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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ERIC VOLKERS, Plaintiff, vs. SUNDAE, INC.; and DOES 1 to 25, inclusive, Defendants.	CASE NO.: 24STCV31043 **COMPLAINT FOR DAMAGES FOR:** **1) PRIVATE ATTORNEYS GENERAL ACT (“PAGA”)**

COMES NOW Plaintiff, ERIC VOLKERS (hereinafter "Plaintiff"), and alleges as follows:

PARTIES, JURISDICTION, and VENUE

1. Jurisdiction and Venue are proper in this Court and this action is properly filed in the County of Los Angeles in this judicial district because Defendants SUNDAE, INC. and DOES 1 to 25, inclusive (hereinafter collectively "SUNDAE" or "Defendant(s)") do business in the County of Los Angeles, and because Defendants' obligations and liabilities arise therein, and because the work that was performed by Plaintiff in the County of Los Angeles is the subject of this action. Moreover, Plaintiff's damages sought herein exceed $35,000.

2. Plaintiff is a male resident of the County of Los Angeles, State of California.

3. Plaintiff is informed and believes that at all times herein mentioned, Defendant SUNDAE, INC., is a Delaware corporation, doing business in the County of Los Angeles, State of California, and which employed Plaintiff.

4. Plaintiff is ignorant of the true names and capacities, whether individual, corporate, or associate of those defendants fictitiously sued as DOES 1 to 25, inclusive, and so Plaintiff sues them by these fictitious names. Plaintiff is informed and believes that each of the DOE defendants, numbers 1 to 25, reside in the State of California and are in some manner responsible for the conduct alleged herein. Upon discovering the true names and capacities of these fictitiously named defendants, Plaintiff will amend this complaint to show the true names and capacities of these fictitiously named defendants.

5. Unless otherwise alleged in this complaint, Plaintiff is informed, and on the basis of that information and belief, alleges that at all times herein mentioned, each of the remaining codefendants, in doing the things hereinafter alleged, were acting within the course, scope, and

under the authority of their agency, employment, or representative capacity, with the consent of his/her codefendants.

GENERAL ALLEGATIONS

6. Plaintiff started working for SUNDAE on or around April 2024 as a "Market Expert". During his employment tenure, Plaintiff was misclassified as a salaried, exempt employee, earning $20,000 per year (below the salary threshold) plus potential commissions. Plaintiff's employment was wrongfully terminated on or around September 2024.

7. Under California law, in order for Plaintiff to be an exempt employee, he would have to fit in one of the following categories: Executive, Professional, or Administrative.

8. Plaintiff did not fit under the Executive exemption because he was NOT a manager and not "primarily engage in" (more than 50%) duties which met the test of exemption and did not have the ability to hire and fire. Work tasks are either exempt or nonexempt as determined by the objective purpose for which the tasks are undertaken. *See* Heyen v. Safeway Inc. (2013) 216 CA4th 795, 826-827. In the Heyen case, *supra*, a grocery store assistant manager who spent more than half of her time bagging groceries or checking out customers was deemed to be engaged in nonexempt activities despite concurrently watching over her subordinates' work.

9. Plaintiff did not fit under the Professional Exemption because his work did not fit into one of the enumerated professions and is not considered a "learned or artistic profession." The Administrative Exemption also does not apply to Plaintiff due to his job duties and because he did not customarily and regularly use discretion and independent judgment in performing his job duties. Plaintiff's general job duties included communication with prospective clients, attending appointments, and doing walkthroughs of properties with clients. The latter does not lend itself to a salaried, exempt position and Plaintiff and others were unequivocally misclassified. Due to being misclassified, SUNDAE committed numerous labor code violations against Plaintiff and others.

10. It is Plaintiff's position that due to personally suffering the below violations, Plaintiff can equivocally bring the following labor code violations on behalf of all other employees, including ALL hourly, non-exempt employees and all salaried, exempt employees who were misclassified but who worked for SUNDAE anywhere in the state of California (at all different locations) during the relevant PAGA period.

