

AEGIS LAW FIRM, PC
SAMUEL A. WONG (State Bar No. 217104)
KASHIF HAQUE (State Bar No. 218672)
ALISON M. MICELI (State Bar No. 243131)
9811 Irvine Center Drive, Suite 100
Irvine, California 92618
Telephone: (949) 379-6250
Facsimile: (949) 379-6251

ELECTRONICALLY FILED
Superior Court of California,
County of Orange

05/14/2013 at 03:01:00 PM
Clerk of the Superior Court
By Enrique Veloz, Deputy Clerk

COHELAN KHOURY & SINGER
Timothy D. Cohelan (State Bar No. 60827)
Isam C. Khoury (State Bar No. 58759)
Michael D. Singer (State Bar No. 115301)
Kimberly D. Neilson (State Bar No. 216571)
605 C Street, Suite 200
San Diego, CA 92101
Telephone: (619) 595-3001
Facsimile: (619) 595-3000

Attorneys for Plaintiff Jose Magdaleno

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE

JOSE MAGDALENO, individually and on
behalf of others similarly situated, and on
behalf of the general public,

Plaintiffs,

vs.

SHELLY AUTOMOTIVE, LLC; SHELLY
AUTO AUCTION, LLC; SHELLY
PROPERTIES, LLC; and DOES 1 through
20, inclusive,

Defendants.

Case No. **30-2013-00643958-CU-OE-CXC**

*Unlimited Civil – Amount Demanded Exceeds
\$25,000*

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR:**

1. Failure to Pay Minimum Wages;
2. Failure to Pay Overtime Wages;
3. Failure to Provide Itemized Wage Statements;
4. Failure to Maintain Records;
5. Failure to Pay All Wages Due Within the Required Time and Upon Separation of Employment;
6. Failure to Reimburse for Business Expenses;
7. Violation of California Labor Code §§ 2698, *et seq.*; and
8. Violation of Business and Professions Code §§ 17200, *et seq.*

DEMAND FOR JURY TRIAL

1 Plaintiff Jose Magdaleno, individually and on behalf of others similarly situated, and on
2 behalf of the general public, alleges as follows:

3 **NATURE OF ACTION AND INTRODUCTORY STATEMENT**

4 1. Plaintiff Jose Magdaleno ("Plaintiff") brings this putative class action against
5 Defendants Shelly Automotive, LLC, Shelly Auto Auction, LLC, Shelly Properties, LLC and
6 DOES 1 through 20, inclusive (collectively, "Defendants" or "SHELLY"), on behalf of himself
7 individually and a purported class of current and former employees employed by Defendants as
8 technicians, service technicians or mechanics throughout California.

9 2. SHELLY is an automobile dealership that sells and services vehicles throughout the
10 State of California.

11 3. Through this action, Plaintiff is alleging that Defendants have engaged in a
12 systematic pattern of wage and hour violations under the California Labor Code and Industrial
13 Welfare Commission ("IWC") Wage Orders, all of which contribute to Defendants' deliberate
14 unfair competition.

15 4. Plaintiff is informed and believes, and thereon alleges, that Defendants have
16 increased their profits by violating state wage and hour laws by, among other things:

- 17 (a) Failing to pay minimum wages;
- 18 (b) Failing to pay overtime wages;
- 19 (c) Failing to provide accurate itemized wage statements;
- 20 (d) Failing to maintain accurate records;
- 21 (e) Failing to pay all wages due within the required time and upon separation of
22 employment; and
- 23 (f) Failing to reimburse for business-related expenses.

24 5. Plaintiff brings this lawsuit seeking monetary and injunctive relief against
25 Defendants on behalf of himself and all other members of the general public similarly situated in
26 California to recover, among other things, unpaid wages and benefits, interest, attorney's fees, costs
27 and expenses and penalties pursuant to Labor Code §§ 201, 202, 203, 204, 210, 226, 226.3, 510,
28 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 2698, *et seq.*, 2800 and 2802.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2
3
4
5
6
7
8
9
10

11
12
13
14
15
16
17
18
19

20
21
22
23

24
25
26
27

10. Venue is proper in this Court because, upon information and belief, Defendants transact business or own and operate dealerships in this county and the acts and omissions alleged herein took place in this county.

