Firm, he was one of only two African American partners out
23 of over 100 partners firmwide. At the time of his dismissal, Kasowitz had only four African
24 American partners; the percentage of African American partners was less than half that race’s
25 representation in the American population overall. Plaintiff is informed and believes that,
26 throughout his employment, the Firm had fewer than five openly gay partners.
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31. Kasowitz treated Plaintiff differently than other straight and white partners. Kasowitz failed to provide Plaintiff with the same business development opportunities that it provided to other white and straight partners. For example, during the negotiation process, Plaintiff was promised that after he was hired, the Firm would hold a marketing event in San Francisco to showcase and publicize his practice area. However, Kasowitz never planned the marketing event. Only after Plaintiff approached Ms. Agre, the Managing Partner of the San Francisco office, did the Firm suggest that Plaintiff's marketing event be combined with a previously scheduled marketing event for Daniel Saunders, a white, straight partner in Los Angeles who was hired around the same time as Plaintiff. By combining the marketing event with an event planned for another partner and holding it in Los Angeles where Mr. Saunders was based, the event offered far less professional value than Plaintiff would have realized had the event been held solely for him in San Francisco, where his client base was centered.

32. On another occasion, Kasowitz inexplicably, but apparently intentionally, excluded Plaintiff from attending a black-tie event in San Francisco celebrating African American in-house attorneys and partners, for which Kasowitz had purchased a table. Excluding Plaintiff not only embarrassed and humiliated him, it denied him important business development opportunities within the African American legal community.

33. Throughout his employment, Plaintiff repeatedly overheard racist comments. For example, one of the leaders in the San Francisco office commented to Plaintiff that it was "obvious" that an African American associate in the Silicon Valley office who was recently promoted to partner was "only promoted because he's black."

34. Plaintiff was paid his wages through the partner "draw" system and Kasowitz supplied Plaintiff with an IRS Form K-1, which is used to report each partner's distributive share of total partnership income.

35. Between Plaintiff's start date and December 2017, Kasowitz paid Plaintiff a salary of \$20,000 per month, or \$240,000 on an annualized basis, substantially less than his agreed upon compensation.

36. In December 2017, Plaintiff received an email addressed to all partners from Executive Director Mr. Capilupi stating that the Firm was experiencing cash flow problems and that partners could expect to be “trued up” (for amounts unpaid for 2017) on or before January 31, 2018.

37. Following this email, Plaintiff approached Mr. Capilupi to discuss his concerns. Plaintiff reminded Mr. Capilupi that, pursuant to the Offer Letter, he was entitled to his full pro-rated salary for 2017. Mr. Capilupi stated that he needed to discuss the issue with Managing Partner Marc Kasowitz.

38. In early January 2018, Plaintiff emailed Mr. Capilupi regarding the deficient salary payments. For clarity, Plaintiff attached the Offer Letter to his email. Mr. Capilupi responded via e-mail that he had conferred with Mr. Kasowitz, who he said agreed with Plaintiff's reading of the Offer Letter as requiring payment of Plaintiff's *guaranteed salary*, but that the Firm would not remit payment until on or before January 31, 2018. Mr. Capilupi also stated that Plaintiff's Offer Letter was poorly drafted.

39. After January 31, 2018, Kasowitz paid Plaintiff for a portion of the deficiency in his 2017 salary. However, without notice or Plaintiff's agreement, Kasowitz deducted a significant sum from Plaintiff's pay and deposited that amount in a profit sharing program. Even after Plaintiff's ultimate termination, he did not receive any payment from the profit sharing program and the amounts withheld by Kasowitz for contribution to the program, purportedly for Plaintiff's benefit, continue to be withheld. Including amounts withheld for the profit sharing program, Kasowitz paid Plaintiff over \$40,000 less than he was guaranteed in the Offer Letter for 2017.

40. In April of 2018, Kasowitz unilaterally and without notice, reduced Plaintiff's monthly salary payment to approximately \$10,000, less than one-third of the amount he should have been paid.

41. Plaintiff was told by another Firm partner that Managing Partner Kasowitz (who retained almost complete control over the partnership, the Firm and its Executive Committee) had directed the reduction in Plaintiff's monthly salary payment. Around the same time, another partner

1 told Plaintiff that Mr. Kasowitz frequently made such unilateral decisions, but that Plaintiff would
2 eventually be made whole. In light of the Offer Letter's guarantee, Plaintiff did not press the issue.

3 42. When the Firm reduced further Plaintiff's monthly payment to approximately \$9,000,
4 Plaintiff again reached out to Mr. Capilupi. As before, Mr. Capilupi stated that he needed to discuss
5 the issue with Mr. Kasowitz.

6 43. During a subsequent discussion with Ms. Agre, Plaintiff asked whether she had
7 received a draw. Ms. Agre confirmed that she had, and expressly instructed Plaintiff not to raise
8 with Mr. Kasowitz any issues about the Firm's failure to pay him. Instead, Ms. Agre assured
9 Plaintiff that she would raise on Plaintiff's behalf the issue with Mr. Kasowitz the next time she was
10 in New York.

11 44. During the course of 2018, most of the litigation work Plaintiff brought with him
12 from his prior firm disappeared because the client and opposing parties decided to handle the
13 relevant matters without resorting to litigation. Ms. Agre, who effectively acted as Plaintiff's
14 supervising partner in the San Francisco office, told him that there was plenty of other Firm work to
15 keep him busy, but without explanation, she (and others) thereafter intentionally blocked Plaintiff's
16 efforts to identify, obtain and take on other work. The Firm's refusal to supply Plaintiff with
17 additional litigation work – work that it continued to assert was available – constitutes a breach of
18 the promises made during the hiring negotiations to assist Mr. Fermino in developing business and
19 supplying him with legal work.

20 45. To make matters worse, Kasowitz began making false and defamatory statements
21 about Plaintiff, apparently in an attempt to justify his firing and with the intent to impugn his
22 professional integrity.

23 46. Plaintiff is informed and believes and thereon alleges that Defendant, its partners,
24 agents, and employees, including, Ms. Agre, made false and defamatory statements to members of
25 the legal community, both inside and outside the Firm, concerning Plaintiff's job performance and
26 the circumstances of Plaintiff's dismissal, including, *inter alia*, express and implied accusations that
27 Plaintiff reneged on his agreement with Kasowitz, exhibited unprofessional conduct, was unable to
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bring in business to the Firm and performed poorly. These and similar false statements published by Defendant expressly and impliedly asserted that Plaintiff is and/or was unprofessional and unsuccessful as an attorney and employee. These false and defamatory statements were unsolicited and made with malice and the intent to cause reputational harm, and indeed did cause Plaintiff such harm.

