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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

06/14/2023 at 11:02:50 AM
Clerk of the Superior Court
By Cheyenne Preston, Deputy Clerk

Attorneys for Plaintiff DAVID SOLTERO in a Representative capacity only, and on behalf of other members of the general public similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

DAVID SOLTERO, in a Representative
capacity only, and on behalf of other
members of the general public similarly
situated,

Plaintiff,

v.

MOSSY NISSAN, INC., a California
Corporation; MOSSY NISSAN NATIONAL
CITY, a California Corporation; and DOES
1-10, inclusive

Defendants

CASE NO. 37-2023-00024875-CU-OE-CTL

COMPLAINT FOR:

1. **MEAL AND REST PERIOD VIOLATIONS PURSUANT TO LABOR CODE § 2698 et seq.**
2. **MINIMUM WAGE VIOLATIONS PURSUANT TO LABOR CODE § 2698 et seq.**
3. **OVERTIME VIOLATIONS PURSUANT TO LABOR CODE § 2698 et seq.**
4. **WAGE STATEMENT VIOLATIONS PURSUANT TO LABOR CODE § 2698 et seq.**
5. **FAILURE TO REIMBURSE PURSUANT TO LABOR CODE § 2698 et seq.**
6. **FAILURE TO PAY WAGES UPON SEPARATION PURSUANT TO LABOR CODE § 2698 et seq.**

Demand for Jury Trial

COMES NOW Plaintiff DAVID SOLTERO ("Plaintiff"), in a Representative capacity only, on behalf of all aggrieved employees, and on behalf of other members of the general public similarly situated, and alleges for his complaint as follows:

PARTIES, JURISDICTION, AND VENUE

1. This Court has jurisdiction over this matter in that all parties are residents of, or do business within, the State of California and the amount in controversy exceeds the statutory minimum limit of this Court. The monetary damages and restitution sought by Plaintiff exceed the minimal jurisdiction limits of the Superior Court and will be established according to proof at trial. Furthermore, there is no federal question at issue as Wage and Hour protections and remedies related thereto are based solely on California Law and Statutes, including the Labor Code, Civil Code, and IWC Wage Order(s). Also, the Ninth Circuit has recently held that, for purposes of establishing federal diversity jurisdiction, penalties pursuant to the Private Attorneys General Act of 2004 ("PAGA") may not be aggregated. *Urbino v. Orkin Servs. of California, Inc.*, 726 F.3d 1118, 1122 (9th Cir. 2013).
2. Venue before this Court is proper in that certain wrongful acts which gave rise to Plaintiff's injuries occurred in the County of San Diego, State of California.
3. Plaintiff is informed and believes and thereon alleges that at all relevant times mentioned herein, Defendant MOSSY NISSAN, INC., (Referred to herein as "Defendant" or "MOSSY"), was and is a California Corporation doing business throughout the state, including the County of San Diego, State of California. Plaintiff is informed and believes and thereon alleges that at all relevant times mentioned herein, Defendant MOSSY NISSAN NATIONAL CITY, (Referred to herein as "Defendant" or "MOSSY"), was and is a California Corporation doing business throughout the state, including the County of San Diego, State of California.
4. Plaintiff is presently unaware of the true names, capacities and liability of Defendants named herein as DOES 1 through 10, inclusive. Accordingly, Plaintiff will seek leave of court to amend this complaint to allege their true names and capacities after the same have been ascertained.
5. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named

1 Defendants is responsible in some manner for the wrongs and damages as herein alleged, and
2 in so acting was functioning as the agent, servant, partner, and employee of the co-defendants,
3 and in doing the actions mentioned below, was acting within the course and scope of his or her
4 authority as such agent, servant, partner, and employee with the permission and consent of the
5 co-defendants. Plaintiff's injuries as herein alleged were proximately caused by said
6 defendants. Wherever it is alleged herein that any act or omission was done or committed by
7 any specially named Defendant or Defendants, Plaintiff intends thereby to allege and does
8 allege that the same act or omission was also done and committed by each and every defendant
9 named as a DOE, both separately and in concert with the named Defendant or Defendants.

- 10 6. Plaintiff is informed and believes and thereon alleges that Defendants, and each of them,
11 including DOES 1 through 10, are and at all times herein mentioned were either individuals,
12 sole proprietorships, partnerships, registered professionals, corporations, alter egos or other
13 legal entities which were licensed to do and/or were doing business in the County of San
14 Diego, State of California at all times relevant to the subject matter of this action.

