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13 Attorneys for Plaintiff,
14 ADRIEL ADLAWAN, and all other similarly situated

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **FOR THE COUNTY OF ALAMEDA**
17 **(UNLIMITED JURISDICTION)**

18 ADRIEL ADLAWAN, as an "aggrieved
19 employee" on behalf of other similarly situated
20 "aggrieved employees" under the Labor Code
Private Attorney General Act of 2004,

21 *Plaintiff(s),*

22 vs.

23
24 MAGNUSSEN'S FREMONT IMPORTS,
25 INC., a California corporation; and DOES 1
through 50, inclusive,

26 *Defendant(s).*
27
28

ENDORSED
FILED
ALAMEDA COUNTY

MAY 10 2021

CLERK OF THE SUPERIOR COURT
Deputy

MARGARET J. DOWNIE

Filed By Fax

Case No.: RG21093431

**FIRST AMENDED COMPLAINT FOR
VIOLATIONS OF THE LABOR CODE
AND CIVIL PENALTIES UNDER THE
LABOR CODE PRIVATE ATTORNEYS
GENERAL ACT OF 2004, LABOR CODE
§§ 2698, ET SEQ.**

JURY TRIAL DEMANDED

MAY 10 REC'D



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Plaintiff ADRIEL ADLAWAN (hereafter “Plaintiff”), on behalf of himself, the State of California, and other Aggrieved Employees, complains and alleges as follows:

I. INTRODUCTION

1. Plaintiff brings this representative action based on alleged violations of the California Labor Code and Industrial Welfare Commission Order No. 7-2001 (hereafter “the Wage Order”), against Defendant MAGNUSSEN’S FREMONT IMPORTS, INC., a California corporation, and DOES 1 through 50, inclusive (collectively “Defendants”).

2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to him, the State of California, and other similarly situated aggrieved current and former employees who worked in California as hourly, non-exempt employees, including, but not limited to, service-line technicians, and persons in similar positions, at any time during the period of January 19, 2020, to the present, for civil penalties and other related relief. These claims are based on Defendants’ failures to: (1) Provide all rest and meal periods; (2) Pay all wages earned for all hours worked at the correct rates of pay; (3) Indemnify for necessary work-related expenditures; (4) Provide accurate and complete written wage statements; (5) Timely pay wages during and upon termination of employment; and (6) Maintain accurate employment records. Accordingly, Plaintiff now seeks to recover civil penalties and related relief through this representative action.

II. JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction because the aggregate claims of Plaintiff and the Aggrieved Employees, inclusive of all relief, place more than \$25,000 in controversy.

4. There is no basis for federal question subject matter jurisdiction in this case. Specifically, Plaintiff asserts claims on behalf of himself, the State of California, and Aggrieved Employees that solely arise under California law, rather than federal law.

5. There is also no basis for federal diversity jurisdiction in this case.

6. Venue is proper in Alameda County pursuant to California Code of Civil Procedure § 395(a) and § 395.5 in that liability arose in Alameda County because at least some of the transactions that are the subject matter of this Complaint occurred therein and/or because each defendant is found, maintains offices, transacts business, and/or has an agent therein.

III. THE PARTIES

7. Plaintiff, ADRIEL ADLAWAN, is an individual and resident of California. Defendants first employed Plaintiff on or about March 12, 2019, as a service-line technician at



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1 their dealership in Fremont, California. Defendants continuously employed him in that capacity
2 until he was laid-off on June 8, 2020. At all relevant times, Plaintiff was an “employee” within
3 the meaning of Title 8 California Code of Regulations Section 11050, and an “aggrieved
4 employee” within the meaning of California Labor Code § 2699(c).

5 8. Defendant MAGNUSSEN FREMONT IMPORTS, INC., is a corporation
6 organized and existing under the laws of California based on Plaintiff’s information and belief.

7 9. Plaintiff is ignorant of the true names, capacities, relationships, and extents of
8 participation in the conduct alleged herein, of the defendants sued as DOES 1-50, inclusive, but
9 is informed and believes and thereon alleges that said defendants are legally responsible for the
10 wrongful conduct alleged herein and therefore sues these defendants by such fictitious names.
11 Plaintiff will amend the Complaint to allege the true names and capacities of the DOE defendants
12 when ascertained.

13 **A. THE AGGRIEVED EMPLOYEES**

14 10. The “Aggrieved Employees” are all individuals Defendants currently and
15 formerly employed in California on an hourly, bonus, shop time, and/or commission basis,
16 including but not limited to, service-line technicians, and persons in comparable positions, at any
17 time during the period of January 19, 2020, and entry of judgment (“the PAGA Period”).

18 11. Plaintiff is informed and believes and thereon alleges that, at all relevant times
19 herein, all Defendants were the agents, employees and/or servants, masters or employers of the
20 remaining defendants, and in doing the things hereinafter alleged, were acting within the course
21 and scope of such agency or employment, and with the approval and ratification of each of the
22 other Defendants.

23 12. At all relevant times, in perpetrating the acts and omissions alleged herein,
24 Defendants, and each of them, acted pursuant to and in furtherance of a policy, practice, or a lack
25 of a practice which resulted in Defendants not paying Plaintiff and the other Aggrieved
26 Employees in accordance with applicable California labor laws as alleged herein.

27 13. Plaintiff is informed and believes and thereon alleges that each and every one of
28 the acts and omissions alleged herein were performed by, and/or attributable to, all Defendants,
each acting as agents and/or employees, and/or under the direction and control of each of the
other defendants, and that said acts and failures to act were within the course and scope of said
agency, employment, and/or direction and control.



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IV. FACTUAL ALLEGATIONS

14. On March 12, 2019, Defendants began to employ Plaintiff as a service-line technician at their dealership in Fremont, California and continuously employed him in that capacity until he was laid off on June 8, 2020.

15. At all relevant times, Defendants paid Plaintiff and the Aggrieved Employees on a weekly basis at an hourly, bonus, shop time, flat rate, and/or commission pay rate. At all relevant times, Defendants classified Plaintiff and the Aggrieved Employees as non-exempt employees entitled to the protections of the Labor Code and the Wage Order.

16. At all times during the relevant time period, Defendants failed to pay Plaintiff and the Aggrieved Employees for all hours worked at the correct rates of pay, including but not limited to, overtime hours at the legally required rates for overtime work in California. Defendants arbitrarily deducted several hours per week from Plaintiff and the Aggrieved Employees' recorded hours worked and compensated them for less than what they reported on their time records. This included paying overtime hours at regular rates of pay instead of at overtime premium rates of pay. For example, during the pay period of March 31, 2019, to April 6, 2019, Plaintiff worked approximately 32 hours and 25 minutes, which included 5 hours and 25 minutes of overtime. Defendants, however, arbitrarily combined the overtime hours with "regular earnings" and "shop time" calculated at the regular rate of pay, instead of calculating them at the correct rates of pay for overtime work in California. Defendants only compensated Plaintiff for 7 minutes of the overtime hours worked during that week at the correct premium rate for overtime work in California, instead of all 5 hours and 25 minutes of overtime work.

17. Further, at all relevant times, Defendants paid Plaintiff and the Aggrieved Employees with a non-discretionary productivity bonus. Plaintiff and the Aggrieved Employees often earned the productivity bonuses during workweeks in which they worked more than 8 hours in a workday or more than 40 hours in a workweek. Defendants, however failed to include the productivity bonuses in their calculations of the regular rates of pay for purposes of calculating overtime wages. Consequently, Defendants underpaid overtime wages earned by Plaintiff and the Aggrieved Employees during those periods in which they worked overtime hours and earned productivity bonuses.

18. Additionally, Defendants paid Plaintiff and the Aggrieved Employees with "flat rate pay." Plaintiff and the Aggrieved Employees often earned the flat rate pay during workweeks



1 in which they worked more than 8 hours in a workday or more than 40 hours in a workweek.
2 Defendants, however, failed to include the flat rate pay in their calculation of the regular rates of
3 pay for purposes of calculating overtime wages. Consequently, Defendants underpaid overtime
4 wages earned by Plaintiff and the Aggrieved Employees during those periods in which they
5 worked overtime hours and earned flat rate pay. The flat rate pay also failed to compensate for
non-productive time and rest and recovery periods.

6 19. At all relevant times, Defendants failed to provide Plaintiff and the Aggrieved
7 Employees with all timely rest and meal periods. Due to the work load and low staffing levels,
8 Plaintiff and the Aggrieved Employees were denied their 30-minute duty-free meal period within
9 the first five hours of work. Defendants frequently forced Plaintiff and the Aggrieved Employees
10 to forego timely, duty-free, 30-minute meal periods by assigning them more time-sensitive work
11 than they could reasonably expect them to complete within their first five hours of work.
12 Defendants also failed to authorize and permit Plaintiff and the Aggrieved Employees to take 10-
13 minute rest breaks every four hours or major fraction thereof, as required by the Wage Order.
14 Defendants' management never authorized breaks, and the heavy work load they assigned the
15 Aggrieved Employees to complete did not permit them. Furthermore, Defendants failed to pay
16 premium wages for each workday they failed to provide Plaintiff and the Aggrieved Employees
17 with a timely meal period in compliance with California law. Defendants also failed to pay
18 premium wages for each workday they failed to provide Plaintiff and the Aggrieved Employees
with a timely rest period in compliance with California law.