47. On August 28, 2018, Kasowitz, without any formal or informal notice, terminated Mr. Fermino's employment. At the time, the Firm owed Plaintiff over \$190,000 in unpaid wages.

48. In terminating Plaintiff's employment, Kasowitz failed to abide by any of the Partnership Agreement's provisions concerning withdrawal from the partnership, demonstrating that Plaintiff was a Special Partner whose terms of employment were governed exclusively by the Offer Letter. Specifically, although Section 9.2 of the Partnership Agreement provides that a partner may only be exited from the partnership "by the affirmative vote of the members of the Executive Committee holding more than one-half (50%) of the total number of Points then held by all Executive Committee members" "upon the delivery of written notice," no vote was taken regarding Plaintiff's withdrawal and no monies were paid to Plaintiff upon his termination.

49. Shortly thereafter, Kasowitz terminated Plaintiff's health benefits without providing him a COBRA notice or notice regarding entitlement to the funds he had contributed to the profit sharing program.

50. Although the Firm justified the termination by asserting that Plaintiff had billed too few hours and generated inadequate revenue, these issues were never raised or discussed with Plaintiff and to the contrary, the Firm failed to provide Plaintiff with the promised opportunity to service existing clients and to join in presentations for potential new clients. The Firm also never warned Plaintiff of a potential termination in the context of future revenue projection. In short, Plaintiff was not afforded any of the basic partnership courtesies and discussion that were afforded straight, white partners when the Firm had issues with their performance, revenue generation, profitability or other partnership issues.

51. A number of Plaintiff's Kasowitz colleagues expressed shock at the manner in which

1 Plaintiff's termination was handled and told Plaintiff that similarly-situated white and straight
2 partners were never terminated in a such a disrespectful and professionally damaging manner. As
3 just one example, Plaintiff was informed that a white, straight male partner with a contract similar to
4 Plaintiff's and who experienced similar revenue generation issues was able to remain employed at
5 the Firm and allowed to work toward rectifying his revenue generation and performance. Indeed,
6 this individual was ultimately promoted to Managing Partner of the Firm's Silicon Valley office.
7 Plaintiff was not, however, provided the same latitude.

8 52. Kasowitz's unlawful conduct was engaged in and/or ratified by managing agents of
9 Defendants, in whom Plaintiff placed his justified and good faith trust. Kasowitz acted in a
10 deliberate, malicious, cold, callous, deceptive, oppressive, and intentional manner in order to injure
11 and damage Plaintiff and/or with callous disregard for Plaintiff's rights to be free from
12 discrimination in the workplace.

13 53. Kasowitz's termination of Plaintiff's employment and outrageous and discriminatory
14 conduct towards him has irreparably disrupted Plaintiff's life and career. As a result of Kasowitz's
15 unlawful conduct, Plaintiff has and continues to suffer significant emotional distress.

16 **FIRST CAUSE OF ACTION**
17 **BREACH OF CONTRACT**
18 **(Against All Defendants)**

19 54. Plaintiff incorporates by reference paragraphs 1 through 53 as though fully set forth
20 herein.

21 55. On or about May 9, 2017, Plaintiff and Defendants executed an Offer Letter
22 governing the terms and conditions of Plaintiff's employment. Under the terms of the Offer Letter,
23 Plaintiff was to "join [Kasowitz] as a Partner" and be paid an "annualized base compensation of
24 \$400,000 [] prorated for the balance of the 2017 calendar year, and remain at \$400,000 for the 2018
25 calendar year." Furthermore, the Offer Letter provided that "[i]n January 2019, [Plaintiff] will be
26 expected to make a capital contribution in the amount of \$50,000."

56. The Offer Letter constitutes a binding contract under California law as an offer by Defendants of terms of employment that were accepted by Plaintiff.

57. The Offer Letter makes clear that Plaintiff was entitled to a guaranteed salary of \$400,000 per year prorated for the 2017 calendar year and through the 2018 calendar year. Plaintiff's guaranteed salary was not contingent on performance or any other metrics.

58. Kasowitz’s Executive Director affirmed the promises made in the Offer Letter in December of 2017 when, after Plaintiff’s monthly salary was decreased, he assured Plaintiff that he would be paid his “guaranteed salary” for 2017 on or before January 31, 2018.

59. Although Plaintiff executed the Kasowitz Partnership Agreement as he was requested to do, nothing in that agreement permitted Kasowitz to reduce Plaintiff's pay while employed or refuse to pay wages due and owing.

60. At all relevant times, Plaintiff was employed by Defendants and performed all conditions, covenants, and promises according to the applicable terms and conditions of the Offer Letter.

61. Kasowitz failed to pay Plaintiff the salary it was legally bound to pay in 2017.

62. Kasowitz failed to pay Plaintiff the salary it was legally obligated to pay in 2018.

63. On August 28, 2017, Defendants terminated Plaintiff's employment. At the time Defendants terminated Plaintiff's employment, Defendants still owed Plaintiff unpaid wages pursuant to the Offer Letter.

64. Defendants materially breached the Offer Letter by terminating Plaintiff's employment and refusing to pay wages due and owed.

65. As a result of Defendants' breach of contract, Plaintiff has suffered damages in a nature and amount to be proven at trial.

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SECOND CAUSE OF ACTION
BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING
(Against All Defendants)

66. Plaintiff incorporates by reference paragraphs 1 through 53 as though fully set forth herein.

67. The Offer Letter is an enforceable contract and under California law. A covenant of good faith and fair dealing is implied in that contract.

68. The covenant of good faith and fair dealing required Defendants to fairly, honestly, and reasonably perform the terms and conditions of the Offer Letter.

69. Defendants breached the covenant of good faith and fair dealing with Plaintiff in several ways, including: (1) by refusing to pay Plaintiff wages owed under the Offer Letter; (2) by failing to discuss with Plaintiff their purported dissatisfaction with his revenue production and billings prior to terminating him, thus impeding Plaintiff's ability to remedy any perceived problems; (3) refusing to conduct any reasonable investigation concerning its obligations pursuant to the Offer Letter and repudiating its obligations under this contract, despite full knowledge of the applicable law; all without good or sufficient cause, for reasons extraneous to the contract, and for the purpose of frustrating Plaintiff's enjoyment of the contract.

