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NEIL MCGOWAN

**UNITED STATES DISTRICT COURT OF CALIFORNIA  
FOR THE NORTHERN DISTRICT - SAN JOSE DIVISION**

NEIL MCGOWAN, an individual,

Plaintiff,

v.

NETAPP, INC., a Delaware  
corporation. HENRI RICHARD,  
ELIZABETH O'CALLAHAN. DEBRA  
MCCOWAN, CÉSAR CERNUDA,  
RICHARD SCURFIELD, MAXWELL  
LONG, ROSALIND HILL, and Does 1  
through 50,

Defendants.

Case No.:

Assigned for all purposes to  
Department

**COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF FOR**

**(1) VIOLATION OF RICO 18 U.S.C. §  
1962(a);**

**(2) VIOLATION OF RICO 18 U.S.C. §  
1962(c);**

**(3) VIOLATION OF RICO 18 U.S.C. §  
1962(d);**

**(4) BREACH OF CONTRACT;**

**(5) BREACH OF IMPLIED  
COVENANT OF GOOD FAITH;**

**(6) FRAUD;**

**(7) RETALIATION IN VIOLATION OF  
LABOR CODE § 1102.5(b);**

**(8) RACE/NATIONAL ORIGIN  
DISCRIMINATION;**

**(9) WRONGFUL TERMINATION IN  
VIOLATION OF PUBLIC POLICY;**

**(10) INTENTIONAL INFLICTION OF  
EMOTIONAL DISTRESS;**

(11) FAILURE TO PAY ALL WAGES  
IN VIOLATION OF LABOR CODE §  
204 AND 204.1;

(12) STATUTORY PENALTIES  
PURRSUANT TO LABOR CODE § 210;

(13) WAITING TIME PENALTIES IN  
VIOLATION OF LABOR CODE § 203;  
AND

(14) UNFAIR BUSINESS PRACTICES  
IN VIOLATION OF BUSINESS &  
PROFESSIONS CODE § 17200.

DEMAND FOR JURY TRIAL  
IND CA Rule 3-6(a)

COMES NOW Plaintiff NEIL MCGOWAN (“Plaintiff” or “MCGOWAN”) alleges, by and through his attorney, THE HILL LAW FIRM, by Attorney Michelle E. Hill, as and for claims against the Defendants NETAPP, INC. (“NETAPP”), HENRI RICHARD, (RICHARD) ELIZABETH O’CALLAHAN (O’CALLAHAN), DEBRA MCCOWAN (MCCOWAN), CÉSAR CERNUDA (CERNUDA), RICHARD SCURFIELD (SCURFIELD), MAXWELL LONG (“LONG”), and ROSALIND HILL (“HILL”), and shows to the Court as follows:

### **JURISDICTION**

1. This action arises under federal law and the laws of California. Plaintiffs seek to recover compensatory damages sustained, resulting from Defendants’ alleged fraudulent conduct, along with the costs of this suit, interest and reasonable attorney’s fees. This Court has original jurisdiction pursuant to the Racketeer Influenced and Corrupt Organizations Act (“RICO”) 18 U.S.C. § 1965 (specifically 18 U.S.C. § 1964(a), (c) and (d)), and 28 U.S.C. § 1331.

2. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over Plaintiff’s California law claims for national origin discrimination in violation of California Fair Employment and Housing Act, codified in Government Code §12900, *et*

1 *seq.* (“FEHA”), retaliation in violation of Government Code §12940(h) and Labor Code  
 2 § 1102.5(b), wrongful termination in violation of public policy, intentional infliction of  
 3 emotional distress, and unfair business practices in violation of Business and Professions  
 4 Code § 17200 *et seq.*

### 5 **DIVISIONAL ASSIGNMENT**

6 3. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2),  
 7 (c)(2), and (d) because Defendant NETAPP’s corporate headquarters are located within this  
 8 Northern judicial district employing Plaintiff as well as numerous other California employees  
 9 and it engages in business throughout California and the district creating sufficient contacts to  
 10 subject NETAPP to personal jurisdiction and which it has the most significant contacts.  
 11 Additionally, a substantial part, if not all, events giving rise to Plaintiff’s claim occurred  
 12 within this judicial district.

### 13 **NATURE OF THE ACTION**

14 4. Plaintiff MCGOWAN has been victimized by a pattern of racketeering  
 15 activity perpetrated against him and other commission earning employees in a  
 16 manner forbidden by Section 1962. After the 2018 companywide reorganization,  
 17 Defendant NETAPP openly expressed its intent to reduce operating expenses. As it is  
 18 well-established that employee salaries are a company’s highest operating expense,  
 19 Defendants HENRI RICHARD (“RICHARD”), ELIZABETH O’CALLAHAN  
 20 (“O’CALLAHAN”), DEBRA MCCOWAN (“MCCOWAN”), and RICHARD  
 21 SCURFIELD (“SCURFIELD”) with the assistance of the finance, human resources and  
 22 accounting departments mastermind various schemes and tactics that allowed them to  
 23 untimely pay and/or outright deny the sales team earned commissions.

24 5. These conspiring executives, directors, officers and managing agents  
 25 created incentive commission plans under the false pretense that Plaintiff MCGOWAN  
 26 and other commission earning employees, including other VP/GMs, had the opportunity  
 27 to maximize their respective commission earnings based upon meeting specified sales  
 28 goals. Having implemented a masked commission depressor, RICO Defendants

1 knowingly induced Plaintiff and others to meet and surpass the specified sales goals but  
2 RICO Defendants had no intention of paying the promised commissions at the time they  
3 were earned, and on at least two separate occasions, did not pay the commissions earned.

4 6. Commencing in May 2018 and continuing to the present, Defendants  
5 utilized the company's Annual Fiscal Year (FY) Incentive Compensation Plan  
6 ("Incentive Plan") as a vehicle to implement their scheme and could not have done so  
7 without the complicity and assistance of each of the other named Defendants, including  
8 Defendant NETAPP, INC. ("NETAPP").

9 7. Defendant NETAPP agreed to compensate Plaintiff and other salespersons  
10 with a base salary plus commissions earned through a commission plan incentive. Under  
11 the false pretense and intentional misrepresentation that Plaintiff and other sales  
12 employees would earn commissions equivalent to 100% of their respective salary for  
13 selling product at agreed upon goals, Plaintiff and the sales team worked diligently to  
14 exceed said agreed upon goals. Yet, Defendants had no intention of fully compensating  
15 them.

16 8. Defendant NETAPP allowed individual Defendants RICHARD,  
17 O'CALLAHAN, MCCOWAN and SCURFIELD to draft, issue and implement Incentive  
18 Plans and Goal Sheets knowing that they had no intention of fully honoring the  
19 commissions earned. Consistent with said intent, Defendant NETAPP allowed  
20 Defendants to deny Plaintiff his earned commissions on at least two occasions despite  
21 Plaintiff surpassing his stated and agreed upon goals. Defendant NETAPP was  
22 instrumental in falsely classifying Plaintiff and other sales employees' previously earned  
23 wages as retention bonuses for less than the amount owed and paid only if Plaintiff  
24 remained employed. Said retention bonus constituted and continues to constitute secret  
25 deductions in violation of California's established public policy against any deductions,  
26 setoffs, or recoupments by an employer from employee wages or earnings, except those  
27 deductions specifically authorized by statute.



11. Plaintiff MCGOWAN repeatedly disclosed to RICO Defendants as well as executive level managing agents and officers the illegality of Defendants' failure timely and fully pay all commissions earned. In retaliation for his advocacy, RICO Defendant subjected Plaintiff to differential treatment because of his race/national origin by not only denying his earned commissions, but also, subsequently terminated his employment. Defendants violated SOX, FEHA, California Labor Laws, and other Unfair Competition Laws.

12. Plaintiff MCGOWAN is an adult African American male, Guyana national origin, and a resident of Alameda County, State of California. At all times relevant to this action until his termination on August 23, 2022, Plaintiff was employed with Defendant NETAPP. At all times alleged herein, Plaintiff MCGOWAN was a commission earning employee whose home base office was Defendant NETAPP's Santa Clara County office, located at 3060 Olsen Drive, San Jose, California 95128.

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

(Corporate No. 2370651), including at its corporate headquarters located at 3060 Olsen Drive, San Jose, California 95128, Santa Clara County. Defendant NETAPP's executive and decision-making team consists of the chief executive officer (CEO), president, executive vice president and chief procurement officer (EVP & CPO), executive vice president and chief financial officer (EVP & CFO), and executive vice president and chief human resources officer (EVP & CHRO). This executive management team oversees not only company operations, but also finance, payroll, and human resources, and therefore from the corporate offices.

14. In addition to California, NETAPP also conducts its business throughout the United States and globally via its sales team workforce who provides systems, software and cloud services to companies across state lines as well as those in other countries that enable them to run their applications optimally from data center to cloud. As such, NETAPP engages in interstate and foreign commerce.

15. For the purposes of Plaintiff MCGOWAN's claims under 18 U.S.C. § 1964(c), Defendant NETAPP is the enterprise, within the meaning of 18 U.S.C. §§ 1961(4) through which the RICO Defendants conducted their racketeering activity. For purposes of Counts Two and Three for violations of RICO, 18 U.S.C. §§ 1962(c) and (d), respectively, Defendant NETAPP is not a defendant.

16. Defendant NETAPP is liable under 18 U.S.C. § 1962(a) because it received the proceeds from the alleged racketeering activity and is liable as a principal for those acts.

17. Regarding the state claims, Defendant NETAPP, a California based company employing individuals throughout the state is an entity subject to suit under the California Fair Employment and Housing Act, codified in Government Code §12900, *et seq.* ("FEHA") in that, at all times alleged herein, it employed and regularly employs five or more persons.

18. As Plaintiff's former employer, Defendant NETAPP is vicariously liable for each of the state counts because all unlawful, discriminatory, and retaliatory conduct

1 and decisions alleged herein was performed by an officer, director, managing agent and/  
2 or employee while acting in the course and scope of said relationship with Defendant  
3 NETAPP. At all times herein, Defendant NETAPP failed to fully and timely pay  
4 Plaintiff and other employees al wages earned. Defendants' unlawful employment  
5 practices consisting of violations of the California Government, Labor, and Business and  
6 Professions Codes all occurred in the County of Santa Clara.

7 19. Defendant RICHARD is an individual and an adult, and was previously  
8 based out of Defendant NETAPP's San Jose, California office, located at 3060 Olsen  
9 Drive, San Jose, California 95128, Santa Clara County. Defendant NETAPP employed  
10 Defendant RICHARD from May 2016 (Fiscal Year (FY) 2017) through the end of FY20.  
11 As executive vice president of Worldwide Field and Customer Operations, Defendant  
12 RICHARD was responsible for expanding relationships with Defendant NETAPP's  
13 strategic technology partners, resellers, and customers across the globe. He led the  
14 company's global customer success operations and field operations, which focused on  
15 customer-facing functions, and supported NETAPP's ecosystem of channel, alliance, and  
16 service partners. At all times during his employment, he managed all offices and the  
17 company's operations throughout the United States and globally. Defendant RICHARD  
18 was the direct supervisor of Richard Scurfield and other senior vice presidents in global  
19 sales. Defendant RICHARD had discretion to decide on employee discipline as well as  
20 modify company payment structures. At all times herein, RICHARD was a managing  
21 agent with apparent authority over Plaintiff MCGOWAN and was responsible for  
22 business operations and during the course and scope of his employment, managed the  
23 operations of Defendant NETAPP's national and international sales department.

24 20. Defendant RICHARD is a person within the meaning of 18 U.S.C.  
25 §1961(3), and as a person associated with said enterprise which violated 18 U.S.C. §§  
26 1962(c) and (d). Plaintiff MCGOWAN alleges that Defendant RICHARD conspired with  
27 co-Defendants and other directors, officers and managing agents to concoct the  
28 fraudulent commissions scheme to reduce operating expenses. Defendant RICHARD

1 created, concocted and/or actively participated in said ongoing scheme which  
2 commenced in 2018 and continues to the present wherein Defendants misrepresented to  
3 Plaintiff and at least eighty-nine (89) sales team their commissions earned and  
4 intentionally failed to pay all commissions owed. Defendant RICHARD benefited from  
5 said fraud and misrepresentation as he received substantial cash bonuses and restricted  
6 stock units (RSUs) awards for the fraudulently increased financial results.

7 21. Defendant O'CALLAHAN is an individual and an adult, and based upon  
8 information and belief, a California resident based out of the company's San Jose,  
9 California office, Santa Clara County. Defendant O'CALLAHAN has been employed  
10 with Defendant NETAPP's legal team since 2013. Employed at the executive level,  
11 Defendant O'CALLAHAN is the company's chief legal officer, appointed in October  
12 2018, responsible for overseeing all legal matters at the company and managing the  
13 worldwide legal team. She is also the corporate secretary and chief compliance officer  
14 responsible for ensuring that all regulatory filings with the Securities Exchange  
15 Commission ("SEC") are complete, accurate, and truthful.

16 22. Defendant O'CALLAHAN is a person within the meaning of 18 U.S.C.  
17 §1961(3), and as a person associated with said enterprise which violated 18 U.S.C. §§  
18 1962(c) and (d). Plaintiff alleges that Defendant O'CALLAHAN conspired with co-  
19 Defendants and other directors, officers and managing agents to concoct the fraudulent  
20 commissions scheme to reduce operating expenses. Defendant O'CALLAHAN  
21 conducts and/or actively participates in said ongoing scheme which misrepresented to  
22 Plaintiff and the sales team their commissions earned. Defendant O'CALLAHAN  
23 benefited from the misrepresented earned and unpaid commissions as she received  
24 substantial cash bonuses and RSU awards for the fraudulently increased financial results.

