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ALAMEDA COUNTY

January 28, 2021

CLERK OF
THE SUPERIOR COURT
By Xian-xii Bowie, Deputy

CASE NUMBER:

RG20077472

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SUPERIOR COURT OF CALIFORNIA**COUNTY OF ALAMEDA**

MICHAEL SCHMIDT, on behalf of the State of
California and Aggrieved Employees,

Plaintiff,

vs.

VISION SERVICE PLAN, VSP GLOBAL, INC.,
MARCHON EYEWEAR, INC., VSP OPTICAL
GROUP, INC., EYEFINITY, INC., and DOES 1-
50, inclusive,

Defendants.

Case No. RG20077472

**FIRST AMENDED COMPLAINT FOR
PENALTIES PURSUANT TO SECTIONS
2699(a) and (f) OF THE CALIFORNIA
LABOR CODE PRIVATE ATTORNEYS
GENERAL ACT AND DEMAND FOR
JURY TRIAL**

Date Action Filed: October 20, 2020

1 Plaintiff Michael Schmidt (“Plaintiff”), on behalf of the State of California and Aggrieved
2 Employees, complains and alleges as follows:

3 **INTRODUCTION**

4 1. Plaintiff Michael Schmidt, individually and on behalf the State of California and the
5 Aggrieved Employees, brings this enforcement action against Defendant Vision Service Plan,
6 Defendant VSP Global, Inc., Defendant Marchon Eyewear, Inc., Defendant VSP Optical Group, Inc.,
7 and Defendant Eyefinity, Inc. (collectively, “Defendants”), on behalf of individuals who have worked
8 for Defendants as non-exempt hourly employees and have been subject to Defendants’ systematic
9 violations of California labor law with respect to Defendants’ current and former non-exempt
10 employees who worked in California (the “Aggrieved Employees”). Throughout the relevant time
11 period, Plaintiff and Aggrieved Employees have been denied proper payment for all hours worked,
12 minimum wages, overtime wages, and compliant meal and rest periods. Furthermore, throughout the
13 relevant time period, Defendants have failed to pay all wages owed after separation of employment to
14 Plaintiff and Aggrieved Employees, and have failed to provide Plaintiff and Aggrieved Employees
15 timely and compliant wage statements, pursuant to California law.

16 2. Defendants maintain a longstanding policy and/or practice of failing to properly
17 compensate non-exempt employees for work performed while “off-the-clock” and for missed meal
18 and rest periods. These policies and practices deny Plaintiff and Aggrieved Employees payment for
19 all hours worked, including overtime, and deny meal and rest periods that comply with California law.

20 3. Plaintiff and Aggrieved Employees bring this action to challenge Defendants’ policies
21 and practices of (1) failing to pay Plaintiff and Aggrieved Employees all minimum wages owed; (2)
22 failing to pay Plaintiff and Aggrieved Employees overtime wages; (3) failing to compensate Plaintiff
23 and Aggrieved Employees for all hours worked; (4) failing to authorize and permit Plaintiff and
24 Aggrieved Employees to take meal and rest breaks to which they are entitled by law; (5) failing to
25 provide Plaintiff and Aggrieved Employees accurate, itemized wage statements; and (6) failing to
26 timely pay Plaintiff and Aggrieved Employees full wages upon termination or resignation.

4. Plaintiff and Aggrieved Employees seek penalties under the Labor Code Private Attorneys General Act of 2004 (“PAGA”).

JURISDICTION AND VENUE

5. This Court has jurisdiction over Plaintiff's claims for penalties pursuant to the PAGA. The Court also has jurisdiction over Defendants because Defendants do business in the State of California, are registered with the California Secretary of State, and/or have their corporate headquarters in California.

6. Venue is proper in this judicial district pursuant to Code of Civil Procedure §§ 393, 395(a), and/or 395.5. Defendants conduct business in this County, employ Aggrieved Employees in this County, have jobsites in this County, and therefore liability arises in this County.