70. As a proximate result of Defendants' breach of the covenant of good faith and fair dealing, Plaintiff has been damaged, in that Plaintiff has suffered and continues to sustain substantial losses in earnings and other employment benefits in an amount according to proof at trial.

THIRD CAUSE OF ACTION
FAILURE TO TIMELY PAY WAGES DUE UPON SEPARATION OF EMPLOYMENT
(CAL. LAB. CODE, §§ 201, subd. (a) and 203, subd. (a))
(Against All Defendants)

71. Plaintiff incorporates by reference paragraphs 1 through 53 as though fully set forth herein.

72. California Labor Code section 201, subdivision (a) provides that "[i]f an employer discharges as employee, the wages earned and unpaid at the time of discharge are due and payable

1 immediately.”

2 73. California Labor Code section 203, subdivision (a) provides that if an employer
3 willfully fails to pay wages owed under California Labor Code section 201, the employer is liable
4 for waiting time penalties in the form of continued compensation to the employee at the same rate
5 for up to 30 work days.

6 74. At all times alleged herein, California Labor Code sections 201 and 203 were in full
7 effect and binding on all Defendants.

8 75. On August 28, 2018, Defendants terminated Plaintiff’s employment. At the time of
9 termination, Defendants owed Plaintiff wages he had earned but failed to pay those wages
10 immediately upon Plaintiff’s termination.

11 76. More than thirty days have passed since Defendants terminated Plaintiff’s
12 employment.

13 77. To date, Defendants have willfully failed to pay accrued wages and other
14 compensation to Plaintiff in violation of California Labor Code section 201, subdivision (a).

15 78. As a consequence of Defendants’ willful conduct in failing to pay compensation
16 owed to Plaintiff, he is entitled to thirty days’ wages under Labor Code section 203, together with
17 interest thereon and attorneys’ fees and costs.

18 **FOURTH CAUSE OF ACTION**
19 **FAILURE TO TIMELY PAY WAGES DUE DURING EMPLOYMENT**
20 **(CAL. LAB. CODE, § 204, subd. (a))**
(Against All Defendants)

21 79. Plaintiff incorporates by reference paragraphs 1 through 53 as though fully set forth
22 herein.

23 80. California Labor Code section 204, subdivision (a) states in pertinent part: “All wages
24 . . . earned by any person in any employment are due and payable twice during each calendar month,
25 on days designated in advance by the employer as the regular paydays.”

26 81. California Labor Code section 210 states in pertinent part: “(a) In addition to, and
27 entirely independent from, any other penalty provided in this article, every person who fails to pay
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1 the wages of each employee as provided in Section[] . . . 204 . . . shall be subject to a civil penalty as
2 follows: (1) For any initial violation, one hundred dollars (\$100) for each failure to pay employee.
3 (2) For each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200)
4 for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld.”

5 82. At all times alleged herein, California Labor Code sections 204 and 210 were in full
6 effect and binding on all Defendants.

7 83. Throughout Plaintiff’s employment, instead of properly paying Plaintiff wages due on
8 a monthly basis, Defendants, for multiple pay periods, paid him less than the monthly wages due.

9 84. The unlawful conduct of Defendants as alleged above, directly and proximately
10 caused Plaintiff to suffer, and continue to suffer, special damages, including, but not limited to, past
11 and future loss of income, benefits, and other damages to be proven at the time of trial, including lost
12 interest on such moneys. As alleged above, Defendants ratified the unlawful conduct of its
13 employees, and is therefore liable for their conduct.

14 85. As a result of the conduct of Defendants and each of them, Plaintiff was forced to
15 retain an attorney in order to protect his rights. Accordingly, Plaintiff seeks the reasonable
16 attorneys’ fees and costs incurred in this litigation in an amount according to proof at trial pursuant
17 to California Labor Code section 218.5, subdivision (a).

18 **FIFTH CAUSE OF ACTION**
19 **DISCRIMINATION BASED UPON RACE IN VIOLATION OF FEHA**
20 **(CAL. GOV. CODE, § 12940, subd. (a))**
(Against All Defendants)

21 86. Plaintiff incorporates by reference paragraphs 1 through 53 as though fully set forth
22 herein.

23 87. Plaintiff is informed and believes and thereon alleges that Defendants are employers
24 subject to suit under California Government Code section 12900 *et seq.*, the Fair Employment and
25 Housing Act, in that Defendants are business organizations with five or more employees doing
26 business in the State of California.

27 88. At all times relevant herein, Plaintiff was an African American employee of
28

1 Defendants. Pursuant to California Government Code section 12940, subdivision (a), Plaintiff had a
2 legal right to be free from discrimination based upon race in the workplace.

3 89. Plaintiff is informed and believes and thereon alleges that Defendants willfully and/or
4 with reckless indifference violated California Government Code section 12900 *et seq.*, as set forth
5 herein, and discriminated against Plaintiff as outlined above, based upon his race. Such
6 discrimination has resulted in damage and injury to Plaintiff as alleged herein.

7 90. The unlawful conduct of Defendants as alleged above, directly and proximately
8 caused Plaintiff to suffer, and continue to suffer, special damages, including, but not limited to, past
9 and future loss of income, benefits, and other damages to be proven at the time of trial. As alleged
10 above, Defendants ratified the unlawful conduct of its employees, and is therefore liable for their
11 conduct.

12 91. The unlawful conduct of Defendants as alleged above, directly and proximately
13 caused Plaintiff to suffer, and continue to suffer, general damages, including, but not limited to,
14 shock, embarrassment, humiliation, emotional distress, stress, depression, anxiety, fear, uncertainty,
15 loss of confidence, and other damages to be proven at the time of trial. As alleged above,
16 Defendants ratified the unlawful conduct of its employees, and is therefore liable for their conduct.

17 92. Defendants committed the acts herein alleged maliciously, fraudulently, and
18 oppressively in conscious disregard for Plaintiff's rights, and Plaintiff is entitled to recover punitive
19 damages from Defendants in an amount according to proof. The unlawful conduct alleged above
20 was engaged in and/or ratified by the officers, directors, supervisors, and/or managing agents of
21 Defendants and each of them, who were acting at all times relevant to this Complaint within the
22 scope and course of their employment. Pursuant to California Civil Code section 3294, Defendants
23 are liable for punitive damages.