25 23. Defendant MCCOWAN is an individual and an adult, and based upon  
26 information and belief, a resident of California, and is based out of the company's San  
27 Jose, California office. Defendant MCCOWAN has been employed with Defendant  
28 NETAPP since October 15, 2018. She is the company's executive vice president and

1 chief human resources officer (“CHRO”), responsible for developing the global HR  
2 strategy and leading the entire organization, including talent acquisition, talent  
3 development and learning, business partnerships, organizational development and  
4 effectiveness, compensation and benefits, diversity, inclusion and belonging, operations,  
5 and systems.

6 24. Defendant MCCOWAN is a person within the meaning of 18 U.S.C.  
7 §1961(3), and as a person associated with said enterprise which violated 18 U.S.C. §§  
8 1962(c) and (d). Defendant MCCOWAN conducts and/or actively participates in the  
9 named RICO Defendants’ fraudulent commission scheme created to “streamline its core  
10 business and reduce operating expenses without losing its competitive edge. Defendant  
11 MCCOWAN benefited from the misrepresented earned and unpaid commissions, based  
12 upon information and belief, by concealing said true facts concerning NETAPP’s expense  
13 and obligation payments regarding commissions. She received substantial cash bonuses  
14 and RSU awards for the fraudulently increased financial results.

15 25. Defendant SCURFIELD is an individual and an adult, and based upon  
16 information and belief, a resident of Santa Clara County, California. Defendant  
17 SCURFIELD had been employed with Defendant NETAPP for almost twenty (20) years  
18 when he appointed to the position as senior vice president of Globals (SVPG). Defendant  
19 SCURFIELD was responsible for growing and leading sales teams supporting Defendant  
20 NETAPP’s largest global accounts, vertical segments, global pathways, and the U.S.  
21 public sector. He managed all offices and the company’s operations throughout the  
22 United States and globally and has discretion to decide on employee discipline as well as  
23 modify company payment structures. Defendant SCURFIELD is based out of the  
24 company’s San Jose, California office, located at 3060 Olsen Drive, San Jose, California  
25 95128, Santa Clara County.

26 26. Defendant SCURFIELD is a person within the meaning of 18 U.S.C.  
27 §1961(3), and as a person associated with said enterprise which violated 18 U.S.C. §§  
28 1962(c) and (d). Defendant SCURFIELD conducts and/or actively participates in the

1 named RICO Defendants ongoing scheme to fraudulently misrepresent the commissions  
2 earned and paid to the sales team and to misclassify said earned wages as retention  
3 bonuses in subsequent quarters. Defendant SCURFIELD benefited from the  
4 misrepresented earned and unpaid commissions. In May 2021, he was promoted to chief  
5 commercial officer and received substantial cash bonuses and RSU awards for the  
6 fraudulently increased financial results.

7 27. Defendant CÉSAR CERNUDA (“CERNUDA”) is an individual and an  
8 adult, and based upon information and belief, a resident of Madrid Spain. On or about  
9 May 2020, Defendant NETAPP employed Defendant CERNUDA as President of  
10 Worldwide Sales North (PWWS) to ramp up the company’s efforts to drive consistency  
11 and simplicity across its global sales organization and more aggressively address key  
12 markets and segments while reaching new customers and partners. Defendant  
13 CERNUDA managed and continues to manage offices and the company’s operations in  
14 multiple states and countries and has discretion to decide on employee discipline as well  
15 as modify company payment structures. Defendant CERNUDA is based out of the  
16 company’s San Jose, California office, located at 3060 Olsen Drive, San Jose, California  
17 95128, Santa Clara County.

18 28. Defendant CERNUDA is a person within the meaning of 18 U.S.C.  
19 §1961(3), and as a person associated with said enterprise which violated 18 U.S.C. §§  
20 1962(c) and (d). Upon his appointment, Defendant CERNUDA learned of said ongoing  
21 scheme and then actively participated in the scheme to fraudulently misrepresent the  
22 commissions earned and paid to the sales team. Defendant CERNUDA benefited from  
23 the misrepresented earned and unpaid commissions as he received substantial cash  
24 bonuses and RSU awards for the fraudulently increased financial results.

25 29. Defendant MAXWELL LONG (“LONG”) is an individual and an adult,  
26 and based upon information and belief, a resident of Santa Clara County, California. On  
27 or about May 1, 2021, Defendant NETAPP employed Defendant LONG as senior vice  
28 president of North America sales (SVPNA) to continue the company’s focus on aligning



1 NETAPP's business objectives in the United States and Canada as driven by NETAPP's  
2 customers' business requirements. The executive level appointed Defendant LONG to  
3 lead direct sales, channel sales, and demand generation teams. He manages offices and  
4 the company's operations in multiple states and Canada and has discretion to decide on  
5 employee discipline as well as modify company payment structures. Defendant LONG is  
6 based out of the company's San Jose, California office, located at 3060 Olsen Drive, San  
7 Jose, California 95128, Santa Clara County.

8 30. Defendant LONG is a person within the meaning of 18 U.S.C. §1961(3),  
9 and as a person associated with said enterprise which violated 18 U.S.C. §§ 1962(c) and  
10 (d). Upon becoming Plaintiff MCGOWAN's direct supervisor, Defendant LONG began  
11 and continued to actively participate in the ongoing scheme to fraudulently misrepresent  
12 the commissions earned and paid to the sales team and to misclassify said earned wages  
13 as retention bonuses. At all times herein, Defendant LONG was a managing agent with  
14 apparent authority over Plaintiff MCGOWAN, and was responsible for business  
15 operations, and did, and continues to manage the operations of Defendant NETAPP's  
16 national and international sales department. He benefited from said fraud and  
17 misrepresentation as he received substantial cash bonuses and RSU awards for the  
18 fraudulently increased financial results.

19 31. Defendant ROSALIND HILL ("HILL") is an individual and an adult, and  
20 based upon information and belief, a resident of Santa Clara County, California.  
21 Defendant HILL is employed with Defendant NETAPP as director, human resources,  
22 directly handling issues for Defendant LONG's direct reports, including Plaintiff.  
23 Defendant HILL has the discretion to decide on employee discipline as well as modify  
24 company payment structures. Defendant HILL is based out of the company's San Jose,  
25 California office, located at 3060 Olsen Drive, San Jose, California 95128, Santa Clara  
26 County.

27 32. Defendant HILL is as a person within the meaning of 18 U.S.C. §1961(3),  
28 and as a person employed by said enterprise which violated 18 U.S.C. §§ 1962(c) and (d).



As Defendant LONG's HR representative, Defendant HILL conducts and/or actively participates in the ongoing scheme to fraudulently misrepresent the commissions earned and paid to the sales team and to misclassify said earned wages as retention bonuses. Defendant HILL benefited from the misrepresented earned and unpaid commissions. At all times herein, Defendant HILL was responsible for the compliance elements and the checks and balances properly processing the payment of earned commissions. She worked closely with Defendant LONG to set and achieve the company's sales goals. She benefited from said fraud and misrepresentation as she received substantial cash bonuses and RSU awards for the fraudulently increased financial results.

33. Individual Defendants O'CALLAHAN, RICHARD, MCCOWAN, SCURFIELD, CERNUDA, LONG and HILL are hereinafter referred to as "RICO Defendants."

34. Plaintiff MCGOWAN is ignorant of the true names and capacities of defendants sued herein as DOES 1 through 50, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff MCGOWAN will amend this Complaint to allege their true names and capacities when ascertained. Plaintiff MCGOWAN is informed and believes, and thereon alleges that each of these fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff MCGOWAN's injuries alleged herein were proximately caused by Defendants.

35. Plaintiff MCGOWAN is informed and believes, and thereon alleges that at all times alleged herein each of the defendants was the agent and employee of each of the remaining defendants and, in doing the things hereinafter alleged, was acting within the course and scope of such agency or employment.

### **GENERAL ALLEGATIONS**

36. Defendant NETAPP is a publicly traded company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), and/or is required to file reports under section 15(d) of the Act (15 U.S.C. 78o(d)) with the Securities and Exchange Commission (SEC). It markets and sales and/or provides

1 hardware and software data storage systems and technologies for use by enterprise  
2 clients, data centers and the cloud globally in all vertical industries.

3 37. The company is comprised of over 10,000 employees, working throughout  
4 California, the United States and globally. The average age is approximately forty-seven  
5 (47), however, when NETAPP reorganizes and/or eliminates job positions, management  
6 utilizes practices and policies that adversely and disproportionately affect employees in  
7 the late fifties (50s) and older, and primarily those who are Black or African-American.

8 38. On September 25, 2017, Defendant NETAPP hired Plaintiff MCGOWAN  
9 as Vice President and General Manager of America Sales (VP/GM Sales) to oversee and  
10 increase sales in the eastern region. Defendants represented to Plaintiff that he would  
11 earn an annual base salary plus incentive commissions commensurate with his skill and  
12 expertise and which is competitive for the industry. Defendant NETAPP represented  
13 that under its commission plan incentive, Plaintiff had the opportunity to earn up to 100%  
14 of his base salary.

15 39. Defendant NETAPP offered and Plaintiff accepted an annual base salary  
16 of \$270,000.00 plus sales commissions compensation in accordance with the company's  
17 Fiscal Year (FY) incentive compensation plan ("Plan") which provided for an annual  
18 target incentive of \$270,000.00. At 100% performance, Plaintiff's offered and agreed  
19 total annual income was \$540,000.00 plus annual merit increases.

20 40. With input from the general manager of sales, each respective commission  
21 plan incentive sets forth market initiatives and sales goals for the forthcoming fiscal year  
22 and is administered on a "whole month" participation basis. Each commission plan  
23 incentive is reviewed, approved and authorized by NETAPP's executive management  
24 team, including the president, executive vice president of field operations, senior vice  
25 president of worldwide sales and/or the geography vice president of sales. For financial  
26 reporting purposes, NETAPP's fiscal year ends (FYE) on April 30<sup>th</sup> of each year. For tax  
27 purposes, this is referred to as the 52-to-53-week year-end. The incentive pay is paid  
28 after the close of each fiscal month in arrears.

1           41. The target incentive was based upon Plaintiff achieving his specified goals  
2 according to the Plan. Plaintiff received 13,000 RSUs which vested at the rate of 25%  
3 per year beginning on the first anniversary of the grant date. Following each vesting  
4 date, Plaintiff was to receive shares of NetApp, Inc. common stock. His VP Sales  
5 position was based in New York, so Defendant NETAPP provided MCGOWAN a  
6 relocation benefits package which allowed Plaintiff MCGOWAN to complete the move  
7 to New York by Spring 2018.

8           42. Prior to his employment, the eastern region sales team frequently  
9 languished below its quarterly and annual operation goals and had undergone a series of  
10 leadership changes. Plaintiff commenced leading and organizing the eastern team with  
11 one month remaining in the second quarter; the group had ended the 1QFY18 behind the  
12 goals for the annual operating plan (“AOP”). While commuting weekly between  
13 California and New York, as VP Sales, Plaintiff MCGOWAN rehauled the team’s  
14 strategies and plans resulting in overachieving the Q3FY18 goals. The eastern region  
15 team had recovered a significant portion of the AOP shortfall by the end of Q3FY18,  
16 continued the momentum into Q4FY18, and finished the year by exceeding the annual  
17 plan for FY18. For the first time in over several years, the eastern region had achieved  
18 approximately \$800 million in orders against a plan of about \$700 million.

19           43. During the course of this same fiscal period, from February 2018 to April  
20 2018, Defendant NETAPP reorganized, based upon information and belief, its structure,  
21 finances, sales departments, accounting and other operations of the company. During this  
22 reorganization, Defendant NETAPP transformed into three separate businesses, forming  
23 new sales roles, regions, and territories to increase sales revenues for the company and its  
24 shareholders.

25           44. As Plaintiff had successfully transformed the eastern region, the following  
26 fiscal year, on May 1, 2018, management offered, and Plaintiff accepted the VP/GM  
27 Globals position for the newly formed region entitled “Globals,” which consisted of both  
28 national and international territories. It was a new role and new territory for FY19 but

1 utilized Plaintiff's same duties and responsibilities. Plaintiff redesigned the preliminary  
2 plan the transformation team drafted and implemented the Globals organization in the  
3 manner he opined would lead to the desired outcome. Impressively, in less than two (2)  
4 quarters, Plaintiff and his team not only produced quantitative, but also, qualitative  
5 results which exceeded the expectations of the executive leadership and cross-functional  
6 groups. Plaintiff MCGOWAN set himself and his team apart from other units of the  
7 company.

8 45. As Plaintiff embarked on the new role as VP/GM Globals, he no longer  
9 needed to relocate to New York. He organized the global accounts by vertical industries  
10 and led his team to develop the strategies and account plans for the top accounts in each  
11 industry including, manufacturing (auto), energy, life sciences, finance, hi-tech EDA,  
12 service providers, and retail. Plaintiff was now responsible for over a billion dollars in  
13 orders across the top 100 accounts (all Fortune 500 companies). He led the organization  
14 to exceed the goals and produced more than \$50 million over the AOP. His direct  
15 supervisor was Defendant SCURFIELD.

16 46. On or about late April to early May 2018, Plaintiff received electronic  
17 access to Defendant NETAPP's FY19 "Incentive Compensation Plan Terms and  
18 Conditions" ("Plan FY19"). A few months later, Plaintiff MCGOWAN received  
19 electronic access to his FY19 Goal Sheet, which governed his salary and commissions for  
20 fiscal year 2019.

21 47. Again, as with previous years, when presenting the Plan FY19 and Goal  
22 Sheets to Plaintiff and other VP/GMs for signature, Defendant SCURFIELD and other  
23 management represented that upon meeting the respective sales goals, Plaintiff  
24 MCGOWAN and other VP/GMs would earn their respective incentive income up to and  
25 including 100% of their salaries as promised. In furtherance of the misrepresentation that  
26 Plaintiff would be fully compensated, Defendant NETAPP paid Plaintiff "recoverable  
27 draws" in an amount equivalent to 100% for the first 3 months of the fiscal year, while he  
28

1 worked without a Goal Sheet. The FY19 Goal Sheet determined the amount of the  
2 commissions Plaintiff would earn for the fiscal year.

