

11/12/2024 4:31:16 PM

Clerk of the Superior Court
By M. Guyot ,Deputy Clerk

1 Eric K. Yaeckel [CSB No. 274608]
2 yaeckel@sullivanlawgroupapc.com

3 Ryan T. Kuhn [CSB No. 324538]
4 ryan@sullivanlawgroupapc.com

SULLIVAN & YAECKEL LAW GROUP, APC

2330 Third Avenue

San Diego, California 92101

(619) 702-6760 * (619) 702-6761 FAX

Attorneys for Plaintiff JESUS GUARDIOLA 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

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

Plaintiff,

v.

MOSSY NISSAN CHULA VISTA, a
California Corporation; and DOES 1-10,
inclusive

Defendants

CASE NO. 24CU022002C

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.**

COMES NOW Plaintiff JESUS GUARDIOLA ("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 CHULA VISTA (Referred to herein as "Defendants" or "MOSSY"), was and is a California Corporation doing business throughout the state, including the County of San Diego, State of California. Accordingly, Plaintiff will seek leave of court to amend this complaint to allege their true names and capacities after the same have been ascertained.
4. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible in some manner for the wrongs and damages as herein alleged, and in so acting was functioning as the agent, servant, partner, and employee of the co-defendants, and in doing the actions mentioned below, was acting within the course and scope of his or her authority as such agent, servant, partner, and employee with the permission and consent of the co-defendants. Plaintiff's injuries as herein alleged were proximately caused by said

1 defendants. Wherever it is alleged herein that any act or omission was done or committed by
2 any specially named Defendant or Defendants, Plaintiff intends thereby to allege and does
3 allege that the same act or omission was also done and committed by each and every defendant
4 named as a DOE, both separately and in concert with the named Defendant or Defendants.

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

10 **FACTUAL BACKGROUND**

- 11 6. Plaintiff was employed by Defendants from approximately July 1, 2023, through October 31,
12 2023. Throughout his employment with Defendants, Plaintiff has and continues to perform his
13 job in a capable, and competent manner.
- 14 7. Throughout the term of their employment, Plaintiff and all other aggrieved employees were,
15 and currently are, denied the benefits and protections of the Labor Code due to Defendants'
16 institutionalized pay practices, standard as to all of Defendants' California-based employees.
- 17 8. On February 9, 2024, counsel for Plaintiff prepared and submitted via online filing a letter to
18 the California Labor & Workforce Development Agency ("LWDA"). A copy of the letter was
19 mailed to Defendants, via USPS Certified Mail. The letter contained the specific provisions
20 of the California Labor Code and Business and Professions Code violated by Defendants, as
21 well as the facts and theories in support of Plaintiff's claims. (Please see **Exhibit 1**, a true and
22 correct copy of this letter.)
- 23 9. The statutory time period for the LWDA to investigate and/or respond, and for the employer
24 to respond, has concluded.

25 **REPRESENTATIVE ALLEGATIONS**

- 26 10. As more specifically set forth below, Plaintiff brings this action in a representative capacity
27 on behalf of all current and former aggrieved employees of Defendants. Code Civ. Proc. §
28 2699; *Arias v. Superior Court* (2009) 46 Cal. 4th 969, 980-981. Plaintiff is proceeding in a

1 representative capacity under PAGA only. Plaintiff is not seeking individual relief.
2 Throughout the operative limitations period, Plaintiff and all other aggrieved employees were
3 denied the protections and benefits of the Labor Code due to Defendants' standard practices.
4 Throughout their employment, Plaintiff and all other aggrieved employees were and are denied
5 full and accurate compensation, including overtime compensation, in violation of, *inter alia*,
6 Labor Code sections 510, 1194, and 1197. Plaintiff and the other aggrieved employees were
7 and are denied Meal and Rest Periods and Meal and Rest Period payments, in violation of,
8 *inter alia*, Labor Code sections 226.7 and 512. Defendants failed to furnish accurate itemized
9 wage statements in violation of, *inter alia*, Labor Code section 226. Defendants failed to
10 reimburse Plaintiff and other aggrieved employees for necessary business expenditures in
11 violation of, *inter alia*, Labor Code section 2802. Defendants failed to provide all
12 compensation due at termination of employment in violation of, *inter alia*, Labor Code sections
13 201 through 203.

