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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **FOR THE COUNTY OF SAN DIEGO**

16 ERIK ROJAS, an individual, on behalf of the
17 State of California, as a private attorney
18 general, and on behalf all others similarly
19 situated,

20 Plaintiff,

21 v.

22 SEMPER SOLARIS CONSTRUCTION, INC.,
23 and DOES 1-50, inclusive,

24 Defendants.

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

06/10/2021 at 01:42:00 PM

Clerk of the Superior Court
By Treva Cutts, Deputy Clerk

CASE NO.: 37-2020-35083-CU-OE-CTL

**FIRST AMENDED REPRESENTATIVE
ACTION COMPLAINT:**

(1) **CIVIL PENALTIES UNDER THE
PRIVATE ATTORNEYS
GENERAL ACT (LABOR CODE §
2698 *et seq.*)**

DEMAND FOR JURY TRIAL

1 Plaintiff Erik Rojas (hereinafter “Plaintiff”) on behalf of himself, and all other similarly
2 Aggrieved Employees, hereby brings this PAGA Representative Action Complaint (“Complaint”)
3 against Defendant Semper Solaris Construction, Inc. and DOES 1 through 50, inclusive (collectively
4 “Defendants”), and on information and belief alleges as follows:

5 **JURISDICTION**

6 1. Plaintiff, on behalf of himself and all others similarly aggrieved employees hereby
7 brings this Complaint for recovery of civil penalties under California Labor Code §§ 2698 *et. seq.*

8 2. This Court has jurisdiction over Defendants because, upon information and belief,
9 Defendants are citizens of California, and Defendants have sufficient minimum contacts in California,
10 or otherwise intentionally avail themselves to the State of California so as to render the exercise of
11 jurisdiction over them by California courts consistent with the traditional notions of fair play and
12 substantial justice.

13 **VENUE**

14 3. Venue is proper in this judicial district pursuant to California Code of Civil Procedure
15 §§ 395(a) and 395.5, as most of the acts and omissions complained of herein occurred in the County
16 of San Diego. Defendants own, maintain offices, transact business, have an agent or agents within
17 the County of San Diego, and/or otherwise are found within the County of San Diego, and Defendants
18 are within the jurisdiction of this Court for purposes of service of process.

19 **PARTIES**

20 4. Plaintiff is an individual over the age of eighteen (18). At all relevant times herein,
21 Plaintiff was and currently is a California resident. During the one-year immediately preceding
22 Plaintiff giving notice to the Labor and Workforce Development Agency and within the statute of
23 limitations periods applicable to each cause of action pled herein, Defendants employed Plaintiff as
24 a non-exempt technician employee.

25 5. Defendant Defendants Construction, Inc. is a leading residential roofing and solar
26 panel installation companies with numerous locations across California. Plaintiff is informed and
27 believes, and based thereon alleges, that during the one year preceding Plaintiff giving PAGA Notice
28 to the LWDA and continuing to the present, Defendants did (and continue to do) business by owning

1 and/or operating a solar panel and roofing company, and employed Plaintiff and other similarly
2 aggrieved employees within San Diego County and the State of California, and therefore, were (and
3 are) doing business in San Diego County and the State of California.

4 6. Plaintiff is informed and believes, and thereon alleges, that at all times mentioned
5 herein, Defendants were licensed to do business in California and County of San Diego and were the
6 employees of Plaintiff and the aggrieved employees.

7 7. Plaintiff does not know the true names or capacities, whether individual, partner, or
8 corporate, of the defendants sued herein as DOES 1 to 50, inclusive, and for that reason, said
9 Defendants are sued under such fictitious names, and Plaintiff will seek leave from this Court to
10 amend this Complaint when such true names and capacities are discovered. Plaintiff is informed, and
11 believes, and thereon alleges, that each of said fictitious defendants, whether individual, partners, or
12 corporate, were responsible in some manner for the acts and omissions alleged herein, and
13 proximately caused Plaintiff and the aggrieved employees to be subject to the unlawful employment
14 practices, wrongs, injuries and damages complained of herein.