3 48. However, upon Plaintiff's receipt and review, the FY19 Plan and Goal  
4 Sheet did not fully compensate all commissions earned and misrepresented the  
5 commissions Plaintiff and other VP Globals would be paid. The misrepresentation/  
6 concealment existed because under his FY19 commission plan, the plan obligated  
7 Plaintiff and other VP/GMs to sell a certain dollar percentage of product but the client  
8 account contract included a client discount which reduced the sales amount, and  
9 therefore, intrinsically diminished the commissions Plaintiff and other VPs could earn.  
10 As written, Plaintiff and other VPs would never earn the incentive commission as  
11 promised.

12 49. Immediately, Plaintiff MCGOWAN reported the diminished earning issue  
13 first, to his direct report, Defendant SCURFIELD, and then to SCURFIELD's direct  
14 report, Defendant RICHARD. Both Defendants SCURFIELD and RICHARD  
15 acknowledged that the plan diminished the true commissions that Plaintiff and other  
16 VP/GMs could earn but advised Plaintiff to sign the Plan anyway. Defendants  
17 SCURFIELD and RICHARD told Plaintiff, "[i]f we change it for you, we will have to  
18 change it for all other VP/GMs." Defendants directed Plaintiff to sign the commission  
19 plan as worded under the representation that management would change the plan in the  
20 next fiscal year. Defendants also told Plaintiff not to disclose the issue to other VP/GMs.  
21 Plaintiff refused to sign the plan as worded, and again requested the correction. Plaintiff  
22 refused to sign the feigned FY19 plan as worded despite pressures Defendants  
23 SCURFIELD and RICHARD applied, and management never corrected the commission  
24 compensation issue.

25 50. Instead, for each month throughout FY19, RICO Defendants excused their  
26 failure to correct the feigned FY19 plan while representing to Plaintiff that management  
27 was addressing the issue. For an entire year, RICO Defendants retaliated against Plaintiff  
28 MCGOWAN for requesting a corrected commissions plan and for requesting proper

1 payment of all commissions owed. Defendant NETAPP withheld Plaintiff's earned  
2 commissions while he continued to work and performed his duties professionally. From  
3 August 2018 through August 2019, as Defendants denied his earned commissions during  
4 this period, he endured the economic hardship of living on less than 50% of his earned  
5 income. RICO Defendants intentionally withheld Plaintiff's earned commission, and said  
6 conduct was so pervasive as Defendants not only denied Plaintiff all his earned  
7 commissions but also denied other VP/GMs their fully earned commissions during FY19.  
8 In furtherance of denying the commissions, RICO Defendants misrepresented NETAPP's  
9 regulatory filings to SEC concerning its expenses and obligations regarding the fifteen  
10 (15) month period.

11 51. Evidencing Defendants' further intent not to fully compensate commissions  
12 earned, during the same period as implementing the commission depressor, on or about  
13 May 23, 2019, Defendant RICHARD sent an email to over 300 employees announcing  
14 that Defendant NETAPP was invoking the Plan's "windfall" provision and would not pay  
15 "further commissions above 200% of goal attainment" based on FY19 sales. Defendant  
16 NETAPP had agreed to pay these employees commissions above 200% of the goal  
17 attainment. As the commissions were earned, they were wages due and payable for  
18 FY19.

19 52. Additionally, as Plaintiff requested the correction to the commission plan,  
20 Plaintiff, his sales team, and several others had over-performed significantly on their  
21 FY19 goals. The capped commission payout affected over thirty (30) employees who  
22 reported to Plaintiff and who had the highest overperformances entitling them to full  
23 overachievement commission payout levels.

24 53. In response Plaintiff and other employees rallied for their payment of their  
25 fully earned commissions. Fully earned commissions are wages which must be paid  
26 when earned. In June 2019, Defendant NETAPP agreed to pay the commissions but in  
27 the form of a "retention bonus" to be paid over several payments to those impacted. For  
28 each affected employee, NETAPP promised to pay, or provide securities, for amounts



1 equivalent to the capped amount NETAPP refused to pay those employees, in two  
2 installments during fiscal year 2020, on December 15, 2019, and June 15, 2020.

3 54. Generally, a retention bonus is a sum of money a company pays to an  
4 employee to stay with the company for a specific amount of time. Thus, if the impacted  
5 employee was not still employed when Defendant NETAPP issued the payment, the  
6 employee would not be compensated.

7 55. Moreover, Defendants calculated the retention bonus below the earned  
8 commission because it knowingly failed to report the commission expense during the  
9 fiscal year in which the expense and obligation arose. Defendants misclassified the  
10 commissions payment to avoid a restatement of earnings and potential adverse impact on  
11 the company stock as well as avoidance of scrutiny from the SEC.

12 56. Regarding Plaintiff's FY19 commissions, on August 6, 2019, instead of  
13 paying Plaintiff his earned commissions monthly as agreed and as due during FY19,  
14 Defendants likewise reclassified his earnings as an opportunity to participate in a "special  
15 NetApp Go to Market Retention Program." Under this "special program," in violation of  
16 California Labor Code §§ 210 and 223, Defendant NETAPP has failed to pay Plaintiff his  
17 earned commissions on the scheduled paydays in as Defendants divided his payment of  
18 \$245,000 into two (2) separate payments of \$122,500, payable on August 5, 2020, and  
19 August 5, 2021, but only if Plaintiff remained employed and was in "good standing."

20 57. Consistent with the scheme to misclassify untimely paid commissions, and  
21 with the intent not to pay commissions at all, Defendants not only failed to pay Plaintiff  
22 during the period in which he earned the commissions, but more than two years after the  
23 wages had been earned.

24 58. Plaintiff MCGOWAN told Defendants SCURFIELD and RICHARD as  
25 well as his human resources representative, Cynthia Brown, that his previously earned  
26 commission in the form of retention bonus was improper, unfair, and punitive retaliation.  
27 Plaintiff MCGOWAN further expressed that the subsequent withholding of 50% of his  
28 earned commission for another twelve (12) months is unreasonable. Defendants would



1 be holding on to Plaintiff's earned commission for twenty-seven (27) months based on no  
2 fault of Plaintiff and all the fault of the Defendants. Despite Plaintiff's request for full  
3 compensation and the illegality of delaying an employee's earned commissions,  
4 Defendants refused to pay Plaintiff unless he signed the letter regarding compensation.  
5 As Plaintiff had already been denied his earned commissions for over a year, he signed  
6 the payment letter under protest, duress, and stress and accepted the retention bonus as  
7 presented.

8 59. In FY19, Plaintiff's goals increased to about \$1.2 billion plus, but the new  
9 plan as written, precluded Plaintiff from ever earning the agreed upon commissions.  
10 During this period, Plaintiff not only met his increased goals of more than \$1.2 billion,  
11 but also, led his team to exceed the goal at year end of FY19.

12 60. During said performance period, Plaintiff met all objective criteria  
13 designating him as one of the top performers that qualified for the President Club. In  
14 further discriminatory and retaliatory interference with the terms and conditions of  
15 Plaintiff's employment, Defendants SCURFIELD and RICHARD denied Plaintiff his  
16 proper position in the Club, and appointed a Caucasian male, Robert Benoit, then VP of  
17 the Systems Engineering Organization to the Club.

18 61. In FY21, as a discriminatory and retaliatory tactic to interfere with  
19 Plaintiff's performance, Defendants SCURFIELD and RICHARD dismantled Plaintiff's  
20 vertical accounts and sales team. His teams had proven to be the best performing sales  
21 team in the company across several objective metrics - revenue, growth, and average  
22 sales productivity amongst the team. Several of Plaintiff's direct reports were reassigned  
23 to Defendant SCURFIELD who reduced these managers' respective goal requirements  
24 despite objective and reasoned business needs. Defendant SCURFIELD, as Defendant  
25 RICHARD authorized, gave these underperformers, all white males, more senior roles  
26 and reduced their quotas. Regarding Plaintiff, Defendant SCURFIELD denied Plaintiff  
27 due and fair-minded consideration for annual merit increases and stock grants that are  
28 usually rewarded to employees in good standing.

62. From late FY21 and continuing through FY22, Defendant NETAPP experienced an exceptionally high turnover rate within the North America Global sales segment of the company which required numerous team reassignments. Defendants represented to the general public that these changes to the data-centric software leader's sales organization were to better meet customer needs and power the company's next stage of growth. However, not all changes were proactive, but rather, were by dissension of the sales team because of management's ongoing misrepresentations regarding full payment of earned commissions.

63. First, in May 2020, Tom Whaley, a regional sales director and one of Plaintiff direct reports transferred to Defendant SCURFIELD, over-performed due to his reduced quota. After Whaley received a substantial commission check, he resigned while poaching seven (7) employees on the same day to join a competitor. Mid-year FY22 (around November 2021), Rich Di Gangi, Plaintiff's peer who also reported to Defendant LONG, resigned. Mr. Di Gangi led the Financial Services + Service Providers (FSSP) team. As 1H22 ended, Peter Srere, who led the Financial Services and Life Science (FSLS) team and a direct report to Defendant LONG, resigned creating yet another void in the organization.

64. As these teams required reassignment, Defendant LONG approached Plaintiff advising that Plaintiff was the most skilled VP/GM of his direct reports to handle the team. Against Plaintiff's suggestion otherwise, Plaintiff agreed, advising LONG that he would manage the team, but not the FSSP and FSLS teams' quotas for T1. Requesting Plaintiff to manage the reassigned quotas would unfairly burden Plaintiff's personal commission rate. Defendants did not compensate Plaintiff for the newly assigned teams.

65. Plaintiff also informed Defendant LONG that as he integrated the new re-assigned teams, he would manage the T2 (only) goals as a consolidated team goal of his old team, plus FSSP, and FSLP. Accordingly, if Plaintiff's teams achieved the total T2 goal, then all teams earned commission payout; and vice versa. Plaintiff applied this model to all groups he managed. Plaintiff successfully managed his original team to be

1 the only VP of North America Sales, and one of a small few worldwide to exceed his T2  
2 goals in 1HFY22.

3 66. Using the team goal concept in 1H22, Plaintiff and his team over-achieved  
4 both T1 and T2 goals and were compensated their commissions. However, there was a  
5 significant portion of the company worldwide that did not achieve its T2 target so  
6 Defendant LONG and his manager Defendant CERNUNDA, based on information and  
7 belief, along with other managing agents including the executive staff reduced the T2  
8 quotas for most of the company by 30%. Defendants LONG and CERNUNDA rewarded  
9 underperformers commissions they did not earn. Defendants denied Plaintiff and his team  
10 a similar quota reduction, and thus, discriminatorily denied the commensurate  
11 overperformance benefit for their performance. Again, Defendant NETAPP underpaid  
12 the earned commissions of Plaintiff and his team for FY22. Defendant NET APP wired  
13 Plaintiff's payment in his account.

14 67. In May 2021, Defendant SCURFIELD began his newly established role  
15 of chief commercial officer. Defendant SCURFIELD became responsible for building a  
16 new GTM model and strategy including direct sales and channel coverage and to drive  
17 Defendant NETAPP's transformation of the company's digital and virtual sales teams  
18 and Sales Operations to better enable the sales force and worldwide partnerships. Based  
19 upon information and belief, Defendant received a substantial pay increase  
20 commensurate with his new position.

21 68. In FY22, when Defendant LONG became Plaintiff's manager and sales  
22 goals were separated into two categories T1 (hybrid cloud) and T2 (cloud). Each team  
23 was assigned a quota, but it was recognized company-wide that there was insufficient  
24 historical data to reasonably assign individual goals to each seller. Plaintiff MCGOWAN  
25 suggested the team goal which had had a proven success record during his employment,  
26 including 1H22.

27 69. As the company entered the second half of FY22, Plaintiff managed and  
28 received goals for the three teams. Plaintiff timely advised LONG and his controller that

1 he would manage the new team under the successful T2 premise utilized during the first  
2 half of FY22. The controller okayed the approach, and Defendant LONG did not deny  
3 Plaintiff's request.

4 70. At the end of the reporting period, Plaintiff's teams, original and FSSP  
5 teams had underachieved about \$300,000.00, but the newly assigned FLSL team  
6 overachieved creating a consolidated result above the T2 goal. Accordingly, under  
7 Plaintiff's submitted team goal method, Plaintiff and his teams earned their respective  
8 commissions. Again, Defendants denied Plaintiff and eighty-nine (89) individuals on his  
9 original and FLSP teams their earned commissions under the basis that their goal sheets  
10 were inaccurate.

11 71. On or about May 1, 2022, Plaintiff MCGOWAN complained to Defendant  
12 LONG regarding Defendant NETAPP's payout plan. Defendant LONG had reassigned  
13 all teams to Plaintiff. Yet, under RICO Defendants' common scheme to avoid paying all  
14 commissions earned, never consolidated on the goal sheets, and had used different goal  
15 sheets for each team assigned to Plaintiff. As the sales team understood they had been  
16 denied their respective earned commissions, they were also in an uproar.

17 72. Ninety (90) days thereafter, Defendant NETAPP agreed to pay the  
18 commissions the sales team had earned in the prior quarter under the guise of a retention  
19 bonus. RICO Defendants use this two-phase retention bonus structure to conceal their  
20 intentional failure to timely pay commissions owed when the commission expense  
21 occurred. Defendant NETAPP and other executive staff have engineered this method to  
22 avoid paying the respective commission expenses in the year the expenses were incurred  
23 and this has an impact of inflating Defendant NETAPP's reported earnings to the public  
24 market. RICO Defendants misrepresent the form of payment and fail to fully compensate  
25 for the actual commission earned. Defendant NETAPP intentionally denies its  
26 employees their respective earned commission and misrepresents the profitability of the  
27 company to the SEC and the shareholders by falsely reporting the expense obligation as  
28

1 another form during a different payment period. Defendants have used the practice at  
2 least two different times within the last four years.

