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County of San Diego
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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO**

DESIREE BERRY, individually and on
behalf of other aggrieved employees,

Plaintiff,

v.

TD AMERITRADE, INC., a corporation;
and DOES 1 through 50,

Defendants.

Case No. 37-2022-00004165-CU-OE-CTL

Representative Action Complaint

1. Failure to Pay All Overtime Wages
2. Paid Sick Leave Violations
3. Supplemental Paid Sick Leave Violations
4. Meal and Rest Period Premium Violations
5. Untimely Payment of Wages
6. Wage Statement Violations
7. Failure to Pay All Wages Upon Separation
8. Recordkeeping Violations

1 Plaintiff DESIREE BERRY (“Plaintiff”), individually as the State of California’s
2 designated proxy under the Private Attorneys General Act (“PAGA”), and on behalf of other
3 current and former aggrieved employees, brings this representative action against Defendants
4 TD AMERITRADE, INC., a corporation registered to do business in California, and DOES 1
5 through 50 (collectively, “Defendants”), alleging as follows:

6 **INTRODUCTION**

7 1. This case is filed by Plaintiff, an aggrieved employee, seeking civil penalties
8 against Defendants for violations of the California Labor Code. Plaintiff’s claims are premised
9 upon Defendants’ failure to include all forms of remuneration in the “regular rate of pay” or
10 “regular rate of compensation” used to lawfully calculate and pay certain wages and premiums
11 to its employees.

12 2. In connection with Plaintiff’s employment and the employment of others within
13 the State of California, Defendants committed numerous systemic Labor Code violations for
14 which Plaintiff now seeks to receiver civil penalties pursuant to Labor Code § 2698 *et seq.*

15 **JURISDICTION & VENUE**

16 3. Jurisdiction of this action is proper in this Court under Article VI, Section 10 of
17 the California Constitution.

18 4. Venue as to each defendant is proper in this judicial district because Defendants
19 employed Plaintiff and aggrieved employees in this county, and committed some of the alleged
20 Labor Code violations in this county.

21 **PARTIES**

22 5. Plaintiff worked for Defendants in San Diego County from December 2015
23 through December 2021 as an hourly, non-exempt employee. During her employment, Plaintiff
24 held various positions with TD Ameritrade, including Regional Account Services
25 Representative, Senior Regional Account Services Representative, and Temp. Team Manager.

26 6. Defendant TD AMERITRADE, INC. does business and employs aggrieved
27 employees throughout California, including in San Diego County.

7. The true names and capacities, whether individual, corporate, or otherwise, of the parties sued as DOES 1 through 50, are presently uncertain to Plaintiff, who sues them by such fictitious names under Code of Civil Procedure section 474. Plaintiff is informed, believes, and alleges that each of the fictitiously-named defendants is responsible in some manner for the acts and omissions alleged herein.

8. Plaintiff is informed, believes, and alleges that all defendants in this action are employers and/or joint employers and part of an integrated employer enterprise, as each defendant exercises control over the wages, hours, and working conditions of Plaintiff and the aggrieved employees, suffers and permits them to work, and engages the workforce creating a common law employment relationship. Additionally, all defendants have common ownership, common management, interrelationship of operations, and centralized control over labor relations and are therefore part of an integrated enterprise and thus jointly and severally responsible for the acts and omissions alleged herein.

9. Plaintiff is informed, believes, and alleges that each defendant acted in all respects pertinent to this action as an alter-ego, agent, servant, joint employer, joint venturer, co-conspirator, partner, in an integrated enterprise, or in some other capacity on behalf of all other co-defendants, such that the acts and omissions of each defendant are legally attributable to all others.

10. Plaintiff is informed, believes, and alleges that the above-mentioned defendants violated and/or caused to be violated Labor Code and IWC Wage Order provisions and/or regulating minimum wages and days of work and other provisions of the Labor Code with respect to the aggrieved employees. As a result, they may be held personally liable under Labor Code sections 558, 558.1, and 1197.1. (*See, e.g., Atempa v. Pedrazzani* (2018) 27 Cal. App. 5th 809.)

PAGA ALLEGATIONS

11. Plaintiff seeks to recover civil penalties as an individual aggrieved employee, on behalf of the State of California and the “aggrieved employees,” defined as follows:

a. All current and former non-exempt hourly employees of TD Ameritrade, Inc. [1] who worked in the State of California at any time

1 from November 4, 2020 through the date of judgment (the “PAGA
2 Period”), and [2] who were paid non-excludable remuneration including,
3 but not limited to, acting manager premiums, bonuses, Basic and Supp
4 Life/ADD payments, shift premiums, non-discretionary incentives, shift
5 differentials, and other such earnings (the “aggrieved employees”).

