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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF PLACER**
11

12 JESSE WHISTLER, an individual, on behalf of
13 the State of California as a private attorney
14 general, and on behalf of all others similarly
situated,

15 Plaintiff,

16 v.

17 FUTURE AUTOMOTIVE GROUP; FUTURE
18 FORD, INC.; FUTURE FORD OF
19 CONCORD, LLC; FUTURE AUTOMOTIVE
20 CONCORD, INC.; FUTURE NISSAN OF
21 FOLSOM, INC.; FUTURE AUTOMOTIVE
22 FAIRFIELD, INC.; FUTURE NISSAN, INC.;
23 FUTURE AUTOMOTIVE OF YUBA CITY,
INC.; FUTURE CHEVROLET OF
24 SACRAMENTO, INC.; and DOES 1 through
50, inclusive,

Defendants.

Case No.: S-CV-0052007

**REPRESENTATIVE ACTION
COMPLAINT FOR CIVIL PENALTIES
PURSUANT TO THE PRIVATE
ATTORNEYS GENERAL ACT OF 2004,
LAB. CODE, §§ 2699, ET SEQ.**

1 Plaintiff Jesse Whistler (“Plaintiff”), individually on behalf of the State of California as an
2 “aggrieved employee” acting as a private attorney general under California’s Private Attorneys
3 General Act of 2004, Labor Code sections 2698, *et seq.* (“PAGA”) on behalf of all others similarly
4 situated, for his Representative Action Complaint against Defendants Future Automotive Group,
5 Future Ford, Inc., Future Ford of Concord, LLC, Future Automotive Concord, Inc., Future Nissan
6 of Folsom, Inc., Future Automotive Fairfield, Inc., Future Nissan, Inc., Future Automotive of Yuba
7 City, Inc., Future Chevrolet of Sacramento, Inc. (collectively, “Future Automotive Group”) and
8 DOES 1 through 50, inclusive (collectively with Future Automotive Group, “Defendants”), alleges
9 as follows:

10 **INTRODUCTION**

11 1. This is a representative action brought pursuant to the PAGA, Labor Code sections
12 2698, *et seq.*, by Plaintiff, on behalf of the State of California, and on behalf of the aggrieved
13 employees, identified as all individuals who are or were employed as hourly, non-exempt employees
14 by Defendants, and/or their predecessor or merged entities, within the State California during the
15 longest applicable limitations period (the “Aggrieved Employees”),¹ seeking penalties for
16 Defendants’ violations of Labor Code sections 201, 202, 203, 204, 210, 221, 223, 224, 225.5, 226,
17 226.3, 226.7, 510, 512, 558, 558.1, 1174, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2751,
18 2800, and 2802, and Industrial Welfare Commission (“IWC”) Wage Order Nos. 4-2001 and 7-
19 2001.²

20 2. Plaintiff and all Aggrieved Employees are ‘aggrieved employees’ within the meaning
21 of Labor Code sections 2699, *et seq.*

22 **JURISDICTION AND VENUE**

23 3. This Court has subject matter jurisdiction over this action pursuant to article VI,
24 section 10 of the California Constitution and Code of Civil Procedure section 410.10, by virtue of

25 ¹ Plaintiff reserves the right to amend or modify the definition of Aggrieved Employees identified
26 herein with greater specificity, and/or amend or modify into further divisions of subgroups, or by
27 limitation of issues, as necessary.

28 ² Upon information and belief, Plaintiff alleges that IWC Wage Order Nos. 4-2001 and 7-2001 are applicable.
However, Plaintiff reserves the right to amend and/or allege any other applicable IWC Wage Orders that may
be deemed relevant after discovery.

1 the fact that this is a civil action in which the matter in controversy, exclusive of interest, exceeds
2 \$25,000, and because each cause of action asserted herein arises under the laws of the State of
3 California or is subject to adjudication in the courts of the State of California.

4 4. This Court has personal jurisdiction over Defendants because Defendants have
5 caused injuries in the County of Placer and the State of California through their acts, and by their
6 violation of the California Labor Code and California state common law. Defendants transact at
7 least \$500,000 dollars of business within the State of California.

8 5. Venue is proper in this judicial district pursuant to Code of Civil Procedure section
9 395, as Defendants operate and do business within the County of Placer, State of California.

10 **THE PARTIES**

11 6. Plaintiff is a citizen of the State of California, and worked for Defendants during the
12 statutory time period applicable to his cause of action for penalties under the PAGA for the various
13 Labor Code violations alleged herein (the "PAGA Period").

14 7. Plaintiff represents the State of California as well as the Aggrieved Employees.

15 8. Plaintiff and the Aggrieved Employees, at all times pertinent hereto, are or were
16 employees of Defendants during the PAGA Period.

17 9. Upon information and belief, Plaintiff and the Aggrieved Employees are covered by
18 IWC Wage Order Nos. 4-2001 and 7-2001.

19 10. Plaintiff is informed and believes, and based thereon alleges, that Defendants are
20 registered to do business in the State of California.

21 11. During the relevant period, Defendants employed Plaintiff and Aggrieved
22 Employees within the State of California.

23 12. The true names and capacities, whether individual, corporate, associate, or otherwise,
24 of the defendants sued herein as DOES 1 through 50, inclusive, are currently unknown to Plaintiff,
25 who therefore sues those defendants by such fictitious names under Code of Civil Procedure section
26 474. Plaintiff is informed and believes, and on that basis alleges, that each of DOE defendants is
27 legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave
28

1 of court to amend this Complaint to reflect the true names and capacities of the DOE defendants
2 when such identities become known.