19 20. Defendants required Plaintiff and the Aggrieved Employees to incur certain
20 business expenses in the course of performing their duties. At all relevant times, Defendants
21 required Plaintiff and the Aggrieved Employees to provide their own tools for mechanical work
22 and all other related activities, including but not limited to impact guns, wrenches, cordless
23 impact drivers, brake bleeders, volt meters, wire wheels, hammers, pry bars, screw drivers, pliers,
24 wheel lock sets, flash lights, extensions, and sockets, but did not reimburse them for the expenses
25 and wear and tear on such tools, nor did they provide them with the required tools as an
alternative.

26 21. As a result of these aforementioned violations, Defendants failed to provide
27 Plaintiff and the Aggrieved Employees with accurate written wage statements; failed to pay them
28 all wages earned during employment; and failed to maintain accurate employee records with



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1 respect to Plaintiff and the Aggrieved Employees, as required under California law.

2 22. For the reasons stated herein, Plaintiff alleges that as a result of Defendants'
3 unlawful practice and policies, Plaintiff and the Aggrieved Employees were:

- 4 A. Not provided with all off duty meal periods;
- 5 B. Not provided with all rest break periods as required by law;
- 6 C. Not paid one hour's pay for each workday in which Defendants failed to
7 provide them with one or more timely rest periods;
- 8 D. Not paid one hour's pay for each workday in which Defendants failed to
9 provide them with one or more timely meal periods;
- 10 E. Not paid all wages earned, including, but not limited to, regular and
11 overtime wages at the correct rates of pay;
- 12 F. Not indemnified for all necessary business expenditures incurred during
13 the discharge of their duties;
- 14 G. Not provided with accurate and complete wage statements; and
- 15 H. Not timely paid all earned and unpaid wages during their employment with
16 Defendants and at the time such employment ended.

17 **V. FIRST (AND ONLY) CAUSE OF ACTION**

18 **CIVIL PENALTIES**

19 **(Lab. Code §§ 2698, *et seq.*)**

20 **(By Plaintiff, on behalf of himself and the other Aggrieved Employees, against all**
21 **Defendants)**

22 23. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

23 24. At all relevant times, Plaintiff and the Aggrieved Employees have been non-
24 exempt employees entitled to the protections of both the Labor Code and the Wage Order.

25 **A. FAILURE TO PROVIDE REST BREAKS AND MEAL PERIODS**

26 25. In relevant part, California Labor Code § 1198 states:

27 "The maximum hours of work and the standard conditions of labor fixed by
28 the commission shall be the maximum hours of work and the standard
conditions of labor for employees. The employment of any employee for
longer hours than those fixed by the order or under conditions of labor
prohibited by the order is unlawful."

26 26. In relevant part, California Labor Code § 512 states:



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1 An employer shall not employ an employee for a work period of more than
2 five hours per day without providing the employee with a meal period of not
3 less than 30 minutes, except that if the total work period per day of the
4 employee is no more than six hours, the meal period may be waived by mutual
5 consent of both the employer and employee.

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

11 27. In relevant part, Section 11 of the Wage Order states:

12 **Meal Periods**

13 (A) “No employer shall employ any person for a work
14 period of more than five (5) hours without a meal period of
15 not less than 30 minutes, except that when a work period of
16 not more than six (6) hours will complete the day’s work the
17 meal period may be waived by mutual consent of the
18 employee and the employee. Unless the employee is relieved
19 of all duty during a 30-minute meal period, the meal period
20 shall be considered an ‘on duty’ meal period and counted as
21 time worked. An ‘on duty’ meal period shall be permitted
22 only when the nature of the work prevents an employee from
23 being relieved of all duty and when by written agreement
24 between the parties an on-the-job paid meal period is agreed
25 to. The written agreement shall state that the employee may,
26 in writing, revoke the agreement at any time.”

27 (B) If an employer fails to provide an employee a meal
28 period in accordance with the applicable provisions of this
Order, the employer shall pay the employee one (1) hour of
pay at the employee’s regular rate of compensation for each
work day that the meal period is not provided.”

...

(D) Notwithstanding any other provision of this order,
employees in the health care industry who work shifts in
excess of eight (8) total hours in a workday may voluntarily
waive their right to one of their two meal periods. In order to
be valid, any such waiver must be documented in a written
agreement that is voluntarily signed by both the employee
and the employer. The employee may revoke the waiver at
any time by providing the employer at least one day’s written



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notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

28. In relevant part, Section 12 of the Wage Order states:

Rest Periods

(A) “Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.”

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each work day that the rest period is not provided.”

29. In addition, California Labor Code § 226.7 states:

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

(c) If an employer fails to provide an employee a meal period or rest period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each work day that the meal or rest period is not provided.

30. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff and the Aggrieved Employees were entitled to uninterrupted meal periods of at least thirty (30) minutes for each day they worked five or more hours, and to a second uninterrupted 30-minute meal on



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1 days they worked more than ten hours.

2 31. Pursuant to the Wage Order, Plaintiff and the Aggrieved Employees were entitled
3 to be provided with net rest breaks of at least ten minutes for each four-hour period of work, or
4 major fraction thereof.

5 32. Defendants intentionally failed to provide Plaintiff and the Aggrieved Employees
6 with all required 30-minute duty-free meal periods and 10-minute rest periods in accordance with
7 the Wage Order.

8 33. As described above, at all relevant times during the applicable time period,
9 Defendants failed to provide Plaintiff and the Aggrieved Employees with all timely rest and meal
10 periods. Due to the workload and low staffing levels, Plaintiff and the Aggrieved Employees
11 were denied their 30-minute duty-free meal period within the first five hours of work. Defendants
12 also failed to authorize and permit Plaintiff and the Aggrieved Employees to take 10-minute rest
13 breaks every four hours or major fraction thereof, as required by the Wage Order. Defendants'
14 management never authorized breaks, and the heavy workload they assigned the Aggrieved
15 Employees to complete did not permit them. Furthermore, Defendants failed to pay premium
16 wages for each workday they failed to provide Plaintiff and the Aggrieved Employees with timely
17 meal and/or rest periods in compliance with California law.

18 34. Plaintiff is informed and believes and thereon alleges that, at all relevant times
19 within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy
20 which resulted in Defendants not providing the Aggrieved Employees with all off-duty meal
21 periods and rest breaks required by California law.

22 **B. FAILURE TO INDEMNIFY**

23 35. In pertinent part, California Labor Code section 2802(a) states, "An employer
24 shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee
25 in direct consequence of the discharge of his or her duties."

26 36. Labor Code section 1198 prohibits employers from employing their employees
27 under conditions prohibited by the Wage Order.

28 37. At all relevant times during the applicable limitations period, as a condition for
employment, Defendants required Plaintiff and the Aggrieved Employees to incur certain
business expenses. At all relevant times, Defendants required Plaintiff and the Aggrieved
Employees to provide their own tools for mechanical work and all other related activities,



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1 including but not limited to impact guns, wrenches, cordless impact drivers, brake bleeders, volt
2 meters, wire wheels, hammers, pry bars, screw drivers, pliers, wheel lock sets, flash lights,
3 extensions, and sockets, but did not reimburse them for the expenses and wear and tear on such
4 tools, nor did they provide them with the required tools as an alternative.

5 38. Therefore, Defendants failed to indemnify them for expenditures incurred as a
6 direct consequence of discharging their duties.

7 39. Plaintiff is informed and believes and thereon alleges that, at all relevant time,
8 Defendants maintained a policy and/practice, or lack thereof, which resulted in Defendants'
9 failure to indemnify Plaintiff and the Aggrieved Employees for the reasonable expenses they
10 incurred during the course of performing their duties.

11 **C. FAILURE TO PAY ALL WAGES EARNED FOR ALL HOURS WORKED AT**
12 **THE CORRECT RATES OF PAY**

13 40. Section 2 of the Wage Order defines "hours worked" as "the time during which
14 an employee is subject to the control of an employer, and includes all the time the employee is
15 suffered or permitted to work, whether or not required to do so[.]"

16 41. Section 4 of the Wage order requires an employer to pay non-exempt employees
17 at least the minimum wage set forth therein for all hours worked, which consist of all hours that
18 an employer has actual or constructive knowledge that employees are working.

19 42. In relevant part, California Labor Code § 510 states,

20 Any work in excess of eight hours in one workday and any work in excess of
21 40 hours in any one workweek and the first eight hours worked on the seventh
22 day of work in any one workweek shall be compensated at the rate of no less
23 than one and one-half times the regular rate of pay for an employee. Any work
24 in excess of 12 hours in one day shall be compensated at the rate of no less
25 than twice the regular rate of pay for an employee. In addition, any work in
26 excess of eight hours on any seventh day of a workweek shall be compensated
27 at the rate of no less than twice the regular rate of pay of an employee.

28 43. Section 3 of the applicable Wage Order states:

(A) Daily Overtime - General Provisions

- (1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 1/2) times such employee's



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regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

- (a) One and one-half (1 1/2) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek; and
- (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.
- (c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one-fortieth (1/40) of the employee's weekly salary.

