SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NEIL SLOANE and CIRO SCOTTI,

Plaintiffs,

-against-

JAF COMMUNICATIONS, INC., d/b/a THE MESSENGER, and JAMES FINKELSTEIN,

Defendants.

Index No. _____

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs Neil Sloane ("Sloane") and Ciro Scotti ("Scotti") (together "Plaintiffs"), by their attorneys, Law Offices – Thomas S. Rosenthal, allege as follows:

NATURE OF THE ACTION

1. This is an action in which the Plaintiffs, individually, seek recovery for injuries sustained and damages incurred by Defendants' violations of the New York Labor Law and Defendant JAF Communications, Inc.'s breach of contract, including, but not limited to, Defendants' failure to pay Plaintiffs severance due and owing to them pursuant to written agreements between Defendant JAF Communications, Inc. and Plaintiffs.

2. Plaintiffs are former employees of Defendants who worked for Defendants from in or about April 2023 until January 2024, when their employment was summarily terminated and Defendants refused to pay them the severance that was explicitly set forth in their respective written employment agreements. Pursuant to Article 6 of the New York Labor Law, §§ 190 *et seq.*, Plaintiffs are entitled to (i) their compensation without unlawful deductions pursuant to New York Labor Law § 193; (ii) liquidated damages pursuant to New York Labor Law §§198(1-a) and 198(3) in an additional amount equal to the amount Plaintiffs individually were not paid by Defendants; and (iii) attorneys' fees and costs pursuant to New York Labor Law § 198(1-a).

3. The Defendants in this action willfully and systematically violated the New York Labor Law and Defendant JAF Communications, Inc. breached its respective contracts with Plaintiffs by paying Plaintiffs substantially less than the wages due and owing to them.

JURISDICTION AND VENUE

4. Plaintiffs bring this action pursuant to Article 6, §§ 190 *et seq.* of the New York Labor Law, and for Defendant JAF Communications, Inc.'s breach of its contracts with Plaintiffs. The Court has jurisdiction over Defendants in that Defendants employed Plaintiffs within this State.

5. This action meets all the requirements to be assigned to the Commercial Division of the Supreme Court, State of New York, New York County. Venue is proper in the Supreme Court of the State of New York, New York County because Defendants' actions occurred in New York County, New York, Defendant JAF Communications, Inc. had or has offices in New York County, and the Plaintiffs were employed by Defendants in New York County.

PARTIES

6. Plaintiff Neil Sloane is an adult individual, is a citizen of New York State, and was employed by Defendants in New York County, New York.

7. Plaintiff Ciro Scotti is an adult individual and was employed by Defendants in New York County, New York.

8. Defendant JAF Communications, Inc. ("JAF") d/b/a The Messenger ("The Messenger") is an "employer" within the meaning of § 190 of the New York Labor Law, and is, upon information and belief, a corporation organized and existing under the laws of Delaware, is registered and authorized to do business in New York, and had offices located at 195 Broadway, 26th Floor, New York, New York 10007. On information and belief, substantial investors in

The Messenger included Josh Harris, James Tisch, Mark Penn, John Catsimatidis, Victor Ganzi, Thomas Peterffy, and International Media Investments. With Defendant James Finkelstein, JAF was responsible for hiring and firing employees, supervising and controlling Plaintiffs' work schedules, overseeing and providing conditions of employment, determining rates and methods of pay, including wages and supplemental benefits, and maintaining employment records for the Plaintiffs.

9. Defendant James Finkelstein ("Finkelstein") is an owner or shareholder of JAF and exercised decision-making authority over the terms and conditions of Plaintiffs' employment, including, but not limited to: the hiring of Plaintiffs; the wages paid to the Plaintiffs; direct oversight and supervision of Plaintiffs' employment; oversight, control and decision-making authority over JAF's operations, including its labor, editorial, and employment practices; the terms and conditions of Plaintiffs' employment, including, but not limited to, the resolution of disputes and decision-making concerning Plaintiffs' employment; the determination to fire Plaintiffs; and the decision to deny Plaintiffs the severance owed to them. As such, Finkelstein has a presence in New York and is or was an employer within the meaning of § 190 of the New York Labor Law.