THE PARTIES

11. Plaintiff Jose Magdaleno is a resident of Lake Forest, California in the County of Orange.

12. Plaintiff is informed and believes, and thereon alleges, that SHELLY AUTOMOTIVE, LLC was and is a Delaware corporation doing business in California and, at all times hereinafter mentioned, was and is an employer as defined in and subject to the Labor Code and IWC Wage Orders, whose employees are engaged throughout this county and the State of California.

13. Plaintiff is informed and believes, and thereon alleges, that SHELLY AUTO AUCTION, LLC was and is a Delaware corporation doing business in California and, at all times hereinafter mentioned, was and is an employer as defined in and subject to the Labor Code and IWC Wage Orders, whose employees are engaged throughout this county and the State of California.

14. Plaintiff is informed and believes, and thereon alleges, that SHELLY PROPERTIES, LLC was and is a Delaware corporation doing business in California and, at all times hereinafter mentioned, was and is an employer as defined in and subject to the Labor Code and IWC Wage Orders, whose employees are engaged throughout this county and the State of California.

15. Plaintiff is unaware of the true names or capacities of the Defendants sued herein under the fictitious names DOES 1 through 20, but will seek leave of this Court to amend the Complaint and serve such fictitiously named Defendants once their names and capacities become known.

16. Plaintiff is informed and believes, and thereon alleges, that DOES 1 through 20 are the partners, agents, owners, shareholders, managers or employees of SHELLY, at all relevant times.

17. Plaintiff is informed and believes, and thereon alleges, that each and all of the acts and omissions alleged herein were performed by, or are attributable to, SHELLY and/or DOES 1 through 20, acting as the agent or alter ego for the other, with legal authority to act on the other's behalf. The acts of any and all Defendants were in accordance with, and represent, the official policy of Defendants.

18. Plaintiff is informed and believes, and thereon alleges, that Defendants were members of, and engaged in, a joint venture, partnership and common enterprise, and acted within the course and scope of, and in pursuit of, said joint venture, partnership and common enterprise.

19. At all relevant times, Defendants, and each of them, acted within the scope of such agency or employment, or ratified each and every act or omission complained of herein. At all relevant times, Defendants, and each of them, aided and abetted the acts and omissions of each and all the other Defendants in proximately causing the damages herein alleged.

20. Plaintiff is informed and believes, and thereon alleges, that each of said Defendants is in some manner intentionally, negligently or otherwise responsible for the acts, omissions, occurrences and transactions alleged herein.

CLASS ACTION ALLEGATIONS

21. Plaintiff brings this action under Code of Civil Procedure § 382 on behalf of himself and all other members of the general public similarly situated who were affected by Defendants' Labor Code, Business and Professions Code §§ 17200 and IWC Wage Order violations.

22. All claims alleged herein arise under California law for which Plaintiff seeks relief authorized by California law.

23. Plaintiff's proposed class consists of and is defined as follows:

Class:

All current and former employees that were employed by Defendants as technicians, service technicians or mechanics in California within four years prior to the filing of the Complaint to the present and continuing.

24. Members of the class described above will collectively be referred to as “class members.” Plaintiff reserves the right to re-define the above class and add subclasses as appropriate based on investigation, discovery and specific theories of liability.

1 25. There are common questions of law and fact as to the class that predominate over
2 any questions affecting only individual members including, but not limited to:

- 3 (a) Whether Defendants paid Plaintiff and class members on a "piece-rate" basis
4 for repair work but failed to pay Plaintiff and class members a separate
5 hourly minimum wage for time spent waiting for vehicles to repair or
6 performing other non-repair tasks;
- 7 (b) Whether Defendants failed to pay at least minimum wage for all hours
8 worked by Plaintiff and class members;
- 9 (c) Whether Defendants required Plaintiff and class members to work over eight
10 (8) hours per day and/or over forty (40) hours per week and failed to pay
11 legally required overtime compensation at the appropriate overtime rate to
12 Plaintiff and class members;
- 13 (d) Whether Defendants failed to provide accurate itemized wage statements to
14 Plaintiff and class members;
- 15 (e) Whether Defendants failed to keep true and accurate time records showing
16 the applicable rates of pay for Plaintiff and class members for all regular
17 time, overtime and waiting time periods;
- 18 (f) Whether Defendants failed to timely pay all earned wages to Plaintiff and
19 class members during their employment within the required time;
- 20 (g) Whether Defendants failed to timely pay all wages due to Plaintiff and
21 former class members upon termination or within 72 hours of resignation;
- 22 (h) Whether Defendants failed to reimburse Plaintiff and class members for all
23 necessary business expenses incurred;
- 24 (i) Whether Defendants' conduct was willful or reckless; and
- 25 (j) Whether Defendants engaged in unfair business practices in violation of
26 Business and Professions Code §§ 17200, *et seq.*