3 13. Plaintiff is informed and believes, and on that basis alleges, that each Defendant
4 herein acted in all respects pertinent to this action as the agent of each of the other Defendants, and
5 carried out a joint scheme, business plan, or policy in all respects pertinent hereto, and the acts of
6 each Defendant are legally attributable to each of the other Defendants. Defendants are joint
7 employers in that they employed Plaintiff and Aggrieved Employees, at the same time and were
8 operating as a joint enterprise and single entity during the relevant time period.

9 14. California courts have recognized that the definition of “employer” for purposes of
10 enforcement of the California Labor Code goes beyond the concept of traditional employment to
11 reach irregular working arrangements for the purpose of preventing evasion and subterfuge of
12 California’s labor laws. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 65.) As such, anyone who directly
13 or indirectly, or through an agent or any other person, engages, suffers, or permits any person to
14 work or exercises control over the wages, hours, or working conditions of any person may be liable
15 for violations of the California Labor Code as to that person.

16 15. California law also permits and recognizes the piercing of a corporate veil between
17 sister companies under the single enterprise rule. (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 155;
18 *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 512.) The single enterprise rule applies
19 where “there are two or more personalities, there is but one enterprise; and that this enterprise has
20 been so handled that it should respond, as a whole, for the debts of certain component elements of
21 it.” (*Hasso, supra*, 227 Cal.App.4th at p. 155; *Greenspan, supra*, 191 Cal.App.4th at p. 512.)

22 16. At all times throughout their employment, Plaintiff and Aggrieved Employees were
23 regularly and consistently subject to the common policies and/or practices utilized by Defendants.

24 17. Accordingly, all Defendants engaged, suffered, and permitted Plaintiff and
25 Aggrieved Employees to perform services from which they benefitted. Moreover, the
26 aforementioned entities had the right to exercise control over the wages, hours, and/or working
27 conditions over Plaintiff and Aggrieved Employees at all relevant times herein, so as to be
28 considered joint employers.

FACTUAL BACKGROUND

18. Plaintiff was employed by Defendants in California as a non-exempt employee.

19. As alleged above, Plaintiff and the Aggrieved Employees are or were, at all times relevant hereto, employed by the Defendants within the State of California.

20. California law requires employers to pay non-exempt employees for all hours worked at the legal rate. Hours worked, as defined by the IWC, includes all time an employee is subject to the employer's control and all time the employee is suffered or permitted to work, regardless of whether the employee is required to work or not. (IWC Wage Order Nos. 4-2001 and 7-2001, § 2.) Defendants did not compensate, and in some situations, undercompensated Aggrieved Employees for all hours worked.

21. Plaintiff alleges that Defendants did not fully compensate Plaintiff and Aggrieved Employees (who worked in non-exempt positions), because they regularly were required to perform pre- and post-shift activities off the clock, as well as during meal periods and rest breaks, and/or were underpaid due to miscalculated premium and overtime payments.

22. Here, Plaintiff and the Aggrieved Employees were required to work off the clock (as alleged in paragraph 21 above), and did not receive the minimum wage for each hour worked. California minimum wage standards apply to each hour employees work for which they are not paid.

23. Due to Defendants' top-down operational pressures, coupled with their failure to schedule adequate staffing, Plaintiff and Aggrieved Employees were compelled to perform pre-shift and post-shift duties off the clock, as well as during meal periods, resulting in uncompensated regular and overtime wages. Moreover, because Plaintiff and Aggrieved Employees often worked full-time schedules, such off-the-clock work resulted in unpaid overtime; and for these off-the-clock hours, not only did they not receive compensation at their straight time rate of pay, they received no payment at all.

24. Defendants' practice of failing to compensate for all hours worked by Plaintiff and Aggrieved Employees contravenes California's policies. (See Lab. Code, § 90.5, subd. (a).)

1 Plaintiff's claim is bolstered by *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, which mandates
2 that all hours worked by employees must be paid, and that any rounding policy must be fair.

3 In light of the Wage Order's remedial purposes requiring a liberal construction, its
4 directive to compensate employees for all time worked, the evident priority it
5 accorded that mandate notwithstanding customary employment arrangements, and
6 its concern with small amounts of time, ***we conclude that the de minimis doctrine
has no application*** under the circumstances presented here. ***An employer that
requires its employee to work minutes off the clock on a regular basis or as a
regular feature of its job may not evade the obligation to compensate that
employee for that time by invoking the de minimis doctrine.***

7
8 (*Id.* at pp. 847 [emphasis added].).

9 25. Additionally, throughout the applicable period, Defendants did not fully compensate
10 Plaintiff and Aggrieved Employees for "non-productive" time (i.e., non-sales activity). Non-sales
11 activity is compensable time. (*See Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal.App.5th 98;
12 *Balasanyan v. Nordstrom* (S.D. Cal. 2012) 913 F.Supp.2d 1001.)

13 26. Employees should be separately compensated for rest periods in weeks when they
14 are paid on a commission basis. *Vaquero, supra*, 9 Cal.App.5th 98. Plaintiff and Aggrieved
15 Employees paid, in whole or part, on a commission basis are owed unpaid wages for rest periods
16 for each workday in which they worked more than 3.5 hours, given Defendants' failure to
17 compensate Plaintiff and Aggrieved Employees separately for rest periods.