15 **FACTUAL BACKGROUND**

- 16 7. Plaintiff was employed by Defendants from approximately December 2, 2015 through March
17 3, 2023. Throughout his employment with Defendants, Plaintiff performed his job in a capable,
18 and competent manner.
- 19 8. Throughout the term of their employment, Plaintiff and all other aggrieved employees were,
20 and currently are, denied the benefits and protections of the Labor Code due to Defendants'
21 institutionalized pay practices, standard as to all of Defendants' California-based employees.
- 22 9. On April 10, 2023, counsel for Plaintiff prepared and submitted via online filing a letter to the
23 California Labor & Workforce Development Agency ("LWDA"). Plaintiff also mailed a
24 courtesy copy of this letter to the LWDA via USPS Mail. A copy of the letter was mailed to
25 Defendant, via USPS Certified Mail. The letter contained the specific provisions of the
26 California Labor Code and Business and Professions Code violated by Defendants, as well as
27 the facts and theories in support of Plaintiff's claims. (Please see **Exhibit 1**, a true and correct
28 copy of this letter.)

10. The statutory time period for the LWDA to investigate and/or respond, and for the employer to respond, has concluded.

REPRESENTATIVE ALLEGATIONS

11. As more specifically set forth below, Plaintiff brings this action in a representative capacity on behalf of all current and former aggrieved employees of Defendants. Code Civ. Proc. § 2699; *Arias v. Superior Court* (2009) 46 Cal. 4th 969, 980-981. Throughout the operative limitations period, Plaintiff and all other aggrieved employees were denied the protections and benefits of the Labor Code due to Defendants' standard practices. Throughout his employment, Plaintiff and all other aggrieved employees were and are denied full and accurate compensation, including overtime compensation, in violation of, *inter alia*, Labor Code sections 510, 1194, and 1197. Plaintiff and the other aggrieved employees were and are denied Meal and Rest Periods and Meal and Rest Period payments, in violation of, *inter alia*, Labor Code sections 226.7 and 512. Defendants failed to furnish accurate itemized wage statements in violation of, *inter alia*, Labor Code section 226. Defendants failed to reimburse Plaintiff and other aggrieved employees for necessary business expenditures in violation of, *inter alia*, Labor Code section 2802. Defendants failed to provide all compensation due at termination of employment in violation of, *inter alia*, Labor Code sections 201 through 203.

12. Plaintiff brings this action on the grounds that he and other current and former aggrieved employees of Defendants were and are improperly denied the mandated wages resulting from the above-referenced violations. Code Civ. Proc. § 2699; *Arias*, 46 Cal. 4th at 980-981. The number of current and former aggrieved employees is believed to exceed Two Thousand (2000) members.

13. The approximately Two Thousand (2000) aggrieved employees are comprised of Defendants' current or former California-based employees.

14. The questions of law and fact common to all aggrieved employees arising from Defendants' actions include, among others, the following:

- a. Whether Defendants failed to pay its employees the proper straight-time, overtime, and double time wages due and owing to them;

- b. Whether Defendants failed to pay its employees all compensation due and owing at termination of employment;
- c. Whether Defendants failed to provide its employees with statutorily-compliant Meal and/or Rest Periods, in violation of, *inter alia*, California Labor Code section 512 and 226.7, in that Defendants' written policies are not compliant with California law, and Defendants do not allow its employees duty-free Meal and/or Rest Periods on occasion;
- d. Whether Defendants failed to properly provide Meal and Rest Period Premiums in accordance with law;
- e. Whether Defendants failed to properly calculate and pay its employees overtime compensation or Meal and Rest Period Premiums in accordance with law by failing to properly calculate, into the Regular Rate of Pay, the value of all employee benefits and other non-discretionary compensation; and
- f. Whether Defendants failed to properly reimburse its employees for necessary business expenditures for, *inter alia*, cell phone costs and other work supplies, in violation of Labor Code section 2802.
15. At all times mentioned herein, Defendants were subject to the Labor Codes and Industrial Welfare Commission Wage Orders of the State of California, including, but not limited to, California Labor Code section 2698 *et seq.*
16. At all times mentioned herein, Defendants are and were "employers" as that term is used within the relevant sections of the California Labor Code.
17. Plaintiff has exhausted his administrative remedies and pre-filing requirements pursuant to California Labor Code section 2699.3, and has also fulfilled all notice requirements under the statute.
18. Throughout the operative limitations period, Plaintiff and all other aggrieved employees were denied the protections and benefits of the Labor Code and IWC Wage Order(s) due to Defendants' standard practices. Said violations are set forth below.

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FIRST CAUSE OF ACTION
Meal and Rest Period Violations Pursuant to Labor Code § 2698 et seq.
Representative Action
(By Plaintiff against Defendants and DOES 1 through 10)

19. Plaintiff hereby incorporates by reference paragraphs 1 through 18 as though fully set forth herein.

20. Labor Code section 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.

Defendants violated this section by establishing working conditions below the standard of the applicable Wage Order.

21. Under applicable California law, “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 [...] 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” Lab. Code § 512(a); see also 8 Cal. Code Regs. § 11070 (11)(A).

22. Unless the employee is relieved of all duty during a thirty (30) minute Meal Period, the Meal Period shall be considered an “on duty” Meal Period and counted as time worked. 8 Cal. Code Regs. § 11070 (11).