6 12. The State of California, via the Labor and Workforce Development Agency
7 (“LWDA”), is the real party in interest in this action with respect to the PAGA claims. (*Kim v.*
8 *Reins Int’l California, Inc.* (2020) 9 Cal. 5th 73, 81 [The “government entity on whose behalf
9 the plaintiff files suit is always the real party in interest.”])

10 13. Plaintiff is an “aggrieved employee” because Plaintiff was employed by
11 Defendants and personally experienced one or more of the alleged violations. Therefore,
12 Plaintiff is properly suited to act on behalf of the State of California and collect civil penalties
13 for violations committed against all other current and former aggrieved employees of
14 Defendants. (*See, e.g., Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal. App. 5th
15 745, 751 [“PAGA allows an “aggrieved employee”—a person affected by one Labor Code
16 violation committed by an employer—to pursue penalties for all the Labor Code violations
17 committed by that employer.”])

18 14. “Notwithstanding any other provision of law, any provision of this code that
19 provides for a civil penalty to be assessed and collected by the Labor and Workforce
20 Development Agency or any of its departments, divisions, commissions, boards, agencies, or
21 employees, for a violation of this code, may, as an alternative, be recovered through a civil action
22 brought by an aggrieved employee on behalf of himself or herself and other current or former
23 employees pursuant to the procedures specified in Section 2699.3.” (Labor Code § 2699(a)).

24 15. On **November 4, 2021**, Plaintiff gave written notice by online filing with the
25 LWDA and by certified mail to Defendants of the specific provisions of the Labor Code alleged
26 to have been violated, including the facts and theories to support the alleged violations (the
27 “PAGA Notice”). Plaintiff paid the requisite filing fee to the LWDA. A copy of the PAGA
28 Notice is attached hereto as **Exhibit 1** and incorporated by reference.

1 16. Within 33 calendar days of the postmark date of the notice sent by Plaintiff,
2 Defendants did not give written notice by certified mail to Plaintiff providing a description of
3 any actions taken to cure the alleged violations.

4 17. Now that at least 65 days have passed from Plaintiff notifying Defendants of these
5 violations, without any notice of cure from Defendants or notice from the LWDA of its intent to
6 investigate the alleged allegations and issue the appropriate citations to Defendant, Plaintiff
7 exhausted all prerequisites and commences this civil action under Labor Code § 2699.

8 18. Any allegations regarding violations of the IWC Wage Orders are enforceable as
9 violations of Labor Code section 1198, which states: “[t]he employment of any employee for
10 longer hours than those fixed by the order or under conditions of labor prohibited by the order is
11 unlawful.”

12 **GENERAL ALLEGATIONS**

13 19. Defendants paid Plaintiff and other aggrieved employee hourly compensation
14 plus other forms of remuneration, including, but not limited to, acting manager premiums,
15 bonuses, shift premiums, non-discretionary incentives, Basic and Supp Life/ADD payments,
16 shift differentials, and other excess earnings incentivizing additional hours or shifts or production
17 or performance.

18 20. In pay periods when Defendants paid employees non-discretionary payments
19 such as Basic and Supp Life/ADD payments, Defendants failed to include these amounts in the
20 regular rate of pay for the purpose of paying overtime. One illustrative example of this regular
21 rate of pay violation is found on the wage statement Defendants issued to Plaintiff, for the pay
22 period dated 12/11/2020. In this pay period, Plaintiff is directly paid a Basic and Supp Life/ADD
23 payment that is attributed to her gross wages, however, Defendants failed to include this amount
24 in the regular rate of pay and paid her overtime at 1.5 times straight hourly rate instead of regular
25 rate of pay.

26 21. In pay periods where Defendants provided Plaintiff and other aggrieved
27 employees with remuneration in addition to their respective base hourly rate for hours worked—
28 excluding any forms of pay subject to any applicable statutory exclusions from the “regular

1 rate”—Defendants failed to properly calculate and pay paid sick leave at the appropriate regular
2 rate of pay, in violation of Labor Code §§ 246, 248.1, and 248.2; and Defendants further failed
3 to properly calculate and pay meal and rest period premiums at the appropriate regular rate of
4 compensation, in violation of Labor Code § 226.7.

5 22. Illustrative examples of these regular rate of pay/compensation violations may be
6 found on the wage statements Defendants issued to Plaintiff, including for the pay periods of
7 10/04/2021 to 10/10/2021 (meal period paid at base hourly rate instead of regular rate of
8 compensation); and 08/16/2021 to 08/22/2021 (sick pay paid at base hourly rate instead of one
9 of the methods allowed by statute).