14 11. Plaintiff brings this action on the grounds that he and other current and former aggrieved
15 employees of Defendants were and are improperly denied the mandated wages resulting from
16 the above-referenced violations. Code Civ. Proc. § 2699; *Arias*, 46 Cal. 4th at 980-981. The
17 number of current and former aggrieved employees is believed to exceed Fifty (50) members.

18 12. The approximately Fifty (50) aggrieved employees are comprised of Defendants' current or
19 former California-based employees.

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

- 22 a. Whether Defendants failed to pay its employees the proper straight-time, overtime, and
23 double time wages due and owing to them;
- 24 b. Whether Defendants failed to pay its employees all compensation due and owing at
25 termination of employment;
- 26 c. Whether Defendants failed to provide its employees with statutorily-compliant Meal
27 and/or Rest Periods, in violation of, *inter alia*, California Labor Code section 512 and
28 226.7, in that Defendants' written policies are not compliant with California law, and

- 1 Defendants do not allow its employees duty-free Meal and/or Rest Periods on occasion;
- 2 d. Whether Defendants failed to properly provide Meal and Rest Period Premiums in
- 3 accordance with law;
- 4 e. Whether Defendants failed to properly calculate and pay its employees overtime
- 5 compensation or Meal and Rest Period Premiums in accordance with law by failing to
- 6 properly calculate, into the Regular Rate of Pay, the value of all employee benefits and
- 7 other non-discretionary compensation; and
- 8 f. Whether Defendants failed to properly reimburse its employees for necessary business
- 9 expenditures for, *inter alia*, cell phone costs and other work supplies, in violation of
- 10 Labor Code section 2802.

11 14. At all times mentioned herein, Defendants were subject to the Labor Codes and Industrial

12 Welfare Commission Wage Orders of the State of California, including, but not limited to,

13 California Labor Code section 2698 *et seq.*

14 15. At all times mentioned herein, Defendants are and were “employers” as that term is used

15 within the relevant sections of the California Labor Code.

16 16. Plaintiff has exhausted his administrative remedies and pre-filing requirements pursuant to

17 California Labor Code section 2699.3, and has also fulfilled all notice requirements under the

18 statute.

19 17. Throughout the operative limitations period, Plaintiff and all other aggrieved employees were

20 denied the protections and benefits of the Labor Code and IWC Wage Order(s) due to

21 Defendants’ standard practices. Said violations are set forth below.

22 **FIRST CAUSE OF ACTION**

23 **Meal and Rest Period Violations Pursuant to Labor Code § 2698 *et seq.***

24 **Representative Action**

25 **(By Plaintiff against Defendants and DOES 1 through 10)**

26 18. Plaintiff hereby incorporates by reference paragraphs 1 through 17 as though fully set forth

27 herein.

28 ///

1 19. Labor Code section 1198 states:

2 The maximum hours of work and the standard conditions of labor fixed
3 by the commission shall be the maximum hours of work and the
4 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.

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

7 20. Under applicable California law, “An employer may not employ an employee for a work period
8 of more than five hours per day without providing the employee with a Meal Period of not less
9 than 30 minutes [...] An employer may not employ an employee for a work period of more than
10 10 hours per day without providing the employee with a second Meal Period of not less than
11 30 minutes” Lab. Code § 512(a); see also 8 Cal. Code Regs. § 11070 (11)(A).

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

15 22. California law requires employers to provide nonexempt employees with a 10-minute Rest
16 Period for every four hours worked, or “major fraction thereof.” 8 Cal. Code Regs. § 11070
17 (11).

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

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

24 25. For example, Defendants do not possess a legal Meal Period policy or legal Rest Period policy,
25 and makes no attempt to ensure that its employees are either timely or wholly provided Meal
26 Periods or Rest Periods.

27 26. Defendants would also pressure employees to either skip, or cut short, Meal Periods and Rest
28 Periods, based on workload volume and coverage issues.

1 27. In addition, Defendants had notice of Plaintiff working outside of his scheduled and/or
2 reported hours, as well as within Meal and Rest Periods, but failed to provide any
3 compensation for this work-time.

4 28. Defendants willfully failed and refused to pay Plaintiff and all other aggrieved employees one
5 additional hour of pay at their regular rate of pay for all workdays that a Meal or Rest Period
6 was not provided, as required by Labor Code section 226.7 and IWC Wage Order 7 § (11),
7 (12).

