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Assigned for All Purposes
Judge Melissa R. McCormick
Dept. CX104

Attorneys Plaintiff, on behalf of the State of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

VICTOR HERMOSILLO, on behalf of the State
of California,

Plaintiff,

v.

SURF CITY AUTO GROUP, INC., a Delaware
Corporation; and DOES 1-50, inclusive.

Defendants.

CASE NO.: 30-2024-01395259-CU-OE-CXC

**REPRESENTATIVE ACTION
COMPLAINT:**

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

UNLIMITED CIVIL CASE

1 Plaintiff Victor Hermosillo (“Plaintiff”), on behalf of the State of California, hereby brings
2 this PAGA Representative Action Complaint (“Complaint”) against Defendant Surf City Auto
3 Group, Inc. (“Defendant”), and DOES 1 to 50 (collectively “Defendants”) and each of them, as
4 follows:

5 **INTRODUCTION**

6 1. Since 1985, Defendant has provided Retail Automobiles from Huntington Beach,
7 California, and surrounding areas. Defendants now operate various automobile dealerships, including
8 Surf City Nissan and Huntington Beach Chrysler Dodge Jeep, in California.

9 2. Plaintiff brings this PAGA representative action solely on behalf of the State of
10 California against Defendant for alleged violations of the California Labor Code.

11 3. **Plaintiff does not seek to recover anything other than penalties as permitted by**
12 **California Labor Code § 2699.**

13 4. As set forth below, Plaintiff alleges that Defendant failed to pay all overtime
14 compensation and sick pay wages at the proper legal rates by failing to calculate the “regular rate of
15 pay properly.” In addition, Plaintiff alleges that Defendant’s meal and rest period policies and
16 practices failed to allow and permit aggrieved employees to take all compliant and timely meal and
17 rest periods or pay premium wages at the “regular rate of pay” in lieu thereof. Plaintiff further alleges
18 that Defendant failed to provide aggrieved employees with accurate written itemized wage statements
19 in violation of Labor Code § 226(a), failed to reimburse business expenses, and failed to timely pay
20 all final wages upon separation of employment in violation of Labor Code §§ 201-203.

21 5. Based on these alleged Labor Code violations, Plaintiff now brings this class action
22 and representative action to recover unpaid wages, restitution, penalties, and other related relief for
23 himself and all other similarly situated aggrieved employees.

24 **JURISDICTION**

25 6. Plaintiff, on behalf of the State of California, brings this representative action pursuant
26 to Labor Code § 2699, *et seq.*, seeking penalties for Defendant’s violation of California Labor Code
27 §§ 201-203, 204, 210, 226a, 226(e), 226.3, 226.7, 246, 510, 512, 1174, 1174.4, 1194, 1197.1, 1199,
28 2802-2804, and applicable Industrial Welfare Commission Wage Orders (“Wage Orders”).

7. Based upon the foregoing, Plaintiff and all aggrieved employees are aggrieved employees within the meaning of Labor Code §2699, *et seq.*

8. This Court has jurisdiction over Defendant's violations of the California Labor Code and applicable Wage Orders because the amount in controversy exceeds this Court's jurisdictional minimum.

VENUE

9. Venue is proper in this judicial district pursuant to California Code of Civil Procedure §§ 395(a) and 395.5, as most of the acts and omissions complained of herein occurred in the County of Orange. Defendant owns, maintains offices, transacts business, has an agent or agents within the County of Orange, and/or otherwise are found within the County of Orange, and Defendant is within the jurisdiction of this Court for purposes of service of process.

PARTIES

10. At all relevant times herein, Plaintiff, who is over 18, was and currently is a California resident residing in the State of California. Defendants employed Plaintiff as an aggrieved employee.

11. Plaintiff is informed and believes and thereon alleges that Defendants are authorized to and doing business within the County of Orange and is and/or was the legal employer of Plaintiff and the Class Members during the applicable statutory periods. Plaintiff was, and is, a victim of Defendants' policies and/or practices complained of herein and has been deprived of the rights guaranteed to him by California Labor Code §§ 201-203, 204, 210, 226a, 226(e), 226.3, 226.7, 246, 510, 512, 1174, 1174.4, 1194, 1197.1, 1199, 2802-2804, and the California Business and Professions Code § 17200 *et seq.*, and applicable Wage Orders.

12. Plaintiff is informed and believes, and based thereon alleges, that during the four years preceding the filing of the Complaint and continuing to the present, Defendants did (and continue to do) business in the State of California, County of Orange.