27 26. There is a well-defined community of interest in this litigation and the class is
28 readily ascertainable:

- 1 (a) Numerosity: The members of the class are so numerous that joinder of all
2 members is impractical. Although the members of the entire class are
3 unknown to Plaintiff at this time, on information and belief, the class is
4 estimated to be greater than one hundred (100) individuals. The identity of
5 the class is readily ascertainable by inspection of Defendants' employment
6 and payroll records.
- 7 (b) Typicality: The claims (or defenses, if any) of Plaintiff are typical of the
8 claims (or defenses, if any) of the class because Defendants' failure to
9 comply with the provisions of California wage and hour laws entitled each
10 class member to similar pay, benefits and other relief. The injuries sustained
11 by Plaintiff are also typical of the injuries sustained by the class because they
12 arise out of and are caused by Defendants' common course of conduct as
13 alleged herein.
- 14 (c) Adequacy: Plaintiff will fairly and adequately represent and protect the
15 interests of all members of the class because it is in his best interests to
16 prosecute the claims alleged herein to obtain full compensation and penalties
17 due him and the class. Plaintiff's attorneys, as proposed class counsel, are
18 competent and experienced in litigating large employment class actions and
19 versed in the rules governing class action discovery, certification and
20 settlement. Plaintiff has incurred and, throughout the duration of this action,
21 will continue to incur attorney's fees and costs that have been and will be
22 necessarily expended for the prosecution of this action for the substantial
23 benefit of each class member.
- 24 (d) Superiority: The nature of this action makes the use of class action
25 adjudication superior to other methods. A class action will achieve
26 economies of time, effort and expense as compared with separate lawsuits,
27 and will avoid inconsistent outcomes because the same issues can be
28 adjudicated in the same manner and at the same time for the entire class. If

1 appropriate this Court can, and is empowered to, fashion methods to
2 efficiently manage this case as a class action.

3 (e) Public Policy Considerations: Employers in the State of California violate
4 employment and labor laws every day. Current employees are often afraid to
5 assert their rights out of fear of direct or indirect retaliation. Former
6 employees are fearful of bringing actions because they believe their former
7 employers might damage their future endeavors through negative references
8 and/or other means. Class actions provide the class members who are not
9 named in the Complaint with a type of anonymity that allows for the
10 vindication of their rights at the same time as affording them privacy
11 protections.

12 GENERAL ALLEGATIONS

13 27. At all relevant times mentioned herein, Defendants employed Plaintiff and other
14 persons as technicians, service technicians or mechanics.

15 28. Plaintiff worked as a service technician for Defendants from approximately May 16,
16 2011 until April 2, 2013. Plaintiff's job duties included, among other things, diagnosing and
17 repairing customer and dealership vehicles, completing assigned repair orders and performing other
18 non-repair tasks directed by Defendants while waiting for other vehicles to repair. Plaintiff was
19 assigned to work at Defendants' Irvine BMW automobile dealership located at 9881 Research
20 Drive in Irvine, California 92618, which was one of several dealerships operated by Defendants.
21 On information and belief, Irvine BMW is wholly owned by SHELLY, a Delaware corporation
22 located at the same address.

23 29. Defendants continue to employ technicians, service technicians and mechanics who
24 work for Defendants in the automotive service section at one or more of their automobile
25 dealerships in California including D. Shelly Group, Shelly BMW, Mercedes-Benz of Long Beach,
26 Irvine BMW, Irvine Mini, Fisker of Orange County, Sprinter of Long Beach, Dealers' Choice Auto
27 Auction and Spectrum Collision.
28

1 30. Plaintiff is informed and believes, and thereon alleges, that at all times herein
2 mentioned, Defendants were advised by skilled lawyers, employees and other professionals who
3 were knowledgeable about California wage and hour laws, employment and personnel practices
4 and the requirements of California law.