3 73. On or about August 1, 2022, Defendant LONG told Plaintiff that except for  
4 him (MCGOWAN), Defendant NETAPP would pay retention bonuses to the eighty-nine  
5 (89) impacted sales employees in lieu of the earned, unpaid commissions. Plaintiff  
6 MCGOWAN had met all objective criteria to earn and did earn commissions in the  
7 amount of \$153,000.00. Yet, again, in violation of California labor laws, Defendants  
8 denied Plaintiff his earned commissions “because someone must be accountable for  
9 Defendants’ error.” RICO Defendants denied and delayed paying earned commissions  
10 when the obligation arose regarding T2 and Morgan Stanley situations and was now  
11 using it as a basis to retaliate and discriminate against Plaintiff.

12 74. Consistent with RICO Defendants’ ongoing fraudulent commissions  
13 scheme, Defendants again withheld his earned commissions. Plaintiff advised LONG  
14 that it was illegal to deny his earned commissions, that he (Plaintiff) was not responsible  
15 for the error, and where was his (LONG’s) accountability and the accountability of sales  
16 operations, finance, and HR management for ensuring that the goals were properly  
17 inserted into the goal sheet. Defendant LONG did not respond to Plaintiff’s complaints,  
18 and no other HR representative addressed or investigated Plaintiff’s concerns.

19 75. Instead, after Plaintiff was again forced to advocate for his and his sales  
20 team’s earned, but unpaid commissions and within twenty-two (22) days of complaining  
21 about the illegality of Defendants ongoing conduct, on August 23, 2022, under the guise  
22 that he (LONG) and Plaintiff “were not coming together,” Defendant NETAPP  
23 retaliatorily and discriminatorily terminated Plaintiff’s employment.

24 76. Plaintiff MCGOWAN delivered the company’s innovations and  
25 transformational technologies (e.g., Cloud, AI, IoT) to his client segment and directly  
26 produced company bookings that exceeded \$1.5 billion in FY’22. Plaintiff’s bookings  
27 represented approximately 27% of the company’s total bookings.  
28

77. For the same period, NETAPP generated more than \$5.5 billion dollars in bookings, derived from interstate and international sales of its systems and technological products. All income derived from interstate and international commerce is to be reported on IRS Form 1120, a corporate income tax return form. NETAPP collects gross income from foreign sources including dividends, royalties, interest, and sales income. All expenses and obligations are to be captured when the obligation arises.

78. On August 23, 2023, within three years of the date in which the last incident of discrimination occurred, Plaintiff filed a Charge with the Department of Fair Employment and Housing (“DFEH”) alleging discrimination and harassment based upon his race and national origin. A true and correct copy of the DFEH charge is attached as Exhibit “A.”

79. On August 23, 2023, the DFEH issued to Plaintiff a notice of a right to bring a civil action based on the charge. A true and correct copy of the Right to Sue Notice is attached as Exhibit “B.”

### **RICO ALLEGATIONS**

80. Plaintiff MCGOWAN complains against Defendants RICHARD, MCCOWAN, O’CALLAHAN, SCURFIELD, CERNUDA, LONG and HILL, and DOES 1 through 25, inclusive, and realleges the allegations contained in Paragraphs 1 through 69 and incorporates them by reference into this count as though fully set forth herein.

81. Section 1962, entitled “Prohibited Activities,” outlaws the use of income derived from a “pattern of racketeering activity” to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce; the acquisition or maintenance of any interest in an enterprise “through” a pattern of racketeering activity; conducting or participating in the conduct of an enterprise through a pattern of racketeering activity; and conspiring to violate any of these provisions.

82. Each RICO Defendant acted in concert with each other and came to a mutual understanding that payment of commissions was and continues to be Defendant NETAPP’s highest operating expense. However, as Plaintiff MCGOWAN’s and the



1 sales team's compensation was commensurate with their respective skill and expertise in  
2 the industry, Defendants knew salary and/or commission reduction would make the  
3 company less competitive in maintaining its team. Based upon information and belief,  
4 RICO Defendants, knowing management controlled the commission payments through  
5 the company's annual commissions plans, reconciled that they would manipulate the  
6 plans to reduce the commissions without disclosing the reduction intent to the sales team.

7 83. Therefore, despite violation of various state and federal labor laws and  
8 fraudulent representations to the sales team, in or about 2018, Defendants RICHARD,  
9 SCURFIELD and HR management conspired with other current directors, officers,  
10 managing agents, and upper-level supervisors to concoct the fraudulent commissions  
11 scheme to methodically deny the sales team's commissions earned without disclosing  
12 Defendants' intent to deny the earned commissions. Under the scheme, Defendants  
13 repeatedly failed to pay all commissions owed, and because of Plaintiff's reports and  
14 ongoing advocacy for proper and full compensation, Defendant NETAPP was forced to  
15 pay back commissions owed. To date, Defendant NETAPP continues to owe Plaintiff  
16 MCGOWAN an amount exceeding \$153,000.

17 84. In furtherance of concealing RICO Defendants' fraudulent scheme,  
18 Defendant RICHARD in concert with HR management and co-Defendants misclassified  
19 said delayed and untimely payments of previously earned commissions (wages) as  
20 retention bonuses in subsequent quarters on regulatory filings to SEC that should have  
21 been an allocated expense in prior quarters.

22 85. Defendant RICHARD, at the executive level, along with Defendant  
23 SCURFIELD, created the sales strategy for the company and managed its sales priorities  
24 to set and achieve the company's sales goals.

25 86. In increasing company revenues, NETAPP executives, directors, officers  
26 and managing agents, including named Defendants RICHARD, O'CALLAHAN and  
27 MCCOWAN, while acting in the course and scope of their respective management  
28 relationship with Defendant NETAPP, met, agreed, and conspired to modify



1 disbursement of the employee annual incentive commission plan to disperse less  
2 commissions owed to employees than they earn.

3 87. Based upon information and belief, these conspiring executives, directors,  
4 officers and managing agents created incentive commission plans under the false pretense  
5 that Plaintiff MCGOWAN and other commission earning employees, including other  
6 VP/GMs, had the opportunity to maximize their respective commission earnings based  
7 upon meeting specified sales goals. Having implemented a masked commission  
8 depressor, RICO Defendants knowingly induced Plaintiff and others to meet and surpass  
9 the specified sales goals but RICO Defendants had no intention of paying the promised  
10 commissions at the time they were earned, and on at least two separate occasions, did not  
11 pay the commissions earned.

12 88. In 2018, Defendants O'CALLAHAN and RICHARD and others at the  
13 executive level initiated the fraudulent scheme and presented said scheme to Defendant  
14 SCURFIELD and other SVPs to distribute to their respective sales team. While acting  
15 in his position as SVP in the course and scope of his employment relationship with  
16 Defendant NETAPP, Defendant SCURFIELD distributed commission plans for FY19  
17 and FY20 to his sales team. Based upon information and belief, Defendant SCURFIELD  
18 knew not only that the plans reduced the commissions but knew also that management  
19 intended to deny or delay the commissions so it could reduce its operating expenses for  
20 various fiscal quarters and/or years.

21 89. Based upon information and belief, Defendants O'CALLAHAN and  
22 RICHARD acclimated Defendant MCCOWAN, upon her appointment as CHRO in  
23 October 2018, to the work environment as well as the need to streamline its core business  
24 and reduce operating expenses without losing its competitive edge. Defendants  
25 O'CALLAHAN and RICHARD introduced MCCOWAN to its ongoing scheme to  
26 reduce commissions without disclosing the true facts to the sales team, and Defendant  
27 MCCOWAN, while acting in her position as CHRO in the course and scope of her  
28 employment relationship with Defendant NETAPP, implemented said ongoing scheme

1 with full knowledge that the sales team's earned commissions were wages that should  
2 have been paid when earned. Defendant MCCOWAN authorized the delayed payment  
3 and/or denial of the commissions owed to Plaintiff and others, knowing that said conduct  
4 was in violation of labor laws as well as fraud.

5 90. After Defendant CERNUDA's appointment to NETAPP's executive level  
6 as PWWS, Plaintiff alleges that in May 2020, Defendant SCURFIELD and NETAPP's  
7 executive level acclimated Defendant CERNUDA to the company culture and policy to  
8 streamline its core business and reduce operating expenses without losing its competitive  
9 edge. Defendant CERNUDA was introduced to the ongoing scheme to reduce  
10 commissions without disclosing the true facts to the sales team, and Defendant  
11 CERNUDA, while acting in his position as PWWS in the course and scope of his  
12 employment relationship with Defendant NETAPP, implemented said ongoing scheme  
13 with full knowledge that the sales team's earned commissions were wages that should  
14 have been paid when earned. Defendant CERNUDA authorized the delayed and/or  
15 denial of the commissions owed to Plaintiff and others, knowing that said conduct was in  
16 violation of labor laws as well as fraud and authorized Plaintiff's retaliatory and  
17 discriminatory termination.

18 91. After Defendant SCURFIELD's promotion, Defendant LONG, as SVPNA,  
19 became Plaintiff's supervisor. Accordingly, Defendant SCURFIELD acclimated  
20 Defendant LONG to the company culture and policy to streamline its core business and  
21 reduce operating expenses without losing its competitive edge. Plaintiff alleges that  
22 Defendant SCURFIELD not only introduced LONG to the ongoing scheme to reduce  
23 commissions without disclosing the true facts to the sales team, but also, advised him of  
24 Plaintiff's ongoing advocacy for fair, prompt and full payment of earned commissions for  
25 himself and the sales team. Defendant LONG, while acting in his position as SVPNA in  
26 the course and scope of his employment relationship with Defendant NETAPP,  
27 implemented said ongoing scheme with full knowledge that the sales team's earned  
28

1 commissions were wages that should have been paid when earned and instigated  
2 Plaintiff's retaliatory and discriminatory termination.

3 92. At all times herein, Defendant HILL was responsible for the compliance  
4 elements and the checks and balances properly processing the payment of earned  
5 commissions. She worked closely with Defendant LONG to set and achieve the  
6 company's sales goals. She participated in and authorized Plaintiff's retaliatory and  
7 discriminatory termination.

8 93. RICO liability exists as corrupt and fraudulent conduct occurred at  
9 managerial levels. The illegal conduct takes place "at such a high level that evidences  
10 corporate policy to promote or engage in illegal conduct." Defendant NETAPP's high  
11 level officials were involved in the underlying scheme which was so pervasive as RICO  
12 Defendants routinely denied paying the full commissions earned, paid commissions more  
13 than two-years after they were earned, and misclassified the payment as a retention bonus  
14 to disguise and misrepresent the untimely paid commissions in Defendant NETAPP's  
15 reports to the SEC.

16 94. As detailed above, Defendant NETAPP has received income derived,  
17 directly or indirectly, from a pattern of racketeering activity, and has used or invested,  
18 directly or indirectly, any part of such income, or the proceeds of such income, in  
19 acquisition of any interest in, or the establishment or operation of, any enterprise which is  
20 engaged in, or the activities of which affect, interstate or foreign commerce. Defendant  
21 NETAPP is liable as a PERSON for those acts in violation of 18 U.S.C. § 1962(a).

22 95. As detailed above, Defendants RICHARD, O'CALLAHAN, MCCOWAN,  
23 SCURFIELD, CERNUDA, LONG and HILL conducted or participated in the conduct of  
24 an enterprise, NETAPP, through a pattern of racketeering activity in violation of 18  
25 U.S.C. § 1962(c).

26 96. Alternatively, the RICO Defendants, through an agreement to commit two  
27 or more predicate acts, conspired to conduct or participate in the conduct of an enterprise,  
28 NETAPP, through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d).

1 The actions of the RICO Defendants as against Plaintiff, and as described above, were in  
2 furtherance of the RICO Defendants' conspiracy and in violation of 18 U.S.C. § 1962(d).

3 97. Civil RICO claim, appellants must show that Defendants' violation  
4 of Section 1962 was the proximate cause of their injury.

### 5 **THE ENTERPRISE**

6 98. NETAPP is an ongoing organization with a corporate structure for making  
7 or carrying out decisions. Its members and/or employees function as a continuing unit  
8 with established duties to carry out the RICO Defendants fraudulent scheme. Thus,  
9 NETAPP was and is the instrument of the RICO Defendants' racketeering activity and  
10 constitutes an "enterprise" as that term is defined in 18 U.S.C. § 1961(4), separate and  
11 distinct from the individual RICO Defendants RICHARD, O'CALLAHAN,  
12 MCCOWAN, SCURFIELD, CERNUDA, LONG and HILL, named herein.

13 99. From sometime 2018 and continuing through the present, the RICO  
14 Defendants, as well as others known or unknown, persons employed by and associated  
15 with NETAPP, which was and is engaged in and the activities of which affected and  
16 affect interstate commerce, unlawfully and knowingly conducted or participated, directly  
17 or indirectly, in the affairs of the enterprise through a pattern of racketeering activity, that  
18 is, through the commission of two or more racketeering acts set forth herein.

19 100. Plaintiff seeks to prohibit the RICO Defendants from utilizing the pattern of  
20 unlawful conduct in which they have continually engaged during the relevant time  
21 period.

22 101. The pattern of racketeering engaged in by the RICO Defendants involved at  
23 least two separate but related acts of racketeering activity, carried out from approximately  
24 May 2018, through the present.

25 102. Plaintiff took steps to prevent said fraudulent scheme, and because of his  
26 retaliatory termination, he was directly injured by the RICO Defendants' acts of  
27 racketeering activity.  
28

**PREDICATE ACTS & THE PATTERN**  
**OF RACKETEERING ACTIVITY**

103. Section 1961(1) of RICO provides that “racketeering activity” includes any act indictable under 18 U.S.C. § 1341 (relating to mail fraud) and 18 U.S.C. § 1343 (relating to wire fraud). As set forth below, the RICO Defendants engaged in conduct violating 18 U.S.C. §§ 1341 and 1343 to effectuate their unlawful scheme.