8 29. Any payments made by Defendants for non-compliant Meal Periods were not paid at the
9 employee's regular rate in violation of Labor Code section 226.7 and the operative IWC Wage
10 Orders. Instead, these payments were made at an employee's base rate and did not include the
11 value of, *inter alia*, all actual compensation owed, and/or all employee benefits such as, for
12 example, non-discretionary compensation and other employee benefits.

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

16 31. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on
17 behalf of himself and all other aggrieved employees by and through Labor Code section
18 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover
19 these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below
20 Prayer For Relief.

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

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

25
26 ///

27
28 ///

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

34. Plaintiff hereby incorporates by reference paragraphs 1 through 33 as though fully set forth herein.
35. Defendants failed to pay its employees all compensation due in violation of, among other statutes, Labor Code section 1197. California law holds that the failure to pay for any work time constitutes a violation of minimum wage laws. *Armenta v. Osmose, Inc.*, (2005) 135 Cal. App.4th 314, 323. These violations were caused by and through Defendants' failure to maintain accurate Time Records (as required by California law), to the detriment of the employees. Specifically, although Defendants would receive "to-the-minute" start and end times (from their employees' mandated timekeeping practices), Defendants would thereafter alter - and deduct time from - the Time Records, prior to payment of compensation to the employees. Additionally, the right to receive the proper minimum wage compensation was impacted by Defendants knowingly failing to consider other work performed by the employees, including all time employees were under Defendants' control. These actions, and instructions, caused the employees to lose compensation, including proper minimum wage compensation and overtime compensation.
36. As a result of Defendants' failure to comply with the provisions of the Labor Code, Plaintiff and all other aggrieved employees have been damaged in an amount to be proven at trial.
37. 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.
38. 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.
39. Plaintiff also seeks an award of reasonable attorneys' fees and costs pursuant to Labor Code

1 section 2699(g)(1).

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

6 40. Plaintiff hereby incorporates by reference paragraphs 1 through 39 as though fully set forth
7 herein.

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

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

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

20 44. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on
21 behalf of himself and all other aggrieved employees by and through Labor Code section
22 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover
23 these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below
24 Prayer For Relief.

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

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

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

47. Plaintiff hereby incorporates by reference paragraphs 1 through 46 as though fully set forth herein.
48. Defendants failed to provide Plaintiff and all other aggrieved employees with accurate itemized wage statements in violation of, among other statutes, Labor Code section 226. These violations include, but are not limited to, Defendants' failure to accurately identify all applicable regular and overtime (including double-time) rates of pay in violation of section 226(a)(9), and providing inaccurate representations of both "gross" and "net wages." Defendants also failed to accurately list "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate," in violation of 226(a)(9). Defendants also failed to provide an accurate showing of the "total hours worked," in violation of Labor Code section 226(a)(2). For example, Defendants had notice of employees working outside of their scheduled and/or reported hours, as well as within Meal and Rest Periods, but did not provide compensation.
49. Further, the Defendants' wage statement listings are confusing and employees cannot readily ascertain their total hours worked, applicable rates, and all gross and net wages. As one example, Defendants are apparently using a time calculating system other than "minutes", but without explanation to the employees within the wage statement. Prior to filing the instant complaint, Plaintiff's counsel requested the personnel file for Plaintiff. Plaintiff's counsel received true and verified copies of Plaintiff's time records and wage statements from Defendants. As an example, Plaintiff's wage statement for the pay period ending October 31, 2023 (produced and verified by Mossy) show Plaintiff worked a totally of "97.93" hours. (**See Exhibit 2**). As minutes are measured on a scale of 1 through 60, it is not apparent what these figures (*i.e.* ".93") are meant to represent. Without an explanation for how these figures were arrived at, Plaintiff cannot "readily ascertain" his total hours worked.
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 proven at trial.

51. 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.

52. 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.

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

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

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

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

56. 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.

57. 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

1 Prayer For Relief.

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

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

6 **SIXTH CAUSE OF ACTION**

7 **Failure to Pay Wages Upon Separation Pursuant to Labor Code § 2698 et seq.**

8 **Representative Action**

9 **(By Plaintiff against Defendants and DOES 1 through 10)**

10 60. Plaintiff hereby incorporates by reference paragraphs 1 through 59 as though fully set forth
11 herein.

12 61. Defendants failed to provide Plaintiff and other aggrieved employees with all wages earned and
13 unpaid at termination in violation of, among other statutes, Labor Code sections 201 through
14 203. These violations resulted from, among other unlawful actions, Defendants' willful failure
15 to provide accurate and complete compensation to aggrieved employees under Labor Code
16 sections 226.7, 510, 512, 1197, and 2802, as set forth above.