5 31. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
6 should have known that Plaintiff and class members were entitled to be paid a separate hourly
7 minimum wage for time spent during their work shifts waiting for vehicles to repair or performing
8 other non-repair tasks. In violation of the Labor Code and IWC Wage Orders, Plaintiff and class
9 members were not paid at least minimum wage for all hours worked because Defendants failed to
10 pay minimum wage for all hours during which employees were waiting for vehicles to repair or
11 performing other non-repair tasks to deprive Plaintiff and class members of hours earned.

12 32. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
13 should have known that Plaintiff and class members were entitled to receive certain wages for
14 overtime compensation at the appropriate overtime rate. In violation of the Labor Code and IWC
15 Wage Orders, Plaintiff and class members were not paid for all their overtime work at the correct
16 overtime rate because Defendants failed to calculate proper overtime hours and also reduced
17 overtime hours.

18 33. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
19 should have known that Plaintiff and class members were entitled to receive itemized wage
20 statements that accurately showed the gross and net wages earned, total hours worked, number of
21 piece-rate units earned and any applicable piece rate, all applicable hourly rates in effect during the
22 pay period and corresponding number of hours worked at each hourly rate and the inclusive dates
23 of the pay period in accordance with California law. In violation of the Labor Code, Plaintiff and
24 class members were not provided with accurate itemized wage statements.

25 34. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
26 should have known that they were required to maintain accurate records showing the applicable
27 rates of pay for Plaintiff and class members for all regular time, overtime and waiting time periods.
28 In violation of the Labor Code and IWC Wage Orders, Defendants did not maintain accurate

1 records regarding the employment of Plaintiff and class members.

2 35. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
3 should have known that Plaintiff and former class members were entitled to timely payment of
4 wages due upon separation of employment. In violation of the Labor Code, Plaintiff and former
5 class members did not receive payment of all wages including, but not limited to, minimum wages
6 and overtime compensation, within permissible time periods.

7 36. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
8 should have known that Plaintiff and class members were entitled to reimbursement for all
9 business-related expenditures. In violation of the Labor Code and IWC Wage Orders, Plaintiff and
10 class members did not receive indemnification for all business-related expenditures, including tool
11 and equipment purchases that were necessary to complete their daily activities, non-slip shoe
12 expenses, mileage reimbursement incurred for attending mandatory training seminars and cell
13 phone expenses, among other things.

14 37. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
15 should have known they had a duty to compensate Plaintiff and class members, and Defendants had
16 the financial ability to pay such compensation but willfully, knowingly and intentionally failed to
17 do so all in order to increase Defendants' profits.

18 **FIRST CAUSE OF ACTION**

19 **FAILURE TO PAY MINIMUM WAGES**

20 (Violation of Labor Code §§ 1194, 1197 and 1197.1; Violation of IWC Wage Order § 4)
21 (Alleged by Plaintiff Individually and On Behalf of All Others Similarly Situated,
Against All Defendants)

22 38. Plaintiff hereby re-alleges and incorporates by reference each and every paragraph of
23 this Complaint as though fully set forth herein.

24 39. Labor Code §§ 1194, 1197 and 1197.1 provide that the minimum wage for
25 employees fixed by the IWC is the minimum wage to be paid to employees, and the payment of a
26 lesser wage than the minimum so fixed is unlawful.

27 40. Section 4(b) of the applicable IWC Wage Order requires an employer to pay each
28 employee, on the established payday for the period involved, not less than the applicable minimum

1 wage for all hours worked in the payroll period, whether the remuneration is measured by time,
2 piece, commission, or otherwise.

3 41. During the relevant time period, Plaintiff and class members were regularly
4 scheduled as a matter of uniform company policy to work and, in fact, did work as piece rate
5 employees with job titles of technicians, service technicians or mechanics. This "piece-rate" work
6 does not fall within any exception to the above-referenced Labor Code sections, the IWC Wage
7 Orders and/or the Unfair Competition Law.