23. California law requires employers to provide nonexempt employees with a 10-minute Rest Period for every four hours worked, or “major fraction thereof.” 8 Cal. Code Regs. § 11070 (11).

24. An employer who fails to provide Meal or Rest Periods as required by an applicable Wage Order must pay the employee one additional hour of pay at the employee’s regular rate of pay for each workday that the Meal or Rest Period was not provided. Lab. Code § 226.7(b); 8 Cal. Code Regs. § 11070 (11), (12).

25. Within the operative time period, Defendants failed to possess compliant Meal and Rest Period policies.

- 1 26. For example, Defendants do not possess a legal Meal Period policy or legal Rest Period policy,
2 and makes no attempt to ensure that its employees are either timely or wholly provided Meal
3 Periods or Rest Periods.
- 4 27. Defendants would also pressure employees to either skip, or cut short, Meal Periods and Rest
5 Periods, based on order volume and coverage issues.
- 6 28. In addition, Defendants had notice of Plaintiff working outside of his scheduled and/or
7 reported hours, as well as within Meal and Rest Periods, but failed to provide any
8 compensation for this work-time.
- 9 29. Defendants willfully failed and refused to pay Plaintiff and all other aggrieved employees one
10 additional hour of pay at their regular rate of pay for all workdays that a Meal or Rest Period
11 was not provided, as required by Labor Code section 226.7 and IWC Wage Order 7 § (11),
12 (12).
- 13 30. Any payments made by Defendants for non-compliant Meal Periods were not paid at the
14 employee's regular rate in violation of Labor Code section 226.7 and the operative IWC Wage
15 Orders. Instead, these payments were made at an employee's base rate and did not include the
16 value of, *inter alia*, all actual compensation owed, and/or all employee benefits such as, for
17 example, non-discretionary compensation and other employee benefits.
- 18 31. As a direct result of Defendants' failure to comply with the foregoing provisions of the Labor
19 Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be
20 proven at trial.
- 21 32. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on
22 behalf of himself and all other aggrieved employees by and through Labor Code section
23 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover
24 these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below
25 Prayer For Relief.
- 26 33. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants
27 pursuant to Labor Code sections 2699(a) for each of these employees.
- 28 34. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code

1 section 2699(g)(1).

2 **SECOND CAUSE OF ACTION**
3 **Minimum Wage Violations Pursuant to Labor Code § 2698 et seq.**
4 **Representative Action**
5 **(By Plaintiff against Defendants and DOES 1 through 10)**

6 35. Plaintiff hereby incorporates by reference paragraphs 1 through 34 as though fully set forth
7 herein.

8 36. Defendants failed to pay its employees all compensation due in violation of, among other
9 statutes, Labor Code section 1197. California law holds that the failure to pay for any work
10 time constitutes a violation of minimum wage laws. *Armenta v. Osmose, Inc.*, (2005) 135 Cal.
11 App.4th 314, 323. These violations were caused by and through Defendants' failure to
12 maintain accurate Time Records (as required by California law), to the detriment of the
13 employees. Specifically, although Defendants would receive "to-the-minute" start and end
14 times (from their employees' mandated timekeeping practices), Defendants would thereafter
15 alter - and deduct time from - the Time Records, prior to payment of compensation to the
16 employees. Additionally, the right to receive the proper minimum wage compensation was
17 impacted by Defendants knowingly failing to consider other work performed by the employees,
18 including all time employees were under Defendants' control. These actions, and instructions,
19 caused the employees to lose compensation, including proper minimum wage compensation
20 and overtime compensation. Moreover, Defendants instructed its employees to "self-round"
21 their actual work-times, with a lack of specific instruction as to how to accurately - and
22 neutrally - perform such a function.

23 37. Additionally, Defendants provided a simple "taxed draw" during at least one pay-period, as
24 well as inaccurately providing commission payments within a separate pay-period, the "taxed-
25 draw" payments were later **deducted** from the employees pay which causes minimum wage
26 and overtime violations.

27 38. As a result of Defendants' failure to comply with the provisions of the Labor Code, Plaintiff
28 and all other aggrieved employees have been damaged in an amount to be proven at trial.

39. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on

behalf of himself and all other aggrieved employees by and through Labor Code section 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below Prayer For Relief.

40. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants pursuant to Labor Code sections 2699(a) for each of these employees.

41. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code section 2699(g)(1).

THIRD CAUSE OF ACTION
Overtime Violations Pursuant to Labor Code § 2698 et seq.
Representative Action
(By Plaintiff against Defendants and DOES 1 through 10)

42. Plaintiff hereby incorporates by reference paragraphs 1 through 41 as though fully set forth herein.

43. Defendants failed to pay Plaintiff and all other aggrieved employees all compensation, including overtime compensation, due in violation of, among other statutes, Labor Code section 510. These violations occurred due to Defendants' illegal policies, referenced above, whereby employees experienced monetary under-compensation. The systematic failure to provide proper overtime compensation is a violation of California law.

