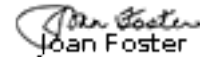


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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA**

FREDERICK MUELLER, an individual, on
behalf of himself and the State of California, as a
private attorney general,

Plaintiff,

v.

KIRBY OLDSMOBILE, a California
Corporation; KIRBY MOTOR CARS, INC., a
California Corporation; SUBARU OF
AMERICA, INC., a New Jersey Corporation;
and DOES 2 TO 50,

Defendants.

Case Number: 2025CUOE036926

**First Amended Representative Action
Complaint For:**

1. Penalties Pursuant to the Labor Code Private Attorneys General Act of 2004 (“PAGA”) for Willful Misclassification in Violation of Labor Code Sections 226.8, 2775, and Other Labor Code Sections That May Be Applicable; and
2. Penalties Pursuant to PAGA for California Labor Code Sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 1174, 1174.5, 1185, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 1199, 2802, 2804, and Other Provisions of the Labor Code.

1 Plaintiff Frederick Mueller (“Plaintiff”), on behalf of himself and the State of California, as a
2 private attorney general, complains and alleges of defendants Kirby Oldsmobile, Kirby Motor Cars,
3 Inc., Subaru of America, Inc., and Does 2 to 50 (collectively, “Defendants”), and each of them, as
4 follows:

5 **I. INTRODUCTION**

6 1. This action is a representative action brought pursuant to the California Labor Code
7 Private Attorneys General Act of 2004 (“PAGA”), codified at California Labor Code sections 2698
8 through 2699.8. Plaintiff brings this action on behalf of himself and the State of California, as a private
9 attorney general, and on behalf of the groups of aggrieved employees, as defined below.

10 2. The “PAGA Period” as used herein, is defined as the period from January 6, 2024, and
11 continuing into the present and ongoing.

12 3. Defendant Subaru of America, Inc. is referred to in this complaint as “Defendant
13 Subaru.” Defendant Kirby Oldsmobile and Defendant Kirby Motor Cars, Inc. are together referred to
14 as “Defendants Kirby.”

15 4. This PAGA action is brought on behalf of Plaintiff, the State of California as private
16 attorney general, and on behalf of the following two groups of aggrieved employees:

17 A. **Misclassified Aggrieved Employees:** “All individuals who performed work (or
18 continue to perform work) in California during the PAGA Period and who: **(1)** have received
19 commission payments, bonus payments, or other forms of wages from Defendant Subaru, and
20 **(2)** were issued IRS Form 1099s from Defendant Subaru or who have otherwise been treated
21 as independent contractors by Defendant Subaru in connection with those commission
22 payments, bonus payments, or other forms of wages.”

23 B. **Non-Exempt Aggrieved Employees:** “All individuals who are or were
24 employed by Defendants Kirby as non-exempt employees in California during the PAGA
25 Period.”

26 5. The Misclassified Aggrieved Employees and the Non-Exempt Aggrieved Employees
27 are hereafter referred to in this complaint together as the “Aggrieved Employees.”
28

1 6. Plaintiff is informed and believes and thereon alleges that the California Industrial
2 Welfare Commission (“IWC”) Wage Orders applicable to the facts of this case are IWC Wage Orders
3 4-2001, 7-2001, and/or 9-2001 (the “Applicable Wage Orders”) and possibly others that may be
4 applicable. (Cal. Code of Regs., tit. 8, §§ 11040, 11070, 11090.) Plaintiff reserves the right to amend
5 or modify the definition of “Applicable Wage Orders” with greater specificity or add additional IWC
6 Wage Orders if additional applicable wage orders are discovered in litigation.

7 **II. JURISDICTION & VENUE**

8 7. This Court has subject matter jurisdiction over all causes of action asserted herein
9 pursuant to Article VI, section 10, of the California Constitution and Code of Civil Procedure section
10 410.10 because this is a civil action in which the matter in controversy, exclusive of interest, exceeds
11 \$25,000, and because each cause of action asserted arises under the laws of the State of California or
12 is subject to adjudication in the courts of the State of California.

13 8. This Court has personal jurisdiction over Defendants because Defendants have caused
14 injuries in the County of Ventura and the State of California through their acts, and by their violation
15 of the California Labor Code and California state common law. Defendants transact millions of dollars
16 of business within the State of California. Defendants own, maintain offices, transact business, have an
17 agent or agents within the County of Ventura, and/or otherwise are found within the County of Ventura,
18 and Defendants are within the jurisdiction of this Court for purposes of service of process.

19 9. Venue as to Defendants is proper in this judicial district, pursuant to section 395 of the
20 Code of Civil Procedure. Defendants operate within California and do business within Ventura County,
21 California. The unlawful acts alleged herein have a direct effect on Plaintiff and all of Defendants’
22 employees identified above within Ventura County and surrounding counties where Defendants may
23 remotely operate. (See *Crestwood Behavioral Health, Inc. v. Superior Court of Alameda County* (2021)
24 60 Cal.App.5th 1069, 1075 [“We hold that venue is proper in any county in which an aggrieved
25 employee worked and Labor Code violations allegedly occurred.”].)

1 **III. THE PARTIES**

2 **A. PLAINTIFF**

3 10. At all relevant times, Plaintiff, who is over the age of 18, was and currently is a citizen
4 of California residing in the State of California. Although Defendant Subaru classified Plaintiff as an
5 independent contractor, Defendants, and each of them, employed Plaintiff as a non-exempt hourly
6 employee in the County of Ventura.

7 **B. DEFENDANTS**

8 11. Plaintiff is informed and believes and thereon alleges that Defendants were authorized
9 to and doing business in Ventura County and is and/or was the legal employer of Plaintiff and the other
10 Aggrieved Employees during the applicable statutory periods. Plaintiff and the other Aggrieved
11 Employees were, and are, subject to Defendants' policies and/or practices complained of herein and
12 have been deprived of the rights guaranteed to them by: California Labor Code sections 201, 202, 203,
13 204, 210, 226, 226.3, 226.7, 226.8, 510, 512, 1174, 1174.5, 1185, 1194, 1194.2, 1197, 1197.1, 1198,
14 1198.5, 1199, 2775, 2802, 2804 and others that may be applicable; and the Applicable Wage Orders
15 (Cal. Code of Regs., tit. 8, §§ 11040, 11070, 11090).