18 27. Defendants also engaged in unlawful deductions from wages in the form of purported
19 corrective measures and/or offsets. Specifically, after having already paid Plaintiff and Aggrieved
20 Employees certain monies as earned wages that were purportedly in error, Defendants without
21 written authorization, consent, or lawful purpose, made subsequent deductions from employee
22 wages in violation of Labor Code sections 221 and 224. There have been several court decisions
23 that significantly restrict an employer's ability to take an offset against an employee's wages. (*See*
24 *Barnhill v. Sanders* (1981) 125 Cal.App.3d 1 [Balloon payment on separation of employment to
25 repay employee's debt to employer is an unlawful deduction even where the employee authorized
26 such payment in writing]; *CSEA v. State of California* (1988) 198 Cal.App.3d 374 [Unlawful to
27 deduct from current payroll for past salary advances that were in error]; *Hudgins v. Nieman Marcus*
28 (1995) 34 Cal.App.4th 1109 [Deductions for unidentified returns from commission sales

1 unlawful.].) Thus, Defendants’ unilateral and self-help deductions from employee wages were
2 improper and unlawful.

3 28. During the relevant period, Defendants have had a policy and/or practice of failing
4 to pay overtime wages to Plaintiff and Aggrieved Employees for all overtime hours they worked.
5 The work times of Plaintiff and Aggrieved Employees have been, and continue to be, greater than
6 eight (8) hours per day and/or forty (40) hours per week. Yet, because Defendants did not pay
7 Plaintiff and Aggrieved Employees wages for, *inter alia*, hours that were worked off the clock,
8 including work performed during meal periods and pre- and post-shift, as discussed and alleged
9 *infra*, Plaintiff and Aggrieved Employees were deprived wages at overtime premium amounts
10 attributable to overtime hours. Additionally, if there was any overtime paid to Plaintiff and
11 Aggrieved Employees, upon information and belief, Defendants incorrectly calculated the regular
12 rate for purposes of calculating overtime; Defendants failed to include, *inter alia*, non-discretionary
13 forms of pay in the regular rate calculations for Aggrieved Employees, thus depriving them of the
14 full and proper amount of overtime pay.

15 29. Third, Plaintiff and Aggrieved Employees often worked during meal periods, as
16 described further, *infra*. To the extent Defendants interrupted Plaintiff’s and Aggrieved Employees’
17 meal periods by requiring or pressuring them to return to work before completing their thirty (30)
18 minute meal periods, some of the unpaid meal period time constitutes off-the-clock hours resulting
19 in unpaid minimum and overtime wages owed to Plaintiff and Aggrieved Employees.

20 30. Labor Code section 1197 states that employees must be paid at least the minimum
21 wage fixed by the IWC, and any payment of less than the minimum wage is unlawful. Similarly,
22 Labor Code section 1194 entitles “any employee receiving less than the legal minimum wage...to
23 recover in a civil action the unpaid balance of the full amount of this minimum wage.” (Lab. Code.,
24 § 1194, subd. (a).) The applicable IWC Wage Order(s) also obligate employers to pay each
25 employee minimum wages for all hours worked.

26 31. These minimum wage standards apply to each hour employees worked for which
27 they were not paid. Therefore, an employer’s failure to pay for any particular hour of time worked
28 by an employee is unlawful, even if averaging an employee’s total pay over all hours worked, paid

1 or not, results in an average hourly wage above minimum wage. (*Armenta v. Osmose, Inc.* (2005)
2 135 Cal.App.4th 314, 324.)

3 32. Labor Code section 1194.2 authorizes employees to recover wages to recover
4 liquidated damages for violations of section 1194. Where an employee is not paid for all hours
5 worked under Labor Code section 1194, the employee may recover minimum wages and liquidated
6 damages for the time for which he or she received no compensation. (*Sillah v. Command Int'l Sec.*
7 *Servs.* (N.D.Cal. 2015) 154 F.Supp.3d 891 [holding that employees suing for failure to pay overtime
8 could recover liquidated damages under section 1194.2 if they also showed they were paid less than
9 minimum wage]; *accord, Andrade v. Arby's Rest. Grp., Inc.* (N.D.Cal. Dec. 12, 2016, No. 15-cv-
10 03175 NC) 2016 U.S. Dist. LEXIS 172319, at *20-21.) Since Defendants failed to provide Plaintiff
11 and Aggrieved Employees with compensation for all hours worked, they are entitled to recover
12 liquidated damages under Labor Code section 1194.2 through the PAGA.

13 33. Labor Code section 1197.1 authorizes employees who are paid less than the
14 minimum wage fixed by an applicable state or local law, or by an order of the commission a civil
15 penalty, restitution of wages, and liquidated damages as follows: (1) for any initial violation that is
16 intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay
17 period for which the employee is underpaid, and (2) for each subsequent violation for the same
18 specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay period
19 for which the employee is underpaid regardless of whether the initial violation is intentionally
20 committed. Accordingly, through PAGA, and to the extent permitted by law, Plaintiff and the
21 Aggrieved Employees are entitled to recovery for violations of Labor Code section 1197.1.

22 34. Because Plaintiff and the Aggrieved Employees worked off the clock as discussed
23 *supra*, they also incurred overtime, which Defendants also failed to pay, and which hours are not
24 reflected in Defendants' time records.

25 35. Labor Code section 510 sets forth the California requirement that employees must
26 be paid overtime as follows:

27 Eight hours of labor constitutes a day's work. Any work in excess of eight hours in
28 one workday and any work in excess of 40 hours in any one workweek and the first

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

7 (Lab. Code, § 510, subd. (a).)