13. Plaintiff does not know the true names or capacities, whether individual, partner, or corporate, of the Defendants sued herein as DOES 1 to 50, inclusive, and for that reason, said Defendants are sued under such fictitious names, and Plaintiff will seek leave from this Court to amend this Complaint when such true names and capacities are discovered. Plaintiff is informed, and

1 believes, and thereon alleges, that each of said fictitious Defendants, whether individual, partners, or
2 corporate, were responsible in some manner for the acts and omissions alleged herein, and
3 proximately caused Plaintiff and the Classes to be subject to the unlawful employment practices
4 alleged herein.

5 14. Plaintiff is informed, and believes, and thereon alleges, that at all times mentioned
6 herein, Defendants were and are the employers of Plaintiff and all members of the Classes. At all
7 times herein mentioned, each of said Defendants participated in the doing of the acts hereinafter
8 alleged to have been done by the named Defendants; and furthermore, the Defendants, and each of
9 them, were the agents, servants, and employees of each and every one of the other Defendants, as
10 well as the agents of all Defendants, and at all times herein mentioned were acting within the course
11 and scope of said agency and employment. Defendants, and each of them, approved of, condoned,
12 and/or otherwise ratified each and every one of the acts or omissions complained of herein.

13 15. At all times mentioned herein, Defendants, and each of them, were members of and
14 engaged in a joint venture, partnership, and common enterprise and acting within the course and
15 scope of and in pursuance of said joint venture, partnership, and common enterprise. Further, Plaintiff
16 alleges that all Defendants were joint employers for all purposes of Plaintiff and all members of the
17 Classes.

18 **PAGA REPRESENTATIVE ACTION ALLEGATIONS**

19 16. Since 1985, Defendant has provided Retail - Automobiles from Huntington Beach,
20 California, and surrounding areas. Defendants now operate various automobile dealerships, including
21 Surf City Nissan, Huntingtin Beach Chrysler Dodge Jeep, and others in California. Plaintiff was
22 employed by Defendant as a non-exempt employee with the title of "Sales Representative."

23 17. Plaintiff began working for Defendants in approximately November 2021. Plaintiff
24 and other aggrieved employees (including, but not limited to, Sales Representatives, Service Advisor,
25 Car Wash Attendants, Workers, Technicians, and all other non-exempt positions) were responsible
26 for all aspects of Defendant's business in California. However, in these roles, Plaintiff and other
27 aggrieved employees were often not afforded all protections and rights conferred under the California
28 Labor Code and applicable wage orders.

1 18. At all relevant times, Plaintiff and other aggrieved employees regularly worked
2 various shifts, many of which were in excess of 8.0 hours in a workday and 40.0 hours in a workweek.
3 Plaintiff alleges that other aggrieved employees were also subjected to the same policies, procedures,
4 practices, working conditions, and corresponding wage and hour violations to which he was subjected
5 during his employment.

6 19. First, at all relevant times, Plaintiff and other aggrieved employees worked regular
7 shifts that lasted longer than 8.0 hours in a workday and resulted in aggrieved employees regularly
8 working more than 40 hours in a workweek. However, Plaintiff and other aggrieved employees were
9 not properly paid at the correct overtime rate for all overtime hours worked due to Defendant's
10 uniform failure to include all forms of compensation/remuneration, including, but not limited to,
11 commissions, incentives, non-discretionary bonuses, and all other forms of remuneration in
12 calculating the "regular rate of pay" for purposes of overtime compensation.

13 20. Under the California Labor Code (as well as the FLSA), courts have consistently held
14 that regularly paid non-discretionary bonuses (and other forms of pay) must be included in
15 determining an employee's "regular rate of pay" for purposes of calculating overtime. (See *Haber v.*
16 *The Americana Corp.* 378 F. 2d 854, 855-856 (9th Cir. 1967) [holding that regularly paid efficiency
17 bonuses must be included in calculating the "regular rate"]; *Wang v. Chinese Daily News, Inc.* 435 F.
18 Supp. 2d 1042, 1055-1057 (C.D. Cal. 2006) [granting summary judgment to Plaintiff under California
19 and federal law on the grounds, that Defendants improperly calculated overtime by excluding annual
20 bonuses paid to employees from the "regular rate of compensation"]; see *Walling v. Youngerman-*
21 *Reynolds Hardwood Co.* (1945) 65 S.Ct. 1242, 1245. ("The regular rate by its very nature must reflect
22 all payments which the parties have agreed shall be received regularly during the workweek,
23 exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact.
24 Once the parties have decided upon the amount of wages and the mode of payment, the determination
25 of the regular rate becomes a matter of mathematical computation, the result of which is unaffected
26 by any designation of a contrary 'regular rate' in the contracts."); see also 29 CFR §§ 778.110
27 ("production bonus") and 778.111 ("piece-rate").)