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

20 63. As California Labor Code Section 2699 provides for civil penalties recoverable by Plaintiff on
21 behalf of himself and all other aggrieved employees by and through Labor Code section
22 2699.3, and as Plaintiff has complied with all pre-filing requirements, Plaintiff may recover
23 these penalties pursuant to Labor Code section 2699, as more specifically set forth in the below
24 Prayer For Relief.

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

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

///

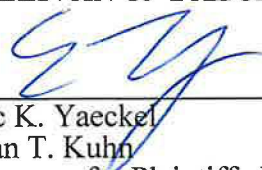
PRAYER FOR RELIEF

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

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

Dated: November 12, 2024

SULLIVAN & YAECKEL LAW GROUP, APC



Eric K. Yaeckel
Ryan T. Kuhn
Attorneys for Plaintiffs JESUS GUARDIOLA in a
Representative capacity only, and on behalf of other
members of the general public similarly situated

Exhibit 1

SULLIVAN & YAECKEL

LAW GROUP

A PROFESSIONAL CORPORATION

2330 THIRD AVENUE
SAN DIEGO, CALIFORNIA 92101

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

February 9, 2024

Labor and Workforce Development Agency
Attn. PAGA Administrator

Submitted Via Online Filing

Re: Jesus Guardiola v. Mossy Nissan Chula Vista
Our File No.: 7398

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 Chula Vista (hereinafter referred to as “Mossy”), in the above referenced matter. This “written notice” is filed on behalf of Mr. Jesus Guardiola (hereinafter “Mr. Guardiola”), 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, 204, 226, 226(a), 226.7, 510, 512, 1194, 1197.1, 1198.5 and 2802, as well as IWC Wage Order 7, codified as Title 8, California Code of Regulations, section 11070 *et seq.*, or any other applicable wage orders.

Facts and theories supporting the allegations: Mr. Guardiola was employed as a non-exempt employee for Mossy from approximately July 1, 2023 through October 31, 2023. Throughout the term of Mr. Guardiola’s employment, Mossy required Mr. Guardiola and all other non-exempt employees to experience actions illegal under the California Labor Code, including the following:

///

///

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, 204, 510, IWC Wage Order 7, and/or 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. Guardiola to report scheduled (as opposed to *actual*) work hours, resulting in a loss of compensation. Additionally, Mossy would often require Mr. Guardiola to work extended hours (beyond scheduled hours), without compensation. Furthermore, Mossy would regularly contact Mr. Guardiola outside of normal work hours (*i.e.*, "after hours" or during lunch) without compensation.
- Additionally, among other issues, Mossy has notice of Mr. Guardiola, 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, and/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.
- 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. As an

example, for the pay period beginning October 1, 2024, the Mossy Wage Statement (produced and verified by Mossy) represents that Mr. Guardiola was paid for more than one “CA Delayed Lunch” premiums for the Year to Date. (Please see **Exhibit A**). 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/or 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.
- 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. Guardiola, 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. Mossy does not explain how its system describes “time worked” on the Wage Statement itself. As such, Plaintiff cannot “readily ascertain” what these figures mean. 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 (*i.e.* “.75”) 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. Guardiola, 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,



Karoline D. Kitlowski, Esq.

cc: *Via Certified U.S. Mail*

PHILIP E. MOSSY

Agent for service of process for
MOSSY NISSAN CHULA VISTA
4625 Brinell St.
San Diego, CA 92111

Exhibit A

Earnings Statement

GUARDIOLA GONZALEZ, JESUS GUSTAVO

Pay Date: 10/23/2023
Period Start: 10/01/2023
Period End: 10/15/2023

Company: 0JX96 - MAG CDRJ CV LLC
4625 BRINELL ST
SAN DIEGO CA 92111 (858) 654-2202

Emp #: A4KK
Dept: 1A - New Car Sales
Pay Basis: Hourly

	Rate	Hours/Units	Current Period	Year To Date
Earnings				
Buy Fees			0.00	750.00
CA Delayed Lunch	19.90	0.00	0.00	40.03
Cell Allowance			10.00	60.92
Commission			0.00	6218.59
Commission Overtime	8.93	0.00	0.00	49.84
Draw			2200.00	2200.00
Non Production Bonus OT	8.22	0.00	0.00	41.84
Non Sales Activity Temp	15.50	5.00	77.50	465.00
Other OT	2.30	0.00	0.00	14.68
Rest Period Supplemental Temp	15.50	3.17	49.14	274.36