16 12. Plaintiff is informed and believes, and based thereon alleges, that during the PAGA
17 Period, Defendants did (and continue to do) business in the State of California, County of Ventura.

18 13. Plaintiff does not know the true names or capacities, whether individual, partner, or
19 corporate, of the defendants sued herein as Does 2 to 50, inclusive, and for that reason, said defendants
20 are sued under such fictitious names, and Plaintiff will seek leave from this Court to amend this
21 complaint when such true names and capacities are discovered. Plaintiff is informed, and believes, and
22 thereon alleges, that each of said fictitious defendants, whether individual, partners, or corporate, were
23 responsible in some manner for the acts and omissions alleged herein, and proximately caused Plaintiff
24 and the other Aggrieved Employees to be subject to the unlawful employment practices, wrongs,
25 injuries, and damages complained of herein.

26 14. Plaintiff is informed, and believes, and thereon alleges, that at all times mentioned
27 herein, Defendants were and/or are the employers of Plaintiff and the other Aggrieved Employees. At
28 all times herein mentioned, each of said Defendants participated in the doing of the acts hereinafter

1 alleged to have been done by the named Defendants. Furthermore, the Defendants, and each of them,
2 were the agents, representatives, and employees of each and every one of the other Defendants, and at
3 all times herein mentioned were acting within the course and scope of said agency, representation, and
4 employment. Defendants, and each of them, approved of, condoned, or otherwise ratified every one of
5 the acts or omissions complained of herein.

6 15. Plaintiff is further informed, and believes, and thereon alleges, that at all times
7 mentioned herein, that Defendants, and each of them, are the alter egos of one another and that there
8 existed and now exists a unity of interest and ownership between them such that the individuality and
9 separateness of each of them has ceased. Plaintiff is further informed, and believes, and thereon alleges,
10 that at all times mentioned herein, that Defendants, and each of them, have been and now are mere
11 shells and naked frameworks that their principal uses for the conduct of that Defendant's own business,
12 property, and affairs, for which Defendants, and each of them, have concealed and misrepresented their
13 identities as the entities responsible for their ownership, management, and financial interests.

14 16. Plaintiff is further informed, and believes, and thereon alleges, that at all times
15 mentioned herein, Defendants, and each of them, were members of and engaged in a joint venture,
16 partnership, and common enterprise, and acting within the course and scope of and in pursuance of said
17 joint venture, partnership, and common enterprise. Further, Plaintiff is informed, and believes, and
18 thereon alleges, that all Defendants were joint employers for all purposes of Plaintiff and the other
19 Aggrieved Employees.

20 **IV. COMMON FACTS & ALLEGATIONS**

21 17. Plaintiff and the other Aggrieved Employees are, and were at all relevant times,
22 employed by the Defendants within the State of California—regardless of how they may have been
23 characterized or treated by Defendants.

24 18. The Misclassified Aggrieved Employees were treated by Defendant Subaru as
25 independent contractors, but were in reality employees of Defendant Subaru.

26 19. The Non-Exempt Aggrieved Employees are, and were, at all relevant times, non-exempt
27 employees for the purposes of minimum wages, overtime, rest breaks, meal periods, and the other
28 claims alleged in this complaint.

1 20. Specifically, Plaintiff was employed by Defendants within the statutory PAGA Period,
2 working as an hourly, non-exempt sales and leasing consultant for Defendants. Plaintiff's duties
3 included assisting customers in selecting and purchasing or leasing vehicles.

4 **A. WILLFUL MISCLASSIFICATION**

5 21. Labor Code section 2775, subdivision (b), provides the test for determining whether an
6 individual performing work for another is an independent contractor or an employee. It states as
7 follows:

8 "[A] person providing labor or services for remuneration shall be considered an
9 employee rather than an independent contractor unless the hiring entity
10 demonstrates that all of the following conditions are satisfied:

11 **"(A)** The person is free from the control and direction of the hiring entity in
12 connection with the performance of the work, both under the contract for
13 the performance of the work and in fact.

14 **"(B)** The person performs work that is outside the usual course of the hiring
15 entity's business.

16 **"(C)** The person is customarily engaged in an independently established trade,
17 occupation, or business of the same nature as that involved in the work
18 performed."

19 22. This standard is commonly referred to as the "ABC Test." Under the ABC Test, the
20 alleged employer, rather than the worker, has the burden of establishing that the worker is an
21 independent contractor and not intended to be included within the relevant wage orders' coverage. "The
22 focus is not on the label attached to a worker's position, but on how that individual's job may
23 reasonably be viewed." (*Gonzales v. San Gabriel Transit, Inc.* (2019) 40 Cal.App.5th 1131, 1154–
24 1155.) Further, the alleged employer must establish that the worker meets **all three** factors of the ABC
25 Test or falls within an exception to the ABC Test. (*Id.* at p. 1154 ["The ABC test is conjunctive, and
26 the hiring entity's failure to establish *any* of the following three factors precludes a finding that the
27 worker is an independent contractor"].) Otherwise, Labor Code section 2775's default
28 presumption applies and the worker must be treated as an employee. (See *Dynamex Operations W. v.*

1 *Superior Court* (2018) 4 Cal.5th 903, 955 [“The ABC test presumptively considers all workers to be
2 employees, and permits workers to be classified as independent contractors only if the hiring business
3 demonstrates that the worker in question satisfies each of three conditions”].)