8 42. During the relevant time period, Plaintiff and class members were not separately
9 compensated for each and every hour of time spent waiting for repair work and performing non-
10 repair work tasks at the direction of Defendants. For example, Plaintiff and class members were
11 not allowed to leave Defendants' premises while waiting for vehicles to repair, but were expected
12 to perform various non-repair tasks such as cleaning their work area, obtaining parts, participating
13 in online training and reviewing service bulletins.

14 43. During the relevant time period, Defendants regularly failed to pay Plaintiff and
15 class members at least minimum wage for all hours worked.

16 44. During the relevant time period, Defendants paid Plaintiff and class members less
17 than minimum wage when they failed to pay proper compensation for all hours worked, including
18 time spent during their work shifts waiting for vehicles to repair and performing other non-repair
19 tasks. To the extent these hours do not qualify for the payment of overtime, Plaintiff and class
20 members were not being paid at least minimum wage for their work.

21 45. On information and belief, Defendants also used Plaintiff and class members' time
22 cards inaccurately through nonfeasance, misfeasance and/or malfeasance, which effectively reduced
23 the compensation received by them.

24 46. Defendants' failure to pay Plaintiff and class members the minimum wage as
25 required violates Labor Code §§ 1194, 1197 and 1197.1. Pursuant to these sections, Plaintiff and
26 class members are entitled to recover the unpaid balance of their minimum wage compensation as
27 well as interest, costs and attorney's fees.
28

47. Pursuant to Labor Code § 1194.2, Plaintiff and class members are entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon.

SECOND CAUSE OF ACTION

FAILURE TO PAY OVERTIME WAGES

(Violation of Labor Code §§ 510, 558 and 1194; Violation of IWC Wage Order § 3)
(Alleged by Plaintiff Individually and On Behalf of All Others Similarly Situated,
Against All Defendants)

48. Plaintiff hereby re-alleges and incorporates by reference each and every paragraph of this Complaint as though fully set forth herein.

49. Section 3 of the applicable IWC Wage Order provides that Defendants are and were required to pay Plaintiff and class members employed by Defendants, and working more than eight (8) hours in a day or more than forty (40) hours in a workweek, at the rate of one and one-half times their regular rate of pay for all hours worked in excess of eight (8) hours in a day or more than forty (40) hours in a workweek.

50. Labor Code § 510 codifies the right to overtime compensation at one and one-half times the regular hourly rate for hours worked in excess of eight (8) hours in a day or forty (40) hours in a week or for the first eight (8) hours worked on the seventh day of work, and overtime compensation at twice the regular hourly rate for hours worked in excess of twelve (12) hours in a day or in excess of eight (8) hours in a day on the seventh day of work.

51. During the relevant time period, Plaintiff and class members worked in excess of eight (8) hours in a day and/or in excess of forty (40) hours in a week. For example, Plaintiff and class members were required to spend time during their work shifts performing non-piece rate tasks that were at Defendants' direction. In particular, Plaintiff and class members were not allowed to leave Defendants' premises while waiting for vehicles to repair, but were expected to, among other things, perform various non-repair tasks such as cleaning their work area, obtaining parts, participating in online training and reviewing service bulletins.

52. During the relevant time period, Plaintiff and class members were not paid for all the hours they worked in excess of eight (8) hours in a day and/or in excess of forty (40) hours in a week. For instance, Plaintiff and class members were not paid a separate hourly wage for the time

1 they were required to remain at work performing non-piece rate tasks. This unpaid time qualified
2 for overtime premium payment. As a result, the overtime rate paid to Plaintiff and class members
3 was miscalculated and incorrect.

4 53. Defendants' willful failure to pay Plaintiff and class members the unpaid balance of
5 overtime compensation, as required by California law, violates the provisions of Labor Code § 510,
6 and is therefore unlawful.