8 36. The IWC Wage Order(s) likewise mirror Labor Code section 510's overtime
9 requirements, and apply here. Moreover, Labor Code section 1198 provides that "[t]he maximum
10 hours of work and the standard conditions of labor fixed by the commission shall be the maximum
11 hours of work and the standard conditions of labor for employees. The employment of any employee
12 for longer hours than those fixed by the order or under conditions of labor prohibited by the order
13 is unlawful."

14 37. In accordance with Labor Code section 1194, Plaintiff and Aggrieved Employees
15 could not agree to work for an amount less than the minimum wage and overtime compensation
16 required by state law. Thus, Plaintiff also seeks penalties on behalf of himself and the Aggrieved
17 Employees pursuant to Labor Code section 1199.

18 38. By their common policy of requiring Plaintiff and Aggrieved Employees to work in
19 excess of eight (8) hours in a workday and/or forty (40) hours in a workweek without compensating
20 them at the rate equal to one and one-half (1½) of their regular rate of pay, Defendants willfully
21 violated the provisions of Labor Code sections 510, 1194, and 1199, as well as IWC Wage Order
22 Nos. 4-2001 and 7-2001. As a result, Plaintiff and the Aggrieved Employees also seek penalties for
23 such violations under the PAGA.

24 39. By failing to pay Plaintiff and Aggrieved Employees for all hours worked and by
25 failing to pay all overtime hours worked at the lawful rates of pay, Defendants willfully and
26 intentionally violated Labor Code section 223. As a result, Plaintiff and the Aggrieved Employees
27 also seek penalties for such violations under the PAGA.

28 40. Pursuant to Labor Code section 225.5, civil penalties may be recovered for violations
of Labor Code section 223 at the rate of one hundred dollars (\$100.00) per employee, per violation,
for each initial violation, and two hundred dollars (\$200.00) per employee, per violation, for each

subsequent—or any willful or intentional—violation of Labor Code section 223, plus 25 percent of the amount of wages unlawfully withheld.

41. Plaintiff also alleges that there are compliance issues *vis-à-vis* meal breaks—some are late, missed, short, or interrupted. Labor Code sections 226.7 and 512, as well as section 11 of IWC Wage Order Nos. 4-2001 and 7-2001, mandate the following for meal breaks: (1) no employer shall employ any person for a work period of more than five (5) hours without a meal break of not less than 30 minutes (*see* IWC Wage Order Nos. 4-2001 and 7-2001, § 11.A), and (2) an employer shall 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. (*See* Lab. Code, § 512.)

42. On February 25, 2021, in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, the California Supreme Court reversed the Fourth Appellate District court’s previous opinion and set forth two clear rules: (1) employers are not permitted to round time records when determining if employees are entitled to meal premium pay, and (2) it is the employer’s burden to show that compliant meal periods were provided to employees if the time records show otherwise.

43. Plaintiff and Aggrieved Employees performed work tasks while off the clock and during their meal periods which were not duty-free. As a result of Defendants’ failure to provide lawful meal periods, Plaintiff and Aggrieved Employees did not receive duty-free meal periods within the first five (5) hours of their work, and did not receive a second duty-free meal period when working shifts of ten (10) hours or more.

44. Defendants violated Labor Code section 512 and the applicable Wage Order(s) by requiring Plaintiff and Aggrieved Employees to work through their meal periods without receiving proper compensation and without entering into legally compliant on-duty meal period agreements. Plaintiff and Aggrieved Employees were required to remain on-call and on the premises during meal periods.

45. In addition to Defendants’ failure to provide timely, duty-free meal breaks, Plaintiff and Aggrieved Employees were also not compensated by Defendants with one (1) hour’s worth of pay at their regular rate of compensation for each non-compliant meal break, in accordance with Code section 226.7. (*See Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858.)

1 46. Furthermore, Defendants failed to provide Plaintiff and the Aggrieved Employees
2 with compensated, duty-free rest periods of not less than ten (10) minutes for every major fraction
3 of four hours worked as required by Labor Code section 226.7 and/or IWC Wage Order Nos. 4-
4 2001 and 7-2001.

5 47. Under the applicable IWC Wage Order(s), an employer must authorize and permit
6 each employee to take one ten (10) minute duty free rest period for every major fraction of four
7 hours worked. Labor Code section 226.7 provides that “[a]n employer shall not require an employee
8 to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or
9 applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational
10 Safety and Health Standards Board, or the Division of Occupational Safety and Health.” (Lab. Code,
11 § 226.7, subd. (b).) Thus, the Wage Orders set when and for how long the rest period must take
12 place and the Labor Code establishes that violations of the Wage Orders violate California law, and
13 set forth the premium pay employers must pay their employees when employers fail to provide rest
14 periods. (*See Ferra, supra*, 11 Cal.5th 858.)

15 48. The California Supreme Court explained that, in the context of rest breaks, employer
16 liability attaches from adopting an unlawful policy:

17 An employer is required to authorize and permit the amount of rest break time called
18 for under the wage order for its industry. If it does not - if, for example, it adopts a
19 uniform policy authorizing and permitting only one rest break for employees working
a seven-hour shift when two are required - ***it has violated the wage order and is***
liable.

20 (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1005.)