44. Additionally, Defendants also failed to provide the actual Overtime Rate of Pay by ignoring certain compensation when calculating the Regular Rate of Pay including, but not limited to, commissions, shift differentials, various forms of bonus and/or incentive pay, and the value of employee benefits and employee discounts, in violation of Labor Code section 510.

45. As a direct result of Defendants' failure to comply with the foregoing provisions of the Labor Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be proved at trial.

46. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on behalf of himself and all other aggrieved employees by and through Labor Code section 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover

1 these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below
2 Prayer For Relief.

3 47. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants
4 pursuant to Labor Code sections 2699(a) for each of these employees.

5 48. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code
6 section 2699(g)(1).

7 **FOURTH CAUSE OF ACTION**
8 **Wage Statement Violations Pursuant to Labor Code § 2698 et seq.**
9 **Representative Action**
10 **(By Plaintiff against Defendants and DOES 1 through 10)**

11 49. Plaintiff hereby incorporates by reference paragraphs 1 through 48 as though fully set forth
12 herein.

13 50. Defendants failed to provide Plaintiff and all other aggrieved employees with accurate itemized
14 wage statements in violation of, among other statutes, Labor Code section 226. These
15 violations include, but are not limited to, Defendants' failure to accurately identify all
16 applicable regular and overtime (including double-time) rates of pay in violation of section
17 226(a)(9), and providing inaccurate representations of both "gross" and "net wages."
18 Defendants also failed to accurately list "all applicable hourly rates in effect during the pay
19 period and the corresponding number of hours worked at each hourly rate," in violation of
20 226(a)(9). Defendants also failed to provide an accurate showing of the "total hours worked,"
21 in violation of Labor Code section 226(a)(2). For example, Defendants had notice of
22 employees working outside of their scheduled and/or reported hours, as well as within Meal
23 and Rest Periods, but did not provide compensation.

24 51. Further, the Defendants' wage statement listings are confusing and employees cannot readily
25 ascertain their total hours worked, applicable rates, and all gross and net wages. As one
26 example, Defendants are apparently using a time calculating system other than "minutes", but
27 without explanation to the employees within the wage statement.

28 50. As a direct result of Defendants' failure to comply with the foregoing provisions of the Labor
Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be

1 proven at trial.

2 51. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff
3 on behalf of himself and all other aggrieved employees by and through Labor Code section
4 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover
5 these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below
6 Prayer For Relief.

7 52. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants
8 pursuant to Labor Code sections 2699(a) for each of these employees.

9 53. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code
10 section 2699(g)(1).

11 **FIFTH CAUSE OF ACTION**
12 **Failure to Reimburse Pursuant to Labor Code § 2698 et seq.**
13 **Representative Action**
14 **(By Plaintiff against Defendants and DOES 1 through 10)**

15 54. Plaintiff hereby incorporates by reference paragraphs 1 through 53 as though fully set forth
16 herein.

17 55. Defendants failed to reimburse their employees for all necessary business expenditures
18 incurred in direct consequence of the discharge of their duties in violation of, among other
19 statutes, Labor Code section 2802. These expenditures are the result of, *inter alia*, Defendants'
20 standard policies which require its employees to incur mileage, purchase work supplies, and
21 to use their own cell phones for work-related purposes, without reimbursement.

22 56. As a direct result of Defendants' failure to comply with the foregoing provisions of the Labor
23 Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be
24 proven at trial.

25 59. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on
26 behalf of himself and all other aggrieved employees by and through Labor Code section
27 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover
28 these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below
Prayer For Relief.

60. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants pursuant to Labor Code sections 2699(a) for each of these employees.

61. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code section 2699(g)(1).

SIXTH CAUSE OF ACTION
Failure to Pay Wages Upon Separation Pursuant to Labor Code § 2698 et seq.
Representative Action
(By Plaintiff against Defendants and DOES 1 through 10)

62. Plaintiff hereby incorporates by reference paragraphs 1 through 61 as though fully set forth herein.

63. Defendants failed to provide Plaintiff and other aggrieved employees with all wages earned and unpaid at termination in violation of, among other statutes, Labor Code sections 201 through 203. These violations resulted from, among other unlawful actions, Defendants' willful failure to provide accurate and complete compensation to aggrieved employees under Labor Code sections 226.7, 510, 512, 1197, and 2802, as set forth above. Additionally, Defendants failed to pay Plaintiff, and other aggrieved employees, all wages actually owed at the time of termination including, but not limited to, holiday pay wages owed.

64. As a direct result of Defendants' failure to comply with the foregoing provisions of the Labor Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be proven at trial.

65. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on behalf of himself and all other aggrieved employees by and through Labor Code section 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below Prayer For Relief.