FACTS

10. On or about April 3, 2023, Plaintiff Sloane commenced employment with JAF as The Messenger's Head of News pursuant to a fully executed written agreement dated March 28, 2023. Sloane's employment by JAF was the culmination of extensive direct negotiations between Sloane and Finkelstein, in which Finkelstein lured Sloane away from his then current employment with the New York Post. After more than 17 years of employment with the New York Post, and as part of that agreement to depart from a secure position, Sloane negotiated with

Finkelstein and insisted upon, and Defendants agreed to, a substantial severance in the event that Sloane's employment with Defendants ended other than for cause. Based upon, and in reasonable reliance on, the terms of the written employment agreement, Sloane did not explore other employment opportunities, left his previous and secure employment with the New York Post, and commenced employment at JAF.

11. As set forth in Section 1 of the written employment agreement, Sloane was employed in JAF's New York offices. That agreement, in Section 2, set forth Sloane's annual base salary of $400,000, less applicable taxes and withholdings, and in relevant part, further provided, in Section 8: "Should the Company terminate your employment without "Cause" during the first three (3) years of your employment, the Company shall pay you your base salary for a period of nine (9) months, less applicable taxes and withholdings ("Severance")."

12. During Sloane's employment, Finkelstein was keenly involved in Sloane's work on nearly a day-to-day basis, emailing or calling Sloane (or instructing Michelle Gotthelf, The Messenger's Deputy Editor, to do so) and directing which stories he wanted covered by The Messenger. Finkelstein was directly involved in hiring and salary decisions for Sloane's news staff (as well as for Sloane himself), and Finkelstein required Sloane to prepare a memorandum for each potential hire, setting forth recommendations for hiring, salaries and benefits. Typically, Sloane would present job candidates to Finkelstein for specific roles, often through Gotthelf, and Finkelstein would either sign off, ask for more information, or reject the candidates. Each hire required Finkelstein's final approval as did all salaries. Neither the General Counsel, Michele Singer, nor the Chief People Officer, Roxanna Flores, would send out an offer letter without an email from Finkelstein indicating his approval. Finkelstein regularly attended meetings with Sloane and other editors and department heads at The Messenger.

Finkelstein would begin sending articles from other news outlets to staff at 5:00 a.m. and provide direction and control over which stories were covered by the Messenger. Finkelstein even attempted to restrict negative coverage of personal friends. Finkelstein also contacted Sloane to question or object to editorial content. And, regularly, Finkelstein praised Sloane's work and the "traffic" Sloane generated on The Messenger's website.

13. The termination of Sloane's employment by Defendants occurred on January 31, 2024 pursuant to an announcement by JAF that made clear that Sloane's termination was not for cause but, instead and as set forth in JAF's "Frequently Asked Questions (FAQ) for Employees When Company is Closing," "[t]he decision to close the company was based on various factors, including financial challenges, market conditions, and other strategic considerations."

14. In its January 31, 2024 announcement and in its "Frequently Asked Questions (FAQ) for Employees When Company is Closing," JAF asserted, contrary to Sloane's written employment agreement with JAF, that there "is no entitlement to severance benefits under Company policy" and "[u]nfortunately, there will be no severance," respectively. Those assertions fabricate the existence of a so-called company policy or otherwise are not applicable to the written employment agreement between Sloane and JAF, are not made in good faith, and directly contravene the express terms of the written agreement between JAF and Sloane.

15. Sloane contacted both Roxanna Flores, JAF's Chief People Officer, and Finkelstein about the severance due and owing to him. Both declined, or otherwise refused to honor JAF's written agreement with Sloane, thereby denying him severance in the amount of $300,000.

16. On or about April 17, 2023, Plaintiff Scotti commenced employment with JAF's The Messenger as its Business and Finance Editor pursuant to a fully executed written

employment agreement dated April 3, 2023. The written employment agreement was the culmination of negotiations directly between Scotti and Finkelstein regarding all aspects of Scotti's hiring and employment, including salary and other compensation, and encompassed the opportunity for severance pay. Based upon, and in reasonable reliance on, the terms of the written employment agreement, Scotti did not explore other employment opportunities, left his previous employment, and commenced employment at JAF.