10 23. During these pay periods, Defendants issued non-compliant wage statements, as
11 the wage statements fail to correctly state the gross and net wages earned and the correct hourly
12 rates in effect for paid sick leave hours or meal/rest period premiums, in violation of Labor Code
13 § 226(a)(1), (5), and (9). This is because Defendants provided paid sick leave and Labor Code
14 § 226.7 premiums at the incorrect hourly rate, resulting in an inaccurate hourly rate on the
15 paystubs, along with inaccurate and depreciated gross and net wages actually earned.

16 24. During pay periods when employees worked overtime and were directly paid
17 Basic and Supp Life/ADD payments and Defendants failed to include those payments in the
18 regular rate of pay, Defendants issued non-compliant wage statements, as the wage statements
19 fail to correctly state the gross and net wages earned and the correct hourly rates in effect, in
20 violation of Labor Code § 226(a)(1), (5), and (9).

21 25. Furthermore, during pay periods when Defendants paid non-discretionary
22 remuneration that was calculated from employees’ hours worked (*i.e.*, differentials, acting
23 manager pay, etc.), Defendants also violated Labor Code section 226(a)(2) because Defendants
24 failed to list employees’ total hours worked. On these wage statements, when the total number
25 of hours listed in each pay category are added together, they do not equal the actual total number
26 of hours Plaintiff or other employees worked, and there is no way to determine the total hours
27 worked from the four corners of the wage statement or through simple math. One illustrative
28 example of this issue occurs on Plaintiff’s wage statement, dated 10/15/2021, where Defendants

1 failed to list Plaintiff's total hours worked. Plaintiff would need to reference other documents to
2 identify her total hours worked because simply adding the hours each pay category together does
3 not yield Plaintiff's total hours worked.

4 26. Defendants' pattern, practice, and uniform administration of corporate company
5 policy regarding payroll, regular rate of pay/compensation calculations, and non-compliant wage
6 statement formats, as described herein, results in Defendants' liability for civil penalties to the
7 State of California and the aggrieved employees, along with interest, attorneys' fees, and costs
8 of suit.

9 27. As a result of the foregoing regular rate violations, Defendants failed to pay all
10 overtime wages, sick leave wages, and premiums in each pay period in which they were earned
11 by Plaintiff and aggrieved employees, in violation of Labor Code § 204 and/or 204b (for any
12 weekly employees), which requires timely payment of all wages each regularly scheduled pay
13 period.

14 28. As a further result of the foregoing regular rate violations, Defendants failed to
15 pay all overtime wages, paid sick leave wages, and Labor Code § 226.7 premiums due to Plaintiff
16 and the aggrieved employees upon separation of employment, or within 72 hours thereof.
17 Defendants have thus violated Labor Code § 201, which requires that if an employer fires an
18 employee all wages must be paid immediately; and, Labor Code § 202, which requires that if an
19 employee quits without providing at least 72 hours' notice, his or her final wages must be paid
20 no later than 72 hours thereafter; or, if at least 72 hours' notice is provided, then the employer
21 must pay the wages immediately upon the employee's final day of employment. Defendants
22 have thus violated Labor Code §§ 201 and 202 because they failed to pay all paid sick leave
23 wages and premium pay during the PAGA Period at the "regular rate" resulting in
24 underpayments. As a result, Defendants are also liable for civil penalties associated with Labor
25 Code §§ 201 through 203.

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1 **FIRST CAUSE OF ACTION**

2 **UNPAID OVERTIME WAGES**

3 **Labor Code §§ 2698, *et seq.***

4 29. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth
5 herein.

6 30. Defendants failed in their affirmative obligation to pay Plaintiff and aggrieved
7 employees no less than one and one-half times their respective “regular rate of pay” for all hours
8 worked in excess of eight hours in one day, 40 hours in one week, or the first eight hours worked
9 on the seventh day of work in any one workweek, and no less than twice their respective “regular
10 rate of pay” for all hours over 12 hours in one day and any work in excess of eight hours on any
11 seventh day of a workweek in violation of Labor Code sections 510 and 1198 and the IWC Wage
12 Orders and the IWC Wage Orders (the “Hours and Days of Work” sections of the applicable
13 orders).

14 31. As a result, Defendants violated the Labor Code and IWC Wage Orders and are
15 liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as
16 required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys’
17 fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

18 **SECOND CAUSE OF ACTION**

19 **PAID SICK LEAVE VIOLATIONS**

20 **Labor Code §§ 246 *et seq.* (All Claims Against All Defendants)**

21 32. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth
22 herein.