4 23. Here, at all times during the PAGA Period, Defendant Subaru treated the Misclassified
5 Aggrieved Employees as independent contractors despite the fact that Defendant Subaru failed to meet
6 any of the prongs of the ABC Test, let alone all three. First, Defendant Subaru retained the right to
7 control the manner and method of how the Misclassified Aggrieved Employees performed their job
8 duties, and Defendant Subaru retained all necessary control over the Misclassified Aggrieved
9 Employees during their employment. Among other things, the Misclassified Aggrieved Employees
10 were required to follow instructions and meet job-specific criteria imposed on them by Defendant
11 Subaru governing the performance of their job. Further, Defendant Subaru set their compensation, at
12 least in part.

13 24. Second, the job duties performed by the Misclassified Aggrieved Employees fell within
14 Defendant Subaru’s usual course of business. Specifically, the roles performed by the Misclassified
15 Aggrieved Employees were and are clearly comparable to those of Defendant Subaru’s employees
16 whose services are provided within the usual course of Defendant Subaru’s business. Thus, the work
17 of the Misclassified Aggrieved Employees was not merely incidental to Defendant Subaru’s business,
18 but rather, was an integral and ordinary part of that business.

19 25. Finally, the Misclassified Aggrieved Employees were not engaged in an independently
20 established trade, occupation, or business of the same nature as the work performed for Defendant
21 Subaru. The Misclassified Aggrieved Employees did not, for example, take any of the usual steps to
22 establish and promote their businesses. Nor did the Misclassified Aggrieved Employees—through
23 incorporation, licensure, advertisements, or routine offerings to provide services to the public or to a
24 number of potential customers—independently choose the burdens and benefits of self-employment by
25 engaging in an independently established trade, occupation, or business. Critically, this last prong of
26 the ABC Test requires that Defendant Subaru show the Misclassified Aggrieved Employees
27 “*actually . . . engaged in an independent business, not merely that [they] could be.*” (*Gonzales v. San*
28 *Gabriel Transit, Inc.* (2019) 40 Cal.App.5th 1131, 1155, emphasis in original.) That simply did not

1 happen here: the Misclassified Aggrieved Employees did not *actually engage* in independent
2 businesses. “A company that labels as independent contractors a class of workers who are not engaged
3 in an independently established business in order to enable the company to obtain the economic
4 advantages that flow from avoiding the financial obligations that a wage order imposes on employers
5 unquestionably violates the fundamental purposes of the wage order.” (*Dynamex Operations W. v.*
6 *Superior Court* (2018) 4 Cal.5th 903, 962.) Here, Defendant Subaru violated California law by
7 attempting to do so.

8 26. Labor Code section 226.8 provides, in pertinent part, as follows:

9 “(a) It is unlawful for any person or employer to engage in any of the following
10 activities:

11 “(1) Willful misclassification of an individual as an independent contractor.

12 “(2) Charging an individual who has been willfully misclassified as an
13 independent contractor a fee, or making any deductions from
14 compensation, for any purpose, including for goods, materials, space
15 rental, services, government licenses, repairs, equipment maintenance,
16 or fines arising from the individual's employment where any of the acts
17 described in this paragraph would have violated the law if the individual
18 had not been misclassified.

19 “(b) If the Labor and Workforce Development Agency or a court issues a
20 determination that a person or employer has engaged in any of the enumerated
21 violations of subdivision (a), the person or employer shall be subject to a civil
22 penalty of not less than five thousand dollars (\$5,000) and not more than fifteen
23 thousand dollars (\$15,000) for each violation, in addition to any other penalties
24 or fines permitted by law.

25 “(c) If the Labor and Workforce Development Agency or a court issues a
26 determination that a person or employer has engaged in any of the enumerated
27 violations of subdivision (a) and the person or employer has engaged in or is
28 engaging in a pattern or practice of these violations, the person or employer shall

1 be subject to a civil penalty of not less than ten thousand dollars (\$10,000) and
2 not more than twenty-five thousand dollars (\$25,000) for each violation, in
3 addition to any other penalties or fines permitted by law.”

4 27. As explained above, Defendant Subaru’s treatment of the Misclassified Aggrieved
5 Employees cannot meet any part of the ABC Test and Defendant Subaru knew it. Defendant Subaru
6 thus intentionally and willfully misclassified the Misclassified Aggrieved Employees as independent
7 contractors in violation of Labor Code section 226.8, subdivision (a). Moreover, this treatment was not
8 merely occasional, but reflected Defendant Subaru’s pattern and practice of willfully misclassifying
9 Defendant Subaru’s employees as independent contractors. Defendant Subaru is thus liable, through
10 PAGA, for the civil penalties of up to \$25,000 for *each* violation as provided by Labor Code section
11 226.8, subdivisions (b) and (c). (Lab. Code, § 2699, subd. (a).)

12 **B. MINIMUM WAGE VIOLATIONS**

13 28. Labor Code section 1197 requires employees to be paid at least the minimum wage fixed
14 by the IWC, and any payment of less than the minimum wage is unlawful. Likewise, the Applicable
15 Wage Orders also obligate employers to pay each employee minimum wages for all hours worked.
16 (Cal. Code of Regs., tit. 8, §§ 11040, 11070, 11090.) Labor Code section 1198 makes unlawful the
17 employment of an employee under conditions that the IWC Wage Orders prohibit.

18 29. These minimum wage standards apply to each hour that employees work. Therefore, an
19 employer’s failure to pay for any particular time worked by an employee is unlawful, even if averaging
20 an employee’s total pay over all hours worked, paid or not, results in an average hourly wage above
21 minimum wage. (*Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324.)