66. Plaintiff seeks an award of statutory civil penalties for each underpaid employee of Defendants pursuant to Labor Code sections 2699(a) for each of these employees.

67. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code section 2699(g)(1), and interest, pursuant to Labor Code section 218.6.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff, on behalf of all aggrieved employees, prays for judgment as follows:

- 3 1. For an award of attorneys' fees and costs of suit herein pursuant to Labor Code section
4 2699(g)(1);
5 2. For an award of statutory civil penalties pursuant to Labor Code section 2699(f)(2); and
6 3. For such other relief as the Court deems just and proper.

7 **DEMAND FOR JURY TRIAL**

8 Plaintiff hereby requests that this matter be heard and decided by trial by jury.
9

10 Dated: June 14, 2023

SULLIVAN & YAECKEL LAW GROUP, APC

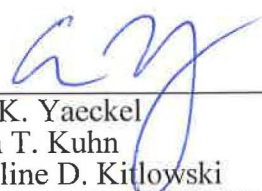
11 
12 _____
13 Eric K. Yaeckel
14 Ryan T. Kuhn
15 Karoline D. Kitlowski
16 Attorneys for Plaintiff DAVID SOLTERO in a
17 Representative capacity only, and on behalf of other
18 members of the general public similarly situated
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27
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Exhibit 1

SULLIVAN & YAECKEL
LAW GROUP

A PROFESSIONAL CORPORATION

2330 THIRD AVENUE
SAN DIEGO, CALIFORNIA 92101

PHONE 619-702-6760
FACSIMILE 619-702-6761

April 10, 2023

Labor and Workforce Development Agency
Attn. PAGA Administrator

Submitted Via Online Filing

Re: David Soltero v. Mossy Nissan, Inc.; and Mossy Nissan
National City
Our File No.: 7349

Dear Administrator:

Please allow this correspondence to serve as "written notice," as required by California Labor Code section 2699.3(a)(1), of the specific provisions of the California Labor Code believed to have been violated by Mossy Nissan, Inc.; and Mossy Nissan National City (hereinafter collectively referred to as "Mossy"), in the above referenced matter. This "written notice" is filed on behalf of Mr. David Soltero (hereinafter "Mr. Soltero"), and all current and former non-exempt employees employed by Mossy. Thank you for your assistance and instruction on this issue.

The specific provisions alleged to have been violated by Mossy are as follows:

CALIFORNIA LABOR CODE SECTIONS 201-203, 226, 226(a),
226.7, 510, 512, 1194, 1197.1, 1198.5 and 2802, as well as IWC
Wage Order 7, and any other applicable wage orders, codified as Title
8, California Code of Regulations, section 11070 *et seq.*

Facts and theories supporting the allegations: Mr. Soltero was employed as a non-exempt employee for Mossy from approximately December 2, 2015, through March 3, 2023. Throughout the term of Mr. Soltero's employment, Mossy required Mr. Soltero and all other non-exempt employees to experience actions illegal under the California Labor Code, including the following:

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Minimum Wage and Overtime Violations

- Mossy failed to provide all compensation, including minimum wage and overtime compensation, as well as compensation for work performed inside of Meal and Rest Periods, to its employees in violation of, *inter alia*, Labor Code sections 1194, 510, IWC Wage Order 7, and any other applicable wage orders. This illegal action is due, in part, to Mossy's policies of (1) failing to properly retain accurate Time Records, in violation of California law, (2) failing to provide compensation (including both minimum and overtime compensation) for all time worked by the employees, or in control of the employer, and (3) providing a simple "draw" during at least one pay-period, as well as inaccurately providing commission payments within a separate pay-period, wherein certain "draw" payments were **deducted** from the employees pay causing minimum wage and overtime violations. Further, Mossy would instruct Mr. Soltero to report scheduled (as opposed to *actual*) work hours, resulting in a loss of compensation. Additionally, Mossy would often require Mr. Soltero to work extended hours (beyond scheduled hours), without compensation. Furthermore, Mossy would regularly contact Mr. Soltero outside of normal work hours (*i.e.*, "after hours" or during lunch) without compensation.
- Additionally, among other issues, Mossy has notice of Mr. Soltero, and others, working outside of their scheduled and/or reported hours, as well as *within* Meal and Rest Periods, yet willfully failed to provide any compensation for this work-time. Mossy failed to properly calculate and pay overtime at the actual overtime rate of pay, as Mossy ignores certain compensation when calculating the Regular Rate of Pay.