PARTIES

7. Plaintiff Michael Schmidt is an individual over the age of eighteen, and at all times relevant to this Complaint was a resident of the State of California, County of Placer. Plaintiff was employed as a non-exempt Customer Service Representative for Defendants at a Vision Service Plan location in Rancho Cordova, California from approximately August 2015 to August 2019.

8. Plaintiff is informed, believes, and thereon alleges that Defendant Vision Service Plan is a California corporation doing business in the State of California, with its principal place of business located in Rancho Cordova, California 95670. Defendant Vision Service Plan may be served with process by serving its registered agent, Stuart L. Thompson, 3333 Quality Drive, Rancho Cordova, California 95670.

9. Plaintiff is informed, believes, and thereon alleges that Defendant VSP Global, Inc. is a Delaware corporation doing business in the State of California, with its principal place of business unknown. Defendant VSP Global, Inc. may be served with process by serving its registered agent, Corporation Service Company, 251 Little Falls Drive, Wilmington, Delaware 19808.

10. Plaintiff is informed, believes, and thereon alleges that Defendant Marchon Eyewear, Inc. is a New York corporation doing business in the State of California, with its principal place of

1 unknown. Defendant Marchon Eyewear, Inc. may be served with process by serving its registered
2 agent, the Prentice-Hall Corporation System, 80 State Street, Albany, New York 12207.

3 11. Plaintiff is informed, believes, and thereon alleges that Defendant VSP Optical Group,
4 Inc. is a Delaware corporation doing business in the State of California, with its principal place of
5 business located in Rancho Cordova, California 95670. Defendant VSP Optical Group, Inc. may be
6 served with process by serving its registered agent, Stuart L. Thompson, 3333 Quality Drive, Rancho
7 Cordova, California 95670

8 12. Plaintiff is informed, believes, and thereon alleges that Defendant Eyefinity, Inc. is a
9 Delaware corporation doing business in the State of California, with its principal place of business
10 located in Rancho Cordova, California 95670. Defendant Eyefinity, Inc. may be served with process
11 by serving its registered agent, Thomas Allen Fessler, 3333 Quality Drive, Rancho Cordova,
12 California 95670.

13 13. The true names and capacities, whether individual, corporate, associate, or otherwise,
14 of Does 1-50, inclusive, are unknown to Plaintiff, who therefore sues the Doe Defendants by fictitious
15 names. Plaintiff is informed, believes, and thereon alleges that each of these fictitiously-named
16 Defendants are responsible in some manner for the occurrences and Labor Code violations alleged
17 herein. Plaintiff will amend this Complaint to show their true names and capacities when they have
18 been ascertained.

19 14. Plaintiff is informed, believes, and thereon alleges that Defendants own, operate, and/or
20 manage a health insurance company, with locations throughout the United States, including California.
21 Plaintiff is informed, believes, and thereon alleges that Defendants employ Aggrieved Employees
22 members, among other hourly employees, throughout California.

23 15. Plaintiff is informed, believes, and alleges that at all times mentioned in this Complaint,
24 each Defendant was the agent and employee of the other Defendant and in doing the things alleged in
25 this Complaint were acting within the course and scope of such agency and employment. Plaintiff is
26 further informed, believes, and alleges that each of the Defendants gave consent to, ratified, and
27

1 authorized the acts alleged herein. Defendants are sued both in their own right and on the basis of
2 respondent superior.

3 16. Defendants acted as joint employers of Plaintiffs and Aggrieved Employees because
4 they jointly, directly, or indirectly, controlled the employment terms, pay practices, timekeeping
5 practices, and daily work of Plaintiff and Aggrieved Employees. Upon information and belief,
6 Defendants each employed Aggrieved Employees jointly with the other the Defendants and/or with
7 currently unknown entities, because Defendants jointly, directly or indirectly, controlled the
8 employment terms, pay practices, timekeeping practices, and daily work of Plaintiff and Aggrieved
9 Employees.