22 30. Here, Defendants failed to fully conform their pay practices to the requirements of the
23 law during the relevant statutory periods. The Aggrieved Employees were not compensated for all
24 hours worked including, but not limited to, all hours they were subject to the control of Defendants
25 and/or suffered or permitted to work under the California Labor Code and the Applicable Wage Orders.
26 Among other violations, the Aggrieved Employees were subject to the control of Defendants while off-
27 the-clock and did not receive minimum wage for each hour worked.
28

1 31. Labor Code section 1197.1 authorizes employees who are paid less than the minimum
2 wage fixed by an applicable state or local law, or by an order of the IWC, a civil penalty, among other
3 damages, as follows:

4 (1) “For any initial violation that is intentionally committed, one hundred
5 dollars (\$100) for each underpaid employee for each pay period for
6 which the employee is underpaid.”

7 (2) “For each subsequent violation for the same specific offense, two
8 hundred fifty dollars (\$250) for each underpaid employee for each pay
9 period for which the employee is underpaid regardless of whether the
10 initial violation is intentionally committed.” (Lab. Code, § 1197.1, subd.

11 (a).)

12 32. As set forth above, Defendants failed to fully compensate the Aggrieved Employees for
13 all minimum wages. Accordingly, through PAGA and to the extent permitted by law, Plaintiff and the
14 Aggrieved Employees are entitled to recover penalties pursuant to California Labor Code section
15 1197.1 in addition to any other applicable penalties.

16 **C. OVERTIME VIOLATIONS**

17 33. Labor Code section 510 requires employers to compensate employees who work more
18 than eight hours in one workday, forty hours in a workweek, and for the first eight hours worked on
19 the seventh consecutive day no less than one and one-half times the regular rate of pay for an employee.
20 (Lab. Code, § 510, subd. (a).) Further, Labor Code section 510 obligates employers to compensate
21 employees at no less than twice the regular rate of pay when an employee works more than twelve
22 hours in a day or more than eight hours on the seventh consecutive day of work. (Lab. Code, § 510,
23 subd. (a).) These rules are also reflected in the Applicable Wage Orders.

24 34. In accordance with Labor Code section 1194 and the Applicable Wage Orders, the
25 Aggrieved Employees could not then agree and cannot now agree to work for a lesser wage than the
26 amount provided by Labor Code sections 510 or the Applicable Wage Orders.

27 35. Here, Defendants violated their duty to accurately and completely compensate the
28 Aggrieved Employees for all overtime worked. The Aggrieved Employees periodically worked hours

1 that entitled them to overtime compensation under the law but were not fully compensated for those
2 hours.

3 36. Moreover, during the relevant statutory periods, Defendants had a policy and practice
4 of failing to pay overtime wages at the proper rate when it actually paid overtime. Specifically, when
5 Defendants paid overtime wages to the Aggrieved Employees, Defendants failed to include all
6 compensation when calculating the regular rate of pay used in overtime calculations and when paying
7 overtime.

8 37. For instance, the Aggrieved Employees would often receive, along with their hourly
9 rates of pay for their working hours, additional remuneration and/or non-discretionary commission
10 and/or bonus pay. Defendants, however, calculated the regular rate of pay for the Aggrieved Employees
11 without factoring into the regular rate of pay all other non-hourly pay earnings received during the pay
12 period. As a result, the Aggrieved Employees were underpaid overtime wages when they worked in
13 excess of eight hours in any workday and/or forty hours in a workweek when such additional forms of
14 remuneration were earned. By its practice of periodically requiring the Aggrieved Employees to work
15 in excess of eight hours in a workday and/or forty hours in a workweek without compensating them at
16 the rate of one and one-half (1½) their regular rate of pay, Defendants willfully violated the provisions
17 of Labor Code sections 510, 1194, and 1199.

18 38. These actions were and are in clear violation of California's overtime laws as set forth
19 in Labor Code sections 510, 1194, 1199, and the Applicable Wage Orders. (Cal. Code of Regs., tit. 8,
20 §§ 11040, 11070, 11090.) As a result of Defendants' faulty policies and practices, the Aggrieved
21 Employees were not compensated for all hours worked or paid accurate overtime compensation.

22 **D. REST BREAK VIOLATIONS**

23 39. Pursuant to Labor Code section 226.7 and the Applicable Wage Orders, Defendants
24 were and are required to provide the Aggrieved Employees with compensated, duty-free rest periods
25 of not less than ten minutes for every major fraction of four hours worked. Under the Applicable Wage
26 Orders, an employer must authorize and permit all employees to take ten minute duty free rest periods
27 for every major fraction of four hours worked. (Cal. Code of Regs., tit. 8, §§ 11040, 11070, 11090.)
28

1 40. Likewise, Labor Code section 226.7 provides that “[a]n employer shall not require an
2 employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute,
3 or applicable regulation, standard, or order of the Industrial Welfare Commission” (Lab. Code, §
4 226.7, subd. (b).) Labor Code section 226.7 also provides that employers must pay their employees one
5 additional hour of pay at the employee’s regular rate for each workday that a “meal or rest or recovery
6 period is not provided.” (Lab. Code, § 226.7, subd. (c).) The “regular rate” for these purposes must
7 factor in all nondiscretionary payments for work performed by the employee, including non-
8 discretionary bonuses, commissions, and other forms of wage payments exceeding the employees’ base
9 hourly rate. (*Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878.) Thus, the Wage
10 Orders set when and for how long the rest period must take place and the Labor Code establishes that
11 violations of the IWC Wage Orders are unlawful and sets forth the premium pay employer must pay
12 their employees when employers fail to provide rest periods.

13 41. The California Supreme Court has held that, during required rest periods, “employers
14 must relieve their employees of all duties and relinquish any control over how employees spend their
15 break time.” (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 260.) Relinquishing
16 control over employees during rest periods requires that employees be “free to leave the employer’s
17 premises” and be “permitted to attend to personal business.” (*Id.* at p. 275.) The *Brinker* Court
18 explained in the context of rest breaks that employer liability attaches from adopting an unlawful
19 policy:

20 “An employer is required to authorize and permit the amount of rest break time
21 called for under the wage order for its industry. If it does not—if, for example,
22 it adopts a uniform policy authorizing and permitting only one rest break for
23 employees working a seven-hour shift when two are required—it has violated
24 the wage order and is liable.” (*Brinker Rest. Corp. v. Superior Court* (2012) 53
25 Cal.4th 1004, 1033.)