15 8. Plaintiff is informed, and believes, and thereon allege, that at all times mentioned
16 herein, Defendants were and are the employers of Plaintiff and the Aggrieved Employees.

17 9. At all times herein mentioned, each of said Defendants participated in the doing of the
18 acts hereinafter alleged to have been done by the named Defendants; and furthermore, the Defendants,
19 and each of them, were the agents, servants, and employees of each and every one of the other
20 Defendants, as well as the agents of all Defendants, and at all times herein mentioned were acting
21 within the course and scope of said agency and employment. Defendants, and each of them, approved
22 of, condoned, and/or otherwise ratified each and every one of the acts or omissions complained of
23 herein.

24 10. At all times mentioned herein, Defendants, and each of them, were members of and
25 engaged in a joint venture, partnership, and common enterprise, and acting within the course and
26 scope of and in pursuance of said joint venture, partnership, and common enterprise. Further, Plaintiff
27 alleges that all Defendants were joint employers for all purposes of Plaintiff and the aggrieved
28 employees.

1 **PAGA REPRESENTATIVE ACTION ALLEGATIONS**

2 11. Defendants are a leading residential roofing and solar panel installation company with
3 numerous locations across California. Plaintiff worked for Defendants as a non-exempt technician
4 until his termination on or about September 11, 2020. Plaintiff and the other aggrieved employees
5 including but not limited to installers, electricians, service technicians, outside sales reps, and other
6 similar positions, partook in all aspects of Defendants' business operations. Plaintiff pursues this
7 instant representative action on behalf of himself and the State of California as well as on behalf of
8 the following group of "aggrieved employees:"

9 All non-exempt employees who work or worked for
10 Defendants in California, during the one year
11 immediately preceding the filing of this PAGA Notice
12 through the date of trial ("aggrieved employees")

13 12. At all relevant times, Defendants failed and continues to fail to authorize and permit
14 Plaintiff and other aggrieved employees from taking compliant and timely 30 minute meal periods,
15 and ten (10) minute duty free rest periods for every major fraction of four hours worked due to
16 Defendants' unlawful meal and rest period policies and/or practices as further described herein.

17 13. From one year ago and continuing until the present, Defendants failed and continues
18 to fail to authorize and permit Plaintiff and other aggrieved employees from taking legally complaint
19 meal periods. Specifically, Plaintiff and other aggrieved employees are regularly unable to take their
20 first meal period before the end of the fifth hour of work, and a second meal period before the tenth
21 hour of work due to Defendants' unlawful meal period policies and/or practices. Additionally, when
22 Plaintiff and other aggrieved employees worked shifts in excess of 10 hours, which is often,
23 Defendants failed to allow and permit aggrieved employees to take a second meal period of 30
24 minutes. Each time Plaintiff or other aggrieved employees were unable to take a complaint first or
25 second meal period, Defendants failed and continues to fail to pay meal period premium payments as
26 required by Labor Code § 226.7.

27 14. Labor Code § 512 requires employers to provide employees with a thirty (30) minute
28 uninterrupted and duty-free meal period within the first five hours of work. An employee who works

1 more than ten (10) hours per day is entitled to receive a second thirty (30) minute uninterrupted and
2 duty-free meal period. (*Brinker Rest. Corp. v. Superior Court*, (2012) 53 Cal. 4th 1004,
3 1042[("Accordingly, first meal periods must start after no more than five hours."]; see also *Munoz v.*
4 *Giumarra Vineyards Corp.*, 2015 WL 5350563 at *3 (E.D. Cal. Sept. 11, 2015) [holding that meal
5 periods must be taken within the first five hours of work].)