23 33. Defendants knowingly and intentionally failed in their affirmative obligation
24 provide and pay paid sick leave to Plaintiff and the aggrieved employees in violation of Labor
25 Code section 246.

26 34. Labor Code section 246(b)(1) requires that employees accrue sick leave at the
27 commencement of employment at a rate of 1 hour for every thirty hours worked. Section 246(c)
28 entitles employees to use any accrued sick leave beginning on their 90th day of employment.

1 35. Labor Code section 246(l) governs how Defendants were required to calculate
2 paid sick leave:

3 36. [A]n employer shall calculate paid sick leave using any of the following
4 calculations:

5 (1) Paid sick time for nonexempt employees shall be calculated in the
6 same manner as the regular rate of pay for the workweek in which the
7 employee uses paid sick time, whether or not the employee actually
8 works overtime in that workweek.

9 (2) Paid sick time for nonexempt employees shall be calculated by
10 dividing the employee's total wages, not including overtime premium
11 pay, by the employee's total hours worked in the full pay periods of the
12 prior 90 days of employment.

13 (3) Paid sick time for exempt employees shall be calculated in the same
14 manner as the employer calculates wages for other forms of paid leave
15 time.

16 37. Defendants failed to pay Plaintiff and aggrieved employees paid sick leave at one
17 of the lawful rates set forth in the statute because Defendants failed to include in their calculation
18 the additional remuneration received by Plaintiff and the aggrieved employees.

19 38. As a result, Defendants violated the Labor Code and are liable to Plaintiff, the
20 aggrieved employees and the State of California for civil penalties as required by Labor Code
21 section 2699(a) and (f)(2), in addition to interest, attorneys' fees, and costs to the extent permitted
22 by law, including under Labor Code section 2699(g). Plaintiff may also be entitled to penalties
23 under Labor Code section 248.5.

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1 **THIRD CAUSE OF ACTION**

2 **SUPPLEMENTAL PAID SICK LEAVE VIOLATIONS**

3 **Labor Code §§ 246 *et seq.***

4 39. Defendants knowingly and intentionally failed in their affirmative obligation to
5 provide and pay Covid-19 Supplemental Sick Leave to the aggrieved employees in violation of
6 Labor Code sections 246, 247.5, 248.1, and 248.2.

7 40. Labor Code section 248.1 requires Covid-19 Supplemental Paid Sick Leave to be
8 paid at the *highest of* the following methods:

9 (1) the regular rate of pay for the workweek in which leave is taken

10 (2) state minimum wage; or

11 (3) local ordinance minimum wage

12 41. Labor Code section 248.2 requires Covid-19 Supplemental Paid Sick Leave to be
13 paid at the *highest of* the following methods:

14 (1) the regular rate of pay for the workweek in which leave is taken

15 (2) state minimum wage

16 (3) local ordinance minimum wage; or

17 (4) average hourly pay for preceding 90 days (excluding overtime pay).

18 42. Defendants failed to provide and pay paid sick leave in the manner described
19 above because Defendants failed to include in their calculation the additional remuneration
20 received by Plaintiff and the aggrieved employees.

21 43. As a result, Defendants violated the Labor Code and are liable to Plaintiff, the
22 aggrieved employees and the State of California for civil penalties as required by Labor Code
23 section 2699(a) and (f)(2), in addition to interest, attorneys' fees, and costs to the extent permitted
24 by law, including under Labor Code section 2699(g). Plaintiff may also be entitled to penalties
25 under Labor Code section 248.5.

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1 **FOURTH CAUSE OF ACTION**

2 **MEAL AND REST PERIOD PREMIUM VIOLATIONS**

3 **Labor Code §§ 226.7**

4 44. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth
5 herein.

6 45. Defendants violated Labor Code §§ 226.7, 512, and 516, 1198 and the IWC Wage
7 Orders (the “Meal Periods” and “Rest Periods” sections of the applicable orders) by failing to
8 pay meal and rest period premiums at the regular rate of compensation to the aggrieved
9 employees during the PAGA Period. On days in which Plaintiff and the aggrieved employees
10 received a meal or rest period premium under Labor Code § 226.7, Defendants failed to pay the
11 corresponding meal or rest period premium at one hour Defendants regular rate of compensation.

12 46. As a result of this common practice, Defendants failed to provide Plaintiff and the
13 aggrieved employees all Labor Code § 226.7 premiums due at the lawful regular rate of
14 compensation in violation of Labor Code §§ 226.7, 512, and 516, and the IWC Wage Orders.