21 49. Since Defendants did not offer Plaintiff and the Aggrieved Employees the
22 opportunity to receive compliant off-duty rest periods, “the court may not conclude employees
23 voluntarily chose to skip . . . breaks.” (*Alberts v. Aurora Behavioral Health Care* (2015) 241
24 Cal.App.4th 388, 410 [“[i]f an employer fails to provide legally compliant meal or rest breaks, the
25 court may not conclude employees voluntarily chose to skip those breaks.”]; accord, *Brinker Rest.*
26 *Corp., supra*, 53 Cal.4th at p. 1033 [“No issue of waiver ever arises for a rest break that was required
27 by law but never authorized; if a break is not authorized, an employee has no opportunity to decline
28 to take it.”].)

1 50. Here, Defendants did not permit Plaintiff and Aggrieved Employees to leave the
2 premises during rest periods, as required by Labor Code section 226.7 and IWC Wage Order Nos.
3 4-2001 and 7-2001. Specifically, Defendants did not have a legally compliant rest period policy in
4 place that would permit and make available duty-free rest breaks, allowed to be taken off the
5 premises, whereby Defendant would relinquish control over its employees during the applicable
6 period.

7 51. Plaintiff and Aggrieved Employees were unlawfully prohibited from leaving the
8 premises during their shifts. Plaintiff and Aggrieved Employees were required to remain available
9 and on premises, with their cell phones turned on, to perform work tasks even during their meal or
10 rest breaks.

11 52. As a result, Defendants retained control over Plaintiff and the Aggrieved Employees
12 during their rest periods. (*See Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 269
13 [concluding that “during rest periods employers must relieve employees of all duties and relinquish
14 control over how employees spend their time.”].) In *Augustus*, the court expressly rejected the
15 employer’s assertion that it could provide an on-duty rest period to employees who worked as
16 security guards and further explained, “that employers [must] relinquish any control over how
17 employees spend their break time, and relieve their employees of all duties.” (*Id.* at p. 273.) Thus,
18 Defendants prevented Plaintiff and Aggrieved Employees from taking duty-free rest periods as
19 mandated by law by not permitting them to leave the premises and by requiring them to remain on
20 call.

21 53. In addition to failing to authorize and permit compliant rest breaks, Plaintiff and
22 Aggrieved Employees were not compensated with one (1) hour’s worth of pay at their regular rate
23 of compensation for each non-compliant meal break, in violation of Labor Code section 226.7. (*See*
24 *Ferra, supra*, 11 Cal.5th 858.)

25 54. As to Plaintiff and Aggrieved Employees, Defendants also failed to provide accurate
26 itemized wage statements in accordance with Labor Code section 226. Labor Code section 226
27 obligates employers, semi-monthly or at the time of each payment to furnish an itemized wage
28 statement in writing showing:

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

(Lab. Code., § 226.7, subd. (a).)

55. Due to Defendants' failure to pay Plaintiff and Aggrieved Employees minimum and overtime wages for all hours worked, failure to provide lawful meal and rest breaks and pay all premiums owed thereon, and failure to reimburse necessarily incurred business expenses, the wage statements issued by Defendants do not indicate the correct amount of gross wages earned, total hours worked, all deductions, correct amount of net wages earned, or the applicable and/or correct hourly rates in effect during each pay period and the corresponding number of hours worked at each hourly rate in violation of Labor Code section 226, subdivision (a).

56. Thus, Defendants have violated Labor Code section 226, subdivision (a), with respect to Plaintiff and all Aggrieved Employees.

57. As a result of Defendants' violation of Labor Code section 226, subdivision (a), Plaintiff and Aggrieved Employees suffered injury because, among other things: (a) the violations kept them from readily determining the amounts of wages actually owed to them by Defendants; (b) the violations required Plaintiff and Aggrieved Employees to perform their own accounting to determine the amounts owed to them, which would have been unnecessary if the wage statements contained the accurate and required information; and (c) the wage statements inaccurately understated the wages, hours, and wage rates to which they were entitled, which also contributed to the difficulties in calculating proper amounts owed by Defendants as noted above.

58. In addition to violating Labor Code section 226, subdivision (a), Defendants also knowingly and intentionally failed to provide Plaintiff and the Aggrieved Employees with accurate itemized wage statements in violation of Labor Code section 226, subdivision (e). Defendants undeniably knew that they were not providing Plaintiff and the other Aggrieved Employees with

1 wage statements that complied with California law. (*See Garnett v. ADT LLC* (E.D.Cal. Oct. 6,
2 2015) 139 F.Supp. 1121, 1131 [finding that the defendant knowingly and intentionally violated
3 Labor Code section 226 because the “[d]efendant knew that it was not providing total hours worked
4 to plaintiff or other employees paid on commission” even though it believed that employees paid
5 solely on commission or commission and salary “are exempt and therefore we do not record hours
6 on a wage statement.”].)

7 59. Plaintiff and the Aggrieved Employees will prevail on their claim for PAGA
8 penalties under Labor Code section 226, subdivision (a). (*See Lopez v. Friant & Assocs., LLC* (2017)
9 15 Cal.App.4th 773, 788 [holding “a plaintiff seeking civil penalties under PAGA for a violation of
10 Labor Code section 226(a) does not have to satisfy the ‘injury’ and ‘knowing and intentional’
11 requirements of section 226(e)(1).”]; *Willner v. Manpower Inc.* (N.D.Cal. 2014) 35 F.Supp.3d 1116,
12 1136 [To obtain judgment on a PAGA claim, “all [Plaintiffs] needs to establish is a violation of
13 section 226(a), which she has done, as discussed above.”]; *McKenzie v. Fed Exp. Corp.* (C.D.Cal.
14 2011) 765 F.Supp.2d 1222, 1232 [holding that “for the purposes of recovering PAGA penalties, one
15 need only prove a violation of Section 226(a), and need not establish a Section 226(e) injury.”];
16 *Aguirre v. Genesis Logistics* (C.D.Cal. July 3, 2013) 2013 U.S. Dist. LEXIS 189815, at *28
17 [“Plaintiffs do not need to establish a Cal. Lab. Code § 226(e) injury to recover penalties under §
18 2699(f) of PAGA.”].)