6 15. Labor Code § 226.7 provides "an employer shall not require an employee to work
7 during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable
8 regulation, standard, or order of the Industrial Welfare Commission ("IWC") (See *Brinker Restaurant*
9 *Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1016-17 ["[T]he wage order's meal period
10 requirement is satisfied if the employee (1) has at least 30 minutes uninterrupted, (2) is free to leave
11 the premises, and (3) is relieved of all duty for the entire period. . .The employer satisfies the [meal
12 period] obligation if it relieves its employees of all duty, relinquishes control over their activities and
13 permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede
14 or discourage them from doing so"])).

15 16. As stated herein, Defendants' meal period policies and practices fail to authorize and
16 permit Plaintiff and other aggrieved employees from taking 30-minute meal periods to which they
17 are entitled to, including a second meal period for shifts in excess of 10 hours. To the extent that
18 Plaintiff and other aggrieved employees are not authorized and permitted to take meal periods,
19 Defendants also fails to maintain a proper mechanism for the payment of meal period premium
20 payments as required by Labor Code § 226.7.

21 17. As a result of Defendants' unlawful meal period policies and practices, Plaintiff seeks
22 to recover on behalf of himself and all aggrieved employee's meal period premiums and penalties.
23 Consequently, Defendants has violated Labor Code §§ 226.7, 512 and applicable Wage Orders.
24 Defendants would also be liable for civil penalties pursuant to Labor Code § 2698.

25 18. Furthermore, from one year ago and continuing until the present, Defendants failed
26 and continues to fail to authorize and permit Plaintiff and other aggrieved employees from taking
27 legally complaint rest periods. Plaintiff and other aggrieved employees are routinely unable to take
28 (10) minute duty free rest periods for every major fraction of four hours worked. This includes a

1 second rest period for shifts in excess of six hours, and a third rest period for shifts in excess of 10.0
2 hours in a workday. Specifically, when Plaintiff and other aggrieved employees worked shifts in
3 excess of 10.0 hours, which is often, Defendants failed to allow and permit aggrieved employees to
4 take a third rest period. Each time Plaintiff or other aggrieved employees were unable to take a
5 complaint rest periods, Defendants failed and continues to fail to pay meal period premium payments
6 as required by Labor Code § 226.7.

7 19. Under the applicable Wage Order, an employer must authorize and permit all
8 employees to take ten (10) minute duty free rest periods *for every major fraction of four hours worked*.
9 This includes a second rest period for shifts in excess of six hours, and a third rest period for shifts in
10 excess of 10.0 hours in a workday. (See *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal. 5th
11 257, 269 [concluding that “during rest periods employers must relieve employees of all duties and
12 relinquish control over how employees spend their time.”])

13 20. As stated herein, Defendants’ rest period policies and/or practices fail to authorize and
14 permit Plaintiff and other aggrieved employees from taking ten-minute rest periods to which they are
15 entitled to, including a second rest period for shifts in excess of six hours, and a third rest period for
16 shifts in excess ten hours. Importantly, Defendants also fails to maintain a mechanism for the payment
17 of rest period premium payments as required by Labor Code § 226.7.

18 21. As a result of Defendants’ unlawful rest period policies and/or practices, Plaintiff
19 seeks to recover on behalf of herself and all aggrieved employees rest period premiums and penalties.
20 Consequently, Defendants has violated Labor Code §§ 226.7, 512 and applicable Wage Orders.
21 Defendants would also be liable for civil penalties pursuant to Labor Code § 2698.