7 54. Labor Code § 558(a) provides "any employer or other person acting on behalf of an
8 employer who violates, or causes to be violated, a section of this chapter or any provisions
9 regulating hours and days of work in any order of the IWC shall be subject to a civil penalty as
10 follows: (1) For any violation, fifty dollars (\$50) for each underpaid employee for each pay period
11 for which the employee was underpaid in addition to an amount sufficient to recover underpaid
12 wages. (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee
13 for each pay period for which the employee was underpaid in addition to an amount sufficient to
14 recover underpaid wages. (3) Wages recovered pursuant to this section shall be paid to the affected
15 employee." Labor Code § 558(c) provides "the civil penalties provided for in this section are in
16 addition to any other civil or criminal penalty provided by law."

17 55. As set forth herein, Defendants have violated numerous provisions of the Labor
18 Code regulating hours and days of work as well as the IWC Wage Orders. Accordingly, Plaintiff
19 seeks the remedies set forth in Labor Code § 558 for himself and class members.

20 56. Pursuant to Labor Code § 1194, Plaintiff and class members are entitled to recover
21 their unpaid overtime compensation, as well as interest, costs and attorney's fees.

22 **THIRD CAUSE OF ACTION**

23 **FAILURE TO PROVIDE ITEMIZED WAGE STATEMENTS**

24 (Violation of Labor Code §§ 226 and 226.3)

25 (Alleged by Plaintiff Individually and On Behalf of All Others Similarly Situated,
26 Against All Defendants)

27 57. Plaintiff hereby re-alleges and incorporates by reference each and every paragraph of
28 this Complaint as though fully set forth herein.

1 58. Labor Code § 226(a) requires employers to furnish their employees with an accurate
2 itemized wage statement that shows gross wages earned, total hours worked, the number of piece-
3 rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, all
4 deductions, net wages earned, the inclusive dates of the period for which the employee is paid, the
5 name of the employee and the portion of his or her social security number as required by law, the
6 name and address of the legal entity that is the employer and all applicable hourly rates in effect
7 during the pay period and the corresponding number of hours worked at each hourly rate by the
8 employee.

9 59. During the relevant time period, Defendants have knowingly and intentionally failed
10 to provide Plaintiff and class members with the above-described writing through actions alleged
11 herein in violation of Labor Code § 226. The deficiencies include, among other things, the failure
12 to list the gross and net wages earned, total hours worked, the number of piece-rate units earned
13 and any applicable piece rate, all applicable hourly rates in effect during the pay period and
14 corresponding number of hours worked at each hourly rate and the inclusive dates of the pay
15 period.

16 60. Plaintiff and class members have been injured by Defendants' intentional violation
17 of Labor Code § 226(a) because they were denied both their legal right to receive, and their
18 protected interest in receiving, accurate itemized wage statements.

19 61. In addition, because Defendants failed to provide the accurate number of total hours
20 worked on their itemized wage statements, Plaintiff and class members have been prevented by
21 Defendants from determining if all hours worked were paid and the extent of the underpayment.
22 Plaintiff has had to file this lawsuit and will be required to conduct discovery and perform
23 computations in order to analyze whether in fact Plaintiff was paid correctly and the extent of the
24 underpayment, thereby causing Plaintiff to incur expenses and lost time. Plaintiff would not have
25 had to engage in these efforts and incur these costs had Defendants provided the accurate number
26 of total hours worked. This has also delayed Plaintiff's ability to demand and recover the
27 underpayment of wages from Defendants.
28

62. Plaintiff and class members are entitled to recover from Defendants the greater of their actual damages caused by Defendants' failure to comply with Labor Code § 226(a), or an aggregate penalty not exceeding four thousand dollars (\$4,000) per employee.

63. Plaintiff and class members are entitled to recover from Defendants a civil penalty for violation of Labor Code § 226(a) in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial citation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation pursuant to Labor Code § 226.3.

FOURTH CAUSE OF ACTION

FAILURE TO MAINTAIN RECORDS

(Violation of Labor Code §§ 1174 and 1174.5; Violation of IWC Wage Order § 7)
(Alleged by Plaintiff Individually and On Behalf of All Others Similarly Situated,
Against All Defendants)

64. Plaintiff hereby re-alleges and incorporates by reference each and every paragraph of this Complaint as though fully set forth herein.

65. Labor Code § 1174(d) requires employers to keep payroll records showing the hours worked daily and the wages paid to their employees.