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1 21. Labor Code § 510 requires an employer to compensate an employee who works more
2 than eight (8.0) hours in one workday, forty (40) hours in a workweek, and for the first eight (8.0)
3 hours worked on the seventh consecutive day, no less than one and one-half times (1 1/2) the regular
4 rate of pay. In addition, Labor Code § 510 obligates employers to compensate employees at no less
5 than twice the regular rate of pay when an employee works more than twelve (12) hours in a workday
6 or more than eight (8.0) hours on the seventh consecutive day of work. Pursuant to Section 3 of the
7 applicable Wage Orders, aggrieved employees shall not be employed more than eight (8.0) hours in
8 any workday or more than 40.0 hours in any workweek, unless the employee receives one and one-
9 half (1 1/2) times such employee's regular rate of pay for all hours, worked over 40 hours in the
10 workweek.

11 22. By their policy of requiring Plaintiff and the other aggrieved employees to work in
12 excess of eight (8.0) hours in a workday and/or forty (40.0) hours in a workweek without
13 compensating them at the lawful rate of one-half (1 1/2) their regular rate of pay, Defendant willfully
14 violated the provisions of Labor Code § 510 and the applicable Wage Orders.

15 23. Accordingly, through PAGA and to the extent permitted by law, Plaintiff and other
16 aggrieved employees are entitled to recover penalties for violations of Labor Code §§ 204, 210, 510,
17 1194, 1197.1, 1199 1197.1 under Labor Code § 1197.1, 1199, or Labor Code § 2699(f)(2), and for
18 attorneys' fees and costs pursuant to Labor Code § 2699(g)(1).

19 24. Furthermore, at all relevant times, Defendant also failed in its obligation to provide
20 Plaintiff and other aggrieved employees the legally required paid sick days at the legal rate pursuant
21 to Labor Code §§ 246(a),(b), which requires that "[a]n employee who, on or after July 1, 2015, works
22 in California for the same employer for 30 or more days within a year from the commencement of
23 employment is entitled to paid sick days. . . at the rate of not less than one hour per every 30 hours
24 worked, beginning at the commencement of employment." Labor Code § 246(l)(1) provides that paid
25 sick time for aggrieved employees must be "calculated in the same manner as the regular rate of pay
26 for the workweek in which the employee uses paid sick time, whether or not the employee actually
27 works overtime in that workweek."

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1 25. Additionally, Labor Code § 246(l)(2) states that the paid sick time must be “calculated
2 by dividing the employee’s total wages, not including overtime premium pay, by the employee’s total
3 hours worked in the full pay periods of the prior 90 days of employment.” Finally, Labor Code §246(i)
4 requires employers to “provide an employee with written notice that sets forth the amount of paid
5 sick leave available, or paid time off leave an employer provides in lieu of sick leave, for use on either
6 the employee’s itemized wage statement described in Section 226 or in a separate writing provided
7 on the designated pay date with the employee’s payment of wages.”

8 26. Here, at all relevant times, Defendant failed in its obligation to provide Plaintiff and
9 other aggrieved employees the legally required paid sick days at the legal rate, including all forms of
10 compensation, pursuant to Labor Code §§ 246(a), (b). As such, Defendant paid sick time below the
11 “regular rate of pay” as required by Labor Code §§ 246(l) (1-2). Based on the foregoing Labor Code
12 violations, Plaintiff seeks all civil and statutory penalties available and applicable under Labor Code
13 § 2699(f)(2), and for attorneys’ fees and costs pursuant to Labor Code § 2699(g)(1).

14 27. Moreover, at all relevant times, Plaintiff and other aggrieved employees were denied
15 compliant and timely 30-minute off-duty meal periods as mandated by California law. Due to
16 Defendant’s uniform meal period policies/practices, operational requirements, and work demands,
17 Plaintiff and other aggrieved employees often could not take timely and uninterrupted net 30-minute
18 first meal periods before the end of the fifth hour of work. Further, when Plaintiff and other aggrieved
19 employees worked more than 10.0 hours in a shift, they were not allowed and permitted to take a
20 mandated second meal period before the end of the tenth hour of work in violation of the Labor Code
21 and applicable Wage Orders. Indeed, Plaintiff’s and other aggrieved employees’ meal periods were
22 often interrupted and lasted fewer than 30 minutes due to Defendant’s meal period policies/practices,
23 operational requirements, and work demands. In addition, Defendant’s managers/supervisors had the
24 unlawful policy/ practice of making Plaintiff and other aggrieved employees remain working during
25 meal periods despite being clocked out due to the work demands of the job.