17. As set forth in Section 1 of the written employment agreement, Scotti was employed in JAF's New York offices. That agreement, in Section 2, set forth Scotti's annual base salary of $325,000, less applicable taxes and withholdings, and in relevant part, further provided, in Section 8: "Should the Company terminate your employment without "Cause" during the first two years of your employment, the Company shall pay you your base salary for a period of two (2) months, less applicable taxes and withholdings ("Severance")."

18. During Scotti's employment, Finkelstein was consummately hands-on in terms of hiring and salary decisions. No one on Scotti's team was hired without Finkelstein's sign-off. Typically, Scotti would present job candidates to Finkelstein for specific roles, often through the Editor-in-Chief Dan Wakeford, and Finkelstein would either sign off, ask for more information, or reject the candidates. On at least one occasion, Finkelstein called friends in the media about a candidate Scotti wanted to hire. Neither the General Counsel, Michele Singer, nor the Chief People Officer, Roxanna Flores, would send out an offer letter without an email from Finkelstein indicating his approval. Even as to vacations, Finkelstein was fully aware of Scotti's time away from work and expressed his dismay and disapproval of Scotti utilizing that perquisite of his employment.

19. Finkelstein was directly involved concerning which stories were covered by The Messenger. He would begin sending articles from other news outlets to Scotti and other editors at 5:00 a.m., suggesting and directing which stories should be covered by the Messenger. Finkelstein even attempted to restrict negative coverage of personal friends.

20. The termination of Scotti's employment by Defendants occurred on January 31, 2024 pursuant to an announcement by JAF that made clear that Scotti's termination was not for cause but, instead and as set forth in JAF's "Frequently Asked Questions (FAQ) for Employees When Company is Closing," "[t]he decision to close the company was based on various factors, including financial challenges, market conditions, and other strategic considerations."

21. In its January 31, 2024 announcement and in its "Frequently Asked Questions (FAQ) for Employees When Company is Closing,", JAF asserted, contrary to Scotti's written employment agreement with JAF, that there "is no entitlement to severance benefits under Company policy" and "[u]nfortunately, there will be no severance," respectively. Those assertions fabricate the existence of a so-called company policy or otherwise is not applicable to the written employment agreement between Scotti and JAF, are not made in good faith, and directly contravene the express terms of the written agreement between JAF and Scotti.

22. Scotti contacted both Roxanna Flores, JAF's Chief People Officer, and Finkelstein about the severance due and owing to him. Flores sympathized, informing Scotti that said concerns about severance would be passed on to JAF's management, including Finkelstein. Finkelstein never replied, effectively refusing to honor JAF's written employment agreement with Scotti, thereby denying Scotti severance in the amount of $54,166.67.

23. Finkelstein was fully aware of the financial situation at JAF and was in the unique position to close The Messenger while funds were still available to pay the severance packages

due and owing to the Plaintiffs, but failed to do so. Additionally, as owner of, and investor in, JAF, Finkelstein had the ability to continue funding JAF in order to pay the severance owed to Plaintiffs. The decision to close The Messenger was Finkelstein's to make.

24. To date, Defendants have failed to pay both Sloane and Scotti the severance due and owing to them for the work they performed on behalf of JAF.

COUNT I

Violation of New York Labor Law Article 6
(against all Defendants)

25. Plaintiffs repeat and reallege paragraphs 1 through 24 as if fully set forth herein.

26. At all times relevant to this action, each Plaintiff was an "employee" and Defendants were and/or are the "employer" as defined in New York Labor Law § 190. JAF contracted with Plaintiffs and paid Plaintiffs' salaries. Finkelstein, as sole or largest owner of JAF, exercised authority over management, supervision, and oversight of JAF's business affairs; had the power to hire and fire employees; supervised and controlled conditions of employment of Plaintiffs and others; and determined the rate and method of pay of Plaintiffs and others. Moreover, Finkelstein had access to all employee records via his direct report, Roxanna Flores.

27. This cause of action is expressly conditioned on a finding of liability against Defendants for breaching the written employment agreements with Plaintiffs. *Walpert v. Jaffrey*, 127 F.Supp.3d 105, 135 (S.D.N.Y. 2015) ("Plaintiff's cause of action under New York Labor Law is dependent upon the success of his breach of contract claim.").