24 93. As a result of the conduct of Defendants and each of them, Plaintiff was forced to
25 retain an attorney in order to protect his rights. Accordingly, Plaintiff seeks the reasonable
26 attorneys' fees and costs incurred in this litigation in an amount according to proof at trial pursuant
27 to California Government Code section 12965, subdivision (b).

SIXTH CAUSE OF ACTION
DISCRIMINATION BASED UPON SEXUAL ORIENTATION IN VIOLATION OF FEHA
(CAL. GOV. CODE, § 12940, subd. (a))
(Against All Defendants)

94. Plaintiff incorporates by reference paragraphs 1 through 53 as though fully set forth herein.

95. Plaintiff is informed and believes and thereon alleges that Defendants are employers subject to suit under California Government Code section 12900 *et seq.*, the Fair Employment and Housing Act, in that Defendants are business organizations with five or more employees doing business in the State of California.

96. At all times relevant herein, Plaintiff was an openly gay employee of Defendants. Pursuant to California Government Code section 12940, subdivision (a), Plaintiff had a legal right to be free from discrimination based upon sexual orientation in the workplace.

97. Plaintiff is informed and believes and thereon alleges that that Defendants willfully and/or with reckless indifference violation California Government Code section 12900 *et seq.*, as set forth herein, and discriminated against Plaintiff as outlined above, based upon his sexual orientation. Such discrimination has resulted in damage and injury to Plaintiff as alleged herein.

98. The unlawful conduct of Defendants as alleged above, directly and proximately caused Plaintiff to suffer, and continue to suffer, special damages, including, but not limited to, past and future loss of income, benefits, and other damages to be proven at the time of trial. As alleged above, Defendants ratified the unlawful conduct of its employees, and is therefore liable for their conduct.

99. The unlawful conduct of Defendants as alleged above, directly and proximately caused Plaintiff to suffer, and continue to suffer, general damages, including, but not limited to, shock, embarrassment, humiliation, emotional distress, stress, depression, anxiety, fear, uncertainty, loss of confidence, and other damages to be proven at the time of trial. As alleged above, Defendants ratified the unlawful conduct of its employees, and is therefore liable for their conduct.

100. Defendants committed the acts herein alleged maliciously, fraudulently, and

1 oppressively in conscious disregard for Plaintiff's rights, and Plaintiff is entitled to recover punitive
2 damages from Defendants in an amount according to proof. The unlawful conduct alleged above
3 was engaged in and/or ratified by the officers, directors, supervisors, and/or managing agents of
4 Defendants and each of them, who were acting at all times relevant to this Complaint within the
5 scope and course of their employment. Pursuant to California Civil Code section 3294, Defendants
6 are liable for punitive damages.

7 101. As a result of the conduct of Defendants and each of them, Plaintiff was forced to
8 retain an attorney in order to protect his rights. Accordingly, Plaintiff seeks the reasonable
9 attorneys' fees and costs incurred in this litigation in an amount according to proof at trial pursuant
10 to California Government Code section 12965, subdivision (b).

11 **SEVENTH CAUSE OF ACTION**
12 **FAILURE TO PREVENT DISCRIMINATION**
13 **(CAL. GOV. CODE, § 12940, subd. (k))**
(Against All Defendants)

14 102. Plaintiff incorporates by reference paragraphs 1 through 53 as though fully set forth
15 herein.

16 103. At all times alleged herein, California Government Code section 12940, subdivision
17 (k) was in full effect and binding on all Defendants and required Defendants to take reasonable steps
18 to prevent harassment and discrimination in the workplace.

19 104. Defendants failed to take all reasonable steps necessary to prevent discrimination
20 against Plaintiff.

21 105. As a direct and proximate result of the wrongful conduct of Defendants, and each of
22 them, Plaintiff has suffered and continues to sustain substantial losses in earnings and other
23 employment and retirement benefits, in an amount according to proof at trial.

24 106. As a direct and proximate result of the wrongful conduct of Defendants, and each of
25 them, Plaintiff has suffered humiliation, emotional and physical distress, and mental pain and
26 anguish in an amount according to proof at trial.

27 107. Defendants committed the acts herein alleged maliciously, fraudulently, and
28

1 oppressively in conscious disregard for Plaintiff's rights, and Plaintiff is entitled to recover punitive
2 damages from Defendants in an amount according to proof. The unlawful conduct alleged above
3 was engaged in and/or ratified by the officers, directors, supervisors and/or managing agents of
4 Defendants and each of them, who were acting at all times relevant to this Complaint within the
5 scope and course of their employment. Pursuant to California Civil Code section 3294, Defendants
6 are liable for punitive damages.

7 108. As a result of the conduct of Defendants and each of them, Plaintiff was forced to
8 retain an attorney in order to protect his rights. Accordingly, Plaintiff seeks the reasonable
9 attorneys' fees and costs incurred in this litigation in an amount according to proof at trial pursuant
10 to California Government Code section 12965, subdivision (b).

11 **EIGHTH CAUSE OF ACTION**
12 **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**
13 **(Against All Defendants)**

14 109. Plaintiff incorporates by reference paragraphs 1 through 53 as though fully set forth
15 herein.

16 110. The conduct complained of above and incorporated herein was outside the conduct
17 expected to exist in the workplace, was intentional and malicious and done for the purpose of
18 causing Plaintiff to suffer humiliation, mental anguish, and emotional and physical distress.
19 Defendants, and each of their conduct, in confirming and ratifying the complained of conduct, was
20 done with the knowledge that Plaintiff's emotional and physical distress would thereby increase, and
21 was done with a wanton and reckless disregard of the consequences to Plaintiff.

22 111. As a direct and proximate result of Defendants', and each of their, intentional
23 infliction of emotional distress as hereinabove alleged, Plaintiff has been harmed in that Plaintiff has
24 suffered humiliation, mental anguish, and emotional and physical distress, and has been injured in
25 mind and health. As a result of said distress and consequent harm, Plaintiff has suffered such
26 damages in an amount in accordance with proof at time of trial.