19 60. Following *Friant*, courts have found that employees can recover separate penalties
20 under PAGA for a defendant’s violations of Labor Code section 226, subdivisions (a) and (e). (*See*,
21 *e.g.*, *Bell v. Home Depot U.S.A.* (E.D.Cal. Dec. 11, 2017) 2017 U.S. Dist. LEXIS 204493, at *5
22 [finding after *Friant* that “[t]o the extent the Court’s Order [granting summary judgment to Home
23 Depot] was ambiguous, the Court now clarifies that it granted summary judgment on Plaintiffs’
24 derivative claim for [PAGA] penalties under section 226(e) . . . the Court’s Order should not be read
25 to grant summary judgment on Plaintiffs’ claim for PAGA penalties based on violation of section
26 226(a).”].)

27 61. Further and in addition to the penalties outlined above, Labor Code section 226.3
28 provides that “[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil

1 penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial
2 violation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation,
3 for which the employer fails to provide the employee a wage deduction statement or fails to keep
4 the required in subdivision (a) of Section 226.” As explained in detail above, Defendants failed to
5 provide Plaintiff and Aggrieved Employees with accurate itemized wage statements.

6 62. Accordingly, Plaintiff and the other Aggrieved Employees may also recover Labor
7 Code section 226.3 penalties for Defendants’ violations of Labor Code section 226, subdivision (a).
8 (*See Finder v. Leprino Foods Co.* (E.D.Cal. Mar. 12, 2015; No. 1:13-CV-2059 AWI-BAM) 2015
9 WL 1137151, at *7 [“the weight of authority counsels that violations of Section 226.3 may be the
10 basis of a PAGA claim.”]; *Pedroza v. PetSmart, Inc.* (C.D.Cal. June 14, 2012, No. ED CV 11-298
11 GHK DTB) 2012 WL 9506073, at *6 [“Lab. Code § 226.3 merely provides that failure to perform
12 actions mandated by § 226(a) may trigger civil penalties.”].)

13 63. Moreover, California Labor sections 1174, subdivision (d), and 1174.5 require an
14 employer to “[k]eep, at a central location in the state or at the plants or establishments at which
15 employees are employed, payroll records showing the hours worked daily by and the wages paid
16 to...employees employed at the respective plants or establishments. These records shall be kept in
17 accordance with rules established for this purpose by the commission, but in any case shall be kept
18 on file for not less than three years.” During the PAGA Period, Defendants failed to keep accurate
19 and complete payroll records showing the actual hours worked daily and the wages earned by
20 Plaintiff and Aggrieved Employees, including earned and unpaid minimum, overtime, and premium
21 wages discussed herein.

22 64. Labor Code section 2802, subdivision (a), provides that an employer must reimburse
23 its employee for all necessary expenditures that the employee incurs in discharging his or her duties.
24 There is a “strong public policy” in favor of indemnifying employees for expenses incurred in the
25 course and scope of their employment. (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937,
26 952.) To further this public policy, reimbursed amounts must be clearly identifiable on the
27 employee’s pay stub. (*Gattuso v. HarteHanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 572.)
28

1 “Necessary” in the context of expense reimbursement means reasonable under the circumstances; it
2 does not mean, as it sometimes does in lay speech, inevitable. (*Id.* at p. 568.)

3 65. Plaintiff and Aggrieved Employees were required to use their personal cell phones
4 for a variety of work activities, including communicating with co-workers and supervisors. Despite
5 being required to use their personal cell phones for business activities, Defendants failed to
6 reimburse Plaintiff and Aggrieved Employees for these necessary business expenses incurred, in
7 violation of Labor Code section 2802. (*See* Lab. Code, § 2802, subd. (a) [“An employer shall
8 indemnify his or her employee for all necessary expenditures or losses incurred by the employee in
9 direct consequence of the discharge of his or her duties.”]; *Cochran v. Schwan’s Home Service, Inc.*
10 (2014) 228 Cal.App.4th 1137.)

11 66. Therefore, because Plaintiff and Aggrieved Employees incurred necessary business
12 expenses in the scope of their employment but were not reimbursed, Defendants are liable under
13 Labor Code section 2802, subdivision (a).

14 67. As a result of Defendants’ failure to pay Plaintiff and Aggrieved Employees for all
15 hours worked (including, but not limited to, failure to capture and pay for all hours worked due to
16 off-the-clock work), failure to provide lawful meal and rest breaks and pay premiums owed thereon,
17 and failure to reimburse necessary business expenses, Defendants violated and continue to violate
18 Labor Code section 203, which provides that “if an employer willfully fails to pay...any wages of
19 an employee who is discharged or who quits, the wages of the employee shall continue as a
20 penalty...” for up to 30 days. (*See Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.)

21 68. Due to Defendants’ faulty pay policies, Plaintiff and those Aggrieved Employees
22 whose employment with Defendants concluded were not compensated for each and every hour
23 worked at the appropriate rate. Defendants have failed to pay all Aggrieved Employees whose sums
24 were certain at the time of termination within seventy-two (72) hours of their resignation and have
25 failed to pay those sums for thirty (30) days thereafter.