28. "Severance payments are made in consideration for employment—for a 'service . . . performed' by 'an employee for the person employing him[.]'" *U.S. v. Quality Stores, Inc.*, 572 U.S. 141, 146-47 (quotation omitted).

29. Severance pay is "earned" in full no later than the date an employee is dismissed. *See*, *e.g., In re Bethlehem Steel Corp.*, 479 F.3d 167, 171 (2d Cir. 2007) (Sotomayor, J.).

30. New York Labor Law § 190(1)'s definition of "wages" incorporates by reference the definition of "benefits and wage supplements" in NYLL § 198-c, which includes, but is not limited to, "separation pay" (which is synonymous with severance pay).

31. New York Labor Law §§ 193, 198(1-a) and 198(3), which must be construed together, provide a remedy for an employer's failure to pay earned but unpaid benefits and wage supplements. *See Gertler v. Davidoff Hutcher & Citron LLP*, 186 A.D.3d 801, 808 (2nd Dept. 2020) ("[C]ontrary to the defendant's contention, the plaintiff's … severance wages fall within the definition of wages as set forth in Labor Law § 190 (1). Therefore, such wages are protected by the provisions set forth in Labor Law § 193 and fall within the ambit of remedies provided by Labor Law § 198"); *Danusiar v. Auditchain USA, Inc.*, 2020 U.S. Dist. Lexis 184162, at **25, 27 (S.D.N.Y. Oct. 4, 2020) (denying dismissal of § 193 claim for, *inter alia*, unpaid severance pay); *R.R. Donnelley & Sons Co. v. Glenn Marino*, 2021 U.S. Dist. Lexis 185933, at *17 (W.D.N.Y. Sep. 28, 2021) (to same effect); *Lord v. Marilyn Model Mgmt., Inc.*, 173 A.D.3d 606, 607-08 (1st Dept. 2019) ("The complaint also sufficiently alleges causes of action for promissory estoppel … and recovery of severance as unpaid wages under Labor Law article 6") (citation omitted).

32. Lest there be any doubt in this regard, New York Labor Law §§ 193 and 198 were amended in 2021 to make explicitly clear that there is "*no exception*" to civil liability under Article 6 for an employer's failure to pay any employee's wages, benefits, or wage supplements.

33. The 2021 New York Labor Law Article 6 amendments (the "No Wage Theft Loophole Act") were enacted to "clarify for the courts once and for all that wage theft remains

completely and without exception in violation of statute and *all employees are entitled to full wages, benefits and wage supplements earned*." 2021 Sess. Law News of N.Y. Ch. 397 (S. 858) (Sponsoring Memorandum) (emphasis added).

34. Thus, as amended in 2021, New York Labor Law § 193 provides, in pertinent part, that "*There is no exception to liability under this section for the unauthorized failure to pay wages, benefits or wage supplements.*" New York Labor Law § 193(5).

35. Likewise, in addition to commanding that "*All employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages …*," New York Labor Law § 198(3) now makes explicitly clear that "*There is no exception to liability under this section for the unauthorized failure to pay wages, benefits or wage supplements.*" New York Labor Law § 198(3) (emphasis added).

36. Defendants withheld, deducted, and refused to compensate Plaintiffs for their earned and due severance pay, in violation of New York Labor Law § 193. In addition to the wages not properly paid to Plaintiffs, New York Labor Law § 198 mandates the award of liquidated damages, pre-judgment interest, and attorneys' fees for Defendants' violations of Article 6 of the New York Labor Law. The payments owed to Plaintiffs constitute wages under the meaning of New York Labor Law § 190 and relief is available under § 198. Liquidated damages under New York Labor Law 198 constitute compensatory damages. *Vega v. CM & Assoc. Constr. Mgt.*, 175 A.D.3d 1144, 1146, n.2 (1st Dep't 2019).

37. Accordingly, for unlawfully withholding, deducting, and keeping, and otherwise not paying Plaintiffs their earned severance pay, Defendants are liable to Plaintiffs under New York Labor Law §§ 193 and 198 for the damages and associated relief described in the "WHEREFORE" clause below.

COUNT II

Breach of Contract

38. Plaintiffs repeat and reallege paragraphs 1 through 37 as if fully set forth herein.

39. Plaintiffs each entered into valid and enforceable written agreements with JAF that covered the terms and conditions of their employment.