Failure to Provide Compliant Meal Periods

- Mossy failed to provide compliant Meal Periods or requisite Meal Period penalty payments, in violation of, *inter alia*, Labor Code sections 226.7, 512, and IWC Wage Order 7, or any other applicable wage orders. For example, Mossy does not possess a legal Meal Period policy and makes no attempt to ensure that its employees are either timely or wholly provided Meal Periods. The employees would often either miss a Meal Period entirely, or be provided a short or untimely Meal Period. Whether or not an employee was provided a Meal Period was often contingent upon the how busy the employees were on a given day. As an example, Mossy Time Records (produced and verified by Mossy) show that on December 5, 2020, Mr. Soltero started a shift at 6:54 a.m and then ended this shift at 7:00 p.m. On this date, Mr. Soltero **worked a shift lasting 10 hours and 6 minutes** without receiving a Meal Period. (Please see **Exhibit A**). Further, the Mossy Time Records indicate **no** California Meal Period Penalty was paid for this date.

- Mossy would pressure its employees to either skip, or cut short, a Meal Period as employees were expected to respond to supervisors and/or customers at all times. Mossy has never provided a compliant Meal Period penalty payment to any employee as to the above referenced issues. Finally, on the rare occasions when employees *were* paid Meal Period penalties (*i.e.* California Meal Period Premiums), such payments do not “cure” the stated Labor Code violation under section 226.7. The California Supreme Court held that “An employer’s failure to provide an additional hour of pay does not form part of a section 226.7 violation, and an employer’s provision of an additional hour of pay does not excuse a section 226.7 violation. The failure to provide required meal and rest breaks is what triggers a violation of section 226.7.” (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1256, italics added.). Even more recently, a 2020 California Supreme Court ruling stated that, “The remedy for a Labor Code violation, through settlement or other means, is distinct from the fact of the violation itself. For example, employers can pay an additional hour of wages as a remedy for failing to provide meal and rest breaks. (§ 226.7, subd. (c).) But we have held that payment of this statutory remedy ‘does not excuse a section 226.7 violation.’” *Kim v. Reins International California, Inc.*, (2020) 9 Cal.5th 73. To be clear, payment of a Meal Period penalty to employees does not rectify the violation, it is in fact an admission of a Labor Code violation. Finally, Mossy failed to pay Meal Period Premiums at the proper rate, as Mossy fails to either (1) pay a full hours worth of pay, or (2) properly calculate the regular rate of pay for purposes of determining the premium rate owed. *Ferra v. Loews Hollywood Hotel, LLC*, S259172 (Slip Op. at p.1).
- Mossy required its employees to constantly monitor their cell phones and be “on-call” at all times, specifically during Meal Periods. On occasion, Mossy would interrupt, or cut short, its employees’ Meal Periods and require them to return to work.
- Mossy illegally retained control over its employees during Meal Periods. For example, Mossy required its employees to “remain on the premises,” and to remain “On Call” (*i.e.* monitor their phones and radios) at all times, including during Meal Periods.

Failure to Provide Compliant Rest Periods

- Mossy failed to provide compliant Rest Periods or requisite Rest Period penalty payments, in violation of, *inter alia*, Labor Code sections 226.7, 512, and IWC Wage Order 7, and any other applicable wage orders. For example, Mossy does not possess a legal Rest Period policy, as its Rest Period policy lacks required language under California law. Mossy makes no attempt to ensure that its employees are either timely or wholly provided Rest Periods. The employees would often either miss a Rest Period entirely, be provided a short or untimely Rest Period, or be provided only one

Rest Period, even when they were working in excess of 6.5 hours a day. Mossy would pressure its employees to either skip, or cut short, a Rest Period as employees were expected to respond to supervisors and customers at all times. Mossy has never provided a compliant Rest Period penalty payment to any employee as to the above referenced issues. Finally, on the rare occasions in which Mossy would provide a Rest Period penalty, it would pay said penalty at an improper (and *lesser*) rate, due to the failure to properly calculate the Regular Rate of Pay.

- Mossy required its employees to constantly monitor their cell phones and be “on-call” at all times, specifically during Rest Periods. On occasion, Mossy would interrupt, or cut short, its employees’ Rest Periods and require them to return to work. Mr. Soltero will testify he was required to respond to customers and business related matters during his Rest Periods.

- Finally, Mossy illegally retained control over its employees during Rest Periods. For example, Mossy required its employees to “remain on the premises,” and to remain “On Call” (*i.e.* monitor their telephones) at all times, including during Rest Periods.

Wage Statement Violations

- Mossy violated Labor Code section 226(a)(2) by failing to furnish an accurate showing of all hours worked at each hourly rate by the employee Mr. Soltero, and other employees were not compensated for all hours worked (due in part to Mossy’s requirement that employees list only *scheduled* work-times, not actual work-times.)

- Mossy violated Labor Code section 226(a)(5) by failing to furnish an accurate showing of the net wages earned by its employees. For example, Mossy **(a)** would not provide compensation for all hours and minutes worked, **(b)** would use an improper (and lesser) Overtime Rate of Pay, and **(c)** would fail to pay Meal and/or Rest Period penalties when due. Further, on the rare occasions in which Mossy would provide a Meal or Rest Period penalty, it would pay said penalty at an improper (and lesser) rate, due to the failure to properly calculate the Regular Rate of Pay.