10 17. Plaintiff is informed and believes that each and every one of the acts and omissions
11 alleged herein were performed by, and/or attributable to, Defendants, acting as joint employers of
12 Plaintiff and Aggrieved Employees. Plaintiff is informed, believes, and thereon alleges that
13 Defendants jointly exercised control over Plaintiff and Aggrieved Employees with respect to their
14 employment with Defendants. Furthermore, Defendants acted through their agents and/or employees,
15 and/or under the direction and control of each of the other, and that said acts and failures to act were
16 within the course and scope of said agency, employment and/or direction and control.

17 18. Plaintiff is informed, believes, and thereon alleges that Defendants directly control the
18 operations of their agents, managers, and employees throughout all of their locations in California.

19 19. Plaintiff is informed, believes, and alleges that Defendants are either solely or jointly
20 and severally liable for damages and penalties owed to Plaintiff and Aggrieved Employees under
21 common law and by statute, including attorneys' fees and costs.

22 20. As employers of Plaintiff and Aggrieved Employees throughout the relevant time
23 periods Defendants, and each of them, are solely, jointly, and severally liable for civil penalties for
24 violating the California Labor Code with respect to the employment of Plaintiff and Aggrieved
25 Employees.

26 21. At all material times, Defendants have done business under the laws of California, have
27

1 had places of business in California, including in this County, and have employed Aggrieved
2 Employees in this County and elsewhere in California. Defendants each are a “person” as defined in
3 Labor Code § 18, and an “employer” as that term is used in the Labor Code and the IWC Wage Orders
4 regulating wages, hours, and working conditions. Upon information and belief, Defendants employ
5 Aggrieved Employees, because Defendants, directly or indirectly, control the employment terms, pay
6 practices, timekeeping practices, and daily work of Plaintiff and similarly situated employees.

7 **FACTUAL ALLEGATIONS**

8 22. Defendants operate a vision care health insurance company throughout the United
9 States and California. Defendants employ thousands of hourly non-exempt workers similarly situated
10 to Plaintiff across its facilities throughout the State of California.

11 23. Plaintiff worked as a non-exempt Customer Service Representative for Defendants
12 from approximately August 2015 until August 2019. On average, Plaintiff was paid at an hourly rate
13 of approximately \$17.62, and regularly worked in excess of eight hours a day and, on average, 40
14 hours per week. On average, Plaintiff worked more than 8 hours per shift one to three times per week,
15 every week worked.

16 24. Aggrieved Employees were and are employed by Defendants and performed work
17 materially similar to Plaintiff throughout California.

18 25. Aggrieved Employees perform their jobs under Defendants’ supervision and using
19 materials and technology approved and supplied by Defendants.

20 26. Aggrieved Employees are required to follow and abide by common work, time, and
21 pay policies and procedures in the performance of their jobs.

22 27. At the end of each pay period, Aggrieved Employees receive wages from Defendants
23 that are determined by common systems and methods that Defendants select and control.

24 28. Defendants pay Aggrieved Employees on an hourly rate basis.

25 29. As a matter of policy and or/practice, Defendants fail to authorize and/or permit
26 Plaintiff and Aggrieved Employees to take compliant meal and rest breaks by requiring them to remain
27

1 on duty during their scheduled shifts. Plaintiff is informed, believes, and thereon alleges that this policy
2 and practice applies to all Aggrieved Employees throughout California. Moreover, Defendants fail to
3 pay Plaintiff and Aggrieved Employees premium wages for their missed breaks.

4 30. In addition to working through their meal and rest breaks, Plaintiff and Aggrieved
5 Employees perform work while “off-the-clock” with Defendants’ knowledge, and are denied
6 compensation for the time spent engaged in this off-the-clock work. Nearly every day, Plaintiff was
7 required to begin working 20 minutes before each shift, and before clocking in. Furthermore, Plaintiff
8 would frequently continue working for 20 minutes up to an hour after he had clocked out. Plaintiff is
9 informed, believes, and thereon alleges that these policies and practices apply to all Aggrieved
10 Employees throughout California.