22 22. Moreover, at all relevant times, Defendants also failed to reimburse Plaintiff and other
23 aggrieved employees for necessary expenditures incurred as a direct consequence and requirement of
24 performing their job duties, including to the costs associated with their daily cell phone use for
25 business purposes. Despite aggrieved employees’ cell phone and data usage for work-related
26 purposes, they were not reimbursed. Pursuant to the U.S. Bureau of Labor Statistics, the national
27 average cost of cell phone service in 2018 was approximately \$115.00 per month per person from
28 age 25 to 64. See <https://www.bls.gov/cex/2018/combined/age.pdf>) Clearly, Defendants was and is

1 required to pay a “reasonable percentage of aggrieved employees’ cell phone bills. (See *Cochran v.*
2 *Schwan’s Home Service, Inc.* (2014) 228 Cal. App. 4th 1137 (the Court of Appeal held that an
3 employer that required its customer service managers to use their personal cell phones for business
4 tasks must reimburse the managers for a reasonable percentage of their cell phone bills).
5 Consequently, since Defendants failed to comply with Labor Code § 2802 and applicable Wage
6 Orders, Plaintiff and other aggrieved employees are entitled to recover penalties under Labor Code
7 §§ 2802 and 2698 *et seq.*

8 23. Moreover, at all relevant times, Plaintiff and other aggrieved employees were not
9 properly paid at the correct overtime rate for all hours worked more than eight hours per workday or
10 40 hours per workweek. When Mr. Rojas and the other aggrieved employees worked overtime hours,
11 Defendants failed to include all forms of compensation, including, but not limited to non-
12 discretionary bonus compensation, commissions and other forms of compensation when calculating
13 the regular rate of pay used in overtime calculations.

14 24. Additionally, as a result of Defendants’ failure to properly account for all forms of
15 compensation in calculating the regular rate of pay, Defendants also failed to adequately pay all meal
16 and rest period premiums and sick pay at the aggrieved employees’ appropriate regular rate of pay.

17 25. Under the California Labor Code (as well as the FLSA), courts have held that regularly
18 paid non-discretionary incentive pay/bonuses/commissions must be included in determining an
19 employee’s “regular rate of pay” for purposes of calculating overtime. (See *Haber v. The Americana*
20 *Corp.* 378 F. 2d 854, 855-856 (9th Cir. 1967) [holding that regularly paid efficiency bonuses must be
21 included in calculating the “regular rate”]; *Wang v. Chinese Daily News, Inc.* 435 F. Supp. 2d 1042,
22 1055-1057 (C.D. Cal. 2006) [granting summary judgement to Plaintiffs under California and federal
23 law on the grounds, tat defendant improperly calculated overtime by excluding annual bonuses paid
24 to employees from the “regular rate of compensation”].)

25 26. As a result of Defendants’ failure to include all forms of compensation in calculating
26 the regular rate as set forth above, Defendants failed to compensate Plaintiff and other aggrieved
27 employees for all overtime wages (and for meal/rest period premiums and sick pay) at the proper
28 rates. Accordingly, through PAGA and to the extent permitted by law Plaintiff and other aggrieved

employees are entitled to recover liquidated damages for violations of Labor Code § 1197.1. Based upon these same factual allegations, Plaintiff and the other aggrieved employees are entitled to penalties under Labor Code § 1199.

27. As a result of Defendants' failure to provide Plaintiff and other aggrieved employees with all legally complaint meal and rest periods or compensation in lieu thereof and failure to pay aggrieved employees for all overtime wages and sick pay at the appropriate premium rate, Defendants also intentionally failed and continue to fail to furnish aggrieved employees with itemized wage statements that accurately reflect the correct amount of gross wages earned, net wages earned, or the applicable hourly rates in effect during the pay period and premium wages due for missed meal and rest periods as required by Labor Code § 226(a). Consequently, because Defendants failed to comply with Labor Code § 226(a) and applicable Wage Orders, Plaintiff and other aggrieved employees would be entitled to recover penalties under Labor Code §§ 226(e) and 2698.

28. As a further result of Defendants' failure to pay all meal and rest period premium wages and failure to pay all overtime wages and sick pay at the appropriate premium rate, Defendants also failed to pay waiting time aggrieved employees all wages owed at their time of separation from employment with Defendants in violation of Labor Code §§ 201-203 and applicable Wage Orders.