26 42. Here, Defendants periodically did not permit the Aggrieved Employees to take
27 compliant duty-free rest breaks, free from Defendants’ control as required by Labor Code section
28 226.7, the Applicable Wage Orders, and applicable precedent. (See *Augustus v. ABM Security Services*,

1 *Inc.* (2016) 2 Cal.5th 257, 269 [concluding that “during rest periods employers must relieve employees
2 of all duties and relinquish control over how employees spend their time.”].) At all relevant times, the
3 Aggrieved Employees were periodically not provided with legally-compliant and timely rest periods
4 of at least ten minutes for each four hour work period, or major fraction thereof due to Defendants’
5 unlawful rest period policies/practices. The Aggrieved Employees were often expected and required to
6 continue working through rest periods to meet the expectations Defendants and finish the workday. In
7 some cases when the Aggrieved Employees worked more than ten hours in a shift, Defendants failed
8 to authorize and/or permit a third mandated rest period. As a result, the Aggrieved Employees were
9 periodically unable to take compliant rest periods.

10 43. In such cases where Defendants did not offer the Aggrieved Employees the opportunity
11 to receive a compliant off-duty rest period, “the court may not conclude employees voluntarily chose
12 to skip those breaks.” (*Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 410
13 (2015) [“If an employer fails to provide legally compliant meal or rest breaks, the court may not
14 conclude employees voluntarily chose to skip those breaks.”]; *Brinker Rest. Corp. v. Superior Court*,
15 *supra*, 53 Cal.4th at p. 1033 [“No issue of waiver ever arises for a rest break that was required by law
16 but never authorized; if a break is not authorized, an employee has no opportunity to decline to take
17 it.”].)

18 44. In addition to failing to authorize and permit compliant rest periods, the Aggrieved
19 Employees were not compensated with one hour’s worth of pay at their regular rate of compensation
20 when they were not provided with a compliant rest period in accordance with Labor Code section
21 226.7, subdivision (c). Thus, Defendants have violated Labor Code section 226.7 and the Applicable
22 Wage Orders.

23 **E. MEAL BREAK VIOLATIONS**

24 45. Labor Code section 512 and the Applicable Wage Orders require employers to provide
25 employees with a thirty-minute uninterrupted and duty-free meal period within the first five hours of
26 work. (Lab. Code, § 512, subd. (a) [“An employer shall not employ an employee for a work period of
27 more than five hours per day without providing the employee with a meal period of not less than 30
28 minutes”]; Cal. Code of Regs., tit. 8, §§ 11040, 11070, 11090 [“No employer shall employ any

1 person for a work period of more than five (5) hours without a meal period of not less than 30
2 minutes”].) Additionally, an employee who works more than ten hours per day is entitled to
3 receive a second thirty-minute uninterrupted and duty-free meal period. (Lab. Code, § 512, subd. (a)
4 [“An employer shall not employ an employee for a work period of more than 10 hours per day without
5 providing the employee with a second meal period of not less than 30 minutes”].)

6 46. “An on-duty meal period is permitted only when the nature of the work prevents an
7 employee from being relieved of all duty and the parties agree in writing to an on-duty paid meal
8 break.” (*Lubin v. The Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 932.) The written agreement must
9 include a provision allowing the employee to revoke it at any time. (*Ibid.*) Generally, the California
10 Department of Industrial Relations, Division of Labor Standards Enforcement (“DLSE”) and courts
11 have “found that the nature of the work exception applies: (1) where the work has some particular
12 external force that requires the employee to be on duty at all times, and (2) where the employee is the
13 sole employee of a particular employer.” (*Id.* at p. 945, internal quotation marks omitted; *Abdullah v.*
14 *U.S. Security Associates, Inc.* (9th Cir. 2013) 731 F.3d 952, 958–959.) “[I]t is the employer’s obligation
15 to determine whether the nature of the work prevents an employee from being relieved before requiring
16 an employee to take an on-duty meal period.” (*Lubin v. The Wackenhut Corp.*, *supra*, 5 Cal.App.5th at
17 p. 946.)

18 47. Here, the Aggrieved Employees were never asked to sign any enforceable document
19 agreeing to an on-duty meal period. Moreover, nothing in the nature of their work involved the kind of
20 “external force” that might justify on-duty meal breaks. (*Lubin v. The Wackenhut Corp.*, *supra*, 5
21 Cal.App.5th at p. 945.) Nevertheless, Defendants periodically did not provide compliant off-duty meal
22 periods within the first five hours of work for the Aggrieved Employees.

23 48. As with rest breaks, meal breaks must be duty-free. (*Brinker Restaurant Corp. v.*
24 *Superior Court* (2012) 53 Cal.4th 1004, 1035 [“The IWC’s wage orders have long made a meal period’s
25 duty-free nature its defining characteristic.”].) Relinquishing control over employees during meal
26 periods requires that employees be “free to leave the employer’s premises” and be “permitted to attend
27 to personal business.” (*Augustus v. ABM Security Services, Inc.*, *supra*, 2 Cal.5th at p. 275.) Under
28 Labor Code section 512, if an employer maintains a uniform policy that does not authorize and permit

1 the amount of meal time called for under the law (as specified in the Labor Code and/or applicable
2 IWC Wage Order), “it has violated the wage order and is liable.” (*Brinker Restaurant Corp. v. Superior*
3 *Court, supra*, 53 Cal.4th at p. 1033.)