44. In relevant part, California Labor Code § 226.2 states:

- a) For employees compensated on a piece-rate basis during a pay period, the following shall apply for the pay period:
 - (1) Employees shall be compensated for rest and recovery periods and other non-productive time separate from any piece-rate compensation.
 - ...
 - (3) (A) Employees shall be compensated for rest and recovery periods at a regular hourly rate that is no less than the higher of:
 - (i) An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods.
 - (ii) The applicable minimum wage.

45. Labor Code § 1194 invalidates any agreement between an employer and an employee to work for less than the minimum or overtime wage required under the applicable Wage Order.

46. Under Labor Code § 1197, "The minimum wage for employees fixed by the



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commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful.”

47. Labor Code § 1198 makes it unlawful for an employer to employ an employee under conditions that violate the Wage Order.

48. Under Labor Code § 221, “It shall be unlawful for any employer to collect or receive from an employee any part of wages therefore paid by said employer to said employee.”

49. In conjunction, these provisions of the Labor Code require employers to compensate non-exempt employees for “off-the-clock” work (before punching in or after punching out on a time clock) if the employers knew or should have known that the employees were working those hours. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.

50. At all relevant times during the applicable limitations period, Defendants knowingly failed to compensate Plaintiff and the Aggrieved Employees for all hours worked at the correct rates of pay, including, but not limited to, overtime wages for all overtime hours they worked at the correct rates of pay. Defendants arbitrarily deducted several hours per week from Plaintiff and the Aggrieved Employees’ recorded hours worked and compensated them for less than what they reported on their time records.

51. Additionally, Defendants paid Plaintiff and the Aggrieved Employees with “flat rate pay.” Plaintiff and the Aggrieved Employees often earned the flat rate pay during workweeks in which they worked more than 8 hours in a workday or more than 40 hours in a workweek. Defendants, however, failed to include the flat rate pay in their calculation of the regular rates of pay for purposes of calculating overtime wages. Consequently, Defendants underpaid overtime wages earned by Plaintiff and the Aggrieved Employees during those periods in which they worked overtime hours and earned flat rate pay. The flat rate pay also failed to compensate for non-productive time and rest and recovery periods.

52. Plaintiff is informed and believes that, at all relevant times, Defendants have applied centrally devised policies and practices to him and the Aggrieved Employees with respect to working conditions and compensation arrangements.

53. Plaintiff is informed and believes and thereon alleges that, at all relevant times, Defendants have maintained a policy, practice, or a lack of a policy which resulted in Defendants’ failure to compensate the Aggrieved Employees for all hours worked, including but not limited to, regular and overtime hours at the correct rates of pay.



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1 **D. FAILURE TO PROVIDE ACCURATE WRITTEN WAGE STATEMENTS**

2 54. Pursuant to California Labor Code § 226(a), Plaintiff and the Aggrieved
3 Employees were entitled to receive, semi-monthly or at the time of each payment of wages, an
4 accurate itemized statement showing: a) gross wages earned; b) net wages earned; c) all
5 applicable hourly rates in effect during the pay period; and d) the corresponding number of hours
6 worked at each hourly rate by the employee.

7 55. Pursuant to California Labor Code § 226, an employee is deemed to suffer injury
8 if the employer fails to provide a wage statement. Also, an employee is deemed to suffer injury
9 if the employer fails to provide accurate and complete information as required by California
10 Labor Code § 226(a) and the employee cannot “promptly and easily determine” from the wage
11 statement alone one or more of the following:

12 A. The amount of the gross wages or net wages paid to the employee during
13 the pay period or any of the other information required to be provided on the itemized wage
14 statement pursuant to California Labor Code § 226(a);

15 B. Which deductions the employer made from gross wages to determine the
16 net wages paid to the employee during the pay period;

17 C. The name and address of the employer and, if the employer is a farm labor
18 contractor, as defined in subdivision (b) of Section 1682 of the California Labor Code, the name
19 and address of the legal entity that secured the services of the employer during the pay period;

20 D. The name of the employee and only the last four digits of his or her social
21 security number or an employee identification number other than a social security number; and

22 E. The number of piece-rate units earned and the piece rate.

23 56. “Promptly and easily determine,” as stated in California Labor Code § 226(e),
24 means a reasonable person would be able to readily ascertain the information without reference
25 to other documents or information.

26 57. In relevant part, California Labor code § 226.2 states:

27 For employees compensated on a piece-rate basis during a pay period, the
28 following shall apply for that period:

(2)The itemized statement required by subdivision (a) of Section 226
shall, in addition to the other items specified in that subdivision, separately
state the following, to which the provisions of Section 226 shall also be
applicable:

(A)The total hours of compensable rest and recovery periods, the rate of



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1 compensation, and the gross wages paid for those periods during the pay
2 period.

3 (B) Except for employers paying compensation for other nonproductive
4 time in accordance with paragraph (7), the total hours of other nonproductive
5 time, as determined under paragraph (5), the rate of compensation, and the
6 gross wages paid for that time during the pay period.

7 58. Defendants failed to issue Plaintiff and the Aggrieved Employees itemized wage
8 statements that state the hours and rates of compensation for rest and recovery periods and
9 nonproductive time.

10 59. As a result of the above describe violations, Defendants violated California Labor
11 Code §§ 226 and 226.2 in that they failed to properly and accurately itemize each employee's
12 gross wages earned, net wages earned, the total hours worked, the corresponding number of hours
13 worked at each rate by the employee, and other requirements of California Labor Code §§ 226
14 and 226.2.

15 60. Defendants' failure to provide Plaintiff and the Aggrieved Employees with
16 accurate wage statements was knowing and intentional. Defendants had the ability to provide
17 Plaintiff and the Aggrieved Employees with accurate wage statements but intentionally provided
18 wage statements that Defendants knew were not accurate.

19 61. As a result of being provided with inaccurate wage statements by Defendants,
20 Plaintiff and the Aggrieved Employees have suffered an injury. Their legal rights to receive
21 accurate wage statements were violated and they were misled about the amount of wages they
22 had actually earned and were owed. In addition, the absence of accurate information on their
23 wage statements prevented immediate challenges to Defendants' unlawful pay practices, has
24 required discovery and mathematical computations to determine the amounts of wages owed, has
25 caused difficulty and expense in attempting to reconstruct time and pay records and/or has led to
26 the submission of inaccurate information about wages to state and federal government agencies.
27 Further, Plaintiff and the Aggrieved Employees were not able to ascertain from the wage
28 statements whether Defendants complied with their obligations under California Labor Code
§ 226(a) and 226.2.

29 **E. UNTIMELY WAGES DURING EMPLOYMENT**

30 62. Labor Code § 204 states:



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1 (a) All wages, other than those mentioned in Section 201, 201.3, 202, 204.1,
2 or 204.2, earned by any person in any employment are due and payable twice
3 during each calendar month, on days designated in advance by the employer
4 as the regular paydays. Labor performed between the 1st and 15th days,
5 inclusive, of any calendar month shall be paid for between the 16th and the
6 26th day of the month during which the labor was performed, and labor
7 performed between the 16th and the last day, inclusive, of any calendar month
8 shall be paid for between the 1st and 10th day of the following month. ...

9 (b) (1) Notwithstanding any other provision of this section, all wages
10 earned for labor in excess of the normal work period shall be paid no later
11 than the payday for the next regular payroll period.

12 (2) An employer is in compliance with the requirements of
13 subdivision (a) of Section 226 relating to total hours worked by the employee,
14 if hours worked in excess of the normal work period during the current pay
15 period are itemized as corrections on the paystub for the next regular pay
16 period. Any corrections set out in a subsequently issued paystub shall state
17 the inclusive dates of the pay period for which the employer is correcting its
18 initial report of hours worked.

19 (c) However, when employees are covered by a collective bargaining
20 agreement that provides different pay arrangements, those arrangements shall
21 apply to the covered employees

22 (d) The requirements of this section shall be deemed satisfied by the
23 payment of wages for weekly, biweekly, or semimonthly payroll if the wages
24 are paid not more than seven calendar days following the close of the payroll
25 period.

26 63. Defendants paid wages to employees on regular intervals. Defendants, however,
27 failed to pay Plaintiff on such intervals for all wages earned and all hours worked including, but
28 not limited to, all premium wages for all rest breaks and/or off-duty meal periods that were not
provided, and all regular and overtime wages at the correct rates of pay. On information and
belief, Plaintiff alleges that Defendants also failed to pay the Aggrieved Employees on such
intervals for all wages earned and all hours worked.

23 **F. UNTIMELY FINAL WAGES**

24 64. Labor Code § 201 provides that all earned and unpaid wages of an employee who
25 is discharged are due and payable immediately at the time of discharge.

26 65. Labor Code § 202 provides that all earned and unpaid wages of an employee who
27 quits after providing at least 72-hours notice before quitting are due and payable at the time of
28 quitting and that all earned and unpaid wages of an employee who quits without providing at



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1 least 72-hours notice before quitting are due and payable within 72 hours.

2 66. By failing to pay Plaintiff and the Aggrieved Employees 1) all earned regular and
3 overtime wages at the correct rates of pay and 2) premium wages for all late or missed rest breaks
4 and/or meal periods, Defendants failed to timely pay them all earned and unpaid wages in
5 violation of Labor Code § 201 or § 202.