FIRST CAUSE OF ACTION

PRIVATE ATTORNEYS GENERAL ACT

(Plaintiff and Similarly Aggrieved Employees Against All Defendants)

29. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

30. Defendants have committed several Labor Code violations against Plaintiff and other similarly aggrieved employees. Plaintiff, an “aggrieved employee” within the meaning of Labor Code § 2698 *et seq.*, acting on behalf of himself and other similarly aggrieved employees, brings this representative action against Defendants to recover the civil penalties due to Plaintiff, other similarly aggrieved employees, and the State of California according to proof pursuant to Labor Code § 2699 (a) and (f) including, but not limited to (1) \$100 for each initial violation and \$200 for each subsequent violation per employee per pay period for those violations of the Labor Code for which no civil

1 penalty is specifically provided based on the following Labor Code violations:

2 a. Failing to provide Plaintiff and other similarly Aggrieved Employees with all of their
3 statutorily-mandated meal periods in violation of Labor Code §§ 204, 510, 1194 and 1198;

4 b. Failing to authorize and permit Plaintiff and other Similarly Aggrieved employees
5 with all of their statutorily-mandated rest periods in violation of Labor Code §§ 226.7 and 516.

6 c. Failing to pay Plaintiff and other similarly Aggrieved Employees all overtime wages
7 at the appropriate premium rates in violation of Labor Code §§ 510, 1194, 1197;

8 d. Failing to pay Plaintiff and other similarly Aggrieved Employees all wages owed in
9 violation of Labor Code §§ 510, 1194, 1197;

10 e. Failing to furnish Plaintiff and other similarly Aggrieved Employees with complete,
11 accurate, itemized wage statements in violations of Labor Code § 226(a);

12 f. Failing to compensate Plaintiff and similarly Aggrieved Employees with all earnings
13 at their separation of employment in violation of Labor Code §§ 201-203; and

14 g. Failing to adequately reimburse Plaintiff and similarly Aggrieved Employees for
15 necessary business expenditures incurred as a direct consequence and requirement of performing their
16 job duties in violation of Labor Code § 2802.

17 31. On September 28, 2020, and again on May 20, 2021, Plaintiff notified Defendant
18 Semper Solaris Construction, Inc. via certified mail, and the California Labor and Workforce
19 Development Agency (“LWDA”) via its website of Defendants’ violations of the California Labor
20 Code § 2698 *et. seq.* with respect to violations of the California Labor Code identified in Paragraph
21 30 (a)-(i). After sixty-five days have passed from Plaintiff notifying Defendants of these violations,
22 Plaintiff will have exhausted his administrative requirements for bringing a claim under the Private
23 Attorneys General Act with respect to these violations.

24 32. Plaintiff was compelled to retain the services of counsel to file this court action to
25 protect his interests and the interests of other similarly aggrieved employees, and to assess and collect
26 the civil penalties owed by Defendants. Plaintiff has therefore incurred attorneys’ fees and costs,
27 which he is entitled to receive under California Labor Code § 2699.

1 **PRAYER FOR RELIEF**

2 **WHEREFORE**, Plaintiff prays for judgment for himself and for all others on whose behalf
3 this suit is brought against Defendants, as follows:

4 1. Upon the First Cause of Action, for civil penalties due to Plaintiff, other similarly
5 Aggrieved Employees, and the State of California according to proof pursuant to Labor Code § 2699
6 (a) and (f) including, but not limited to: (1) \$100.00 for each initial violation and \$200 for each
7 subsequent violation per employee per pay period for those violations of the Labor Code for which
8 no civil penalty is specifically provided under the Labor Code;

9 2. On all causes of action, for attorneys' fees and costs as provided by Labor Code
10 §§2698 *et seq.*, and Code of Civil Procedure §1021.5; and

11 3. For such other and further relief, the Court may deem just and proper.

12
13 Dated: May 20, 2021

FALAKSSA LAW, P.C.
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14
15 By: _____/s/
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