11 31. As a result of this off-the-clock work, Plaintiff and Aggrieved Employees are not
12 adequately compensated for all hours worked at their regular rate or at the applicable overtime rates.
13 Plaintiff frequently worked 20 minutes to over an hour of off-the-clock work on a regular basis as a
14 Customer Service Representative.

15 32. Defendants’ common course of wage-and-hour abuse includes routinely failing to
16 maintain true and accurate records of the hours worked by Aggrieved Employees. In particular,
17 Defendants have failed to record hours that Plaintiff and Aggrieved Employees worked off the clock.

18 33. Defendants’ failure to record all hours worked results in a failure to provide Aggrieved
19 Employees, including Plaintiff, accurate itemized wage statements as required by California law. The
20 wage statements Defendants provide are not accurate because they do not reflect the actual hours
21 worked by Plaintiff and Aggrieved Employees. The wage statements do not contain off-the-clock work
22 or premium pay for missed meal and rest breaks.

23 34. Further, Defendants do not provide Aggrieved Employees, including Plaintiff, whose
24 employment has ended, with full payment of all wages owed at the end of their employment. As these
25 workers are owed for off-the-clock work, unpaid overtimes, and premium pay when their employment
26 ends, and these amounts remain unpaid under Defendants’ policies and practices, Defendants fail to
27

1 pay all wages due upon termination. As a consequence, Defendants are subject to waiting time
2 penalties.

3 35. Defendants have employed hundreds of people similarly situated to Plaintiff.

4 36. Defendants' method of paying Plaintiff and Aggrieved Employees is willful, and is not
5 based on a good faith and reasonable belief that their conduct complies with California law.
6 Defendants' conduct causes significant damages to non-exempt hourly employees in an amount to be
7 determined at trial.

8 **FIRST CAUSE OF ACTION**
9 **Penalties Pursuant to Labor Code § 2699(a)**

10 37. Plaintiff re-alleges and incorporates the foregoing paragraphs as though fully set forth
11 herein.

12 38. Labor Code § 2699(a) provides:

13 Notwithstanding any other provision of law, any provision of this code that
14 provides for a civil penalty to be assessed and collected by the Labor and
15 Workforce Development Agency or any of its departments, divisions,
16 commissions, boards, agencies or employees, for a violation of this code,
may, as an alternative, be recovered through a civil action brought by an
aggrieved employee on behalf of himself or herself and other current or
former employees.

17 39. Labor Code § 226(a) provides:

18 Every employer shall, semimonthly or at the time of each payment of
19 wages, furnish each of his or her employees, either as a detachable part of
20 the check, draft, or voucher paying the employee's wages, or separately
21 when wages are paid by personal check or cash, an accurate itemized
22 statement in writing showing (1) gross wages earned, (2) total hours worked
23 by the employee, except for any employee whose compensation is solely
24 based on a salary and who is exempt from payment of overtime under
25 subdivision (a) of Section 515 or any applicable order of the Industrial
26 Welfare Commission, (3) the number of piece-rate units earned and any
27 applicable piece rate if the employee is paid on a piece-rate basis, (4) all
deductions, provided that all deductions made on written orders of the
employee may be aggregated and shown as one item, (5) net wages earned,
(6) the inclusive dates of the period for which the employee is paid, (7) the
name of the employee and his or her social security number, (8) the name
and address of the legal entity that is the employer, and (9) all applicable
hourly rates in effect during the pay period and the corresponding number
of hours worked at each hourly rate by the employee.