6 67. Plaintiff is informed and believes that Defendants' failures to timely pay Plaintiff
7 and the Aggrieved Employees all of their earned and unpaid wages have been willful in that, at
8 all relevant times, Defendants have deliberately maintained policies and practices that violate the
9 requirements of the Labor Code and the Wage Order even though, at all relevant times, they have
10 had the ability to comply with those legal requirements.

11 **G. FAILURE TO MAINTAIN ACCURATE EMPLOYMENT RECORDS**

12 68. Labor Code § 1174 states:

13 Every person employing labor in this state shall:

14 ...

15 (c) Keep a record showing the names and addresses of all employees
16 employed and the ages of all minors.

17 (d) Keep, at a central location in the state or at the plants or establishments
18 at which employees are employed, payroll records showing the hours worked
19 daily by and the wages paid to, and the number of piece-rate units earned by
20 and any applicable piece rate paid to, employees employed at the respective
21 plants or establishments. These records shall be kept in accordance with rules
22 established for this purpose by the commission, but in any case shall be kept
23 on file for not less than three years. An employer shall not prohibit an
24 employee from maintaining a personal record of hours worked, or, if paid on
25 a piece-rate basis, piece-rate units earned.

26 69. Labor Code § 1174.5 states:

27 Any person employing labor who willfully fails to maintain the records
28 required by subdivision (c) of Section 1174, or to allow any member of the
commission or employees of the division to inspect records pursuant to
subdivision (b) of Section 1174, shall be subject to a civil penalty of five
hundred dollars (\$500).

70. Section 7 of the Wage Order states,

(a) Every employer shall keep accurate information with respect to each
employee including the following:

1. Full name, home address, occupation, and social security number.
2. Birth date, if under 18 years, and designation as a minor.
3. Time records showing when the employee begins and ends each
work period. Meal periods, split shift intervals and total daily



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- hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
4. Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
 5. Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
 6. When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

71. Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

72. On information and belief, Defendants have willfully failed to maintain the records required by § 1174 and Wage Order, including, but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Plaintiff and the Aggrieved Employees.

H. CIVIL PENALTIES SOUGHT

73. Labor Code § 204 states

- (a) All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month.

...

- (b)
 - (i) Notwithstanding any other provision of this section, all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period.
 - (ii) An employer is in compliance with the requirements of subdivision (a) of Section 226 relating to total hours worked by the employee, if hours worked in excess of the normal work period during the current pay period are itemized as corrections on the paystub for the next regular pay period. Any corrections set out in a subsequently issued paystub shall state the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked.



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1 (c) However, when employees are covered by a collective bargaining agreement
2 that provides different pay arrangements, those arrangements shall apply to
the covered employees.

3 (d) The requirements of this section shall be deemed satisfied by the payment of
4 wages for weekly, biweekly, or semimonthly payroll if the wages are paid
5 not more than seven calendar days following the close of the payroll period.

6 74. Defendants paid wages to employees on regular intervals. Defendants failed to
7 pay Plaintiff on such intervals for all wages earned and all hours worked. On information and
8 belief, Plaintiff alleges that Defendants also failed to pay the Aggrieved Employees on such
intervals for all wages earned and all hours worked.

9 75. During the applicable time period, Defendants violated California Labor Code
10 §§ 201, 202, 203, 204, 221, 226, 226.2, 226.7, 510, 512, , 1174, 1194, 1197, 1198, and 2802.

11 76. California Labor Code §§ 2699(a) and (g) authorize an aggrieved employee, on
12 behalf of themselves and other current or former employees, to bring a civil action to recover
13 civil penalties pursuant to the procedures specified in California Labor Code § 2699.3.

14 77. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff and the Aggrieved
15 Employees are entitled to recover civil penalties for each of the Defendants' violations of
16 California Labor Code §§ 201, 202, 203, 204, 221, 226, 226.2, 226.7, 510, 512, 1174, 1194,
1197, 1198, and 2802 during the applicable limitations period in the following amounts:

17 A. For violations of California Labor Code § 204, one hundred dollars
18 (\$100.00) for each aggrieved employee for each initial violation and two hundred dollars
19 (\$200.00) for each aggrieved employee for each subsequent, willful or intentional violation
20 (penalty amounts established by California Labor Code § 210).

21 B. For violations of California Labor Code § 221, one hundred dollars
22 (\$100.00) for each aggrieved employee for each initial violation (if found to be neither willful
23 nor intentional) and two hundred dollars (\$200.00) for each aggrieved employee for each initial
24 violation (if found to be either willful or intentional) and for each subsequent violation of
25 California Labor Code § 221 (regardless of whether they are found to be either willful or
26 intentional) (penalties set by California Labor Code § 225.5).

27 C. For violations of California Labor Code § 226(a), two hundred fifty
28 dollars (\$250.00) per employee for initial violation and one thousand dollars (\$1,000.00) per
employee for each subsequent violation (penalty amounts established by California Labor Code



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§ 226.3).

D. For violations of California Labor Code §§ 510 and 512, fifty dollars (\$50.00) for each aggrieved employee for each initial violation for pay period for which the employee was underpaid and one hundred dollars (\$100.00) for each underpaid employee for each pay period for which the employee was underpaid (penalty amounts established by California Labor Code § 558).

E. For violations of California Labor Code § 1174, five hundred dollars (\$500.00) for each Aggrieved Employee for each initial violation (penalty amounts established by Labor Code § 1174.5).

F. For violations of California Labor Code § 1197, one hundred dollars (\$100.00) for each Aggrieved Employee for each initial and intentional violation and two hundred fifty dollars (\$250.00) for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were intentionally committed) (penalty amounts established by California Labor Code § 1197.1).

G. For violations of California Labor Code §§ 201, 202, 203, 226.2, 226.7, 1194, 1198, and 2802, one hundred dollars (\$100.00) for each aggrieved employee per pay period for each initial violation and two hundred dollars (\$200.00) for each aggrieved employee per pay period for each subsequent violation (penalty amounts established by California Labor Code § 2699(f)(2)).

I. NOTICE TO THE STATE OF CALIFORNIA AND DEFENDANTS

78. Plaintiff has complied with the procedures for bringing suit specified in California Labor Code § 2699.3. By letter dated January 19, 2021, Plaintiff gave written notice by certified mail to the Labor and Workforce Development Agency (“LWDA”) and Defendants of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. A true and correct copy of Plaintiff’s letter to the LWDA dated January 19, 2021, is attached hereto as **Exhibit A**. By letter dated March 4, 2020, Plaintiff gave supplemental written notice by certified mail to the LWDA and Defendants of additional provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. A true and correct copy of Plaintiff’s supplemental letter to the LWDA, dated March 4, 2020, is attached hereto as **Exhibit B**. The LWDA has not responded to Plaintiff’s letters.



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1 79. Pursuant to California Labor Code § 2699(g), Plaintiff and the Aggrieved
2 Employees are entitled to an award of civil penalties, reasonable attorney's fees and costs in
3 connection with their claims for civil penalties.

4 **VI. PRAYER FOR RELIEF**

5 80. WHEREFORE, Plaintiff, on behalf of himself and the Aggrieved Employees,
6 prays for relief and judgment against Defendants as follows:

- 7 A. Civil penalties;
8 B. Costs of suit;
9 C. Reasonable attorneys' fees; and
10 D. Such other relief as the Court deems just and proper.

11 **VII. DEMAND FOR JURY TRIAL**

12 Plaintiff, on behalf of himself and all other Aggrieved Employees, hereby demands a jury
13 trial on all issues so triable.

14 Respectfully submitted,

15 THE SPIVAK LAW FIRM

16 Dated: May 10, 2021

17 By: 
18 DAVID SPIVAK,
19 MARALLE MESSRELIAN,
20 MAYA CHEAITANI,
21 Attorneys for Plaintiff, ADRIEL
22 ADLAWAN, the State of California, and the
23 Aggrieved Employees



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EXHIBIT A



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

January 19, 2021

Attn: PAGA Administrator
Labor and Workforce Development Agency
Attn: PAGA Administrator
<http://dir.tflaforms.net>
Via Electronic Submission

RE: *Adriel Adlawan / Magnussen's Fremont Imports, Inc.*

To whom it may concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Adriel Adlawan (hereafter "Adlawan") provides notice on behalf of himself and of all individuals currently and formerly employed in California on an hourly, bonus, shop time, and/or commission basis, including but not limited to, service-line technicians, and employees in comparable positions (hereafter "Aggrieved Employees"), by Magnussen's Fremont Imports, Inc., a California corporation, and Swickard Fremont Corporation, a California corporation, doing business as Lexus of Fremont (hereafter collectively "Magnussen"), of violations of California Labor Code §§ 201-203, 204, 226, 226.2, 226.7, 510, 512, 1174, 1194, 1197, and 1198, and of Industrial Welfare Commission Wage Order 7-2001.

At all relevant times, Magnussen has employed persons, conducted business in, and engaged in illegal payroll practices and policies throughout California. Adlawan and the Aggrieved Employees are "employees" within the meaning of Industrial Welfare Commission Order No. 7-2001 (hereafter "the Wage Order"), paragraph 2.E, and "aggrieved employees" within the meaning of California Labor Code § 2699(c).