104. A “pattern” of racketeering activity is shown when a racketeer commits at least two distinct but related predicate acts.

105. Sections 18 U.S.C. §§ 1341 and 1343 share identical language in providing that those who act “having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... shall be fined or imprisoned not more than twenty (20) years or both. ...” 18 U.S.C. § 1341; *Id.* § 1343; *see, United States v. Bohonus*, 628 F.2d 1167.

106. The RICO Defendants’ acts were not isolated, but rather formed a pattern of conduct through which the RICO Defendants used the enterprise, NETAPP, to defraud the NETAPP employees, shareholders, and SEC and to silence Plaintiff from complaining about and exposing such illegal and fraudulent acts.

107. The acts performed by Defendants RICHARD, O’CALLAHAN, MCCOWAN, SCURFIELD, CERNUDA, LONG and HILL are related as they apply to Plaintiff. They have the same purpose, result, victim and method of execution. Defendants acted in concert to manipulate the calculation of sales performance and commissions and the account assignment functions so that Plaintiff’s earned commissions would be denied and/or delayed while executive level receive full bonus compensation not justified by their sales performance.

108. Defendants RICHARD, O’CALLAHAN, MCCOWAN, SCURFIELD, CERNUDA, LONG and HILL violated and continued to violate RICO by joining

1 together in a conspiracy to deceive employees about their earnings and misrepresent to  
2 shareholders and SEC company revenue and expenses. Defendant NETAPP uses the  
3 income or proceeds from the pattern of racketeering activity to maintain the enterprise  
4 engaged in interstate commerce. Specifically, the pattern of the RICO Defendants'  
5 illegal racketeering activity, as defined by 18 U.S.C. § 1961(1) (3), (4) and (5) and 18  
6 U.S.C. §§ 1341 and 1343 are based on the following facts:

7           a. During Defendant NETAPP's 2018 reorganization, the company  
8 transformed into three separate businesses of which Globals was formed and managed by  
9 its own separate executive level. For Globals, Defendant NETAPP formed new sales  
10 roles, regions, and territories to increase sales revenues for the company and its  
11 shareholders. Defendants also sought to streamline its core business and reduce  
12 expenses.

13           b. The company's executive staff including Defendants  
14 O'CALLAHAN and RICHARD and the Globals sales management team, consisting of  
15 SCURFIELD and other SVPs met, discussed, and concocted an annual commission plan  
16 designed to pay the Globals sales team less commissions than earned (Plan FY19).  
17 Based upon information and belief, Defendants had disclosed in its regulatory filing for  
18 FY19 that it would reduce expenses.

19           c. Defendant RICHARD, at the executive level, along with Defendant  
20 SCURFIELD, created the sales strategy for the company and managed its sales priorities  
21 to set and achieve the company's sales goals. Plaintiff alleges that Defendant  
22 O'CALLAHAN assisted with legal matters pertaining to the scheme and was  
23 subsequently appointed to CLO.

24           d. Consistent with said regulatory filing, Defendants O'CALLAHAN,  
25 RICHARD and SCURFIELD designed Plan FY19 to automatically decrease the  
26 commissions earned by Plaintiff and other VP/GMs despite their sales, which as  
27 Defendants intended, decreased reportable expenses. Defendants did not disclose to  
28 Plaintiff or the other VP/GMs that Plan FY19 intrinsically diminished the commissions



1 they could earn. Instead, Defendants issued the plan while misrepresenting to Plaintiff or  
2 the other VP/GMs that they would earn 100% commissions as promised. As written,  
3 Plaintiff and other VPs would never earn the incentive commission as promised.

4 e. In accordance with the misrepresentations, Defendants distributed  
5 and had already implemented Plan FY19 for sales team who received the plan and who  
6 signed off on the plan without question. The sales team worked for an entire year under  
7 Plan FY19, wherein Defendants O'CALLAHAN, RICHARD, SCURFIELD and  
8 MCCOWAN, after she joined NETAPP in October 2018, intentionally failed to pay the  
9 sales team all commissions earned. Defendants wired the deficient monthly commissions  
10 payment into the sales team respective accounts each month in violation of 18 U.S.C. §  
11 1343.

12 f. Based upon information and belief, Defendants completed  
13 NETAPP's regulatory filing for FY19, failing to report all commissions owed to the sales  
14 team, and therefore, created the false representation that Defendant NETAPP had  
15 decreased its expenses, creating the false representation that NETAPP had more revenue  
16 than actually reported. The regulatory filing containing the misrepresented expenses was,  
17 based upon information and belief wired and mailed to the SEC in violation of 18 U.S.C.  
18 §§ 1341 and 1343.

19 g. To continue reducing operating expenses, without disclosing their  
20 intentions to the sales team, for the following year, Defendants O'CALLAHAN,  
21 RICHARD, SCURFIELD and MCCOWAN issued the same commissions plan for FY20  
22 (Plan FY20) as Plan FY19. Consistent with the prior year, Plan FY20 misrepresented the  
23 commissions that sales staff would earn despite exceeding the specified goal.

24 h. On or about May 2019, RICO Defendant SCURFIELD presented  
25 Plaintiff with Plan FY20. Shortly after receipt, Plaintiff reported first to Defendant  
26 SCURFIELD that the plan as written reduced the sales team's earned commissions.  
27 Thereafter, as Defendant SCURFIELD sought assistance from Defendant RICHARDS,  
28 Plaintiff explained to both Defendants that Plan FY20 failed to fully compensate for all



1 wages earned and that despite selling at 100% capacity, the sales team would not be fully  
2 compensated.

3 i. Defendants SCURFIELD and RICHARDS acknowledged the  
4 reduced payment but told Plaintiff MCGOWAN that if Plan FY19 was changed for  
5 Plaintiff, Defendant would have to change the plan for other sales team staff.

6 j. Defendants SCURFIELD and RICHARDS told Plaintiff to simply  
7 sign Plan FY19 and that it would be corrected in the next fiscal year. As Defendants  
8 planned and schemed to pay staff reduced commissions, RICO Defendants delayed  
9 paying commissions earned as intended.

10 k. Plaintiff refused to sign the uncorrected FY20 commissions plan so  
11 in retaliation, Defendants failed to pay commission more than two (2) years after they  
12 were earned.

13 l. Plaintiff's goals increased to about \$1.2 billion plus. Plaintiff  
14 worked professionally and during FY20, Plaintiff not only met his increased goals, but  
15 also, led his team to exceed the goal by more than \$100 million at year end of FY20.

16 m. RICO Defendants routinely used a two-phase retention bonus  
17 structure to conceal their intentional failure to timely pay commissions owed when the  
18 commission expense occurred.

19 n. When Plaintiff received his untimely paid commissions, it was wired  
20 into his account.

21 o. On August 23, 2022, Defendants violated SOX when NETAPP  
22 terminated Plaintiff MCGOWAN's employment for reported that Defendants illegally  
23 withheld his commissions and that it was improper to misclassify untimely paid  
24 commissions as a retention bonus.

25 ///

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**COUNT ONE**

**(VIOLATION OF RICO 18 U.S.C. § 1962(a))**

**Against All Defendants**

109. Plaintiff MCGOWAN complains against all Defendants and DOES 1 through 50, inclusive, and realleges all allegations contained in Paragraphs 1 through 108 and incorporates them by reference into this count as though fully set forth herein.

110. Section 1962(a) of RICO provides that “it shall be unlawful for any person to use of income or proceeds from a pattern of racketeering activity by a principal in that activity to acquire an interest in or to establish an enterprise engaged in interstate commerce....”

111. At all relevant times, the union constituted an “enterprise” within the meaning of 18 U.S.C. §§ 1961(4) and 1962(a), in that it was and is a business

112. As set forth above, NETAPP is the enterprise that engages in interstate and foreign commerce and receives income and proceeds from a pattern of racketeering activity.

113. As alleged with particularity above, the facts demonstrate that NETAPP used income or proceeds from a pattern of racketeering activity by a principal in that activity to acquire an interest in or to establish an enterprise engaged in interstate commerce.

114. As alleged with particularity above, as a direct and proximate result of the RICO Defendants’ aforementioned RICO conduct, Plaintiff’s lawful employment and livelihood have been irreparably damaged.

115. As alleged with particularity above, the RICO Defendants are jointly and severally liable to Plaintiff for treble damages, together with all costs for this action, plus reasonable attorneys’ fees as provided by 18 U.S.C. § 1964.

116. To the extent permitted by law, Plaintiff is entitled to damages, plus court costs, and pre- and post-judgment interest at the legally allowable limit.

**COUNT TWO**

**(VIOLATION OF RICO 18 U.S.C. § 1962(c))**

**Against Defendants RICHARD, MCCOWAN, O'CALLAHAN,  
CERNUDA, SCURFIELD, LONG and HILL**

117. Plaintiff MCGOWAN complains against the RICO Defendants and DOES 1 through 25, inclusive, and realleges all allegations contained in Paragraphs 1 through 108 and incorporates them by reference into this count as though fully set forth herein.

118. Section 1962(c) of RICO provides that “it shall be unlawful for any person employed by...any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity....”

119. As set forth above, the RICO Defendants are employed by an enterprise, NETAPP, which engages in interstate and foreign commerce.

120. As set forth above, the RICO Defendants, as employees of the enterprise, used their positions with NETAPP to conduct or participate, directly or indirectly, in the conduct of NETAPP’s affairs through a pattern of racketeering activity.

121. As set forth herein, the RICO Defendants’ pattern of racketeering activity is comprised of predicate acts including wire fraud, tampering and retaliation.

122. As set forth above, the pattern of racketeering activity engaged-in by the RICO Defendants was for the common purpose of concealing and benefitting from the intentional failure to properly and timely pay employees all commissions earned, and to silence Plaintiff from exposing that concealment.

123. As alleged with particularity above, the facts demonstrate that the RICO Defendants willingly and knowingly conducted or participated, directly or directly, in the conduct of NETAPP’s affairs through a pattern of racketeering activity.

124. As alleged with particularity above, as a direct and proximate result of the RICO Defendants’ aforementioned RICO conduct, Plaintiff’s lawful employment and livelihood have been irreparably damaged.

125. As alleged with particularity above, the RICO Defendants are jointly and severally liable to Plaintiff for treble damages, together with all costs for this action, plus reasonable attorneys' fees as provided by 18 U.S.C. § 1964.

126. To the extent permitted by law, Plaintiff is entitled to damages, plus court costs, and pre- and post-judgment interest at the legally allowable limit.

### **COUNT THREE**

#### **(VIOLATION OF RICO 18 U.S.C. § 1962(d))**

#### **Against Defendants RICHARD, MCCOWAN, O'CALLAHAN, CERNUDA, SCURFIELD, LONG and HILL**

127. Plaintiff MCGOWAN complains against RICO Defendants and DOES 1 through 25, inclusive, and realleges all the allegations contained in Paragraphs 1 through 118 and incorporates them by reference into this count as though fully set forth herein.

128. Section 1962(d) of RICO makes it unlawful "for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section."

129. The RICO Defendants' conspiracy to conceal and benefit from erroneously-provided federal tax credits, to defraud the United States consumers through that concealment, and to silence Plaintiff from exposing that concealment, as described above, violates 18 U.S.C. § 1962(d).

130. Each RICO Defendant agreed to participate, directly or indirectly, in the conduct of the affairs of NETAPP through a pattern of racketeering activity comprised of numerous acts of mail fraud, tampering and retaliation, and each RICO Defendant so participated in violation of 18 U.S.C. § 1962(c).

131. As alleged with particularity above, the facts demonstrate that the RICO Defendants conspired to violate 18 U.S.C. § 1962(c) by conducting, or participating directly or indirectly in the conduct of, the affairs of NETAPP through a pattern of racketeering activity.

132. As alleged with particularity above, as a direct and proximate result of the RICO Defendants' aforementioned RICO conduct, Plaintiff's lawful employment and

1 livelihood have been irreparably damaged.

2 133. As alleged with particularity above, the RICO Defendants are jointly and  
3 severally liable to Plaintiff for treble damages, together with all costs for this action, plus  
4 reasonable attorneys' fees as provided by 18 U.S.C. § 1964.

5 134. To the extent permitted by law, Plaintiff is entitled to damages, plus court  
6 costs, and pre- and post-judgment interest at the legally allowable limit.

7 **COUNT FOUR**

8 **(BREACH OF CONTRACT)**

9 **Against Defendant NETAPP Only**

10 135. Plaintiff MCGOWAN complains against Defendant NETAPP and DOES 1  
11 through 25, inclusive, and realleges all the allegations contained in Paragraphs 1 through  
12 134 and incorporates them by reference into this count as though fully set forth herein.

13 136. On or about September 2017, Defendant NETAPP and Plaintiff  
14 MCGOWAN entered into a valid written contract that during Plaintiff's employment,  
15 Defendant NETAPP would pay Plaintiff a base salary plus commission.

16 137. Defendant NETAPP offered and Plaintiff accepted a compensatory package  
17 consisting of an annual base salary of \$270,000.00 plus sales commissions compensation  
18 in accordance with the company's Fiscal Year (FY) incentive compensation plan ("Plan")  
19 which provided for an annual target incentive of \$270,000.00. At 100% performance,  
20 Plaintiff's offered and agreed total annual income was \$540,000.00 plus annual merit  
21 increases.

22 138. In exchange for the annual base salary, commissions, and benefits, Plaintiff  
23 MCGOWAN was obligated to deliver the company's innovations and transformational  
24 technologies to his client segment consisting of global accounts by vertical industries for  
25 manufacturing (auto), energy, life sciences, finance, hi-tech EDA, service providers, and  
26 retail. Plaintiff handled over a billion dollars in orders across the top 100 accounts (all  
27 Fortune 500 companies) and directly produced company bookings.