1 40. Labor Code § 512(a) provides:

2 An employer shall not employ an employee for a work period of more than
3 five hours per day without providing the employee with a meal period of
4 not less than 30 minutes, except that if the total work period per day of the
5 employee is no more than six hours, the meal period may be waived by
6 mutual consent of both the employer and employee. An employer shall not
7 employ an employee for a work period of more than 10 hours per day
8 without providing the employee with a second meal period of not less than
9 30 minutes, except that if the total hours worked is no more than 12 hours,
10 the second meal period may be waived by mutual consent of the employer
11 and the employee only if the first meal period was not waived.

12 41. Labor Code § 226.7 provides, in relevant part:

13 An employer shall not require an employee to work during a meal or rest or recovery
14 period mandated pursuant to an applicable statute, or applicable regulation, standard,
15 or order of the Industrial Welfare Commission, the Occupational Safety and Health
16 Standards Board, or the Division of Occupational Safety and Health.

17 ...

18 If an employer fails to provide an employee a meal or rest or recovery period in
19 accordance with a state law, including, but not limited to, an applicable statute or
20 applicable regulation, standard, or order of the Industrial Welfare Commission, the
21 Occupational Safety and Health Standards Board, or the Division of Occupational
22 Safety and Health, the employer shall pay the employee one additional hour of pay at
23 the employee's regular rate of compensation for each workday that the meal or rest or
24 recovery period is not provided.

25 42. Labor Code § 203 provides, in relevant part:

26 If an employer willfully fails to pay, without abatement or reduction, in
27 accordance with Sections 201, 201.3, 201.5, 201.6, 201.8, 201.9, 202, and
28 205.5, any wages of an employee who is discharged or who quits, the wages
29 of the employee shall continue as a penalty from the due date thereof at the
30 same rate until paid or until an action therefor is commenced; but the wages
31 shall not continue for more than 30 days.

32 43. Labor Code § 226(e)(1) provides:

33 An employee suffering injury as a result of a knowing and intentional failure by
34 an employer to comply with subdivision (a) is entitled to recover the greater of
35 all actual damages or fifty dollars (\$50) for the initial pay period in which a
36 violation occurs and one hundred dollars (\$100) per employee for each violation
37 in a subsequent pay period, not to exceed an aggregate penalty of four thousand

dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees.

44. Labor Code § 226.3 provides:

Any employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial citation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the records required in subdivision (a) of Section 226. The civil penalties provided for in this section are in addition to any other penalty provided by law. In enforcing this section, the Labor Commissioner shall take into consideration whether the violation was inadvertent, and in his or her discretion, may decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake.

45. Plaintiff seeks civil penalties pursuant to Labor Code § 2699(a) for each failure by Defendants, as alleged above, to timely pay all wages owed to Plaintiff and Aggrieved Employees in compliance with Labor Code §§ 201-202 in the amounts established by Labor Code § 203. Plaintiff seeks such penalties as an alternative to the penalties available under Labor Code § 203, as prayed for herein.

46. Plaintiff also seeks civil penalties pursuant to Labor Code § 2699(a) for each failure by Defendants, alleged above, to provide Plaintiff and Aggrieved Employees an accurate, itemized wage statement in compliance with Labor Code § 226(a) in the amounts established by Labor Code § 226(e). Plaintiff seeks such penalties as an alternative to the penalties available under Labor Code § 226(e), as prayed for herein.

47. Plaintiff also seeks civil penalties pursuant to Sections 225.5, 226.3, and 256 of the California Labor Code.

48. Pursuant to Labor Code § 2699.3(a)(1) and (2), Plaintiff provided the Labor and Workforce Development Agency ("LWDA") with notice of his intention to file this claim. Sixty-five calendar days have passed without notice from the LWDA. Plaintiff therefore satisfied the administrative prerequisite to commence this civil action in compliance with § 2699.3(a).

49. Plaintiff seeks the aforementioned penalties on behalf of the State, other aggrieved Employees, and himself as set forth in Labor Code § 2699(g)(i).