11. SUNDAE did not provide Plaintiff and other aggrieved employees with compensation for all hours worked and did not pay Plaintiff and others the minimum wages to which they were entitled for work performed “off the clock” pursuant to California Labor Code sections 1194, 1197 and 1197.1. Plaintiff and others also worked “off the clock” and were not paid for all hours worked because SUNDAE had a company policy wherein they would disproportionately round down the number of hours worked by Plaintiff and other aggrieved employees, resulting in “time shaving” and further resulting in aggrieved employees not being paid for all hours worked. In fact, due to being misclassified, Plaintiff did not formally clock in and out. Moreover, Plaintiff generally worked 7 days per week and his hours during the week were 10am to 7pm or later. Plaintiff was working many hours “off the clock”, but was not compensated for any of it due to being misclassified as a salaried, exempt employee. In addition, SUNDAE did not provide reporting time to pay employees.

12. SUNDAE also violated Labor Code §510 because it failed to pay the hourly employees and the misclassified employees such as Plaintiff the correct amount of overtime, even though they worked more than 8 hours per day, 12 hours per day, and/or 40 hours per week throughout their employment. The latter is due to the “off the clock” work and time shaving as described above. Moreover, Plaintiff’s actual work hours would have entitled Plaintiff to overtime compensation, but he was not paid as such due to being misclassified. Moreover, and in looking at Plaintiff’s pay stubs, the 86.67 hours per pay period was not a reliable indicator of the actual number of hours worked per day, especially since Plaintiff did not clock in and out and generally worked into the night and during weekends. Furthermore, for the commissioned employees like Plaintiff SUNDAE failed to pay overtime during pay periods during which Plaintiff and others did not meet the inside salesperson exemption in that they did not earn one-and-a-half times the minimum wage during a particular pay period and more than half of their wages for that particular pay period were not from commission/sales. Moreover, during those particular pay periods wherein the inside salesperson exemption did not apply, SUNDAE did not factor in the commission payments and any bonuses in deciphering employees regular rate of pay for purposes of figuring out the overtime rate of pay. Generally, SUNDAE did not factor in the commission payments/incentive payments/shift differentials and/or any bonuses in deciphering hourly employees’ regular rate of pay for purposes of figuring out the overtime rate of pay. Additionally, the incentive and bonus payments/shift differentials were also not factored into

employees' regular rate for purposes of receiving meal and rest break premiums per the Ferra v. Loews case.

13. SUNDAE violated Labor Code §§ 512 and 226.7 as well as the applicable Industrial Welfare Commission (IWC) Wage Order (no. 4) because it failed to provide Plaintiff and other aggrieved employees the requisite 30-minute, uninterrupted meal periods for every five (5) hours of work throughout their employment, and Plaintiff did not validly waive said meal periods. SUNDAE did not completely relieve Plaintiffs of all duties during said meal periods. SUNDAE did not pay to Plaintiff one additional hour of pay at Plaintiff's regular rate of compensation for each workday that one or more statutory meal periods was not provided. Due to being misclassified, Plaintiff simply was not able to take meal breaks that were before the 5th work and uninterrupted. Moreover, Plaintiff did not clock in and out for any formal meal breaks as the company had made the determination that he was not entitled to them. For the other hourly employees, the meal breaks would often be late and/or interrupted by work obligations and were not properly enforced. Furthermore, hourly, non-exempt employees did not receive a second meal break on those days wherein they worked more than 10 hours. Additionally, the incentive and bonus payments/commission payments/shift differential payments were also not factored into Plaintiff's and others' regular rate for purposes of receiving meal and rest break premiums per the Ferra v. Loews case.

14. If SUNDAE had Plaintiff sign a meal period waiver, it would not be valid and enforceable since Plaintiff and others generally have worked more than a 6-hour shift. If SUNDAE had Plaintiff sign an on-duty meal period agreement wherein Plaintiff agreed to work through his meal periods or stay on the premises during meal periods, it would be invalid and unenforceable because the nature of Plaintiff's job does not and did not prevent him from taking a meal period. SUNDAE could have easily hired more staff, which would have allowed Plaintiff to take a timely, uninterrupted break and be relieved of all work duties. If SUNDAE argues that Plaintiff and others were actually paid for their meal breaks, the latter would not mean there was no violation since Plaintiff and others were essentially denied any meal breaks for them to rest and get something to eat. The solution for SUNDAE is not to keep their employees from taking meal periods, but to hire additional staff and "breakers" to make sure that their employees receive statutory breaks. To the extent that SUNDAE argues that employees receive meal break premium pay for missed meal periods, that argument is inconsequential for PAGA penalty purposes since the PAGA penalties are for the violations themselves, irrespective of whether an employee