15 47. As a result, Defendants violated the Labor Code and IWC Wage Orders and are
16 liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as
17 required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys’
18 fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

19 **FIFTH CAUSE OF ACTION**

20 **UNTIMELY PAYMENT OF WAGES**

21 **Labor Code § 204 et seq.**

22 48. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth
23 herein.

24 49. Defendants willfully failed in their affirmative obligation to timely pay all wages
25 and premiums earned by Plaintiff and aggrieved employees twice during each calendar month
26 on days designated in advance by the employer as regular paydays (for employees paid on a non-
27 weekly basis) and on the regularly-scheduled weekly payday for any weekly employees, as
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1 applicable, in violation of Labor Code sections 204 and 204b and the IWC Wage Orders (the
2 “Minimum Wages” sections of the applicable orders).

3 50. As a result, Defendants violated the Labor Code and IWC Wage Orders and are
4 liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as
5 required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys’
6 fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

7 **SIXTH CAUSE OF ACTION**

8 **WAGE STATEMENT VIOLATIONS**

9 **Labor Code §§ 226**

10 51. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth
11 herein.

12 52. Labor Code section 226.3 provides: “Any employer who violates subdivision (a)
13 of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250)
14 per employee per violation in an initial citation and one thousand dollars (\$1,000) per employee
15 for each violation in a subsequent citation, for which the employer fails to provide the employee
16 a wage deduction statement or fails to keep the records required in subdivision (a) of Section
17 226. The civil penalties provided for in this section are in addition to any other penalty provided
18 by law.”

19 53. Defendants failed in their affirmative obligation provide accurate itemized wage
20 statements to Plaintiff and aggrieved employees in violation of Labor Code section 226(a)
21 because Plaintiff and aggrieved employees were not paid for all hours worked at the proper wage
22 rates and the wage statements reflected inaccurate totals, including gross and net wages earned,
23 total hours worked, applicable rates in effect and corresponding number of hours worked.

24 54. As a result, Defendants violated the Labor Code and IWC Wage Orders and are
25 liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as
26 required by Labor Code sections 226.3 and 2699(a) and (f)(2), in addition to interest, attorneys’
27 fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

1 **SEVENTH CAUSE OF ACTION**

2 **FAILURE TO TIMELY PAY ALL WAGES UPON SEPARATION OF EMPLOYMENT**

3 **Labor Code §§ 201 through 203**

4 55. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth
5 herein.

6 56. Defendants willfully failed in their affirmative obligation to pay all wages earned
7 and unpaid to Plaintiff and aggrieved employees immediately upon termination of employment
8 or within 72 hours thereafter for employees who did not provide at least 72 hours prior notice of
9 his or her intention to quit, and further failed to pay those sums for 30 days thereafter in violation
10 of Labor Code sections 201 through 203 and the IWC Wage Orders. The wages remaining unpaid
11 are those due to the regular rate underpayments for meal and rest period premiums and paid sick
12 leave.

13 57. As a result, Defendants violated the Labor Code and IWC Wage Orders and are
14 liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as
15 required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys'
16 fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

17 **EIGHTH CAUSE OF ACTION**

18 **RECORDKEEPING VIOLATIONS**

19 **Labor Code § 1174**

20 58. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth
21 herein.

22 59. Labor Code section 1174 provides: "Every person employing labor in this state
23 shall: ...(d) Keep, at a central location in the state or at the plants or establishments at which
24 employees are employed, payroll records showing the hours worked daily by and the wages paid
25 to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees
26 employed at the respective plants or establishments. These records shall be kept in accordance
27 with rules established for this purpose by the commission, but in any case shall be kept on file
28 for not less than three years."

60. Labor Code section 1174.5 provides: “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 ..., shall be subject to a civil penalty of five hundred dollars (\$500).”

61. Defendants willfully failed in their affirmative obligation to maintain accurate records showing the hours worked daily and wages paid to the aggrieved employees, in violation of Labor Code sections 1174, 1198 and the IWC Wage Orders (the “Records” sections of the applicable orders).

62. As a result, Defendants violated the Labor Code and are liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as required by Labor Code section 1174.5, in addition to interest, attorneys' fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

PRAYER FOR RELIEF

Plaintiff prays for judgment as follows:

- a. For an award of all civil penalties under Labor Code section 2698 *et seq.*;
- b. For an award of reasonable attorneys' fees and costs of suit, including expert fees, to the extent permitted by law, including under Labor Code section 2699(g);
- c. For any recoverable pre- and post-judgment interest; and
- d. For such other relief the Court deems just and proper.

Dated: February 1, 2022

Ferraro Vega Employment Lawyers, Inc.

Nicholas J. Ferraro

Nicholas J. Ferraro

Attorneys for Plaintiff Desiree Berry