1 50. Defendants are liable to Plaintiff, Aggrieved Employees, and the State of California for
2 the civil penalties set forth in this Complaint. Plaintiff is also entitled to an award of attorneys' fees
3 and costs as set forth below.

4 51. Wherefore, Plaintiff requests relief as hereinafter provided.

5
6 **SECOND CAUSE OF ACTION**
7 **Penalties Pursuant to Labor Code § 2699(f)**

8 52. Plaintiff re-alleges and incorporates the foregoing paragraphs as though fully set forth
9 herein.

10 53. Labor Code § 2699(f) provides:

11 For all provisions of this code except those for which a civil penalty is
12 specifically provided, there is established a civil penalty for a violation of
13 these provisions, as follows: . . . (2) If, at the time of the alleged violation,
14 the person employs one or more employees, the civil penalty is one hundred
15 dollars (\$100) for each aggrieved employee per pay period for the initial
16 violation and two hundred dollars (\$200) for each aggrieved employee per
17 pay period for each subsequent violation.

18 54. To the extent than any violation alleged herein does not carry penalties under Labor
19 Code § 2699(a), Plaintiff seeks civil penalties pursuant to Labor Code § 2699(f) for Plaintiff and
20 Aggrieved Employees each pay period in which he or she was aggrieved, in the amounts established
21 by Labor Code § 2699(f). Plaintiff seeks civil penalties under Labor Code § 2699(f) for Defendants'
22 violations of Labor Code §§ 204, 226.7, 510, 512, 1194, 1197, and 1197.1.

23 55. Pursuant to Labor Code § 2699.3(a)(1) and (2), Plaintiff has provided the LWDA with
24 notice of his intention to file this claim. Sixty-five calendar days have passed without notice from
25 the LWDA. Plaintiff satisfied the administrative prerequisites to commence this civil action in
26 compliance with § 2699.3(a).

27 56. Plaintiff seeks the aforementioned penalties on behalf of the State, other Aggrieved
28 Employees, and himself as set forth in Labor Code § 2699(g)(i).

 57. Defendants are liable to Plaintiff, Aggrieved Employees, and the State of California
for the civil penalties set forth in this Complaint. Plaintiff is also entitled to an award of attorneys'

1 fees and costs as set forth below.

2 58. Wherefore, Plaintiff requests relief as hereinafter provided.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff, on behalf of the State of California and Aggrieved Employees,
5 requests the following relief:

6 1. For the Court to declare, adjudge, and decree that Defendants have violated the
7 California Labor Code as alleged herein;

8 2. For an order awarding civil penalties to the full extent provided for by the PAGA;

9 3. For interest on penalties awarded as provided by applicable law;

10 4. For an award of reasonable attorneys' fees as provided by the California Labor Code,
11 including Labor Code § 2699(g)(1); California Code of Civil Procedure §1021.5; and/or any other
12 applicable law;

13 5. For all costs of suit; and

14 6. For such other and further relief as this Court deems just and proper.

15
16 Respectfully submitted,

17 Date: January 27, 2021



18 Carolyn H. Cottrell
19 David C. Leimbach
20 Ryan M. Hecht
21 SCHNEIDER WALLACE
22 COTTRELL KONECKY LLP

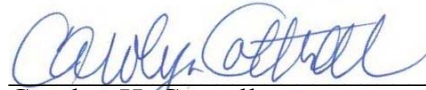
23 *Attorneys for Plaintiff, on behalf of the State of*
24 *California and Aggrieved Employees*

1 **DEMAND FOR JURY TRIAL**

2 Plaintiff hereby demands a jury trial on all claims and issues for which Plaintiff is entitled to
3 a jury.

4
5 Date: January 27, 2021

Respectfully submitted,

6 

7 Carolyn H. Cottrell
8 David C. Leimbach
9 Ryan M. Hecht
10 SCHNEIDER WALLACE
11 COTTRELL KONECKY LLP

12 *Attorneys for Plaintiff, on behalf of the State of*
13 *California and Aggrieved Employees*