1           139. Plaintiff MCGOWAN continued to work and performed his duties  
2 professionally and fully earned commissions in the amount of \$245,000.00 from May  
3 2019 through August 2020. Plaintiff MCGOWAN performed all conditions, covenants,  
4 and promises required to be performed in accordance with the terms and conditions of the  
5 agreement, including subsequent commissions plans. Indeed, Plaintiff over-performed.  
6 bookings that exceeded \$1.5 billion in FY'22. Plaintiff's bookings represented  
7 approximately 27% of the company's total bookings.

8           140. Defendant NETAPP, by and through Defendants RICHARD,  
9 SCURFIELD, and LONG, the executive staff, other individual defendants, other  
10 managing agents, directors, and officers, breached the agreement by engaging in  
11 intentional acts to steal earned commissions from Plaintiff and his colleagues. These  
12 alleged acts include "back-dooring" sales by negotiating customers incentives without  
13 accounting for sales, discriminatorily applying reduced quotas requirements without  
14 fairly paying commission overages, refusing to correct benign plans that fail to fully  
15 compensate all earned commissions, untimely and unfairly denying earned commissions,  
16 refusing to sign off agreed upon commissions plans and/or modifying commissions plans  
17 after Plaintiffs and others properly earn commissions and reversing Plaintiff's  
18 commissions for sales made months and years earlier, and terminating Plaintiff to avoid  
19 paying all commissions earned during his employment.

20           141. As a foreseeable result of Defendant NETAPP's actions, Plaintiff suffered  
21 further general damages in an amount which is currently unknown, but which will be  
22 proved upon the trial or other disposition of this action. Such injuries and damages  
23 include, but are not limited to, the damages suffered in an amount exceeding \$153,000.00,  
24 according to proof.

25           142. Plaintiff seeks specific performance of the contract.

26           143. WHEREFORE, Plaintiff request relief as hereinafter provided.

27 ///

28 ///



**COUNT FIVE**

**(BREACH OF IMPLIED COVENANT OF GOOD  
FAITH AND FAIR DEALING)**

**Against Defendant NETAPP Only**

144. Plaintiff MCGOWAN complains against Defendant NETAPP only and DOES 1 through 25, inclusive, and realleges all the allegations contained in Paragraphs 1 through 143 and incorporates them by reference into this count as though fully set forth herein.

145. The covenant of good faith and fair dealing is implied in every contract.

146. Defendant NETAPP, by and through Defendants RICHARD, SCURFIELD, and LONG, the executive staff, other individual defendants, other managing agents, directors, and officers, unfairly interfered with Plaintiff MCGOWAN's right to receive his commissions under the agreement.

147. As a foreseeable result of Defendant NETAPP's actions, Plaintiff suffered further general damages in an amount which is currently unknown, but which will be proved upon the trial or other disposition of this action. Such injuries and damages include, but are not limited to, the damages suffered in an amount exceeding \$153,000.00, according to proof.

148. As a controversy exists, Plaintiff is entitled to declaratory relief.

149. WHEREFORE, Plaintiff request relief as hereinafter provided.

**COUNT SIX**

**(FRAUD)**

**Against All Defendants**

150. Plaintiff MCGOWAN complains against Defendants NETAPP, RICHARD, O'CALLAHAN, MCCOWAN, SCURFIELD, CERNUDA, LONG and HILL and DOES 1 through 50, inclusive, and realleges all the allegations contained in Paragraphs 1 through 149 and incorporates them by reference into this count as though fully set forth herein.

1           151. Upon Plaintiff's hire on about September 2017, Defendants represented to  
2 Plaintiff MCGOWAN that if he performed at 100%, he would earn commissions of  
3 \$270,000.00 in addition to his base salary. Said representation was false.

4           152. Plaintiff MCGOWAN alleges that on or about May 2018, and continuing  
5 through the present regarding current employees, Defendant NETAPP's executive  
6 management team has manipulated the annual incentive plan which dictates the sales  
7 team's commission compensation with the specific intent to deny and/or delay payment  
8 of Plaintiff's commission earned and the earned commissions of other members of the  
9 sales team.

10           153. In furtherance of said fraudulent scheme, on or about May 1, 2018,  
11 Defendants RICHARD, O'CALLAHAN, MCCOWAN and SCURFIELD drafted and  
12 created the feigned commissions' package and presented it to Plaintiff and other members  
13 of Defendant NETAPP's sales force. Each of the other sales member's compensation  
14 package was dependent upon his or her respective salary.

15           154. However, unbeknownst to Plaintiff, Defendants did not intend to  
16 compensate him for his sales and the Agreement, itself, was a ruse that Defendants  
17 craftily designed to reduce Plaintiff's earned commissions. Defendants, and each of  
18 them, knew that the representations made to Plaintiff were false, in that Defendants  
19 drafted the agreement without establishing a method and/or procedure to pay out the  
20 earned commissions as Plaintiff and other employees reasonably believed they would  
21 receive. As Defendants provided no basis to compensate Plaintiff, they had no intention  
22 of compensating Plaintiff according to his sales.

23           155. Defendants intended that Plaintiff rely on the false representations so that  
24 Plaintiff would continue selling and increasing Defendant NETAPP's profits. And as  
25 commission agreements are standard in employment relations, Plaintiff's reliance was  
26 reasonable. Plaintiff performed all duties and responsibilities required under his position  
27 as a sales representative and in accordance with the terms of the Agreement.  
28

1           156. Plaintiff reasonably relied on Defendants’ promises to pay commissions on  
2 his sales in accordance with the terms in the Agreement and performed his duties.

3           157. In furtherance of this scheme, each year thereafter, Defendants RICHARD,  
4 O’CALLAHAN, MCCOWAN and SCURFIELD delayed paying Plaintiff his earned  
5 commissions until August 5, 2021, requiring him to remain employed to collect said  
6 wages that he had earned in 2018-2019. As Defendants bragged about the success of the  
7 misclassification of Plaintiff’s previously earned commissions as a “special NetApp Go  
8 to Market Retention Program,” Defendants continued this practice when Defendant  
9 LONG, along with Defendants O’CALLAHAN, MCCOWAN, CERNUDA, HILL and  
10 SCURFIELD denied his earned commissions in May 2022, and then terminated his  
11 employment on August 23, 2022, effective September 1, 2022.

12           158. As a proximate result of Defendants’ false promises with no intent to pay  
13 all earned commissions, as alleged above, Plaintiff has incurred damages in that  
14 Defendant NETAPP owes Plaintiff more than \$153,000.00 in unpaid commissions. As a  
15 result of Defendants’ fraud and misrepresentation, Plaintiff has suffered damages in an  
16 amount according to proof.

17           159. Defendants RICHARD, O’CALLAHAN, MCCOWAN, SCURFIELD,  
18 CERNUDA, LONG and HILL acted with malice, in reckless disregard of Plaintiff’s rights  
19 by intending to cause injury to Plaintiff. Defendants fraudulently represented to Plaintiff  
20 that he would receive commissions on his sales when Defendants had intent that he be  
21 paid. Defendants’ conduct was deliberate, malicious, fraudulent, oppressive and in  
22 reckless regard of Plaintiff’s rights under California Civil Code §3294. Accordingly,  
23 Plaintiff is entitled to punitive and exemplary damages against Defendants RICHARD,  
24 O’CALLAHAN, MCCOWAN, SCURFIELD, CERNUDA, LONG and HILL in an  
25 amount sufficient to punish Defendants for such malicious and oppressive conduct.

26           160. Defendants RICHARD, O’CALLAHAN, MCCOWAN, SCURFIELD,  
27 CERNUDA, LONG and HILL make decisions on Defendant NETAPP’s behalf and  
28 regarding all employees nationwide that are binding on the corporation. Defendants

1 conspired, drafted and created a fraudulent commission agreement in order to reduce  
 2 Plaintiff MCGOWAN's salary with the knowing intent to deprive him of his earned  
 3 commissions and wages. Each defendant ratified the conduct of the other, and when  
 4 Plaintiff continued to complain, Defendant used their respective positions to retaliate  
 5 against Plaintiff to create a diversion from paying Plaintiff his earned commissions.

6 161. Defendants RICHARD, O'CALLAHAN, MCCOWAN, SCURFIELD,  
 7 CERNUDA, LONG and HILL are managing agents, officers and/or directors of  
 8 Defendant NETAPP. The conduct of Defendants RICHARD, O'CALLAHAN,  
 9 MCCOWAN, SCURFIELD, CERNUDA, LONG and HILL was deliberate, malicious,  
 10 fraudulent and oppressive, and in reckless disregard of Plaintiff's rights under California  
 11 *Civil Code* § 3294. Plaintiff is entitled to punitive and exemplary damages against  
 12 Defendant NETAPP in an amount sufficient to punish Defendant for such malicious and  
 13 oppressive conduct.

14 162. WHEREFORE, Plaintiff request relief as hereinafter provided.

#### 15 **COUNT SEVEN**

#### 16 **(RETALIATION IN VIOLATION OF LABOR CODE § 1102.5(b))**

#### 17 **Against Defendant NETAPP only**

18 163. Plaintiff MCGOWAN complains against Defendant NETAPP and DOES 1  
 19 through 25, inclusive, and Plaintiff MCGOWAN realleges all the allegations contained in  
 20 Paragraphs 1 through 162 and incorporates the respective allegations by reference into  
 21 this count as though fully set forth herein.

22 164. Labor Code § 1102.5(b) provides that "[a]n employer, or any person acting  
 23 on behalf of the employer, shall not retaliate against an employee for disclosing  
 24 information, or because the employer believes that the employee disclosed or may  
 25 disclose information, to a government or law enforcement agency, to a person with  
 26 authority over the employee or another employee who has the authority to investigate,  
 27 discover, or correct the violation or noncompliance, or for providing information to, or  
 28 testifying before, any public body conducting an investigation, hearing, or inquiry, if the

1 employee has reasonable cause to believe that the information discloses a violation of  
2 state or federal statute, or a violation of or noncompliance with a local, state, or federal  
3 rule or regulation, regardless of whether disclosing the information is part of the  
4 employee's job duties."

5 165. Plaintiff MCGOWAN was employed by Defendant NETAPP, Plaintiff  
6 MCGOWAN as the VP/GM Sales and then the VP/GM Globals to sell product to the top  
7 global strategic clients in all vertical industries globally including cloud hyperscalers and  
8 service providers, healthcare, life sciences, financial services, manufacturing (auto and  
9 eda), energy and media & entertainment in North America, Asia Pacific, Latin America,  
10 Europe, Middle East, and Africa.

11 166. At 100% performance, Defendant NETAPP agreed to timely pay all  
12 commissions earned, at the time they were earned. Noticing the discrepancies regarding  
13 the commissions, Plaintiff MCGOWAN, from May 2018 through his termination, not  
14 only repeatedly reported the violations to management, including Defendants RICHARD,  
15 SCURFIELD, and LONG, but also, directed Defendant on how to avoid the issues.  
16 Despite Plaintiff's continued complaints, Defendants delayed and denied paying Plaintiff,  
17 and ultimately terminated him on August 23, 2022, advising him that "someone had to  
18 pay" for upper managements mistakes of failing to pay commission.

19 167. In violation of Labor Code § 1102.5(b), Defendant NETAPP retaliated  
20 against Plaintiff by terminating him because he repeatedly challenged NETAPP  
21 management failure to timely and fully pay commissions earned at the time Plaintiff  
22 earned said commissions. Moreover, Plaintiff challenged payment of the earned  
23 commissions in the form of a retention bonus as it concealed and misrepresented to the  
24 SEC that Defendant NETAPP engaged in a pattern and practice of delaying and failing to  
25 pay commissions when the obligation arose.

26 168. NETAPP human resources and management have authority to investigate,  
27 discover, or correct the violation and/or noncompliance of Defendants' conduct regarding  
28 the commission earnings and payment.

1           169. Defendants' retaliatory actions against Plaintiff, as alleged above,  
2 constituted unlawful retaliation in violation of Labor Code §1102.5(b).

3           170. As a proximate result of Defendant NETAPP's retaliatory conduct, by and  
4 through Defendants RICHARD, O'CALLAHAN, MCCOWAN, SCURFIELD,  
5 CERNUDA, LONG and HILL, against Plaintiff MCGOWAN, as alleged above, Plaintiff  
6 has suffered loss of his salary and commissions, benefits and additional amounts of  
7 compensation he would have received if Defendant NETAPP, by and through Defendants  
8 RICHARD, O'CALLAHAN, MCCOWAN, SCURFIELD, CERNUDA, LONG and  
9 HILL, would not have terminated him. As a result of such retaliatory and consequent  
10 harm, Plaintiff MCGOWAN has suffered such damages in an amount according to proof.

11           171. As a further proximate result of Defendants' retaliatory actions, by and  
12 through Defendants RICHARD, O'CALLAHAN, MCCOWAN, SCURFIELD,  
13 CERNUDA, LONG and HILL, against Plaintiff MCGOWAN, as alleged above, Plaintiff  
14 has suffered the intangible loss of employment-related opportunities. As a result of such  
15 retaliation and consequent harm, Plaintiff MCGOWAN has suffered such damages in an  
16 amount according to proof.

17           172. As a further proximate result of Defendants' retaliatory conduct, by and  
18 through Defendants RICHARD, O'CALLAHAN, MCCOWAN, SCURFIELD,  
19 CERNUDA, LONG and HILL, against Plaintiff MCGOWAN, as alleged above, Plaintiff  
20 has suffered humiliation, mental anguish, emotional and physical distress, and has been  
21 injured in mind and body. As a result of such retaliation and consequent harm, Plaintiff  
22 MCGOWAN has suffered such emotional distress damages in an amount according to  
23 proof.

24           173. Plaintiff has been injured by Defendant's retaliatory employment practices  
25 in violation of various sections of the Labor Code entitling him to an award of reasonable  
26 attorneys' fees pursuant to statute.  
27  
28



1 174. Plaintiff has been injured by Defendant's retaliatory employment practices  
2 in violation of various sections of the Labor Code entitling him to reinstatement of  
3 employment and all back pay.