received the premium payment for a missed, short, or interrupted meal period. In *Kirby v. Immoos Fire Protection, Inc.*, the Court stated, "section 226.7 does not give employers a lawful choice between providing *either* meal and rest breaks *or* an additional hour of pay." *See Kirby v. Immoos Fire Protection, Inc.*, (2012) 53 Cal.4th 1244, 1256 (emphasis in original). Thus, the extra hour of pay does not excuse the violation; the employer has still committed a violation even if the remedy for the violation has been paid. *See Wert v. U.S. Bancorp*, (S.D. Cal. Mar. 22, 2016, 2016 WL 1110302 at *4). As such, the work environment and culture as well as the misclassification of employees at SUNDAE was not conducive to receiving consistent, **timely**, **uninterrupted** statutory meal breaks under California law. Moreover, any meal or rest break premiums paid were not compensated at the weighted average regular rate, inclusive of bonuses and/or incentive payments/sick pay/shift differentials.

15. SUNDAE violated Labor Code § 226.7 as well as the applicable IWC Wage Order (no. 4) because it failed to provide Plaintiff and other similarly situated aggrieved employees 10-minute rest periods for every four hours of work, or majority portion thereof, throughout their employment. SUNDAE did not completely relieve Plaintiff of all duty during said rest periods. SUNDAE did not pay to Plaintiff one additional hour of pay at Plaintiff's regular rate of compensation for each workday that one or more statutory rest periods was not provided. Due to being misclassified, Plaintiff did not take any 10-minute rest periods throughout his shift wherein he was relieved of all work duties. The latter simply did not exist and was not enforced. Moreover, for the employees that were properly classified as non-exempt employees, it was not company policy and not part of the company culture for employees to take full rest breaks, especially two daily rest breaks of at least 10 minutes each (for a full shift) wherein they were fully relieved of their work duties. As such, the culture and environment at SUNDAE did not lend itself to the employees receiving statutory breaks wherein they were relieved of all work duties. It was the normal practice and custom of SUNDAE not to authorize, permit, and enforce statutory rest periods. As such, the environment and culture at SUNDAE was not conducive to receiving statutory rest breaks under California law.

16. Furthermore, during the relevant time period, and due to the aforementioned violations, SUNDAE failed to pay Plaintiff and other similarly situated aggrieved employees all wages due to them within any time period specified by California Labor Code section 204. SUNDAE was also in violation of California Labor Code section 226(a) by failing to include pertinent information on the wage statements, including but not limited to, the correct hourly rate, all hours

worked, overtime hours worked, correct overtime pay, gross wages earned, premium pay for missed meal and rest breaks, all deductions, net wages earned, the correct name and address of the employer, employee identifying information, the correct start and end of the pay periods, and reimbursement for business expenses, among others. As such, SUNDAE did not provide Plaintiff and other similarly situated aggrieved employees with complete, accurate itemized wage statements.

17. SUNDAE violated Labor Code § 203 because it willfully failed to pay Plaintiff and other similarly situated aggrieved employees earned and due wages upon separation of employment, either immediately upon involuntary termination, or within 72 hours of resignation. After aggrieved employees stopped working at SUNDAE and after their employment with SUNDAE ended, SUNDAE failed and refused to pay all wages earned and due immediately upon separation. These earned but unpaid wages include the unpaid minimum wages/compensation for all hours worked, "off the clock" work, overtime, premium pay for missed meal and rest breaks, and business expense reimbursement, among others.

18. It is Plaintiff's contention that the rounding/time shaving/ "off the clock" work, and statutory meal and rest period violations would trigger penalties under Labor Code sections 203, 204, and 226 per Naranjo v. Spectrum Security Services Inc. (2022) 13 Cal. 5th 93.

19. During the relevant time period, SUNDAE also failed to keep accurate and complete payroll records showing the correct wages paid to Plaintiff (and correct hours worked) and other aggrieved employees, pursuant to California Labor Code sections 1174(d).

20. Moreover, during the relevant time period, Plaintiff and other aggrieved employees incurred necessary, business-related expenses and costs that were not fully reimbursed by SUNDAE. These costs include, but are not limited to, use of personal laptops/computers and home internet for work purposes. Accordingly, SUNDAE was in violation of California Labor Code sections 2800 and 2802.