27 112. Defendants, and each of them, engaging in the conduct as hereinabove alleged, acted
28

1 fraudulently, maliciously, oppressively, and with reckless disregard of Plaintiff's rights and safety,
2 thereby entitling Plaintiff to an award of punitive damages. Defendants, and each of them,
3 authorized, ratified, and knew of the wrongful conduct complained of herein, but failed to take
4 immediate and appropriate corrective action to remedy the situation and thereby acted fraudulently,
5 maliciously, oppressively, and with reckless disregard of Plaintiff's rights and safety, thereby
6 entitling Plaintiff to an award of punitive damages.

7 **NINTH CAUSE OF ACTION**
8 **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**
9 **(Against All Defendants)**

10 113. Plaintiff incorporates by reference paragraphs 1 through 53 as though fully set forth
11 herein.

12 114. In the alternative, if said conduct of Defendants, and each of them, and of their agents
13 and employees was not intentional, it was negligent and Plaintiff is thereby entitled to general
14 damages for the negligent infliction of emotional distress.

15 **TENTH CAUSE OF ACTION**
16 **WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY**
17 **(Against All Defendants)**

18 115. Plaintiff incorporates by reference paragraphs 1 through 53 as though fully set forth
19 herein.

20 116. At all relevant times herein, California Government Code section 12900 *et seq.*, was
21 in full force and effect, and establishes that the public policy of the State of California is, in part, to
22 protect and safeguard the right and opportunity of all persons to seek and hold employment without
23 discrimination, harassment, or abridgement on account of sex, gender, age, national origin, race,
24 ancestry, sexual orientation, and/or without retaliation for opposing and protesting unlawful conduct.

25 117. As set forth above, Plaintiff was employed by Defendants. Plaintiff's wrongful
26 termination from his employment with Defendants was based upon Defendants' violation of the
27 public policy of the State of California as put forward in the FEHA, the California Constitution, and
28 other statutes and provisions.

1 118. The unlawful conduct of Defendants, as alleged above, directly and proximately
2 caused Plaintiff to suffer, and continue to suffer, special damages, including, but not limited to, past
3 and future loss of income, benefits and other damages to be proven at the time of trial. As alleged
4 above, Defendants ratified the unlawful conduct of its employees, and are therefore liable for their
5 conduct.

6 119. The unlawful conduct of Defendants, as alleged above, directly and proximately
7 caused Plaintiff to suffer, and continue to suffer, general damages, including, but not limited to,
8 shock, embarrassment, humiliation, emotional distress, stress, depression, anxiety, fear, uncertainty,
9 loss of confidence, and other damages to be proven at trial. As alleged above, Defendants ratified
10 the unlawful conduct of its employees, and is therefore liable for their conduct.

11 120. Defendants committed the acts herein alleged maliciously, fraudulently, and
12 oppressively in conscious disregard for Plaintiff's rights, and Plaintiff is entitled to recover punitive
13 damages from Defendants in an amount according to proof. The unlawful conduct alleged above
14 was engaged in and/or ratified by the officers, directors, supervisors and/or managing agents of
15 Defendants and each of them, who were acting at all times relevant to this Complaint within the
16 scope and course of their employment. Pursuant to California Civil Code section 3294, Defendants
17 are liable for punitive damages.

18 **ELEVENTH CAUSE OF ACTION**
19 **DEFAMATION**
20 **(Against All Defendants)**

21 121. Plaintiff incorporates by reference paragraphs 1 through 53 as though fully set forth
22 herein.

23 122. Plaintiff is informed and believes Defendants by the herein-described acts, conspired
24 to, and in fact, did negligently, recklessly, and intentionally cause excessive and unsolicited internal
25 and external publications of defamation, of and concerning Plaintiff, to third persons and to the
26 community. These false and defamatory statements included express and implied accusations that
27 Plaintiff performed poorly, exhibited unprofessional conduct, and was unable to bring in business.

28 123. While the precise dates of these publications are not known to Plaintiff, Plaintiff is

1 informed and believes the publications started in or around January of 2018, for the improper
2 purpose of finding a justification for Plaintiff's wrongful termination. These publications were
3 outrageous, negligent, reckless, intentional, and maliciously published and republished by
4 Defendant. Plaintiff is informed and believes that the negligent, reckless, and intentional
5 publications by Defendant were and continue to be foreseeably published and republished by
6 Defendant, its agents and employees, and recipients in the community. Plaintiff hereby seeks
7 damages for these publications and all foreseeable republications discovered up to the time of trial.

8 124. During the above-described time-frame, Defendant conspired to, and in fact, did
9 negligently, recklessly, and intentionally cause excessive and unsolicited publication of defamation,
10 of and concerning Plaintiff, to third persons, who had no need or desire to know. Those third
11 person(s) to whom Defendant published this defamation are believed to include, but are not limited
12 to, other partners, agents and employees of Defendant and the community, including Plaintiff's
13 prospective employers after his wrongful termination, all of whom are known to Defendant, but
14 unknown at this time to Plaintiff.

15 125. The defamatory publications consisted of oral and written, knowingly false and
16 unprivileged communications, tending directly to injure Plaintiff and Plaintiff's personal, business,
17 and professional reputation. These publications included the following false and defamatory
18 statements (in violation of Civil Code §§ 45 and 46(3)(5)) with the meaning and/or substance that
19 Plaintiff: accusations that plaintiff reneged on his agreement with Kasowitz, exhibited
20 unprofessional conduct, was unable to bring in business to the Firm and performed poorly. These
21 and similar statements published by Defendant expressly and impliedly asserted that Plaintiff is an
22 unprofessional, unsuccessful and incompetent attorney and employee.

23 126. Plaintiff is informed, believes and fears that these false and defamatory *per se*
24 statements will continue to be published by Defendant and will be foreseeably republished by its
25 recipients, all to the ongoing harm and injury to Plaintiff's business, professional, and personal
26 reputations. Plaintiff also seeks redress in this action for all foreseeable republications, including his
27 own compelled self-publication of these defamatory statements.

1 127. The defamatory meaning of all of the above-described false and defamatory
2 statements, and their reference to Plaintiff, were understood by these above-referenced third person
3 recipients and other members of the community who are known to Defendant, but unknown to
4 Plaintiff at this time.

5 128. None of Defendant's defamatory publications against Plaintiff referenced above
6 are true.

7 129. The above defamatory statements were understood as assertions of fact, and not
8 as opinion. Plaintiff is informed and believes this defamation will continue to be negligently,
9 recklessly, and intentionally published and foreseeably republished by Defendant, and foreseeably
10 republished by recipients of Defendant's publications, thereby causing additional injury and
11 damages for which Plaintiff seeks redress by this action.