40. The written employment agreement between Sloane and JAF entitled Sloane to a severance payment of $300,000 in the circumstances present here, namely, a termination of employment without "cause" as otherwise defined in the written agreement.

41. The written employment agreement between Scotti and JAF entitled Scotti to a severance payment of $54,166.67 in the circumstances present here, namely, a termination of employment with "cause" as otherwise defined in the written agreement.

42. JAF was obligated to abide by the parties' written agreements, but has failed and refused to pay each of the Plaintiffs the severance compensation they are owed under their respective written employment agreements, and thereby is in breach of contract.

43. Plaintiffs have fully abided by the terms of the respective written agreements and are ready, able and willing to execute a release of claims acceptable to JAF promptly upon JAF's provision of a release to each of them.

44. JAF’s willingness to accept the benefits of its employment agreements with Plaintiffs, coupled with their violation of the employment agreements by failing and/or refusing to pay severance to Plaintiffs, is a breach of the covenant of good faith and fair dealing that attaches to every contract.

45. In purposely not fulfilling their obligations under the written employment agreements, JAF breached the covenant of good faith and fair dealing, in an amount to be determined at trial.

46. As a direct and proximate result of JAF's foregoing acts of breach of contract, Plaintiffs have suffered damages, including, but not limited to, the unpaid severance compensation each is owed until their respective written employment agreements.

COUNT III

Promissory Estoppel
(against all Defendants)

47. Plaintiffs repeat and reallege paragraphs 1 through 46 as if fully set forth herein.

48. In hiring Plaintiffs, Defendants promised, clearly and unambiguously, that Plaintiffs would be accorded severance if their employment was terminated without cause, as defined in their respective written employment agreements.

49. Plaintiffs relied to their detriment upon Defendants' promises to them in deciding to accept employment with JAF, thereby foregoing other work opportunities and/or altering their respective employment positions based on the promise of financial security provided by the severance pay that was promised by Defendants. Plaintiffs' reliance was reasonable and foreseeable.

50. Defendants' refusal to pay the promised severance to Plaintiffs constitutes a breach of the promise of severance made to Plaintiffs, which was a significant factor in Plaintiffs' decisions to enter into their written employment agreements with JAF.

51. As a direct and proximate result of Defendants' breach, Plaintiffs have been severely damaged, including, but not limited to, the loss of severance pay in the amounts

Plaintiffs expected to receive based on Defendants' promises contained in Plaintiffs' written employment agreements.

52. Under the doctrine of promissory estoppel, Defendants are estopped from refusing to fulfill their promise of severance pay to Plaintiffs, a promise Plaintiffs relied upon to their detriment.

53. As a result of Defendants' breach of promise, and Sloane's reliance on said promise of severance, Sloane has been damaged in an amount to be determined at trial, but not less than $300,000.

54. As a result of Defendants' breach of promise, and Scotti's reliance on said promise of severance, Scotti has been damaged in an amount to be determined at trial, but not less than $54,166.67.

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief in favor of Plaintiffs and against Defendants:

A. Declare Defendants' conduct complained of herein to be in violation of Article 6 of the New York Labor Law;

B. Award Plaintiffs their unpaid wages pursuant to the New York Labor Law, including, but not limited to, Defendants' failure to pay Plaintiffs their severance compensation, in violation of New York Labor Law §§ 193 and 198;

C. Award Plaintiffs liquidated damages pursuant to New York Labor Law § 198(1-a);

D. Award Plaintiffs damages arising from Defendants' breach of the written contracts between Plaintiffs and JAF;

E. Declare Defendants estopped from denying Plaintiffs their right to severance based on promises made by Defendants upon which Plaintiffs relied in accepting employment with Defendants;

F. Award Plaintiffs pre-judgment statutory interest;

G. Award Plaintiffs attorneys' fees and the costs of this action pursuant to Articles 6 of the New York Labor Law, §§ 198(1-a); and

H. Award such other relief as the Court deems necessary and proper, including, but not limited to, injunctive relief enjoining Defendants from violating (i) the New York Labor Law and (ii) JAF's written employment agreements with Plaintiffs.

Dated: Brooklyn, New York
March 11, 2024

Respectfully submitted,

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