- Mossy violated Labor Code section 226(a)(9) by failing to furnish an accurate showing of all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. Mr. Soltero, and the other employees were not compensated for all hours worked (due in part to Mossy requiring employees to list only *scheduled* work-times, not actual work-times to include “on-call” hours). Additionally, Mossy does not use “minutes,” to describe the amount of time worked, on the “Earnings Statement. As an example, for the pay period ending October 31, 2022, Mossy states that it paid Mr. Soltero for “42.80” hours of “Other OT” Pay. (Please see **Exhibit B**). However, Mr. Soltero

cannot “readily ascertain” what 42.80 means without “reference to other documents or information.” Additionally, Mossy does not use “minutes,” to describe the amount of time worked, on the “Earnings Statement.” As an example, .80 is not an accurate representation of minutes worked, but an altered representation of those minutes. (i.e., 25 minutes of work could be represented as .25, and 50 minutes of work could be represented as .50, however .80 minutes of work cannot be represented as .80 as there are not 80 minutes within one hour.) This is because Mossy is apparently using a time-calculating system other than “minutes,” but without explanation to the employees within the wage statement. As minutes are measured on a scale of 1 through 60, it is not apparent what these figures are meant to represent. Without an explanation for how these figures were arrived at, employees cannot “readily ascertain” their total hours worked. Therefore, Mossy failed to provide an accurate showing of the “total hours worked” by its employees pursuant to section 226(a)(2), due to all the aforesaid reasons.

Failure to Provide Compliant Expense Reimbursement Payments

- Mossy failed to provide compliant expense reimbursement payments in violation of, *inter alia*, Labor Code section 2802, by failing to provide payments for expenses incurred by Mr. Soltero, and other non-exempt employees, including expenses for cell-phone costs, and mileage.

Willful Failure to Provide All Compensation to Ex-Employees

- Mossy failed to provide all compensation upon termination of employment in violation of Labor Code sections 201-203, due, in part, to the fact that Mossy failed to provide proper compensation for all hours worked, and failed to pay full Meal or Rest Period penalties, as discussed above.

To confirm, Mossy is a “person” as defined within California Labor Code section 18.

Again, thank you for your assistance and instruction throughout this matter. Should you have any questions or comments, please do not hesitate to contact the undersigned.

Very Truly Yours,


Eric K. Yaeckel, Esq.

cc: *Via Certified U.S. Mail*

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Exhibit A

Current Year 2020

[00:20] MOSSY AUTOMOTIVE GROUP

Name **EDLTERO, DAVID (A316)**Status **ACTIVE**Dept **IA**Schedule Group **[933] NC Sales Team A (yellow)**Labor Allocation **New Car Sales-MOSSY NISSAN NATIONAL CITY**Pay Period **11/16/2020 - 11/30/2020 (Previous Period) - Sem -Monthly**Badge Number **10650**Position **Sales Consultant**Exception Code **1:0**Pay Class **HS1**Hire Date **12/02/2015**Pay Type **Hourly**Full/Part Time **Full Time**

Date	Pay Code	IN	Allocation (tax)	OUT	IN	Allocation (tax)	OUT	Hours	Total Hours	Dollars	Units	A
MON (11/16)												
TUE (11/17)		09:50 AM	[A]-MO...	10:02 AM	10:32 AM	[ST1]-M...	10:40 AM	0.83				
		10:40 AM	[A]-MO...	12:47 PM	01:34 PM	[A]-MO...	06:50 PM	7.54	8.37			
WED (11/18)		09:57 AM	[A]-MO...	10:07 AM	10:37 AM	[ST1]-M...	10:32 AM	0.59				
		10:32 AM	[A]-MO...	01:03 PM	01:30 PM	[A]-MO...	07:50 PM	7.97	8.56			
THU (11/19)												
FRI (11/20)		09:00 AM	[A]-MO...	09:01 AM	09:01 AM	[ST1]-M...	09:34 AM	0.57				
		09:34 AM	[A]-MO...	12:00 PM	12:30 PM	[A]-MO...	05:01 PM	7.61	8.18			
SAT (11/21)												
SUN (11/22)												
Weekly Totals								25.11		\$0.00	0.00	
MON (11/23)		09:56 AM	[A]-MO...	10:09 AM	10:09 AM	[ST1]-M...	10:37 AM	0.69				
		10:37 AM	[A]-MO...	01:00 PM	01:30 PM	[A]-MO...	07:39 PM	8.53	9.22			
TUE (11/24)	[S] Sick		[A]-MO...					8.00	8.00			
WED (11/25)		09:00 AM	[A]-MO...	12:00 PM	12:30 PM	[A]-MO...	06:00 PM	8.50	8.50			
THU (11/26)												
FRI (11/27)		09:59 AM	[A]-MO...	02:00 PM	02:30 PM	[A]-MO...	07:00 PM	8.52	8.52			
SAT (11/28)		08:55 AM	[A]-MO...	02:00 PM	02:30 PM	[A]-MO...	07:00 PM	9.58	9.58			
SUN (11/29)												
Weekly Totals								43.82		\$0.00	0.00	
MON (11/30)		08:52 AM	[A]-MO...	09:04 AM	09:04 AM	[ST1]-M...	09:22 AM	0.50				
		09:22 AM	[A]-MO...	01:00 PM	01:30 PM	[A]-MO...	07:00 PM	9.13	9.63			
TUE (12/01)												
WED (12/02)												
THU (12/03)		09:59 AM	[A]-MO...	10:00 AM	10:00 AM	[ST1]-M...	10:40 AM	0.69				
		10:40 AM	[A]-MO...	06:57 PM				8.28	8.97			
FRI (12/04)		09:57 AM	[A]-MO...	09:00 AM	09:00 AM	[ST1]-M...	09:25 AM	0.47				
		09:25 AM	[A]-MO...	??				0.00	0.47			
SAT (12/05)		06:54 AM	[A]-MO...	07:30 PM				10.10	10.10			
SUN (12/06)		09:57 AM	[A]-MO...	??				6.00	0.00			
Weekly Totals								9.63		\$0.00	0.00	