Statement of Facts

On March 12, 2019, Magnussen began to employ Adlawan as a service-line technician at its dealership in Fremont, California and continuously employed him in that capacity until he was laid off on June 8, 2020. In or about the end of August 2020, Magnussen rehired Adlawan where he is still employed as a service-line technician.

At all relevant times, Magnussen paid Adlawan and other Aggrieved Employees on a weekly basis at an hourly, bonus, shop time, flat rate, and/or commission pay rate. At all relevant times, Magnussen classified Adlawan and the other Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all times during the relevant time period, Magnussen failed to pay Adlawan and the Aggrieved Employees for all hours worked at the correct rates of pay, including but not limited to, overtime hours at the legally required rates for overtime work in California. Magnussen arbitrarily deducted several hours per week from Adlawan and the other Aggrieved Employees' recorded hours worked and compensated them for less than what they reported on their time records. This included paying overtime hours at regular rates of pay instead of at overtime premium rates of pay. For example, during the pay period of March 31, 2019, to April 6, 2019, Adlawan worked approximately 32 hours and 25 minutes, which included 5 hours and 25 minutes of overtime. Magnussen, however, arbitrarily combined the overtime hours with "regular earnings" and "shop time" calculated at the regular rate of pay, instead of calculating them at the correct rates of pay for overtime work in California. Magnussen only compensated Adlawan for 7 minutes of the overtime hours worked during that week at the correct premium rate for overtime work in California, instead of all 5 hours and 25 minutes overtime work.

Further, at all relevant times, Magnussen paid Adlawan and the Aggrieved Employees with a non-discretionary productivity bonus. Adlawan and the Aggrieved Employees often earned the productivity bonuses during workweeks in which they worked more than eight hours in a workday or more than 40 hours in a workweek. Magnussen, however, failed to include the productivity bonuses in its calculations of the regular rates of pay for purposes of calculating overtime

wages. Consequently, Magnussen underpaid overtime wages earned by Adlawan and the Aggrieved Employees during those periods in which they worked overtime hours and earned productivity bonuses.

Additionally, Magnussen paid Adlawan and the Aggrieved Employees with "flat rate pay." Adlawan and the Aggrieved Employees often earned the flat rate pay during workweeks in which they worked more than eight hours in a workday or more than 40 hours in a workweek. Magnussen, however, failed to include the flat rate pay in its calculations of the regular rates of pay for purposes of calculating overtime wages. Consequently, Magnussen underpaid overtime wages earned by Adlawan and the Aggrieved Employees during those periods in which they worked overtime hours and earned flat rate pay. The flat rate pay also failed to compensate for non-productive time and rest and recovery periods.

At all relevant times, Magnussen failed to provide Adlawan and the Aggrieved Employees with all timely rest and meal periods. Due to the work load and low staffing levels, Adlawan and the other Aggrieved Employees were denied their 30-minute duty-free meal period within the first five hours of work. Magnussen frequently forced Adlawan and the other Aggrieved Employees to forego timely, duty-free, 30 minute meal periods by assigning them more time-sensitive work than it could reasonably expect them to complete within their first five hours of work. Magnussen also failed to authorize and permit Adlawan and the Aggrieved Employees to take ten minute rest breaks every four hours or major fraction thereof, as required by the Wage Order. Magnussen's management never authorized breaks, and the heavy work load they assigned the Aggrieved Employees to complete did not permit them. Furthermore, Magnussen failed to pay premium wages for each workday it failed to provide Adlawan and the other Aggrieved Employees with a timely meal period in compliance with California law. Magnussen also failed to pay premium wages for each workday it failed to provide Adlawan and the other Aggrieved Employees with a timely rest period in compliance with California law.

Magnussen required Adlawan and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. At all relevant times, Magnussen required Adlawan and the Aggrieved Employees to provide their own tools for mechanical work and all other related activities, including but not

limited to impact guns, wrenches, cordless impact drivers, brake bleeders, volt meters, wire wheels, hammers, pry bars, screw drivers, pliers, wheel lock sets, flash lights, extensions, and sockets but did not reimburse them for the expense and wear and tear on such tools, nor did it provide them with the required tools as an alternative.

As a result of these aforementioned violations, Magnussen failed to provide Adlawan and the Aggrieved Employees with accurate written wage statements; failed to pay them all wages earned during employment; and failed to maintain accurate employee records with respect to Adlawan and the Aggrieved Employees as required under California law.

For the reasons herein, on behalf of himself and the Aggrieved Employees, Adlawan alleges that Magnussen committed the following violations of the California Labor Code and the Wage Order:

- a) Magnussen failed to pay Adlawan and the Aggrieved Employees for all hours worked at the correct rates of pay;
- b) Magnussen failed to timely provide Adlawan and the Aggrieved Employees with all meal and rest periods as required by California law;
- c) Magnussen failed to compensate Adlawan and the Aggrieved Employees at one hour's pay for each day in which it failed to provide them with all meal periods as required by California law;
- d) Magnussen failed to compensate Adlawan and the Aggrieved Employees at one hour's pay for each day in which it failed to provide them with all rest periods as required by California law;
- e) Magnussen failed to indemnify Adlawan and the Aggrieved Employees for business expenses it required them to incur in the discharge of their duties;

- f) Magnussen failed to provide Adlawan and the Aggrieved Employees with properly itemized wage statements;
- g) Magnussen failed to timely pay Adlawan and the Aggrieved Employees all earned wages during employment with Magnussen; and
- h) Magnussen failed to maintain accurate employment records for Adlawan and the Aggrieved Employees.

Accordingly, on behalf of himself and the Aggrieved Employees, Adlawan seeks civil penalties based on Magnussen's alleged violations of the California Labor Code and the Wage Order.

The Wage Order

The Wage Order applies to "all persons employed in the mercantile industry whether paid on a time, piece rate, commission, or other basis[.]" § 1. The Wage Order defines "Mercantile Industry" to include "industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail; or for the purpose of renting goods or commodities." § 2(H). At all relevant times during the applicable limitations period, Magnussen operated a car dealership for the purpose of selling commodities at wholesale or retail. Accordingly, Adlawan and the Aggrieved Employees are entitled to the protections provided by the Wage Order.

Failure To Pay All Wages Earned For All Hours Worked At the Correct Rates of Pay

(Lab. Code §§ 226.2, 510, 1194, 1197, and 1198)

Under Labor Code § 1197, "The minimum wage for employees fixed by the [Industrial Welfare] commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful."

Section 4 of Wage Order states,

“Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.”

In relevant part, Section 2(G) of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

In relevant part, California Labor Code § 1194 states,

(a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

Labor Code § 1198 makes it unlawful for an employer to employ an employee under conditions that violate the Wage Order.

Labor Code § 226.2 states,

(a) For employees compensated on a piece-rate basis during a pay period, the following shall apply for the pay period:

(1) Employees shall be compensated for rest and recovery periods and other non-productive time separate from any piece-rate compensation.

...

(3) (A) Employees shall be compensated for rest and recovery periods at a regular hourly rate that is no less than the higher of:

- (i) An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods.
- (ii) The applicable minimum wage.

Employers must compensate nonexempt employees for “off-the-clock” work (before punching in or after punching out on a time clock) if the employers knew or should have known that the employees were working those hours. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.

In relevant part, Section 3 of the Wage Order states,

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up

to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

At all relevant times during the applicable limitations period, Magnussen failed to compensate Adlawan and other Aggrieved Employees for all hours worked, including, but not limited to overtime wages for all overtime hours they worked at the correct rates of pay.

Accordingly, on behalf of himself and the Aggrieved Employees, Adlawan seeks against Magnussen civil penalties as follows:

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.2, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each aggrieved employee for each initial violation of California Labor Code § 510, and \$100 for each aggrieved employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558);
3. \$100 for each aggrieved employee for each initial violation of California Labor Code § 1198, and \$200 for each aggrieved

employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));

4. \$100 for each aggrieved employee for each initial violation of California Labor Code § 1194, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)); and
5. \$100 for each underpaid hourly employee for each initial violation of California Labor Code § 1197, and \$250 for each underpaid employee for each subsequent violation per pay period (regardless of whether the initial violations were intentionally committed), in addition to an amount sufficient to recover underpaid wages, liquidated damages pursuant to Section 1194.2, and any applicable penalties imposed pursuant to Section 203 (penalties set by Labor Code § 1197.1).

Failure To Provide Meal and Rest Periods
(Lab. Code §§ 226.7, 512, 558, and 1198)

In relevant part, California Labor Code § 1198 states:

The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was no waived.

In relevant part, Section 11 of the Wage Order states:

Meal Periods:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

...

(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

In relevant part, Section 12 of the Wage Order states:

Rest Periods:

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states:

- (b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.
- (c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the

employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

As described above, at all relevant times during the applicable limitations period, Magnussen failed to provide Adlawan and the Aggrieved Employees with all timely rest and meal periods. Due to the work load and low staffing levels, Adlawan and the other Aggrieved Employees were denied their 30-minute duty-free meal period within the first five hours of work. Magnussen also failed to authorize and permit Adlawan and the Aggrieved Employees to take ten minute rest breaks every four hours or major fraction thereof, as required by the Wage Order. Magnussen's management never authorized breaks, and the heavy work load they assigned the Aggrieved Employees to complete did not permit them. Furthermore, Magnussen failed to pay premium wages for each workday it failed to provide Adlawan and the other Aggrieved Employees with a timely meal period in compliance with California law. Magnussen also failed to pay premium wages for each workday it failed to provide Adlawan and the other Aggrieved Employees with a timely rest period in compliance with California law.