12 130. Each of these false defamatory *per se* publications (as set forth above) were
13 negligently, recklessly, and intentionally published in a manner equaling malice and abuse of any
14 alleged conditional privilege (which Plaintiff denies existed), since the publications, and each of
15 them, were made with hatred, ill will, and an intent to vex, harass, annoy, and injure Plaintiff in
16 order to justify the illegal and cruel actions of Defendant, to cause further damage to Plaintiff's
17 professional and personal reputation, to cause him to be fired, and to justify his firing.

18 131. Each of these publications by Defendant were made with knowledge that no
19 investigation supported the unsubstantiated and obviously false statements. Defendant published
20 these statements knowing them to be false, unsubstantiated by any reasonable investigation, and the
21 product of hostile witnesses. These acts of publication were known by Defendant to be negligent to
22 such a degree as to be reckless. In fact, not only did Defendant have no reasonable basis to believe
23 these statements, but it also had no belief in the truth of these statements, and in fact knew the
24 statements to be false. Defendant excessively, negligently, and recklessly published these statements
25 to individuals with no need to know, and who made no inquiry, and who had a mere general or idle
26 curiosity of this information.

27 132. The above complained-of publications by Defendant were made with hatred and ill
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1 will towards Plaintiff and the design and intent to injure Plaintiff, Plaintiff's good name, his
2 reputation, employment and employability. Defendant published these statements, not with an intent
3 to protect any interest intended to be protected by any privilege, but with negligence, recklessness
4 and/or an intent to injure Plaintiff and destroy his reputation. Therefore, no privilege existed to
5 protect any Defendant from liability for any of these aforementioned publications or republications.

6 133. As a proximate result of the publication and republication of these defamatory
7 statements by Defendant, Plaintiff has suffered injury to his personal, business and professional
8 reputation including suffering embarrassment, humiliation, severe emotional distress, shunning,
9 anguish, fear, loss of employment, and employability, and significant economic loss in the form of
10 lost wages and future earnings, all to Plaintiff's economic, emotional, and general damage in an
11 amount according to proof.

12 134. Defendant committed the acts alleged herein recklessly, maliciously, fraudulently,
13 and oppressively, with the wrongful intention of injuring Plaintiff, for an improper and evil motive
14 amounting to malice (as described above), and which abused and/or prevented the existence of any
15 conditional privilege, which in fact did not exist, and with a reckless and conscious disregard of
16 Plaintiff's rights. All actions of Defendant, their agents and employees, herein alleged were known,
17 ratified and approved by the Defendant. Plaintiff thus is entitled to recover punitive and exemplary
18 damages from Defendant for these wanton, obnoxious, and despicable acts in an amount based on
19 the wealth and ability to pay according to proof at time of trial.

20 **WHEREFORE, PLAINTIFF DAVID W. FERMINO PRAYS FOR JUDGMENT**
21 **AGAINST ALL DEFENDANTS, AND EACH OF THEM AS FOLLOWS:**

22 1. For damages for breach of contract sufficient to restore to Plaintiff the bargained-for
23 benefits of the contract;

24 2. For waiting time penalties pursuant to California Labor Code section 203, subdivision
25 (a);

26 3. For an award of penalties incurred under California Labor Code section 210,
27 subdivision (a)(1)-(2);

1 4. For compensatory damages including lost wages, earnings, retirement benefits, and
2 other employee benefits; and all other sums of money, together with interest on these amounts at
3 prevailing rates and according to proof;

4 5. Civil penalties for each violation of the Labor Code;

5 6. For general, special, and incidental damages and amounts for emotional and physical
6 distress according to proof;

7 7. For injunctive relief;

8 8. For punitive damages in an amount to be determined at trial sufficient to punish,
9 penalize and/or deter Defendants;

10 9. For prejudgment interest and interest on the sum of damages awarded to the
11 maximum extent permitted by law;

12 10. For reasonable attorneys' fees and costs of suit herein incurred; and

13 11. For such other and further relief as the Court deems proper.
14

15 DATED: January 9, 2020

Respectfully submitted,

16 
17 JENNIFER SCHWARTZ
18 OUTTEN & GOLDEN LLP

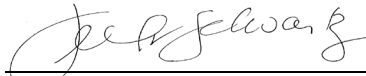
19 Attorneys for Plaintiff
20 DAVID W. FERMINO

21 **JURY TRIAL DEMANDED**

22 Plaintiff demands trial of all issues by jury.
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1 DATED: January 9, 2020

Respectfully submitted,

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4 JENNIFER SCHWARTZ
OUTTEN & GOLDEN LLP

5 Attorneys for Plaintiff
6 DAVID W. FERMINO
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EXHIBIT A



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

2218 Kausen Drive, Suite 100 | Elk Grove | CA | 95758
(800) 884-1684 (Voice) | (800) 700-2320 (TTY) | California's Relay Service at 711
<http://www.dfeh.ca.gov> | Email: contact.center@dfeh.ca.gov

August 28, 2019

RE: Notice of Filing of Discrimination Complaint
DFEH Matter Number: 201908-07313423
Right to Sue: Fermino / Kasowitz Benson Torres LLP

To All Respondent(s):

Enclosed is a copy of a complaint of discrimination that has been filed with the Department of Fair Employment and Housing (DFEH) in accordance with Government Code section 12960. This constitutes service of the complaint pursuant to Government Code section 12962. The complainant has requested an authorization to file a lawsuit. This case is not being investigated by DFEH and is being closed immediately. A copy of the Notice of Case Closure and Right to Sue is enclosed for your records.

Please refer to the attached complaint for a list of all respondent(s) and their contact information.

No response to DFEH is requested or required.

Sincerely,

Department of Fair Employment and Housing



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

2218 Kausen Drive, Suite 100 | Elk Grove | CA | 95758

(800) 884-1684 (Voice) | (800) 700-2320 (TTY) | California's Relay Service at 711

<http://www.dfeh.ca.gov> | Email: contact.center@dfeh.ca.gov

KEVIN KISH, DIRECTOR

August 28, 2019

David Fermino
148 Lundys Lane
San Francisco, California 94110

RE: **Notice of Case Closure and Right to Sue**
DFEH Matter Number: 201908-07313423
Right to Sue: Fermino / Kasowitz Benson Torres LLP

Dear David Fermino,

This letter informs you that the above-referenced complaint was filed with the Department of Fair Employment and Housing (DFEH) has been closed effective August 28, 2019 because an immediate Right to Sue notice was requested. DFEH will take no further action on the complaint.