4 175. Plaintiff has been injured by Defendant's retaliatory employment practices  
5 in violation of various sections of the Labor Code entitling him penalty payments of  
6 \$10,000.00 for each violation.

7 176. Defendants O'CALLAHAN, MCCOWAN, SCURFIELD, CERNUDA,  
8 LONG and HILL acted with malice and intended to injure Plaintiff MCGOWAN.  
9 Defendants retaliated against Plaintiff MCGOWAN, by terminating him. The unlawful  
10 conduct of Defendants O'CALLAHAN, MCCOWAN, SCURFIELD, CERNUDA,  
11 LONG and HILL was so mean and vile because Defendants' conduct vindictive and  
12 discriminatorily motivated. As Defendants' unlawful conduct was deliberate, malicious,  
13 fraudulent, oppressive and in reckless disregard of Plaintiff's rights under California Civil  
14 Code § 3294, Plaintiff MCGOWAN is entitled to punitive and exemplary damages  
15 against Defendant NETAPP in an amount sufficient to punish Defendant for such  
16 malicious and oppressive conduct.

17 177. WHEREFORE, Plaintiff MCGOWAN requests relief as hereinafter  
18 provided.

19 **COUNT EIGHT**

20 **(RACE/NATIONAL ORIGIN DISCRIMINATION –**

21 **DISPARATE TREATMENT)**

22 **Against Defendant NETAPP only**

23 178. Plaintiff MCGOWAN complains against Defendant NETAPP and DOES 1  
24 through 25, inclusive, and realleges all the allegations contained in Paragraphs 1 through  
25 177 and incorporates them by reference into this count as though fully set forth herein.

26 179. Plaintiff MCGOWAN is African American, Guyana ancestry.

27 180. While representing that Defendant NETAPP's diversity, inclusion, and  
28 belonging goals are a continuous process of self-reflection and growth, to build belonging

1 within our culture, values and business practices, the company's executive staff is  
2 primarily Caucasian with no African Americans.

3 181. At all times herein mentioned, Plaintiff MCGOWAN was a more than  
4 qualified and competent employee as he earned the most bookings entitling him to  
5 placement in the Presidents Club. Instead of receiving his appointment to the Club, his  
6 position was given to a white male.

7 182. Defendant NETAPP denied Plaintiff his commissions, delayed paying him  
8 his commissions for up to two years, dismantled his sales team to prevent him from  
9 making his commissions, and terminated his employment.

10 183. Caucasian employees were not subject to the same treatment. Instead, they  
11 were assigned to less strenuous positions, received reduced quotas, and paid commissions  
12 although they did not meet the objective criteria.

13 184. As a proximate result of Defendant's discriminatory actions against  
14 Plaintiff MCGOWAN, as alleged above, Plaintiff has suffered loss of his salary, wages,  
15 commissions, benefits and additional amounts of money he would have received if  
16 Defendant NETAPP would have provided fair and non-discriminatory working  
17 conditions. As a result of such discrimination and consequent harm, Plaintiff  
18 MCGOWAN has suffered such damages in an amount according to proof.

19 185. As a further proximate result of Defendant's discriminatory actions against  
20 Plaintiff MCGOWAN, as alleged above, Plaintiff has suffered the intangible loss of  
21 employment-related opportunities such as unbiased interactions with subordinate and co-  
22 workers in management. As a result of such discrimination and consequent harm,  
23 Plaintiff MCGOWAN has suffered such damages in an amount according to proof.

24 186. As a further proximate result of Defendant's discriminatory actions against  
25 Plaintiff MCGOWAN, as alleged above, Plaintiff has suffered humiliation, mental  
26 anguish, emotional and physical distress, and has been injured in mind and body. As a  
27 result of such discrimination and consequent harm, Plaintiff MCGOWAN has suffered  
28 such emotional distress damages in an amount according to proof.

1           187. Defendant's discriminatory action against Plaintiff, as alleged above,  
2 constituted unlawful discrimination in violation of various sections of FEHA entitling  
3 him to an award of reasonable attorneys' fees pursuant to statute.

4           188. Defendant NETAPP acted with malice and in reckless disregard of  
5 Plaintiff's rights under FEHA by having knowledge of the discriminatory policies and  
6 practices of terminating American employees. Defendant NETAPP, through the  
7 individual Defendants, officers and managing agents, engaged in said unlawfully  
8 harassing conduct against Plaintiff and implemented said discriminatory practices  
9 throughout the company. Additionally, other managerial agents and officers were aware  
10 of Defendants' conduct, knew that said discriminatory conduct was occurring against  
11 Plaintiff, and condoned and ratified Defendants' discriminatory conduct against Plaintiff.

12           189. Defendant RICHARD and CERNUDA are managing agents or officers of  
13 Defendant NETAPP who engaged in the harassing practices, and was at all times herein,  
14 in a position of authority, made decisions on the company's behalf and decisions  
15 regarding the employees and purposely chose to harass and terminate Plaintiff because he  
16 is American. Defendant NETAPP, through Defendants, and other managing agents,  
17 officers and/or directors knew the existence of the discriminatory environment and  
18 intentionally implemented harassing and discriminatory practices targeting Plaintiff  
19 MCGOWAN.

20           190. Defendants failed to discipline the employees who engaged in this  
21 discriminatory behavior and refused to take precautionary measures to prevent further  
22 discrimination in the workplace in complete disregard of the law. As a result of the  
23 above-recited actions and by allowing Defendants RICHARD and SCURFIELD to  
24 continuously harass Plaintiff MCGOWAN, Defendants acted in complete disregard of  
25 Plaintiff's rights. As the conduct of Defendants NETAPP and LONG was deliberate,  
26 malicious, fraudulent, oppressive and in reckless disregard of Plaintiff's rights under  
27 FEHA, and under California Civil Code § 3294, Plaintiff is entitled to punitive and  
28

1 exemplary damages against Defendants NETAPP in an amount sufficient to punish  
2 Defendants for such malicious and oppressive conduct.

3 191. WHEREFORE, Plaintiff MCGOWAN requests relief as hereinafter  
4 provided.

5 **COUNT NINE**

6 **(WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY)**

7 **Against Defendant NETAPP only**

8 192. Plaintiff MCGOWAN complains against Defendants and DOES 1 through  
9 25, inclusive, and realleges all the allegations contained in Paragraphs 1 through 191 and  
10 incorporates them by reference into this count as though fully set forth herein.

11 193. Plaintiff MCGOWAN, African American, Guyana national origin, and who  
12 complained about Defendants ongoing and continuous failure to timely and fully pay  
13 earned commissions.

14 194. In violation of FEHA, codified in California Government Code § 12960 *et*  
15 *seq.*, Defendant NETAPP terminated Plaintiff MCGOWAN based upon his race and  
16 national origin. FEHA prohibits discrimination and harassment based upon race, national  
17 origin and other protective classifications and is a statute for the public's benefit that is  
18 fundamental, substantial and well-established.

19 195. In violation of Labor Code § 1102.5, Defendant NETAPP terminated  
20 Plaintiff MCGOWAN who complained about Defendants ongoing failure to fully and  
21 timely pay his earned commissions. Said statute for the public's benefit that is  
22 fundamental, substantial and well-established.

23 196. At all times herein mentioned, Plaintiff MCGOWAN was qualified for his  
24 respective position. At the time of the conduct alleged herein, Plaintiff MCGOWAN  
25 performed his duties and responsibilities in accordance with his job duties and  
26 responsibilities, supervisory direction and Defendant NETAPP's policies and procedures,  
27 to provide bookings for the benefit of Defendant NETAPP.  
28

1           197. As a proximate result of Defendant NETAPP's discriminatory actions and  
2 wrongful termination, by and through individual Defendants, against Plaintiff  
3 MCGOWAN, as alleged above, Plaintiff has suffered loss of his salary, commissions,  
4 benefits and additional amounts of money he would have received if Defendant NETAPP  
5 would not have terminated his employment relationship. As a result of such  
6 discrimination and consequent harm, Plaintiff MCGOWAN has suffered such damages in  
7 an amount according to proof.

8           198. As a further proximate result of Defendant's discriminatory actions and  
9 wrongful termination, by and through individual Defendants, against Plaintiff  
10 MCGOWAN, as alleged above, Plaintiff has suffered the intangible loss of employment-  
11 related opportunities. As a result of such discrimination and consequent harm, Plaintiff  
12 MCGOWAN has suffered such damages in an amount according to proof.

13           199. As a further proximate result of Defendant's discriminatory actions and  
14 wrongful termination, by and through individual Defendants, against Plaintiff  
15 MCGOWAN, as alleged above, Plaintiff has suffered humiliation, mental anguish,  
16 emotional and physical distress, and has been injured in mind and body. As a result of  
17 such discrimination and consequent harm, Plaintiff MCGOWAN has suffered such  
18 emotional distress damages in an amount according to proof.

19           200. As a result of the above-recited actions and by allowing its employees to  
20 harass and discriminate against Plaintiff MCGOWAN, Defendant NETAPP's unlawful  
21 conduct was in complete disregard of Plaintiffs' rights. As Defendant NETAPP's  
22 conduct was deliberate, malicious, fraudulent, oppressive and in reckless disregard of  
23 Plaintiffs' rights under FEHA, and under California Civil Code § 3294, Plaintiff  
24 MCGOWAN are entitled to punitive and exemplary damages against Defendant  
25 NETAPP in an amount sufficient to punish Defendants for such malicious and oppressive  
26 conduct.

27           201. Additionally, as no adequate remedy exists at law for the injuries suffered  
28 by Plaintiff herein, insofar as the employment opportunity that Defendants have denied to

1 Plaintiff cannot be secured absent injunctive relief. If this court does not grant injunctive  
2 relief of the type and for the purpose specified below, Plaintiff will suffer irreparable  
3 injury. Therefore, Plaintiff requests the following injunctive relief that requires  
4 Defendant NETAPP to reinstate Plaintiff MCGOWAN employment and cease and desist  
5 any further retaliatory conduct against him.

6 202. WHEREFORE, Plaintiff requests relief as hereinafter provided.

7 **COUNT TEN**

8 **(INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)**

9 **Against All Defendants**

10 203. Plaintiff MCGOWAN complains against Defendants and DOES 1 through  
11 50, inclusive, and realleges all the allegations contained in Paragraphs 1 through 202 and  
12 incorporates them by reference into this count as though fully set forth herein.

13 204. Defendant NETAPP, through RICHARD, O'CALLAHAN, MCCOWAN,  
14 SCURFIELD, CERNUDA, LONG and HILL concocted, participated in, implemented  
15 and/or executed a scheme that not only manipulated the commissions that Plaintiff and  
16 the sales team could earn, but also, denied Plaintiff his earned commissions first, for  
17 more than 22 months and completely when Plaintiff complained about Defendants'  
18 conduct. Defendants misrepresented the commissions plan with no intent to timely pay  
19 commissions earned.

20 205. As Plaintiff continuously advocated for full compensation of commissions  
21 earned as promised, Defendants, including managerial agents, also concocted a scheme  
22 and conspired with each other to terminate Plaintiff because he repeatedly spoke against  
23 Defendants violation of state and federal laws.

24 206. Additionally, Defendant NETAPP, through RICHARD, O'CALLAHAN,  
25 MCCOWAN, SCURFIELD, CERNUDA, LONG and HILL, engaged in conduct against  
26 Plaintiff MCGOWAN based upon his race and national origin, wherein Defendants  
27 treated him differently than his Caucasian peers. For over a year, Plaintiff had been  
28



1 denied commissions while his Caucasian peers received decreased quotas and were paid  
2 commissions which they did not properly earn.

3 207. Defendants RICHARD and SCURFIELD dismantled Plaintiff's sales team  
4 to prevent him from earning his commissions. Defendants LONG, CERNUDA,  
5 MCGOWAN, and HILL terminated his employment.

6 208. Defendants' conduct was extreme and outrageous and done with the intent  
7 to cause and did cause Plaintiff MCGOWAN to suffer severe emotional distress,  
8 including but not limited to mental suffering, anguish, horror, nervousness, grief, anxiety,  
9 worry, shock, humiliation and shame because of the actions of Defendant NETAPP and  
10 its staff.

11 209. As a result of Defendants' intentional, extreme and outrageous conduct  
12 against Plaintiff MCGOWAN, as alleged above, Plaintiff has suffered extreme emotional  
13 and physical distress, including humiliation, mental anguish, emotional and physical  
14 distress, and has been injured in mind and body. As a result of such discrimination and  
15 consequent harm, Plaintiff MCGOWAN has suffered such emotional damages in an  
16 amount according to proof.

17 210. As a proximate result of Defendants discriminatory and harassing conduct  
18 against Plaintiff MCGOWAN, as alleged above, Plaintiff has suffered loss of his salary,  
19 benefits, commissions and additional amounts of money he would have received if  
20 Defendant NETAPP, by and through individual Defendants, would not have terminated  
21 his employment relationship with NETAPP. As a result of such discrimination and  
22 consequent harm, Plaintiff MCGOWAN has suffered such damages in an amount  
23 according to proof.

24 211. As a further proximate result of Defendants' fraudulent scheme and  
25 discriminatory and harassing actions, by and through Defendants RICHARD,  
26 O'CALLAHAN, MCCOWAN, SCURFIELD, CERNUDA, LONG and HILL, against  
27 Plaintiff MCGOWAN, as alleged above, Plaintiff has suffered the intangible loss of  
28

1 employment-related opportunities. As a result of such discrimination and consequent  
2 harm, Plaintiff MCGOWAN has suffered such damages in an amount according to proof.

3 212. Defendants acted with malice and intended to injure Plaintiff MCGOWAN.  
4 Defendants commenced a feign scheme to deny commission earned. Defendants  
5 benefited from the bookings, by defrauding SEC by concealing said true facts concerning  
6 NETAPP's untimely payment of commissions and by attempting to silence Plaintiff from  
7 exposing the fraudulent concealment. Defendants engaged in said conduct to subject  
8 Plaintiff MCGOWAN to cruel and unjust hardship with the knowledge they were  
9 disregarding Plaintiff's rights.