Accordingly, on behalf of himself and the Aggrieved Employees, Adlawan seeks against Magnussen civil penalties as follows:

1. \$100 for each aggrieved employee for each initial violation of California Labor Code § 226.7, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each aggrieved employee for each initial violation of California Labor Code § 512, and \$100 for each aggrieved employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and
3. \$100 for each aggrieved employee for each initial violation of California Labor Code § 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

Failure to Indemnify for Expenses
(Lab. Code § 2802)

In pertinent part, California Labor Code § 2802(a) states, “An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.”

At all relevant times during the applicable limitations period, as a condition for employment, Magnussen required Adlawan and the Aggrieved Employees to incur certain business expenses. Magnussen required Adlawan and the Aggrieved Employees to provide their own tools for mechanical work and all other related activities, but did not reimburse them for their personal expenses, nor did they provide them with the required tools as an alternative. Therefore, Magnussen failed to indemnify them for expenditures incurred as a direct consequence of discharging their duties. Accordingly, on behalf of himself and Aggrieved Employees, Adlawan seeks civil penalties against Magnussen as follows: \$100 for each aggrieved employee for each initial violation of California Labor Code section 2802, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code section 2699(f)(2)).

Failure To Provide Accurate Wage Statements
(Lab. Code §§ 226)

California Labor Code § 226 requires employers to furnish employees with accurate itemized written wage statements showing:

- 1) gross wages earned,
- 2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission,

- 3) the number of piece rate units earned and any 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, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement,
- 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.

As a result of the above described violations, Magnussen violated California Labor Code § 226 in that it failed to properly and accurately itemize each employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the employee, and other requirements of California Labor Code § 226.

Accordingly, on behalf of himself and the Aggrieved Employees, Adlawan seeks civil penalties as follows: \$250 for each aggrieved employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each aggrieved employee for each subsequent violation (penalties set by California Labor Code § 226.3).

Failures to Timely Pay Wages (Lab. Code § 204)

California Labor Code § 204 states all wages (other than those mentioned in Labor Code sections 201–202) earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor

performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. In addition, all wages for work performed in excess of the normal work period must be paid by no later than the following regular payday.

As a result of the above described violations, Magnussen failed to pay Adlawan and the Aggrieved Employees within the time periods set by California Labor Code § 204 in that it failed to pay them for all hours worked at the correct rates of pay and failed to pay them premium wages for days on which it failed to provide them with one or more rest or meal periods.

Accordingly, on behalf of himself and Aggrieved Employees, Adlawan seeks against Magnussen civil penalties as follows: \$100 for each aggrieved employee for each initial violation of California Labor Code § 204, and \$200 for each aggrieved employee, plus 25% of the amount unlawfully withheld from each aggrieved employee, for each subsequent violation (penalties set by Labor Code § 210).

Failure to Timely Pay Wages Upon Termination of Employment
(Lab. Code §§ 201-203)

Under Labor Code § 2019, if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. Under § 202, if an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. Notwithstanding any other provision of law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. *Id.* The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting. *Id.*

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Under Labor Code § 203, if an employer willfully fails to pay without abatement or reduction, in accordance with §§ 201 and 202, the wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

Magnussen failed to pay Adlawan and the Aggrieved Employees whose employment ended all of the earned but unpaid wages described above by the conclusion of their employment with Magnussen. By failing to pay Adlawan and the Aggrieved Employees as set forth above by such time, Magnussen is liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of himself and the Aggrieved Employees, Adlawan seeks civil penalties from Magnussen as follows:

1. For violations of Labor Code § 201, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 201 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 201 occurred (penalties set by Labor Code § 2699(f)(2));
2. For violations of Labor Code § 202, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 202 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 202 occurred (penalties set by Labor Code § 2699(f)(2)); and
3. For violations of Labor Code § 203, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 203 occurred, and \$200 for per Aggrieved Employee per pay period in which subsequent violations of § 203 occurred (penalties set by Labor Code § 2699(f)(2)).

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Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174 and 1198)

Labor Code section 1174, which also pertains to recordkeeping, states:

Every person employing labor in this state shall:

...

(c) Keep a record showing the names and addresses of all employees employed and the ages of all minors.

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code section 1174.5 states:

Any person employing labor who willfully fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete records required by subdivision (d) of Section 1174, or to allow any member of the commission or employees of the division to inspect records pursuant to subdivision (b) of Section 1174, shall be subject to a civil penalty of five hundred dollars (\$500).

Section 7 of the Wage Order states,

- (A) Every employer shall keep accurate information with respect to each employee including the following:
 - (1) Full name, home address, occupation and social security number.
 - (2) Birth date, if under 18 years, and designation as a minor.
 - (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
 - (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
 - (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
 - (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

- (B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

- (C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.
- (D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

Labor Code section 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

Magnussen has failed to maintain the records required by section 1174 and the Wage Order, including but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Adlawan and the Aggrieved Employees. Accordingly, Adlawan seeks civil penalties on behalf of himself and the other aggrieved employees as follows:

1. \$500 for each aggrieved employee for each violation of Labor Code section 1174 (penalties set by Labor Code section 1174.5); and
2. \$100 for each aggrieved employee for each initial violation of Labor Code section 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code section 2699, subdivision (f)(2)).

Conclusion

As noted above, this letter constitutes the required notice under the California Labor Code Private Attorneys General Act of 2004. Please be advised that I will seek both reasonable attorneys' fees and costs under Labor Code § 2699, subdivision (g)(1) in a civil action should the LWDA decline to pursue this

matter. This letter also serves as a formal notice under the catalyst theory and Code of Civil Procedure section 1021.5 to resolve this matter before litigation.

Sincerely,



David Spivak, Esq.

David@spivaklaw.com

cc: Walter Haines, Esq.
Adriel Adlawan

Magnussen's Fremont Imports, Inc.
c/o Sandra Magnussen
Agent for Service of Process
5600 Cushing Parkway
Fremont, CA 94538

Swickard Fremont Corporation dba Lexus of Fremont
c/o Unisearch, Inc.
Agent for Service of Process
4 Venture, Suite 280
Irvine, CA 92618

EXHIBIT B



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

March 4, 2021

Attn: PAGA Administrator
Labor and Workforce Development Agency
Attn: PAGA Administrator
<http://dir.tflaforms.net>
Via Electronic Submission

RE: *Adriel Adlawan / Magnussen's Fremont Imports, Inc.*

To whom it may concern:

This is a supplemental notice to Adriel Adlawan's ("Adlawan") original notice, dated January 19, 2021. The original notice inadvertently omitted claims for unlawful collection of wages under California Labor Code § 221. The original notice is enclosed herewith and incorporated by reference.

Statement of Facts

At all times during the relevant time period, Magnussen failed to pay Adlawan and the Aggrieved Employees for all hours worked at the correct rates of pay, including but not limited to, overtime hours at the legally required rates for overtime work in California. Magnussen arbitrarily deducted several hours per week from Adlawan and the other Aggrieved Employees' recorded hours worked and compensated them for less than what they reported on their time records. This included paying overtime hours at regular rates of pay instead of at overtime premium rates of pay. For example, during the pay period of March 31, 2019, to April 6, 2019, Adlawan worked approximately 32 hours and 25 minutes, which included 5 hours and 25 minutes of overtime. Magnussen, however, arbitrarily combined the overtime hours with "regular earnings" and "shop time" calculated at the regular rate of pay, instead of calculating them at the correct rates of pay

for overtime work in California. Magnussen only compensated Adlawan for 7 minutes of the overtime hours worked during that week at the correct premium rate for overtime work in California, instead of all 5 hours and 25 minutes overtime work.

For the reasons herein, on behalf of himself and the Aggrieved Employees, Adlawan alleges that Magnussen committed the following violation of the California Labor Code and the Wage Order: Magnussen unlawfully deducted the wages Adlawan and the Aggrieved Employees earned, including but not limited to regular and overtime wages.

Accordingly, Adlawan now seeks civil penalties on behalf of himself and the other Aggrieved Employees based on Magnussen's violations of the California Labor Code.

Unlawful Collection of Wages

In relevant part, California Labor Code § 221 states:

It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.

At relevant times during the applicable limitations period, Magnussen has illegally and arbitrarily deducted several hours per week from Adlawan and the other Aggrieved Employees' recorded hours worked and compensated them for less than what they reported on their time records. As a result, Magnussen collected and received part of Adlawan's and the Aggrieved Employees' wages in violation of California Labor Code § 221.

Accordingly, Adlawan seeks civil penalties on behalf of himself and the Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 221 (if found to be neither willful nor intentional) and \$200 for each Aggrieved Employee

for each initial violation of California Labor Code § 221 (if found to be either willful or intentional) and for each subsequent violation of California Labor Code § 221 (regardless of whether they are found to be either willful or intentional) (penalties set by California Labor Code sex 225.5).