26 28. In addition, for each missed or non-compliant meal period, Defendant failed and
27 continues to fail to maintain a mechanism by which aggrieved employees were paid meal period
28 premiums at the “regular rate of pay” pursuant to *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11

1 5th 858 and Labor Code § 226.7.

2 29. Accordingly, due to Defendant's uniform meal period policies/practices, aggrieved
3 employees were also regularly denied legally compliant meal periods in violation of Labor Code §§
4 226.7, 510, 516, and applicable Wage Orders, and would be entitled to penalties under Labor Code §
5 2698 *et seq.*

6 30. Next, at all relevant times, Plaintiff and other aggrieved employees were not provided
7 with all uninterrupted 10-minute rest periods for every four hours worked, or major fraction thereof
8 due to Defendant's uniform rest period policies/practices, operational requirements and work
9 demands. As a result, other aggrieved employees were and are often unable to take a net 10-minute
10 duty-free rest period for every major fraction of four hours worked. This includes a second rest period
11 for shifts in excess of six hours and a third rest period for shifts in excess of 10 hours in a workday.
12 In addition, Plaintiff's and other aggrieved employees' rest periods were often cut short or interrupted
13 for work reasons.

14 31. By not relieving all aggrieved employees of all duties during rest periods, Defendant
15 failed to provide legally compliant rest periods. See *Augustus v. ABM Security Services, Inc.* (2016)
16 2 Cal. 5th 257, 269 [concluding that "during rest periods employers must relieve employees of all
17 duties and relinquish control over how employees spend their time."] (Emphasis added). In *Augustus*,
18 the California Supreme Court expressly rejected the employer's assertion that it could provide an on-
19 duty rest period to employees who worked as security guards and further explained: "that employers
20 [must] relinquish any control over how employees spend their break time and relieve their employees
21 of all duties." *Id.* at 273. Each time aggrieved employees could not take a compliant rest period,
22 Defendant failed and continued to fail to adequately pay rest period premium payments at the "regular
23 rate of pay" as required by Labor Code § 226.7.

24 32. Accordingly, due to Defendant's uniform rest period policies/practices, aggrieved
25 employees were regularly denied legally compliant rest breaks in violation of Labor Code §§ 226.7,
26 512, and applicable Wage Orders, and would be entitled to penalties under Labor Code § 2698 *et seq.*

27 33. As a result of Defendant's failure to pay Plaintiff and other aggrieved employees for
28 all hours they were subject to the control of Defendant, including all overtime, sick pay wages, and

1 Defendant's failure to adequately pay for all overtime and meal and rest period premiums at the
2 "regular rate of pay," Defendant issued wage statements which failed to identify the gross wages
3 earned accurately, the total hours worked, the net wages earned, and the correct corresponding
4 number of hours worked at each hourly rate, in violation of Labor Code § 226(a)(1, 2, 5, and 9).

5 34. Labor Code § 226.3 provides that "[a]ny employer who violates subdivision (a) of
6 Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per
7 employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for
8 each violation in a subsequent citation, for which the employer fails to provide the employee a wage
9 deduction statement or fails to keep the required in subdivision (a) of Section 226."

10 35. Thus, for the violations of Labor Code section 226 described above, Plaintiff and other
11 aggrieved employees may also recover Labor Code § 226.3 penalties for Defendant's violations of
12 Labor Code § 226(a). Consequently, because Defendant failed to comply with Labor Code § 226(a),
13 Plaintiff and other aggrieved employees would be entitled to recover penalties under Labor Code §§
14 226(e) and/or 2698 *et seq.*

15 36. Moreover, because Defendant failed to pay all overtime, sick pay wages, and meal and
16 rest period premiums at the "regular rate of pay," Defendant also failed and continues to fail to pay
17 the aggrieved employees all wages owed at their time of separation from employment in violation of
18 Labor Code §§ 201-203. Thus, aggrieved employees would be entitled to recover penalties under
19 Labor Code §§ 201-203 and/or 2698 *et seq.*