10 213. Defendants' unlawful conduct was so mean and vile because they knew  
11 they had no basis for their conduct other than discriminatory, harassing motivation to  
12 terminate Plaintiff because he requested Defendants to comply with American state and  
13 federal laws and interfered with Defendants' proceeds from the sale of expired, defective  
14 car seat that were harming consumers and their babies. As Defendants' unlawful conduct  
15 was deliberate, malicious, fraudulent, oppressive and in reckless disregard of Plaintiff's  
16 rights under California Civil Code § 3294, Plaintiff MCGOWAN is entitled to punitive  
17 and exemplary damages against Defendants RICHARD, O'CALLAHAN, MCCOWAN,  
18 SCURFIELD, CERNUDA, LONG and HILL in an amount sufficient to punish  
19 Defendants for such malicious and oppressive conduct.

20 214. Defendants are managing agents of Defendant NETAPP. Defendants are in  
21 positions of authority and made decisions on Defendant NETAPP's behalf and regarding  
22 its employees. Defendants RICHARD, O'CALLAHAN, MCCOWAN, SCURFIELD,  
23 CERNUDA, LONG and HILL used their positions and authority to discriminate against  
24 Plaintiff, wherein Defendants intentionally and oppressively conspired with each other  
25 and other officers, directors, and managing agents to concoct a scheme to terminate  
26 Plaintiff MCGOWAN, all with malice and ill intent to injure Plaintiff MCGOWAN and  
27 to terminate his employment. As Defendants' unlawful conduct was deliberate,  
28 malicious, fraudulent, oppressive and in reckless disregard of Plaintiff's rights under

1 California Civil Code § 3294, Plaintiff MCGOWAN is entitled to punitive and exemplary  
 2 damages against Defendant NETAPP in an amount sufficient to punish Defendant for  
 3 such malicious and oppressive conduct.

4 215. WHEREFORE, Plaintiff MCGOWAN requests relief as hereinafter  
 5 provided.

6 **COUNT ELEVEN**

7 **(Failure to Pay All Wages**

8 **In Violation of Labor Code §§ 204 and 204.1)**

9 **Against Defendant NETAPP only**

10 216. Plaintiff MCGOWAN complains against Defendants and DOES 1 through  
 11 25, inclusive, and realleges all the allegations contained in Paragraphs 1 through 215 and  
 12 incorporates them by reference into this count as though fully set forth herein.

13 217. Wages include all amounts for labor performed by employees of every  
 14 description, whether the amount is fixed or ascertained by the standard of time, task,  
 15 piece, commission basis, or other method of calculation. Labor Code § 200(a).

16 218. Labor Code § 204 provides that all wages earned by an employee are due  
 17 and payable at least twice during each calendar month on days designated in advance by  
 18 the employer as the regular paydays. Salaried “white color” employees may be paid  
 19 monthly exempt executive, administrative and professional employees of an employer  
 20 covered by the Fair Labor Standards Act (FLSA) may be paid once a month rather than  
 21 semi-monthly Id.

22 219. Labor Code § 204.1 provides that commission wages are compensation  
 23 paid to any person for services rendered in the sale of such employer’s property or  
 24 services and based proportionately upon the amount or value thereof.

25 220. Defendant NETAPP pays earned commissions once a month. However, in  
 26 violation of Labor Code § 204, Defendant NETAPP intentionally failed to pay Plaintiff  
 27 his earned commissions in the amount of \$245,000 at the time they were earned in FY19.  
 28 Said earnings were not paid until 27 months after they were due. Moreover, Defendant

1 NETAPP willfully and intentionally failed and refused to timely pay earned commissions  
2 for the FY19 period and earned commissions in the amount of approximately  
3 \$153,000.00 for the FY22 period.

4 221. Plaintiff is entitled to recover \$153,000 in earned commissions which is due  
5 and owing, in accordance with Labor Code §§ 204, 204.1 and 218.

6 222. Plaintiff MCGOWAN' recoverable damages are "certain or capable of  
7 being made certain by calculation," and therefore, pursuant to Civil Code § 3287(b),  
8 Plaintiff is entitled as a matter of law to prejudgment interest from the date the right to  
9 recover vested. Plaintiff requests an award of interest on the unpaid wages, in accordance  
10 with Labor Code § 218.6 and Civil Code § 3287(b).

11 223. Plaintiff is entitled to recover reasonable attorneys' fees and costs of suit  
12 herein incurred, in accordance with Labor Code § 218.5.

13 224. WHEREFORE, Plaintiff MCGOWAN requests relief as hereinafter  
14 provided.

15 **COUNT TWELVE**

16 **(Statutory Penalties**

17 **Pursuant to Labor Code § 210)**

18 **Against Defendant NETAPP only**

19 225. Plaintiff MCGOWAN complains against Defendant NETAPP and DOES 1  
20 through 25, inclusive, and realleges all the allegations contained in Paragraphs 1 through  
21 224 and incorporates them by reference into this count as though fully set forth herein.

22 226. Defendant NETAPP misclassified Plaintiff's earned commissions in the  
23 amount of \$245,000 as an unlawful retention bonus and intentionally delayed said  
24 payment for 27 months as well as denied him his earned commissions in the amount of  
25 \$153,000, owed by May 1, 2022.

26 227. As a result of Defendant NETAPP's violation of Sections 204 and 204.1,  
27 Plaintiff is entitled to penalties against Defendant, in addition to, and entirely independent  
28 and apart from, any other penalty provided in this article as follows:

228. (1) For any initial violation, one hundred dollars (\$100) for each failure to pay each employee.

229. (2) For each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld.

230. Pursuant to *Labor Code* § 218.5, Plaintiff requests an award of reasonable costs, including attorneys' fees, in enforcing the rights granted by this *Labor Code* section.

231. Plaintiff MCGOWAN' recoverable damages are "certain or capable of being made certain by calculation," and therefore, pursuant to Civil Code § 3287(b), Plaintiff is entitled as a matter of law to prejudgment interest from the date the right to recover vested. Plaintiff requests an award of interest on the unpaid wages, in accordance with Labor Code § 218.6 and Civil Code § 3287(b).

232. WHEREFORE, Plaintiff MCGOWAN requests relief as hereinafter provided.

### **COUNT THIRTEEN**

#### **(Waiting Time Penalties**

#### **Pursuant to Labor Code § 203)**

#### **Against Defendant NETAPP only**

233. Plaintiff MCGOWAN complains against Defendants and DOES 1 through 50, inclusive, and realleges all the allegations contained in Paragraphs 1 through 232 and incorporates them by reference into this count as though fully set forth herein.

234. Defendant NETAPP failed to compensate Plaintiff for all time worked at the time of his termination. Pursuant to Labor Code § 201, Defendant NETAPP was obligated to pay Plaintiff his earned commissions in the amount of \$153,000 at his termination but failed to do so. Plaintiff MCGOWAN has suffered damages in an amount to be established according to proof at time of trial.

235. Plaintiff earns a base salary of \$270,000 plus 100% commissions for an annual salary of \$540,000, monthly salary in the amount of \$45,000. Plaintiff alleges that his daily rate is approximately \$2,045 for a penalty payment owed in the amount of \$61,363.63.

236. As a proximate result of Defendant NETAPP's willful failure to pay Plaintiff MCGOWAN all wages owed at the time Plaintiff's employment relationship terminated, as required by Labor Code § 201, Plaintiff is entitled to waiting time penalties pursuant to Labor Code § 203, in an amount equal to 30 days of his per diem wage rate. Plaintiff has suffered damages to be established at trial according to proof.

237. Pursuant to Labor Code § 218.5, Plaintiff requests an award of reasonable costs, including attorneys' fees, in enforcing the rights granted by this Labor Code section.

238. Plaintiff MCGOWAN's recoverable damages are "certain or capable of being made certain by calculation," and therefore, pursuant to Civil Code § 3287(b), Plaintiff is entitled as a matter of law to prejudgment interest from the date the right to recover vested. Plaintiff requests an award of interest on the unpaid wages, in accordance with Labor Code § 218.6 and Civil Code § 3287(b).

239. WHEREFORE, Plaintiff MCGOWAN requests relief as hereinafter provided.

#### **COUNT FOURTEEN**

#### **(Unfair Business Practices In Violation Of Business & Professions Code § 17200, et seq.) Against Defendant NETAPP only**

240. Plaintiff MCGOWAN complains against Defendants and DOES 1 through 50, inclusive, and realleges all the allegations contained in Paragraphs 1 through 239 and incorporates them by reference into this count as though fully set forth herein.

241. *Business and Professions Code* § 17200 et seq. prohibits acts of unfair competition, which shall mean and include any "unlawful and unfair business practices."



1           242. The conduct of Defendants as alleged herein has been and continues to be  
2 unfair, unlawful, and deleterious to Plaintiff. Plaintiff is a “person” within the meaning  
3 of *Business and Professions Code* § 17204, and therefore has standing to bring this suit  
4 for injunctive relief and restitution.

5           243. The prompt payment of wages is a fundamental public policy of the State  
6 of California.

7           244. It is also the public policy of the State to enforce minimum labor standards,  
8 to ensure that employees are not required or permitted to work under substandard and  
9 unlawful conditions, and to protect those employers who comply with the law from  
10 losing competitive advantage to other employers who fail to comply with labor standards  
11 and requirements. Through the conduct alleged herein, Defendant NETAPP acted  
12 contrary to these public policies and have thus engaged in unlawful and/or unfair  
13 business practices in violation of *Business and Professions Code* §§ 17200 *et. seq.*,  
14 depriving Plaintiff of the rights, benefits, and privileges guaranteed to employees under  
15 California law.

16           245. Defendant NETAPP’s violation of California’s labor laws constitutes a  
17 business practice because it was done repeatedly over a significant period of time and in a  
18 systematic manner to the detriment of Plaintiff MCGOWAN and other similarly situated  
19 employees. Defendant NETAPP regularly and routinely violated the following statutes  
20 and regulations with respect to Plaintiff:

21                   (a) *Labor Code* §§201 and 203 (failure to pay wages due on a timely  
22 basis);

23                   (b) *Labor Code* § 204 and 204.1 (failure to compensate for all hours  
24 worked); and

25           246. By engaging in these business practices, which are unfair business practices  
26 within the meaning of *Business and Professions Code* §§ 17200 *et al. seq.*, Defendant  
27 harmed Plaintiff and gained an unfair competitive edge. Under the *Business and*  
28

1 *Professions Code* § 17203, Plaintiff is entitled to obtain restitution of these funds on his  
2 behalf.

3 247. Pursuant to *Business and Professions Code* § 17203, injunctive relief is  
4 necessary to prevent Defendant from continuing to engage in the unfair business practices  
5 as alleged herein. Plaintiff is informed and believes that Defendant, and persons acting in  
6 concert with them, have committed and will continue to commit the above-described  
7 unlawful acts unless restrained or enjoined by this Court. Unless the relief prayed for  
8 below is granted, a multiplicity of actions will result. Plaintiff has no plain, speedy, or  
9 adequate remedy at law, in that pecuniary compensation alone would not afford adequate  
10 and complete relief. The above-described acts will cause great and irreparable damage to  
11 Plaintiff unless Defendant NETAPP is restrained from committing further illegal acts.

12 248. Plaintiff's success in this action will result in the enforcement of important  
13 rights affecting the public. Private enforcement of the rights enumerated in this  
14 Complaint is necessary, as public agencies have only sought limited enforcement of those  
15 rights, if any. The named Plaintiff individually, and by and through counsel, is incurring  
16 a financial burden in pursuing this action. Plaintiff further seeks to enjoin the above-  
17 referenced unlawful actions under the *Labor Code*. Therefore, Plaintiff seeks an award  
18 of attorney's fees and costs of suit on this count pursuant to California *Code of Civil*  
19 *Procedure* § 1021.5 and other applicable laws.

20 249. WHEREFORE, Plaintiff MCGOWAN requests relief as hereinafter  
21 provided.

### 22 **PRAYER FOR RELIEF**

23  
24  
25 WHEREFORE, Plaintiff MCGOWAN respectfully prays that this Court enter  
26 judgment in his favor and against Defendants NETAPP, INC., HENRI RICHARD,  
27 ELIZABETH O'CALLAHAN, DEBRA MCCOWAN, CÉSAR CERNUDA, RICHARD  
28 SCURFIELD, MAXWELL LONG, and ROSALIND HILL as follows:

- 1           1.       Compensatory damages in an amount according to proof and prejudgment
- 2           interest thereon to the extent allowable by law for all Counts;
- 3           2.       Treble damages on the First, Second and Third Counts in an amount
- 4           according to proof;
- 5           3.       Exemplary and punitive damages on the Sixth through Tenth Counts in an
- 6           amount according to proof;
- 7           4.       Emotional distress damages on the Sixth through Tenth Counts in an
- 8           amount according to proof;
- 9           5.       Reinstatement of employment for the Seven and Ninth Counts;
- 10          6.       Declaratory Relief for Fifth Count;
- 11          7.       Injunctive Relief for the Fourteenth Count;
- 12          5.       Attorneys' fees and costs for the First through Third, Seventh and Eighth,
- 13          and Eleventh through Fourteenth Counts; and
- 14          6.       Such other and further relief as the Court deems just and proper.

15  
16  
17                               Respectfully submitted,

18       Date: August 22, 2023

**THE HILL LAW FIRM**

19  
20  
21                               By: 

Michelle E. Hill  
Attorneys for Plaintiff  
NEIL MCGOWAN


**DEMAND FOR JURY TRIAL**

Pursuant to Federal Rules of Civil Procedure, Rule 38 and Civil Local Rules, Rule 3-6(a), Plaintiff hereby demands a jury trial on all issues triable by a jury.

Date: August 22, 2023

Respectfully submitted,

**THE HILL LAW FIRM**

By:   
Michelle E. Hill  
Attorneys for Plaintiff  
NEIL MCGOWAN