This letter is also your Right to Sue notice. According to Government Code section 12965, subdivision (b), a civil action may be brought under the provisions of the Fair Employment and Housing Act against the person, employer, labor organization or employment agency named in the above-referenced complaint. The civil action must be filed within one year from the date of this letter.

To obtain a federal Right to Sue notice, you must contact the U.S. Equal Employment Opportunity Commission (EEOC) to file a complaint within 30 days of receipt of this DFEH Notice of Case Closure or within 300 days of the alleged discriminatory act, whichever is earlier.

Sincerely,

Department of Fair Employment and Housing

1 Mr. Fermino began negotiating with Kasowitz to join the Firm's San Francisco office
2 in or about the late fall of 2016. Ultimately, the parties agreed that Mr. Fermino
3 would join the Firm as a non-equity partner and be paid a guaranteed salary of
4 \$400,000 per year for the time he worked in 2017 and 2018. The parties further
5 agreed that he would not be paid pursuant to the partnership "points" formula until
6 he made a capital contribution. The offer letter, executed by both parties, reduced
7 this agreement to writing:

8 "[You will] join [Kasowitz] as a Partner with full rights and responsibilities under the
9 Partnership Agreement, and its resolutions and procedures except as modified
10 herein. Your annualized base compensation of \$400,000 will be prorated for the
11 balance of the 2017 calendar year, and remain at \$400,000 for the 2018 calendar
12 year. In January 2019, you will be expected to make a capital contribution in the
13 amount of \$50,000."

14 The offer letter contains no other language regarding the guaranteed salary and no
15 reference to the salary being contingent upon performance or any other metrics.

16 Mr. Fermino was the only African American and openly gay partner in the San
17 Francisco office. When Mr. Fermino joined the Firm, he was one of only two African
18 American partners, out of over 100 partners firmwide. At the time of his termination,
19 the Firm employed only four African American partners. Mr. Fermino is informed
20 and believes that throughout his employment, the Firm employed less than five
21 openly gay partners.

22 Kasowitz treated Mr. Fermino differently than other white and straight partners. In
23 particular, Kasowitz did not provide Mr. Fermino with the same business
24 development opportunities that it provided to other white and straight partners. For
25 example, during the negotiation process, Mr. Fermino was promised that after he
26 was hired, the Firm would hold a marketing event in San Francisco to showcase and
27 publicize his practice area. However, Kasowitz never planned the marketing event.
28 Only after Mr. Fermino approached the Managing Partner of the San Francisco
office, did the Firm suggest that Mr. Fermino's marketing event be combined with a
previously scheduled marketing event for Daniel Saunders, a white, straight partner
in Los Angeles who was hired around the same time as Mr. Fermino. By combining
the marketing event with an event planned for another partner and holding it in Los
Angeles, the event offered far less professional value than Mr. Fermino would have
realized had the event been held solely for him in San Francisco, where his client
base was centered.

On another occasion, Kasowitz excluded Mr. Fermino from attending a black-tie
event in San Francisco celebrating African American in-house attorneys and

1 partners where Kasowitz had purchased a table. Not only was excluding Mr.
2 Fermino nonsensical, but it denied him important business development
opportunities.

3 Throughout his employment, Mr. Fermino overheard racially-motivated comments.
4 For example, one of the leaders of the San Francisco office commented to Mr.
5 Fermino that it was "obvious" that an African American associate in the Silicon
6 Valley office who was recently promoted to partner was only promoted because
"he's black."

7 Instead of being properly paid one-twelfth of his set annual wages for services
8 performed on a monthly basis as required by California Labor Code section 204 (and
9 withholding federal taxes and depositing payroll taxes pursuant to IRS Regulations),
10 Mr. Fermino was improperly paid his wages through the partnership "draw" system.
11 The draw system was intended to compensate partners whose share of partnership
12 proceeds were paid in installments over the course of the year and then "trued up"
13 pursuant to a point system at the end of the year. Instead of providing Mr. Fermino
14 with an IRS Form W-2, noting tax withholding on wages earned and payroll taxes
15 deposited by the Firm, Kasowitz supplied Mr. Fermino with an IRS Form K-1, which
16 should only be used for reporting the distributive share of a partnership income.
17 Until March 2018, Kasowitz paid Mr. Fermino a "draw" of \$20,000 per month (which,
18 multiplied by 12 would have amounted to \$240,000 annually) and was told that he
19 would be "trued up" to \$400,000 at the end of the year. In March 2018, Kasowitz
20 made the unilateral decision to reduce the monthly payment to \$10,000 per month,
21 which resulted in the Firm falling far behind its contractual promise to pay Mr.
22 Fermino \$400,000 per year.

23 During the course of 2018, the Firm reneged on numerous promises to assist Mr.
24 Fermino in developing business and supplying him with legal work. During this
25 same time, Mr. Fermino lost a piece of business that he had anticipated would
26 generate much of his revenue in 2018 due to circumstances completely beyond his
27 control. On August 28, 2018, Kasowitz terminated Mr. Fermino's employment
28 without ever talking to him about his revenue generation, options for servicing
existing clients, alternative sources of revenue generation, or even the possibility
that he would be terminated. At that point, the Firm owed Mr. Fermino over
\$160,000 in unpaid wages for 2017 and 2018. Instead of paying the balance owed
to Mr. Fermino, Kasowitz offered Mr. Fermino a severance package of \$10,000 in
exchange for a full release of claims against the Firm.

Mr. Fermino and other colleagues were shocked at the manner in which his
termination was handled, without any discussion, warning, or effort to help him
remedy the issues that Kasowitz later claimed it was concerned about. Mr. Fermino
is informed and believes that similarly performing white and straight partners were

1 never terminated in a similarly disrespectful and professionally damaging manner.
2 For example, Mr. Fermino is informed and believes that a white, straight male
3 partner with a contract similar to Mr. Fermino's and similar revenue generation
4 issues was able to remain employed at the Firm and allowed to work toward
5 rectifying his revenue generation and performance. Indeed, this individual was
6 ultimately promoted to managing partner of the Firm's Silicon Valley office. In stark
contrast, Kasowitz summarily terminated Mr. Fermino without any discussion or
opportunity to re-negotiate his employment and Kasowitz refused to pay him
amounts owed pursuant to the employment agreement.