26 69. Labor Code section 204 expressly requires employers who pay employees on a
27 weekly, biweekly, or semimonthly basis to pay all wages “not more than seven calendar days
28 following the close of the payroll period.”

70. Due to Defendants' failure to pay Plaintiff and Aggrieved Employees with minimum and overtime wages, along with meal period and rest break premiums and unreimbursed business expenses, as described above, Defendants failed to timely pay employees within seven calendar days following the close of payroll in accordance with Labor Code section 204 on a regular and consistent basis. (*See Parson v. Golden State FC, LLC* (N.D.Cal. May 2, 2016, No. 1 6-cv-00405-JST) 2016 U.S. Dist. LEXIS 58299, at *3-5 [finding after *Ling vs. P.F Chang's China Bistro, Inc.* that a failure to pay rest period premiums can support claims under Labor Code sections 203 and 204].)

FIRST CAUSE OF ACTION

**(For Penalties Pursuant to the PAGA, Lab. Code, §§ 2699, *et seq.*,
for Violations of Lab. Code, §§ 201, 202, 203, 204, 210, 221, 223, 224, 225.5, 226, 226.3, 226.7,
510, 512, 558, 558.1, 1174, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2751, 2800, and
2802, and IWC Wage Order Nos. 4-2001 and 7-2001)**

(By Plaintiff and Aggrieved Employees against All Defendants)

71. Plaintiff, on behalf of himself and all Aggrieved Employees, realleges and incorporates by reference the allegations contained in paragraphs 1-70 above as if fully set forth herein.

72. Based on the above allegations, Defendants violated Labor Code sections 201, 202, 203, 204, 210, 221, 223, 224, 225.5, 226, 226.3, 226.7, 510, 512, 558, 558.1, 1174, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2751, 2800, and 2802, and IWC Wage Order Nos. 4-2001 and 7-2001.

73. Under Labor Code sections 2699(f)(2) and 2699.5, Plaintiff and Aggrieved Employees are entitled to penalties in an amount to be shown at the time of trial subject to the following formula:

\$100 for the initial violation per employee per pay period; and

\$200 for each subsequent violation per employee per pay period.

These penalties shall be allocated seventy-five percent (75%) to the Labor and Workforce Development Agency (LWDA) and twenty-five percent (25%) to Aggrieved Employees.

74. These penalties may be stacked separately for each of Defendants’ violations of the California Labor Code. (*See, e.g., Hernandez v. Towne Park, Ltd.* (C.D.Cal. June 22, 2012, No. CV 12-02972 MMM (JCGx)) 2012 U.S. Dist. LEXIS 86975, at *59 fn. 77 [holding that although the plaintiffs did not seek stacked PAGA penalties, that “PAGA penalties can be ‘stacked,’ i.e., multiple PAGA penalties can be assessed for the same pay period for different Labor Code violations.”]; *Friant, supra*, 15 Cal.App.5th at p. 778 [holding “a plaintiff seeking civil penalties under PAGA for a violation of Labor Code section 226(a) does not have to satisfy the ‘injury’ and ‘knowing and intentional’ requirements of section 226(e)(1)” and acknowledging that a plaintiff could recover separately under PAGA for violations of Labor Code sections 226, subdivision (a) and 226, subdivision (e)]; *accord, Schiller v. David’s Bridal, Inc.* (E.D.Cal. July 14, 2010, No. 1:10-cv-00616 AWI SKO) 2010 U.S. Dist. LEXIS 81128, at *17; *Pulera v. F & B, Inc.* (E.D.Cal. Aug. 19, 2008, No. 2:08-cv-00275-MCE-DAD) 2008 U.S. Dist. LEXIS 72659, at * 2-3; *Smith v. Brinker Intern, Inc.* (N.D.Cal. May 5, 2010, No. C 10-0213 VRW) 2010 U.S. Dist. LEXIS 54110, at * 2-6.)

75. In addition, to the extent permitted by law, Defendants failed to provide Plaintiff and Aggrieved Employees with accurate itemized wage statements in compliance with Labor Code section 226, subdivision (a). Plaintiff seeks separate PAGA penalties for Defendants’ violations of Labor Code sections 226, subdivision (a) and 226, subdivision (e). (*Friant, supra*, 15 Cal. App. 5th at p. 788; *Bell, supra*, 2017 U.S. Dist. LEXIS 204493, at *5 [finding after *Friant* that “[t]o the extent the Court’s Order [granting summary judgment to Home Depot] was ambiguous, the Court now clarifies that it granted summary judgment on Plaintiffs’ derivative claim for [PAGA] penalties under section 226(e) . . . the Court’s Order should not be read to grant summary judgment on Plaintiffs’ claim for PAGA penalties based on violation of section 226(a).”].) For violations of Labor Code section 226, subdivision (a), Plaintiff seeks the default penalty provided by Labor Code section 226.3. Labor Code section 226.3 provides that “[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the required in subdivision (a) of Section 226.” Accordingly,

1 through PAGA and to the extent permitted by law Plaintiff and the Aggrieved Employees are
2 entitled to recover penalties for violations of Labor Code section 226.3 and seeks default PAGA
3 penalties for each of Defendants' numerous violations of Labor Code section 226, subdivision (e).