4 49. During the applicable statutory periods here, the Aggrieved Employees were
5 periodically denied legally-compliant and timely off-duty meal periods of at least thirty minutes due to
6 Defendants’ unlawful meal period policy and practices. As a result of Defendants’ uniform meal period
7 policies and practices, the Aggrieved Employees were often not permitted to take compliant first meal
8 periods before the end of the fifth hour of work. The Aggrieved Employees were also periodically not
9 permitted to take second meal periods for shifts in excess of ten hours. Defendants thus violated Labor
10 Code section 512 and the Applicable Wage Orders by failing to advise, authorize, or permit the
11 Aggrieved Employees to receive thirty-minute, off-duty meal periods within the first five hours of their
12 shifts.

13 50. Labor Code section 226.7 provides that “[a]n employer shall not require an employee
14 to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or
15 applicable regulation, standard, or order of the Industrial Welfare Commission.” (Lab. Code, § 226.7,
16 subd. (b).) Labor Code section 226.7, subdivision (c), and the Applicable Wage Orders further obligate
17 employers to pay employees one additional hour of pay at the employee’s regular rate of compensation
18 for each workday that the meal period is not provided. (Lab. Code, § 226.7, subd. (c); Cal. Code of
19 Regs., tit. 8, §§ 11040, 11070, 11090 [“If an employer fails to provide an employee a meal period in
20 accordance with the applicable provisions of this order, the employer shall pay the employee one (1)
21 hour of pay at the employee’s regular rate of compensation for each workday that the meal period is
22 not provided.”].) The “regular rate” for these purposes must factor in all nondiscretionary payments for
23 work performed by the employee, including non-discretionary bonuses, commissions, and other forms
24 of wage payments exceeding the employees’ base hourly rate. (*Ferra v. Loews Hollywood Hotel, LLC*
25 (2021) 11 Cal.5th 858, 878.)

26 51. Accordingly, for each day that the Aggrieved Employees did not receive compliant meal
27 periods, they were and are entitled to receive meal period premiums pursuant to Labor Code section
28 226.7 and the Applicable Wage Orders. Defendants, however, failed to pay the Aggrieved Employees

1 applicable meal period premiums for many workdays that the employees did not receive a compliant
2 meal period. Thus, Defendants have violated Labor Code section 226.7 and the Applicable Wage
3 Orders.

4 **F. UNTIMELY WAGES DURING EMPLOYMENT**

5 52. Labor Code section 204 expressly requires employers who pay employees on a weekly,
6 biweekly, or semimonthly basis to pay all wages “not more than seven calendar days following the
7 close of the payroll period.” Labor Code section 210, subdivision (a), makes employers who violate
8 Labor Code section 204 subject to a penalty of:

9 “(1) For any initial violation, one hundred dollars (\$100) for each failure to
10 pay each employee.

11 “(2) For each subsequent violation, or any willful or intentional violation, two
12 hundred dollars (\$200) for each failure to pay each employee, plus 25
13 percent of the amount unlawfully withheld.” (Lab. Code, § 210, subd.
14 (a).)

15 53. Notably, the penalty provided by Labor Code section 210 is “[i]n addition to, and
16 entirely independent and apart from, any other penalty provided in this article” (Lab. Code, § 210,
17 subd. (a).)

18 54. Due to Defendants’ failure to pay the Aggrieved Employees the wages described above,
19 along with rest and meal break premiums, Defendants failed to timely pay the Aggrieved Employees
20 within seven calendar days following the close of payroll in accordance with Labor Code section 204
21 on a regular and consistent basis. (See *Parson v. Golden State FC, LLC* (N.D. Cal., May 2, 2016, No.
22 16-CV-00405-JST) 2016 WL 1734010, at p. *3–5, 2016 U.S. Dist. LEXIS 58299 [finding that a failure
23 to pay rest period premiums can support claims under Labor Code sections 203 and 204].)

24 **G. UNTIMELY WAGES AT SEPARATION**

25 55. Labor Code section 203 provides “if an employer willfully fails to pay . . . any wages
26 of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty”
27 for up to thirty days. (Lab. Code § 203; *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.) As a result
28

1 of Defendants' failure to pay the Aggrieved Employees for the wages described above, along with rest
2 and meal break premiums, Defendants violated and continue to violate Labor Code section 203.

3 56. Due to Defendants' faulty pay policies, those Aggrieved Employees whose employment
4 with Defendants concluded were not compensated for each and every hour worked at the appropriate
5 rate. Defendants have failed to pay formerly-employed Aggrieved Employees whose sums were certain
6 at the time of termination within at least seventy-two hours of their resignation and have failed to pay
7 those sums for thirty days thereafter.

8 **H. WAGE STATEMENT VIOLATIONS**

9 57. Defendants also failed to provide accurate itemized wage statements in accordance with
10 Labor Code sections 226, subdivisions (a)(1), (2), (5), and (9). Labor Code section 226, subdivision
11 (a), obligates employers, semi-monthly or at the time of each payment to furnish an itemized wage
12 statement in writing showing:

- 13 (1) The gross wages earned;
- 14 (2) The total hours worked by the employee;
- 15 (3) The number of piece-rate units earned and any applicable piece rate if
16 the employee is paid on a piece rate basis;
- 17 (4) All deductions, provided that all deductions made on written orders of
18 the employee may be aggregated and shown as one item;
- 19 (5) The net wages earned;
- 20 (6) The inclusive dates of the period for which the employee is paid;
- 21 (7) The name of the employee and only the last four digits of his or her social
22 security number or an employee identification number other than a social
23 security number;
- 24 (8) The name and address of the legal entity that is the employer; and
- 25 (9) All applicable hourly rates in effect during the pay period and the
26 corresponding number of hours worked at each hourly rate by the
27 employee.
28

1 58. Due to Defendants’ failure to pay the Aggrieved Employees properly as described
2 above, the wage statements issued do not indicate the correct amount of gross wages earned, total hours
3 worked, or the net wages earned, or the applicable hourly rates in effect during the pay period and the
4 corresponding number of hours worked at each hourly rate. Thus, Defendants have violated Labor
5 Code section 226, subdivisions (a)(1), (2), (5), and (9).