Pay-Period Totals

	Pay Code	Allocation (tax)	Hours	Units	Rate	Dollars
HOU	Hourly Regular	[A]-MOSSY NISSAN NATIONAL CITY	61.63		\$13.00	\$801.19
HOU	Hourly Regular	[ST1]-MOSSY NISSAN NATIONAL CITY	2.37		\$13.00	\$30.81
O	Overtime	[A]-MOSSY NISSAN NATIONAL CITY	6.56		\$19.50	\$127.92
S	Sick	[A]-MOSSY NISSAN NATIONAL CITY	8.00		\$13.00	\$104.00
Totals			78.56	0.00		\$1,063.93

Hours for authorized entries are already included in totals once.

Pay-Period Approvals

Approve Dates	Approved By	Approved Time	Approve Type	Details
Up to: 11-30-2020	021304216	12-03-2020 13:52:56	Employee	

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EE added sick pay on timesheet after payroll deadline.

Exhibit B

Earnings Statement

SOLTERO, DAVID

Pay Date:	11/07/2022	Company: 0Q141 - MOSSY NISSAN, INC.	Emp #: A2L6
Period Start:	10/16/2022	DBA: MOSSY NISSAN NATIONAL CITY	Dept: 1A - New Car Sales
Period End:	10/31/2022	2700 NATIONAL CITY BLVD	Pay Basis: Hourly
		NATIONAL CITY CA 91950	

	Rate	Hours/Units	Current Period	Year To Date	
Earnings					
Overtime	22.50	0.00	0.00	565.20	
Sick Temp	42.84	0.00	0.00	1365.20	
Vacation - Mossy	15.00	0.00	0.00	1560.00	
CA Delayed Lunch	16.76	7.00	117.32	2251.46	
CA Lunch Adj Temp	16.76	1.00	16.76	140.54	
Cell Allowance			10.00	210.00	
Commission			3372.80	61667.54	
Commission Overtime	7.73	42.80	330.84	330.84	
Draw			-2000.00	-2000.00	
Hourly Regular	15.00	0.00	0.00	1999.80	
Non Production Bonus			0.00	3425.00	
Non Sales Activity Temp	15.00	5.00	75.00	1545.40	
Other OT	1.57	42.80	67.20	67.20	
Production Bonus			0.00	3250.00	
Rest Period Supplemental Temp	15.00	4.17	62.55	988.78	
TOTAL HOURS WORKED	0.00	218.30	0.00	0.00	
In and Out Cash Bonus			0.00	265.00	*In/Out

Gross	321.07	2052.47	77631.96
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W/H Taxes

Federal W/H(H)	0.00	6250.59
Medicare	29.03	1110.81
Social Security	124.14	4749.67
California State W/H(H/O)	22.18	3071.12
California SDI Tax	22.02	842.68

Deductions

401K Loan	0.00	78.70
401k %	205.25	7574.62
AR	0.00	60.00
Accidental Injury	7.10	149.10
LTD Buy Up	7.58	155.34
Life Ins Buy Up	11.50	241.50
Life Ins Dependent	0.35	7.35
Medical HMO Simnsa	47.80	1003.80
Vision	2.28	20.52

Net Pay	1573.24	52051.16	Voucher No. 39310DD
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Net Pay Distribution

Direct Deposit Net Check	1373.24	47851.16	A/C:6990
Direct Dep. Distribution 1	200.00	4200.00	A/C:2677

Employee Benefits, Allowances, and Other

	Current Period	Year To Date	YTD Taken	Available
Bereavement Hours **		24.00	0.00	24.00
Jury Duty Hours **		24.00	0.00	24.00

MOSSY_000344