Gross 8.17 2336.64 10115.26

W/H Taxes

Federal W/H(H)	0.00	0.00
Medicare	33.66	145.58
Social Security	143.95	622.50
California State W/H(M/1)	24.95	74.63
CaliforniaSDI Tax	20.89	90.36

Deductions

UHC HMO Plan	<15.00> x2	75.00
--------------	---------------	-------

Net Pay 2098.19 9107.19 Check No. 139

Net Pay Distribution

Payroll Net Check	2098.19	9107.19 A/C:
-------------------	---------	--------------

Check No. 139

MAG CDRJ CV LLC
4625 BRINELL ST
SAN DIEGO, CA 92111

DATE: 10/23/2023

Dept: 1A

Net Pay: 2098.19

Two Thousand Ninety Eight And 19/100 Dollars

GUARDIOLA GONZALEZ, JESUS GUSTAVO
2564 E BEYER BLVD
SAN YSIDRO, CA 92173

For Record Purposes Only
****NON-NEGOTIABLE****

MOSSY_000189

Exhibit 2

Current Year 2023				[03X96] MAG CDRJ CV LLC					
Manual Check									
Employee	Manual Check Date	Pay-Period Start Date	Pay-Period End Date	Department	Tax Information	Manual Check Number	Scheduled	Tax Frequency	Final Check
GUARDIOLA GONZALEZ, JESUS (A4KK) -ACTIVE	10/23/2023	10/16/2023	10/31/2023	1A	1 - CA/CA/CA Edit	000000000	No		No

Hypothetical Check

Save Check

Cancel

Earnings

Zero Out All Earnings

Add New Hours Add New Amount

Current Sort: None v

Earning	Hours/Units	Rate	Amount	Labor Allocation	Tax Profile
[CEL] Cell Allowance			\$2.76		
[CMO] Commission Overtime	9.58	*Rate Overridden* \$8.95	\$85.74		
[COM] Commission			\$1,753.73		
[DRW] Draw			-\$1,927.61		
[NSL] Non Sales Activity Temp	3.00	*Rate Overridden* \$15.50	\$46.50		
[OOT] Other OT	9.58	*Rate Overridden* \$2.44	\$23.38		
[OTH] Other	4.00	*Rate Overridden* \$17.30	\$69.20		
[RPT] Rest Period Supplemental Temp	1.00	*Rate Overridden* \$15.50	\$15.50		
[TCH] TOTAL HOURS WORKED	97.93	\$0.00	\$0.00		
Total	125.09		\$69.20		

Employee Taxes

Current Sort: None v

W/H Tax	Amount
[FWT] Federal W/H	\$0.00
[MED] Medicare	\$1.44
[SSC] Social Security	\$6.15
[CAW] California State W/H	\$0.00
[SDI] California SDI Tax	\$0.90
Total	\$8.49

Deductions

Zero Out All Deductions

Add Deduction

Current Sort: None v

Deduction	Details / Tax Treatment	Amount	Labor Allocation
[ANI] Accidental Injury	After Tax Deduction	\$0.00	
[HMO] UHC HMO Plan	\$125 Pre-Tax	-\$30.00	
[LUP] LTD Buy Up	After Tax Deduction	\$0.00	
[MSM] Medical HMO Simmsa	\$125 Pre-Tax	\$0.00	
[VIS] Vision	\$125 Pre-Tax	\$0.00	
[ERH] Employer Healthcare Memo	(Memo/Match)	\$177.87	
Total		\$147.87	

NET MANUAL CHECK

\$90.71

Manual Check Number

000000000

Employee Benefits

Current Sort: None v

Benefit	Hours
Total	0.00

Employer Taxes

Current Sort: None v

Tax	Amount
[FUT] Employer FUTA Limit Met	\$0.00
[MED] Employer Medicare	\$1.44
[SSC] Employer Social Security	\$6.15
[CAT] California SUTA Limit Met	\$0.00
[WKC] Workers Compensation	\$1.59
[ETT] California ETT Tax Limit Met	\$0.00
Total	\$9.18

Terms of Use | Privacy Policy | © 2023 Paycom | All Rights Reserved.