4 76. Labor Code section 210 provides that "in addition to, and entirely independent and
5 apart from, any other penalty provided in this article, every person who fails to pay the wages of
6 each employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For
7 any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For each
8 subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each
9 failure to pay each employee, plus 25% of the amount unlawfully withheld." (Lab. Code, § 210,
10 subd. (a).) As a result of the faulty compensation policies and practices, Plaintiff and the Aggrieved
11 Employees are also entitled to recover penalties under Labor Code section 210 through PAGA.

12 77. A civil penalty against Defendants, pursuant to Labor Code section 1197.1,
13 authorizes a civil penalty, restitution of wages, and liquidated damages, in the amount of: "(1) for
14 any initial violation that is intentionally committed, one hundred dollars (\$100) for each underpaid
15 employee for each pay period for which the employee is underpaid . . . [and] (2) [f]or each
16 subsequent violation for the same specific offense, two hundred fifty dollars (\$250) for each
17 underpaid employee for each pay period for which the employee is underpaid regardless of whether
18 the initial violation is intentionally committed" (Lab. Code, § 1197.1, subd. (a).) Accordingly,
19 through PAGA and to the extent permitted by law Plaintiff and the Aggrieved Employees are
20 entitled to recover pursuant to Labor Code section 1197.1.

21 78. Plaintiff has fully and completely exhausted his administrative remedies under
22 PAGA prior to proceeding with this PAGA claim. On September 15, 2023, Plaintiff filed his PAGA
23 Notice online with the LWDA and sent a letter by certified mail to Defendants, setting forth the
24 facts and theories of the violations alleged against Defendants, as prescribed by Labor Code sections
25 2698, *et seq.* As required by the PAGA, Plaintiff submitted the \$75.00 filing fee to the LWDA.
26 Pursuant to Labor Code section 2699.3, subdivision (a)(2)(A), no notice was received by Plaintiff
27 from the LWDA evidencing its intention to investigate within sixty-five (65) calendar days of the
28

1 postmark date of the PAGA notice. Plaintiff is therefore entitled to commence and proceed with a
2 civil action pursuant to Labor Code section 2699.

3 79. Plaintiff was compelled to retain the services of counsel to file this action to protect
4 his interests and those of the Aggrieved Employees, and to assess and collect the wages and penalties
5 owed by Defendants. Plaintiff has thereby incurred attorneys' fees and costs, which he is also
6 entitled to recover under Labor Code section 2699.

7 **RELIEF REQUESTED**

8 **WHEREFORE**, Plaintiff, on behalf of the State of California, prays for judgment against
9 Defendants as follows:

10 1. For penalties and other relief allowable under Labor Code sections 2699, *et seq.*,
11 because of Defendants' violation of Labor Code sections 201, 202, 203, 204, 210, 221, 223, 224,
12 225.5, 226, 226.3, 226.7, 510, 512, 558, 558.1, 1174, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198,
13 1199, 2751, 2800, and 2802, and IWC Wage Order Nos. 4-2001 and 7-2001.

14 2. For civil penalties against Defendants in the amounts of one hundred dollars (\$100)
15 for the initial violation and two hundred dollars (\$200) for each subsequent violation, as specified
16 in section 2699, subdivision (f)(2) of the Labor Code, for each and every pay period of Plaintiff and
17 Aggrieved Employees that occurred during the PAGA Period;

18 3. For civil penalties against Defendants pursuant to Labor Code section 1197.1 for the
19 initial violation that was committed, in the amounts of one hundred dollars (\$100) for each
20 underpaid employee for each pay period for which the employee was underpaid, and for each
21 subsequent violation, two hundred fifty dollars (\$250) for each subsequent violation for each pay
22 period for which the employee was underpaid, for each and every pay period of Plaintiff and
23 Aggrieved Employees that occurred during the PAGA Period;

24 4. For civil penalties against Defendants pursuant to Labor Code section 210 in the
25 amounts of one hundred dollars (\$100) for each initial violation that was committed for each
26 underpaid employee for each pay period for which the employee was underpaid, and for each
27 subsequent violation, two hundred dollars (\$200) for each underpaid employee for each pay period
28

1 for which the employee was underpaid, for each and every pay period of Plaintiff and Aggrieved
2 Employees that occurred during the PAGA Period;

3 5. For civil penalties against Defendants in the amounts of fifty dollars (\$50) for the
4 initial violation and one hundred dollars (\$100) for each subsequent violation by Defendants under
5 Labor Code section 226, subdivision (e) and 2699, subdivision (f), for each and every pay period of
6 Plaintiff and Aggrieved Employees that occurred during the PAGA Period;

7 6. For civil penalties against Defendants in the amounts of two hundred and fifty dollars
8 (\$250) for the initial violation and one thousand dollars (\$1,000) for each subsequent violation by
9 Defendants of Labor Code section 226, subdivision (a), for each and every pay period of Plaintiff
10 and all Aggrieved Employees during the PAGA Period, pursuant to Labor Code sections 226.3 and
11 2699, subdivision (f);

12 7. For an award of reasonable attorney's fees as specified in Labor Code section 2699,
13 subdivision (g), and Code of Civil Procedure section 1021.5;

14 8. For an award of all costs incurred by the undersigned counsel as provided for in
15 Labor Code section 2699, subdivision (g)(1); and

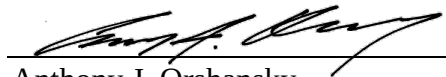
16 9. For all other relief as this Court deems just and proper.

17
18 Dated: January 18, 2024

Respectfully submitted,

COUNSELONE, PC

20
21 By:



Anthony J. Orshansky
Attorneys for Plaintiff and Aggrieved
Employees