7 Mr. Fermino's race and sexual orientation were substantial motivating factors in
8 Kasowitz's decision to terminate his employment and deny him the benefits
9 guaranteed under the employment agreement. Kasowitz's discriminatory treatment
10 of Mr. Fermino based on his race and sexual orientation violated the Fair
11 Employment and Housing Act and California common law. In addition, Kasowitz's
12 mischaracterization of Mr. Fermino as an equity partner instead of an employee for
purposes of paying him by "draw" with an IRS Form K-1 and failing to pay him his
agreed upon salary in equal monthly installments with an IRS Form W-2 violated the
California Labor Code. Kasowitz also failed to timely pay Mr. Fermino for his wages
due and owing in violation of California Labor Code section 203.

1 VERIFICATION

2 I, **Erin M. Pressman**, am the **Attorney** in the above-entitled complaint. I have read
3 the foregoing complaint and know the contents thereof. The matters alleged are
4 based on information and belief, which I believe to be true.

5 On August 28, 2019, I declare under penalty of perjury under the laws of the State of
6 California that the foregoing is true and correct.

7 **San Francisco, CA**
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PROOF OF SERVICE

I, Kimberly Falt, declare:

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is One California, Suite 1250, San Francisco, CA 94111. September 16, 2019, I caused the following documents to be served:

- **Notice of Filing of Discrimination Complaint; Right to Sue**
- **Complaint of Employment Discrimination Before the State of California Department of Fair Employment and Housing**

on the following interested parties in this action:

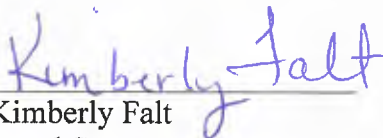
Jessica T. Rosenberg
Kasowitz Benson Torres LLP
1633 Broadway
New York, New York 10019

☐ **BY E-MAIL.** I e-mailed the following documents to the above addresses.

☒ **BY U.S. CERTIFIED MAIL.** I deposited such envelopes in the mail at San Francisco, California. The envelopes were mailed with postage thereon fully prepaid. I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated: 9/16/2019


Kimberly Falt
Legal Secretary
Outten & Golden, LLP



California Street 12th Floor
San Francisco, CA 94111

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Jessica T. Rosenberg
Kasowitz Benson Torres LLP
1633 Broadway
New York, New York 10019

EXHIBIT B

KASOWITZ BENSON TORRES LLP

1633 BROADWAY
NEW YORK, NEW YORK 10019
(212) 506-1700
FAX: (212) 506-1800

AARON H. MARKS
DIRECT DIAL: (212) 506-1721
AMARKS@KASOWITZ.COM

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WASHINGTON DC

May 5, 2017

David W. Fermino, Esq.
148 Lundys Lane
San Francisco, CA 94110

Re: **Offer of Employment**

Dear David:

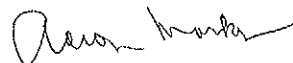
This letter will confirm our offer to you to join Kasowitz Benson Torres LLP ("the Firm") as a Partner ("Partner") in the San Francisco office, and sets forth the language regarding offers of employment that will apply to you as a Partner of the Firm:

1. Our offer is for you to join us as a Partner with full rights and responsibilities under the Partnership Agreement, and its resolutions and procedures except as modified herein. Your annualized base compensation of \$400,000 will be prorated for the balance of the 2017 calendar year, and remain at \$400,000 for the 2018 calendar year. Should you accept our offer, we will expect you to start on an agreed upon date, conditioned upon the satisfactory review and clearance of your potential conflicts, background and employment verification.
2. In January 2019, you will be expected to make a capital contribution in the amount of \$50,000.

A summary of the benefits program for partners is attached. You will receive more detailed information on our health & welfare programs under separate cover. Your continued eligibility, participation and benefits under any policy, program or plan are governed by the provisions of such policy, program or plan, and the Firm reserves the right to withdraw, modify and administer its policies, programs and plans at its discretion and without limitations.

If you should have any questions, please contact me or Lisa A. Finn (212.547.1310), Director of Human Resources. We look forward to a mutually rewarding relationship.

Sincerely yours,



Aaron H. Marks

KASOWITZ BENSON TORRES LLP

Enclosures

Agreed and Accepted:

David W. Fermino, Esq., _____, 2017

AVAILABLE INSURANCE**Monthly Partner Rates for Medical, Dental, and Vision***Medical & Dental Effective date of hire, Vision Effective 1st of the month following date of hire*

	Partner Only	Partner+ Spouse	Partner+ Child	Partner+ Family
Medical (UHC)				
<i>Core</i>	\$904.23	\$1,898.87	\$1,582.40	\$2,757.89
<i>Enhanced</i>	\$1,026.72	\$2,156.12	\$1,796.76	\$3,131.50
<i>High Deductible</i>	\$764.87	\$1,606.21	\$1,338.53	\$2,332.83
Dental (Aetna)				
	\$54.14	\$112.93	\$108.36	\$155.81
Vision (EyeMed)				
	\$8.08	\$15.35	\$16.15	\$23.75

*For California Employees Only: Kaiser premium calculated upon receipt of date of birth***Additional Partner Benefits**

<u>Life/Accidental Death & Dismemberment (AD&D)</u>	Coverage in the amount of \$300,000
<u>401(k) Retirement Savings Plan</u> <i>Effective 1st of the month after date of hire</i>	2017 Annual IRS Limit: \$18,000 2017 Annual catch-up contribution: \$6,000 (Catch-up contribution applies to those age 50+) Annual profit sharing contribution with vesting program
<u>Long Term Disability (LTD)</u> <i>Effective 60 days after hire date</i>	The Firm provides Partners with a LTD benefit of 60% of your pre-disability salary (up to a maximum benefit of \$25,000 per month). This benefit provides for coverage of \$8,000 in an individual policy and up to \$17,000 of coverage in the group policy.
<u>Voluntary Supplemental Life/AD&D (effective 30 days after date of hire)</u>	You may purchase amounts in \$10,000 units, to an overall maximum of the lesser of 5x your annual base salary or \$500,000.
<u>Corporate AMEX Program</u>	The Firm pays the annual membership fee. The membership rewards program, if elected, is paid for by the Partner.