Conclusion

As noted above, this letter constitutes the required notice under the California Labor Code Private Attorneys General Act of 2004. Please be advised that I will seek both reasonable attorneys' fees and costs under Labor Code § 2699, subdivision (g)(1) in a civil action should the LWDA decline to pursue this matter. This letter also serves as a formal notice under the catalyst theory and Code of Civil Procedure section 1021.5 to resolve this matter before litigation.

Sincerely,



David Spivak, Esq.

David@spivaklaw.com

cc: Walter Haines, Esq.
Adriel Adlawan

Magnussen's Fremont Imports, Inc.
c/o Sandra Magnussen
Agent for Service of Process
5600 Cushing Parkway
Fremont, CA 94538

Swickard Fremont Corporation dba Lexus of Fremont
c/o Unisearch, Inc.
Agent for Service of Process
4 Venture, Suite 280
Irvine, CA 92618



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

January 19, 2021

Attn: PAGA Administrator
Labor and Workforce Development Agency
Attn: PAGA Administrator
<http://dir.tflaforms.net>
Via Electronic Submission

RE: *Adriel Adlawan / Magnussen's Fremont Imports, Inc.*

To whom it may concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Adriel Adlawan (hereafter "Adlawan") provides notice on behalf of himself and of all individuals currently and formerly employed in California on an hourly, bonus, shop time, and/or commission basis, including but not limited to, service-line technicians, and employees in comparable positions (hereafter "Aggrieved Employees"), by Magnussen's Fremont Imports, Inc., a California corporation, and Swickard Fremont Corporation, a California corporation, doing business as Lexus of Fremont (hereafter collectively "Magnussen"), of violations of California Labor Code §§ 201-203, 204, 226, 226.2, 226.7, 510, 512, 1174, 1194, 1197, and 1198, and of Industrial Welfare Commission Wage Order 7-2001.

At all relevant times, Magnussen has employed persons, conducted business in, and engaged in illegal payroll practices and policies throughout California. Adlawan and the Aggrieved Employees are "employees" within the meaning of Industrial Welfare Commission Order No. 7-2001 (hereafter "the Wage Order"), paragraph 2.E, and "aggrieved employees" within the meaning of California Labor Code § 2699(c).

Statement of Facts

On March 12, 2019, Magnussen began to employ Adlawan as a service-line technician at its dealership in Fremont, California and continuously employed him in that capacity until he was laid off on June 8, 2020. In or about the end of August 2020, Magnussen rehired Adlawan where he is still employed as a service-line technician.

At all relevant times, Magnussen paid Adlawan and other Aggrieved Employees on a weekly basis at an hourly, bonus, shop time, flat rate, and/or commission pay rate pay rate. At all relevant times, Magnussen classified Adlawan and the other Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all times during the relevant time period, Magnussen failed to pay Adlawan and the Aggrieved Employees for all hours worked at the correct rates of pay, including but not limited to, overtime hours at the legally required rates for overtime work in California. Magnussen arbitrarily deducted several hours per week from Adlawan and the other Aggrieved Employees' recorded hours worked and compensated them for less than what they reported on their time records. This included paying overtime hours at regular rates of pay instead of at overtime premium rates of pay. For example, during the pay period of March 31, 2019, to April 6, 2019, Adlawan worked approximately 32 hours and 25 minutes, which included 5 hours and 25 minutes of overtime. Magnussen, however, arbitrarily combined the overtime hours with "regular earnings" and "shop time" calculated at the regular rate of pay, instead of calculating them at the correct rates of pay for overtime work in California. Magnussen only compensated Adlawan for 7 minutes of the overtime hours worked during that week at the correct premium rate for overtime work in California, instead of all 5 hours and 25 minutes overtime work.

Further, at all relevant times, Magnussen paid Adlawan and the Aggrieved Employees with a non-discretionary productivity bonus. Adlawan and the Aggrieved Employees often earned the productivity bonuses during workweeks in which they worked more than eight hours in a workday or more than 40 hours in a workweek. Magnussen, however, failed to include the productivity bonuses in its calculations of the regular rates of pay for purposes of calculating overtime

wages. Consequently, Magnussen underpaid overtime wages earned by Adlawan and the Aggrieved Employees during those periods in which they worked overtime hours and earned productivity bonuses.

Additionally, Magnussen paid Adlawan and the Aggrieved Employees with "flat rate pay." Adlawan and the Aggrieved Employees often earned the flat rate pay during workweeks in which they worked more than eight hours in a workday or more than 40 hours in a workweek. Magnussen, however, failed to include the flat rate pay in its calculations of the regular rates of pay for purposes of calculating overtime wages. Consequently, Magnussen underpaid overtime wages earned by Adlawan and the Aggrieved Employees during those periods in which they worked overtime hours and earned flat rate pay. The flat rate pay also failed to compensate for non-productive time and rest and recovery periods.

At all relevant times, Magnussen failed to provide Adlawan and the Aggrieved Employees with all timely rest and meal periods. Due to the work load and low staffing levels, Adlawan and the other Aggrieved Employees were denied their 30-minute duty-free meal period within the first five hours of work. Magnussen frequently forced Adlawan and the other Aggrieved Employees to forego timely, duty-free, 30 minute meal periods by assigning them more time-sensitive work than it could reasonably expect them to complete within their first five hours of work. Magnussen also failed to authorize and permit Adlawan and the Aggrieved Employees to take ten minute rest breaks every four hours or major fraction thereof, as required by the Wage Order. Magnussen's management never authorized breaks, and the heavy work load they assigned the Aggrieved Employees to complete did not permit them. Furthermore, Magnussen failed to pay premium wages for each workday it failed to provide Adlawan and the other Aggrieved Employees with a timely meal period in compliance with California law. Magnussen also failed to pay premium wages for each workday it failed to provide Adlawan and the other Aggrieved Employees with a timely rest period in compliance with California law.

Magnussen required Adlawan and the Aggrieved Employees to incur certain business expenses in the course of performing their duties. At all relevant times, Magnussen required Adlawan and the Aggrieved Employees to provide their own tools for mechanical work and all other related activities, including but not

limited to impact guns, wrenches, cordless impact drivers, brake bleeders, volt meters, wire wheels, hammers, pry bars, screw drivers, pliers, wheel lock sets, flash lights, extensions, and sockets but did not reimburse them for the expense and wear and tear on such tools, nor did it provide them with the required tools as an alternative.

As a result of these aforementioned violations, Magnussen failed to provide Adlawan and the Aggrieved Employees with accurate written wage statements; failed to pay them all wages earned during employment; and failed to maintain accurate employee records with respect to Adlawan and the Aggrieved Employees as required under California law.

For the reasons herein, on behalf of himself and the Aggrieved Employees, Adlawan alleges that Magnussen committed the following violations of the California Labor Code and the Wage Order:

- a) Magnussen failed to pay Adlawan and the Aggrieved Employees for all hours worked at the correct rates of pay;
- b) Magnussen failed to timely provide Adlawan and the Aggrieved Employees with all meal and rest periods as required by California law;
- c) Magnussen failed to compensate Adlawan and the Aggrieved Employees at one hour's pay for each day in which it failed to provide them with all meal periods as required by California law;
- d) Magnussen failed to compensate Adlawan and the Aggrieved Employees at one hour's pay for each day in which it failed to provide them with all rest periods as required by California law;
- e) Magnussen failed to indemnify Adlawan and the Aggrieved Employees for business expenses it required them to incur in the discharge of their duties;

- f) Magnussen failed to provide Adlawan and the Aggrieved Employees with properly itemized wage statements;
- g) Magnussen failed to timely pay Adlawan and the Aggrieved Employees all earned wages during employment with Magnussen; and
- h) Magnussen failed to maintain accurate employment records for Adlawan and the Aggrieved Employees.

Accordingly, on behalf of himself and the Aggrieved Employees, Adlawan seeks civil penalties based on Magnussen's alleged violations of the California Labor Code and the Wage Order.

The Wage Order

The Wage Order applies to "all persons employed in the mercantile industry whether paid on a time, piece rate, commission, or other basis[.]" § 1. The Wage Order defines "Mercantile Industry" to include "industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail; or for the purpose of renting goods or commodities." § 2(H). At all relevant times during the applicable limitations period, Magnussen operated a car dealership for the purpose of selling commodities at wholesale or retail. Accordingly, Adlawan and the Aggrieved Employees are entitled to the protections provided by the Wage Order.

Failure To Pay All Wages Earned For All Hours Worked At the Correct Rates of Pay

(Lab. Code §§ 226.2, 510, 1194, 1197, and 1198)

Under Labor Code § 1197, "The minimum wage for employees fixed by the [Industrial Welfare] commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful."

Section 4 of Wage Order states,

“Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.”

In relevant part, Section 2(G) of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

In relevant part, California Labor Code § 1194 states,

(a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

Labor Code § 1198 makes it unlawful for an employer to employ an employee under conditions that violate the Wage Order.

Labor Code § 226.2 states,

(a) For employees compensated on a piece-rate basis during a pay period, the following shall apply for the pay period:

(1) Employees shall be compensated for rest and recovery periods and other non-productive time separate from any piece-rate compensation.

...