20 37. Finally, at all relevant times, Defendant required Plaintiff and other aggrieved
21 employees to incur necessary business expenses associated with using their personal cell phones and
22 home internet for work-related purposes but did not reimburse aggrieved employees adequately for
23 these necessary expenditures in violation of Labor Code §§ 2802-2804. *See Cochran v. Schwan's*
24 *Home Service, Inc.*, (2014) 228 Cal.App.4th 1137, 1144 ["[i]f an employee is required to make work-
25 related calls on a personal cell phone, then he or she is incurring an expense for the purposes of
26 section 2802. It does not matter whether the phone bill is paid for by a third person or at all...To show
27 liability under section 2802, an employee need only show that he or she was required to use a personal
28 cell phone to make work-related calls, and he or she was not reimbursed"]. Here, Defendant uniformly

1 failed to reimburse aggrieved employees for a reasonable portion of cell phone bill and other
2 necessary costs incurred in the discharge of their duties for those aggrieved employees. Accordingly,
3 due to Defendant's uniform failure to adequately reimburse for necessary business expenditures in
4 violation of Labor Code §§ 2802-2804 and applicable Wage Orders. Plaintiff and other aggrieved
5 employees would be entitled to civil penalties under Labor Code § 2698 *et seq.*

6 **FIRST CAUSE OF ACTION**

7 **PRIVATE ATTORNEYS GENERAL ACT**

8 **(Plaintiff and Similarly Aggrieved Employees Against All Defendants)**

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

11 39. Defendant has committed several Labor Code violations against Plaintiff and other
12 similarly aggrieved employees. Plaintiff, and "aggrieved employee" within the meaning of Labor
13 Code § 2698 *et seq.*, acting on behalf of the State of California, brings this representative action
14 against Defendant to recover the civil penalties due to Plaintiff, other similarly aggrieved employees,
15 and the State of California according to proof pursuant to Labor Code § 2699 (a) and (f) including,
16 but not limited to (1) \$100 for each initial violation and \$200 for each subsequent violation per
17 employee per pay period for those violations of the Labor Code for which no civil penalty is
18 specifically provided based on the following Labor Code violations:

19 a) Defendant's failure to pay all overtime wages at the "regular rate of pay" because
20 Defendant failed to include all forms of compensation, including, but not limited to, shift differentials,
21 non-discretionary bonuses, incentive pay, and other forms of remuneration;

22 b) Defendant's failure to pay all sick pay at the "regular rate of pay";

23 c) Defendant's failure to allow and permit legally compliant meal periods or compensation
24 at the "regular rate of pay" in lieu thereof;

25 d) Defendant's failure to allow and permit legally compliant rest periods or compensation
26 at the "regular rate of pay" in lieu thereof;

27 e) Defendant's failure to furnish legally compliant wage statements pursuant to Labor
28 Code § 226(a);

1 f) Defendant's failure to timely pay final wages to aggrieved employees at the time of
2 separation from employment was unlawful; and

3 g) Defendant's failure to reimburse aggrieved employees for all necessary business
4 expenses in violation of Labor Code §§ 2802-2804.

5 40. On or about July 26, 2023, Plaintiff notified Defendant Surf City Auto Group, Inc. via
6 certified mail and the California Labor and Workforce Development Agency ("LWDA") via its
7 website of Defendant's violations of the California Labor Code § 2698 *et. seq.* with respect to
8 violations of the California Labor Code identified in Paragraph 40 (a)-(i). Now that sixty-five days
9 (65) have passed from Plaintiff notifying Defendant of these violations, Plaintiff has exhausted his
10 administrative requirements for bringing a claim under the Private Attorneys General Act with respect
11 to these violations.

12 41. Plaintiff was compelled to retain counsel to file this court action to protect his interests
13 and the interests of other similarly aggrieved employees and to assess and collect the civil penalties
14 owed by Defendant. Plaintiff has, therefore, incurred attorneys' fees and costs, which he is entitled
15 to receive under California Labor Code § 2699.

16 **PRAYER FOR RELIEF**

17 **WHEREFORE**, Plaintiff prays for judgment on behalf of the State of California against
18 Defendant, as follows:

19 1. Upon the First Cause of Action, for civil penalties due to similarly aggrieved
20 employees, and the State of California according to proof pursuant to Labor Code § 2699 (a) and (f)
21 including, but not limited to: (1) \$100 for each initial violation and \$200 for each subsequent violation
22 per employee per pay period for those violations of the Labor Code for which no civil penalty is
23 specifically provided under the Labor Code;

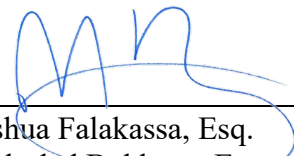
24 2. For attorneys' fees and costs as provided by Labor Code § 2698 *et seq.*, and Code
25 of Civil Procedure §1021.5; and

26 3. For such other relief that the Court may deem just and proper.
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Dated: April 18, 2024

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