21. Furthermore, SUNDAE did not provide proper and correct/accurate sick pay (inclusive of bonus/incentive payments/commission payments/shift differential payments) that was also delineated on employee pay stubs and also failed to provide proper sick leave in violation of Labor Code sections 233 and 246.

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FIRST CAUSE OF ACTION

PRIVATE ATTORNEYS GENERAL ACT
Representative Claim for PAGA penalties under California Labor Code sections 201, 202, 203, 204 and/or 204b, 210, 226, 226.3, 226.7, 233, 246, 510, 512, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 2800, 2802, and IWC Wage Order 4-2001)

(Plaintiff against All Named Defendants and all DOE defendants)

22. Plaintiff re-alleges and incorporates by reference each and every allegation in paragraphs 1 through 21, inclusive, of this Complaint as though fully set forth herein.

23. Plaintiff has complied with the procedures for bringing suit specified in California Labor Code § 2699.3. By letter dated September 12, 2024, Plaintiff gave written notice by certified mail to the Labor and Workforce Development Agency ("LWDA") and Defendants of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations.

24. Pursuant to California Labor code section 2699.3, no response was received from the LWDA within 65 days of the postmark date of the above-alleged letter.

25. Plaintiff therefore has exhausted all administrative remedies required of him under California Labor Code sections 2698, 2699, and 2699.3, and, as a result, may prosecute this cause of action and pursue penalties in a representative action for Defendants' violations of the Labor Code.

26. Pursuant to California Labor Code section 2699, any provisions of the Labor Code that provides for a civil penalty to be assessed and collected by the LWDA or any of its departments, divisions, commissions, boards, agencies, or employees for violation of the code may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of other current or former employees pursuant to the procedures specified in California Labor Code section 2699.3.

27. Plaintiff is an "aggrieved employee" because Plaintiff was employed by the alleged violator and had one or more of the alleged violations committed against him, and therefore is properly suited to represent the interests of other current and former employees, including all current and former hourly, non-exempt employees who worked for SUNDAE at any and all locations in the State of California during the applicable PAGA Period.

28. Based on the acts alleged above, Plaintiff, on behalf of others, seeks penalties under California Labor Code sections 2698 and 2699 because of Defendants' violations of numerous provisions of the California Labor Code as alleged in this Complaint.

29. Plaintiff therefore has exhausted all administrative remedies required of him under California Labor Code sections 2698, 2699, and 2699.3, and, as a result, may prosecute this cause of action and pursue penalties in a representative action for Defendants' violations of the Labor Code.

30. California Labor Code section 2699 et seq. imposes penalties upon culpable Defendants for violating the Labor Code.

31. Plaintiff seeks penalties for Defendants' misconduct as alleged herein as permitted by law, but only those penalties that are required to be shared with the LWDA as Plaintiff is not seeking individual penalties/victim specific relief or underpaid wages for himself or other employees under this specific PAGA cause of action.

32. Specifically, Plaintiff seeks penalties under California Labor Code section 2699, for the following:

Violations of California Labor Code sections 201, 202, 203, 204 and/or 204b, 210, 226, 226.3, 226.7, 233, 246, 510, 512, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 2800, 2802, and any other Labor Codes/Industrial Welfare Commission Order (No. 4) violated based on the facts alleged in this Complaint.

33. Pursuant to Labor Code section 2698 et seq., Plaintiff seeks to recover attorney's fees, costs, and civil penalties on behalf of other current and former aggrieved employees as alleged herein in an amount to be shown according to proof at trial and within the jurisdictional limits of this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for Judgment against Defendants, and each of them, as follows:

1. For the imposition of civil penalties;
2. For maximum civil penalties available under Labor Code Section 2699 against

Defendants in a manner and amount authorized by that statute, as described more particularly in the Complaint and representative PAGA claims;

3. For all costs and disbursements incurred in this suit;
4. Reasonable attorney's fees where available by law, including but not limited to, pursuant to Labor Code section 2698 et seq., Code of Civil Procedure section 1021.5, and/or other applicable laws; and
5. For such other and further relief as this Court may deem proper.

DATED: November 22, 2024

MESSRELIAN LAW INC.

By________________________________
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