(3) (A) Employees shall be compensated for rest and recovery periods at a regular hourly rate that is no less than the higher of:

- (i) An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods.
- (ii) The applicable minimum wage.

Employers must compensate nonexempt employees for “off-the-clock” work (before punching in or after punching out on a time clock) if the employers knew or should have known that the employees were working those hours. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.

In relevant part, Section 3 of the Wage Order states,

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up

to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

At all relevant times during the applicable limitations period, Magnussen failed to compensate Adlawan and other Aggrieved Employees for all hours worked, including, but not limited to overtime wages for all overtime hours they worked at the correct rates of pay.

Accordingly, on behalf of himself and the Aggrieved Employees, Adlawan seeks against Magnussen civil penalties as follows:

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.2, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each aggrieved employee for each initial violation of California Labor Code § 510, and \$100 for each aggrieved employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558);
3. \$100 for each aggrieved employee for each initial violation of California Labor Code § 1198, and \$200 for each aggrieved

employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));

4. \$100 for each aggrieved employee for each initial violation of California Labor Code § 1194, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)); and
5. \$100 for each underpaid hourly employee for each initial violation of California Labor Code § 1197, and \$250 for each underpaid employee for each subsequent violation per pay period (regardless of whether the initial violations were intentionally committed), in addition to an amount sufficient to recover underpaid wages, liquidated damages pursuant to Section 1194.2, and any applicable penalties imposed pursuant to Section 203 (penalties set by Labor Code § 1197.1).

Failure To Provide Meal and Rest Periods
(Lab. Code §§ 226.7, 512, 558, and 1198)

In relevant part, California Labor Code § 1198 states:

The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was no waived.

In relevant part, Section 11 of the Wage Order states:

Meal Periods:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

...

(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

In relevant part, Section 12 of the Wage Order states:

Rest Periods:

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states:

- (b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.
- (c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the

employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

As described above, at all relevant times during the applicable limitations period, Magnussen failed to provide Adlawan and the Aggrieved Employees with all timely rest and meal periods. Due to the work load and low staffing levels, Adlawan and the other Aggrieved Employees were denied their 30-minute duty-free meal period within the first five hours of work. Magnussen also failed to authorize and permit Adlawan and the Aggrieved Employees to take ten minute rest breaks every four hours or major fraction thereof, as required by the Wage Order. Magnussen's management never authorized breaks, and the heavy work load they assigned the Aggrieved Employees to complete did not permit them. Furthermore, Magnussen failed to pay premium wages for each workday it failed to provide Adlawan and the other Aggrieved Employees with a timely meal period in compliance with California law. Magnussen also failed to pay premium wages for each workday it failed to provide Adlawan and the other Aggrieved Employees with a timely rest period in compliance with California law.

Accordingly, on behalf of himself and the Aggrieved Employees, Adlawan seeks against Magnussen civil penalties as follows:

1. \$100 for each aggrieved employee for each initial violation of California Labor Code § 226.7, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each aggrieved employee for each initial violation of California Labor Code § 512, and \$100 for each aggrieved employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and
3. \$100 for each aggrieved employee for each initial violation of California Labor Code § 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

Failure to Indemnify for Expenses
(Lab. Code § 2802)

In pertinent part, California Labor Code § 2802(a) states, “An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.”

At all relevant times during the applicable limitations period, as a condition for employment, Magnussen required Adlawan and the Aggrieved Employees to incur certain business expenses. Magnussen required Adlawan and the Aggrieved Employees to provide their own tools for mechanical work and all other related activities, but did not reimburse them for their personal expenses, nor did they provide them with the required tools as an alternative. Therefore, Magnussen failed to indemnify them for expenditures incurred as a direct consequence of discharging their duties. Accordingly, on behalf of himself and Aggrieved Employees, Adlawan seeks civil penalties against Magnussen as follows: \$100 for each aggrieved employee for each initial violation of California Labor Code section 2802, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code section 2699(f)(2)).

Failure To Provide Accurate Wage Statements
(Lab. Code §§ 226)

California Labor Code § 226 requires employers to furnish employees with accurate itemized written wage statements showing:

- 1) gross wages earned,
- 2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission,

- 3) the number of piece rate units earned and any 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, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement,
- 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.

As a result of the above described violations, Magnussen violated California Labor Code § 226 in that it failed to properly and accurately itemize each employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the employee, and other requirements of California Labor Code § 226.

Accordingly, on behalf of himself and the Aggrieved Employees, Adlawan seeks civil penalties as follows: \$250 for each aggrieved employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each aggrieved employee for each subsequent violation (penalties set by California Labor Code § 226.3).

Failures to Timely Pay Wages (Lab. Code § 204)

California Labor Code § 204 states all wages (other than those mentioned in Labor Code sections 201–202) earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor

performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. In addition, all wages for work performed in excess of the normal work period must be paid by no later than the following regular payday.

As a result of the above described violations, Magnussen failed to pay Adlawan and the Aggrieved Employees within the time periods set by California Labor Code § 204 in that it failed to pay them for all hours worked at the correct rates of pay and failed to pay them premium wages for days on which it failed to provide them with one or more rest or meal periods.

Accordingly, on behalf of himself and Aggrieved Employees, Adlawan seeks against Magnussen civil penalties as follows: \$100 for each aggrieved employee for each initial violation of California Labor Code § 204, and \$200 for each aggrieved employee, plus 25% of the amount unlawfully withheld from each aggrieved employee, for each subsequent violation (penalties set by Labor Code § 210).

Failure to Timely Pay Wages Upon Termination of Employment
(Lab. Code §§ 201-203)

Under Labor Code § 2019, if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. Under § 202, if an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. Notwithstanding any other provision of law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. *Id.* The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting. *Id.*

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Under Labor Code § 203, if an employer willfully fails to pay without abatement or reduction, in accordance with §§ 201 and 202, the wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

Magnussen failed to pay Adlawan and the Aggrieved Employees whose employment ended all of the earned but unpaid wages described above by the conclusion of their employment with Magnussen. By failing to pay Adlawan and the Aggrieved Employees as set forth above by such time, Magnussen is liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of himself and the Aggrieved Employees, Adlawan seeks civil penalties from Magnussen as follows:

1. For violations of Labor Code § 201, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 201 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 201 occurred (penalties set by Labor Code § 2699(f)(2));
2. For violations of Labor Code § 202, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 202 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 202 occurred (penalties set by Labor Code § 2699(f)(2)); and
3. For violations of Labor Code § 203, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 203 occurred, and \$200 for per Aggrieved Employee per pay period in which subsequent violations of § 203 occurred (penalties set by Labor Code § 2699(f)(2)).

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Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174 and 1198)

Labor Code section 1174, which also pertains to recordkeeping, states:

Every person employing labor in this state shall:

...

(c) Keep a record showing the names and addresses of all employees employed and the ages of all minors.

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code section 1174.5 states:

Any person employing labor who willfully fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete records required by subdivision (d) of Section 1174, or to allow any member of the commission or employees of the division to inspect records pursuant to subdivision (b) of Section 1174, shall be subject to a civil penalty of five hundred dollars (\$500).

Section 7 of the Wage Order states,

- (A) Every employer shall keep accurate information with respect to each employee including the following:
 - (1) Full name, home address, occupation and social security number.
 - (2) Birth date, if under 18 years, and designation as a minor.
 - (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
 - (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
 - (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
 - (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

- (B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

- (C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.
- (D) Clocks shall be provided in all major work areas or within a reasonable distance thereto insofar as practicable.

Labor Code section 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

Magnussen has failed to maintain the records required by section 1174 and the Wage Order, including but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Adlawan and the Aggrieved Employees. Accordingly, Adlawan seeks civil penalties on behalf of himself and the other aggrieved employees as follows:

1. \$500 for each aggrieved employee for each violation of Labor Code section 1174 (penalties set by Labor Code section 1174.5); and
2. \$100 for each aggrieved employee for each initial violation of Labor Code section 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code section 2699, subdivision (f)(2)).

Conclusion

As noted above, this letter constitutes the required notice under the California Labor Code Private Attorneys General Act of 2004. Please be advised that I will seek both reasonable attorneys' fees and costs under Labor Code § 2699, subdivision (g)(1) in a civil action should the LWDA decline to pursue this

matter. This letter also serves as a formal notice under the catalyst theory and Code of Civil Procedure section 1021.5 to resolve this matter before litigation.

Sincerely,



David Spivak, Esq.
David@spivaklaw.com

cc: Walter Haines, Esq.
Adriel Adlawan

Magnussen's Fremont Imports, Inc.
c/o Sandra Magnussen
Agent for Service of Process
5600 Cushing Parkway
Fremont, CA 94538

Swickard Fremont Corporation dba Lexus of Fremont
c/o Unisearch, Inc.
Agent for Service of Process
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State of California,
County of Los Angeles

2. I am familiar with the practice of The Spivak Law Firm, for collection and processing of correspondence for mailing with the United States Postal Service. It is the practice that correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

MAGNUSSEN'S FREMONT IMPORTS, INC.
c/o Sandra Magnussen
Agent for Service of Process
690 San Antonio Rd
Palo Alto, CA 94306

XXXX (BY PERSONAL SERVICE) My agent delivered such envelope by hand to the home/offices of the addressee.

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


BRECK OYAMA