6 59. In addition to Labor Code section 226, subdivision (a), Defendants also knowingly and
7 intentionally failed to provide the Aggrieved Employees with accurate itemized wage statements in
8 violation of Labor Code section 226, subdivision (e). Defendants knew that they were not providing
9 the Aggrieved Employees with wage statements required by California law but nevertheless failed to
10 correct their unlawful practices and policies. (See *Garnett v. ADT LLC* (E.D. Cal. 2015) 139 F.Supp.3d
11 1121, 1134 [finding the defendant knowingly and intentionally violated Labor Code section 226
12 because the “[d]efendant knew that it was not providing total hours worked to plaintiff or other
13 employees paid on commission” even though it believed that employees paid solely on commission or
14 commission and salary “are exempt and therefore we do not record hours on a wage statement.”].)

15 **I. RECORDKEEPING VIOLATIONS**

16 60. Labor Code section 226, subdivision (a), requires employers to keep an accurate record
17 of, among other things, all hours worked by employees. Labor Code section 226.3 provides, in pertinent
18 part, as follows:

19 “Any employer who violates subdivision (a) of Section 226 shall be subject to a
20 civil penalty in the amount of two hundred fifty dollars (\$250) per employee per
21 violation in an initial citation and one thousand dollars (\$1,000) per employee
22 for each violation in a subsequent citation, for which the employer fails to
23 provide the employee a wage deduction statement or fails to keep the records
24 required in subdivision (a) of Section 226. The civil penalties provided for in
25 this section are in addition to any other penalty provided by law.” (Lab. Code, §
26 226.3, emphasis added.)

27 61. Likewise, Labor Code section 1174, subdivision (d), requires every employer, including
28 Defendants, to:

1 “Keep, at a central location in the state or at the plants or establishments at which
2 employees are employed, payroll records showing the hours worked daily by
3 and the wages paid to, and the number of piece-rate units earned by and any
4 applicable piece rate paid to, employees employed at the respective plants or
5 establishments. These records shall be kept in accordance with rules established
6 for this purpose by the commission, but in any case shall be kept on file for not
7 less than three years. An employer shall not prohibit an employee from
8 maintaining a personal record of hours worked, or, if paid on a piece-rate basis,
9 piece-rate units earned.” (Lab. Code, § 1174, subd. (d), emphasis added.)

10 62. As explained in detail above, Defendants failed to provide the Aggrieved Employees
11 with accurate itemized wage statements. Defendants did so, in part, because they failed to accurately
12 track hours worked by the Aggrieved Employees. Defendants have thus failed to keep accurate records
13 of the “total hours worked by the employee[s]” in violation of Labor Code section 226, subdivision (a),
14 and are therefore subject to the penalties provided by Labor Code section 226.3. These penalties are
15 “in addition to any other penalty provided by law.” (Lab. Code, § 226.3.)

16 63. The failure to accurately track hours worked also resulted in a failure of Defendants to
17 keep a record of all “payroll records showing the hours worked daily by” Defendants’ employees,
18 including Plaintiff, in violation of Labor Code section 1174, subdivision (d).

19 **J. FAILURE TO REIMBURSE BUSINESS EXPENSES**

20 At all relevant times herein, Defendants were subject to Labor Code section 2802, which states
21 that “an employer shall indemnify his or her employees for all necessary expenditures or losses incurred
22 by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience
23 to the directions of the employer.” The purpose of this section is to “prevent employers from passing
24 along their operating expenses onto their employees.” (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007)
25 42 Cal.4th 554, 562.)

26 At all relevant times herein, Defendants were subject to Labor Code section 2804, which states
27 that “any contract or agreement, express or implied, made by any employee to waive the benefits of
28

1 this article or any part thereof, is null and void, and this article shall not deprive any employee or his
2 personal representative of any right or remedy to which he is entitled under the laws of this State.”

3 Thus, the Class Members and the Aggrieved Employees were and are entitled to reimbursement
4 for the expenses they incurred during the course of their duties. The duty to reimburse even extends to
5 the use of equipment the employee may already own and would be required to pay for anyway.
6 (*Cochran v. Schwan’s Home Serv., Inc.* (2014) 228 Cal.App.4th 1137, 1144 [“The threshold question
7 in this case is this: Does an employer always have to reimburse an employee for the reasonable expense
8 of the mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation
9 in which the employee incurred an extra expense that he or she would not have otherwise incurred
10 absent the job? The answer is that reimbursement is always required. Otherwise, the employer would
11 receive a windfall because it would be passing its operating expenses on to the employee.”].)

12 Here, Defendants failed to fully reimburse the Class Members and the Aggrieved Employees
13 for necessary expenditures incurred as a direct consequence and requirement of performing their job
14 duties, including the costs associated with their personal cell phone they required to perform their work.
15 Consequently, Defendants failed to comply with Labor Code section 2802.

16 **V. EXHAUSTION OF REMEDIES**

17 64. Plaintiff has fully and completely exhausted administrative remedies under PAGA prior
18 to proceeding with the PAGA claims stated in this complaint. Plaintiff filed a PAGA notice online with
19 the Labor Workforce Development Agency (“LWDA”) and sent a letter by certified mail to Defendants
20 setting forth the facts and theories of the violations alleged against Defendants, as prescribed by PAGA.
21 (Lab. Code, §§ 2698–2699.8.)

22 65. As required by PAGA, Plaintiff submitted the \$75.00 filing fee with the LWDA by
23 regular mail. Pursuant to Labor Code section 2699.3, subdivision (a)(2)(A), no notice was received by
24 Plaintiff from the LWDA evidencing its intention to investigate within sixty-five calendar days of the
25 postmark date of the PAGA notice. Plaintiff is therefore entitled to commence and proceed with a civil
26 action pursuant to Labor Code section 2699.

1 **VI. CAUSES OF ACTION**

2 **First Cause of Action**

3 *Penalties Pursuant to PAGA for Willful Misclassification in Violation of Labor Code*

4 *Sections 226.8, 2775, and Other Labor Code Sections That May Be Applicable*

5 *(Against Defendant Subaru of America, Inc. Only)*

6 66. Plaintiff realleges and incorporates by reference all previous paragraphs.

7 67. As explained in more detail above, at all times during the PAGA Period, Defendant
8 Subaru treated the Misclassified Aggrieved Employees as independent contractors despite the fact that
9 Defendant Subaru failed to meet the standards required by the ABC Test to classify the Misclassified
10 Aggrieved Employees as independent contractors. Put simply, Defendant Subaru's treatment of the
11 Misclassified Aggrieved Employees cannot meet any part of the ABC Test and Defendant Subaru knew
12 it. Plaintiff and the other Misclassified Aggrieved Employees are thus "aggrieved employees" within
13 the meaning of PAGA, as they were employed by Defendant Subaru during the PAGA Period and
14 suffered the Labor Code violations alleged herein.

15 68. At all relevant times, Plaintiff and the other Misclassified Aggrieved Employees were
16 "employees" for purposes of the California Labor Code, as defined in section 2775, although they were
17 knowingly, willfully, and intentionally misclassified by Defendant Subaru as independent contractors
18 as part of Defendant Subaru's unlawful scheme to obtain the economic advantages that flow from
19 avoiding the financial obligations that the Labor Code and Applicable Wage Orders imposes on
20 employers. This was part of a pattern as practice of willful misclassification of all, or nearly all, of
21 Defendants' employees who meet the definition of "Misclassified Aggrieved Employees" provided
22 above, thereby triggering heightened penalties under Labor Code section 226.8, subdivisions (b) and
23 (c).

24 69. Plaintiff by this action seeks to recover, on behalf of himself and all other Misclassified
25 Aggrieved Employees, the civil penalties provided by Labor Code section 226.8 and by PAGA, as
26 specified in Labor Code section 2699, subdivision (f). Plaintiff seeks to recover the civil penalties
27 through a representative action as permitted by PAGA and the California Supreme Court in *Arias v.*
28 *Superior Court* (2009) 46 Cal.4th 969, 986.

70. In addition to the penalties sought as described above, Plaintiff was compelled to retain the services of counsel to file this action to protect his interests and those of the Misclassified Aggrieved Employees, and to assess and collect the penalties owed by Defendant Subaru. Plaintiff has thereby incurred attorneys' fees and costs, which Plaintiff is also entitled to recover under Labor Code section 2699, subdivision (k)(1).

Second Cause of Action

*Penalties Pursuant to PAGA for California Labor Code Sections 201, 202, 203, 204,
210, 226, 226.3, 226.7, 510, 512, 1174, 1174.5, 1185, 1194, 1194.2, 1197, 1197.1,
1198, 1198.5, 1199, 2802, 2804, and Other Provisions of the Labor Code
(Against All Defendants)*

71. Based on the above allegations incorporated by reference, Defendants violated Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 1174, 1174.5, 1185, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 1199, 2802, 2804, and others that may be applicable; and the Applicable Wage Orders (Cal. Code of Regs., tit. 8, §§ 11040, 11070, 11090), and others that may be applicable.

72. As a result of the acts alleged above, Plaintiff seeks penalties under Labor Code sections 2698 through 2699.8 because of Defendants' violation of Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 1174, 1174.5, 1185, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 1199, 2802, 2804, and others that may be applicable; and the Applicable Wage Orders (Cal. Code of Regs., tit. 8, §§ 11040, 11070, 11090), and others that may be applicable.

73. Under Labor Code section 2699, subdivision (f), and 2699.5, for each such violation, Plaintiff and the Aggrieved Employees are entitled to penalties in an amount to be shown at the time of trial. These penalties must be allocated sixty-five percent to the Labor and Workforce Development Agency (“LWDA”) and thirty-five percent to the affected employees.

74. Plaintiff was compelled to retain the services of counsel to file this action to protect his interests and those of the Aggrieved Employees, and to assess and collect the wages and penalties owed by Defendants. Plaintiff has thereby incurred attorneys' fees and costs, which Plaintiff is also entitled to recover under Labor Code section 2699, subdivision (k)(1).

1 **VII. PRAYER FOR RELIEF**

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

- 4 **1.** For willful misclassification, penalties as provided by Labor Code section 226.8,
5 subdivisions (b) and (c), any other penalties applicable under Labor Code section 2699,
6 and attorneys' fees and costs pursuant to Labor Code section 2699, subdivision (k)(1);
7 **2.** For the failure to maintain accurate employment records, penalties pursuant to Labor
8 Code sections 226.3, 1174.5, and others that may be applicable;
9 **3.** For the claim of penalties pursuant to PAGA and other provisions of the California
10 Labor Code, a civil penalty in the amount of \$100 for each violation as specified in
11 Labor Code section 2699, subdivision (f), in the representative action brought on behalf
12 of Plaintiff and the Aggrieved Employees pursuant the Labor Code Private Attorneys
13 General Act of 2004, and for civil penalties available under Labor Code section 210;
14 **4.** Prejudgment interest on all due and unpaid wages pursuant to Labor Code section 218.6
15 and Civil Code sections 3287 and 3289;
16 **5.** On all causes of action for which attorneys' fees may be available, for attorneys' fees
17 and costs as provided by Labor Code sections 218.5, 226, 2699, Code of Civil Procedure
18 section 1021.5, and others as may be applicable;
19 **6.** For an order enjoining Defendants, and each of them, and their agents, servants, and
20 employees, and all persons acting under, in concert with, or for them, from acting in
21 derogation of any rights or duties adumbrated in this complaint; and
22 **7.** For such other and further relief, this Court may deem just and proper.

23 Dated: March 12, 2025

MELMED LAW GROUP P.C.

24 

25 **KYLE D. SMITH**

26 Attorneys for Plaintiff and the Aggrieved
27 Employees
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