66. Section 7 of the applicable IWC Wage Order provides that when a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees and the employer must maintain an accurate production record, as well as total hours worked in the payroll period and applicable rates of pay..

67. Pursuant to Labor Code § 1174.5, any person employing labor who willfully fails to maintain the records required by Labor Code § 1174(d) is subject to a civil penalty of five hundred dollars (\$500).

68. During the relevant time period, Defendants willfully failed to maintain accurate records showing the applicable rates of pay for Plaintiff and class members for all regular time, overtime and waiting time periods.

69. As a result of Defendants knowing and willful failure to comply with Labor Code § 1174, Plaintiff and class members have suffered an injury in that they were prevented from knowing, understanding and disputing the wage payments paid to them.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FIFTH CAUSE OF ACTION

**FAILURE TO PAY ALL WAGES DUE WITHIN THE REQUIRED TIME AND UPON
SEPARATION OF EMPLOYMENT**

(Violation of Labor Code §§ 201, 202, 203, 204 and 210)

(Alleged by Plaintiff Individually and On Behalf of All Others Similarly Situated,
Against All Defendants)

70. Plaintiff hereby re-alleges and incorporates by reference each and every paragraph of this Complaint as though fully set forth herein.

71. Labor Code §§ 201 and 202 provide that if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, and that if an employee voluntarily leaves his employment, his wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) hours previous notice of his intention to quit, in which case the employee is entitled to his wages at the time of quitting.

72. During the relevant time period, Defendants willfully failed to pay Plaintiff and class members who are no longer employed by Defendants all their earned wages upon termination including, but not limited to, minimum wages and overtime compensation, either at the time of discharge or within seventy-two (72) hours of their leaving Defendants' employ in violation of Labor Code §§ 201 and 202.

73. Labor Code § 203 provides that if an employer willfully fails to pay wages owed immediately upon discharge or resignation in accordance with Labor Code §§ 201 and 202, then the wages of the employee shall continue as a penalty from the due date at the same rate until paid or until an action is commenced; but the wages shall not continue for more than thirty (30) days.

74. Plaintiff and class members are entitled to recover from Defendants the statutory penalty which is defined as Plaintiff and class members' regular daily wages for each day they were not paid, at their regular hourly rate of pay, up to a thirty (30) day maximum pursuant to Labor Code § 203.

75. Labor Code § 204 requires that all wages earned by any person in any employment between the 1st and 15th days, inclusive, of any calendar month, other than those wages due upon

1 termination of an employee, are due and payable between the 16th and the 26th day of the month
2 during which the labor was performed, and that all wages earned by any person in any employment
3 between the 16th and the last day, inclusive, of any calendar month, other than those wages due
4 upon termination of an employee, are due and payable between the 1st and 10th day of the
5 following month. Section 204 also requires that all wages earned for labor in excess of the normal
6 work period shall be paid no later than the payday for the next regular payroll period.

7 76. During the relevant time period, Defendants failed to pay Plaintiff and class
8 members all wages due to them within any time period specified by Labor Code § 204 including,
9 but not limited to, minimum wages and overtime compensation.

10 77. Labor Code § 210 imposes upon Defendants for each initial violation of failing to
11 pay the wages of each employee a penalty of \$100.00. Furthermore, Labor Code § 210 imposes
12 upon Defendants for each subsequent violation, or any willful or intentional violation, of failing to
13 pay the wages of each employee a penalty of \$200.00, plus 25% of the amount unlawfully withheld.

14 **SIXTH CAUSE OF ACTION**

15 **FAILURE TO REIMBURSE FOR BUSINESS EXPENSES**

16 (Violation of Labor Code §§ 2800 and 2802; Violation of IWC Wage Order § 9)
17 (Alleged by Plaintiff Individually and On Behalf of All Others Similarly Situated,
Against All Defendants)

18 78. Plaintiff hereby re-alleges and incorporates by reference each and every paragraph of
19 this Complaint as though fully set forth herein.

20 79. Labor Code §§ 2800 and 2802 requires employers to indemnify its employees for all
21 necessary expenditures or losses incurred by employees in direct consequence of the discharge of
22 their duties.

23 80. Section 9 of the applicable IWC Wage Order states that when tools or equipment are
24 required by the employer or are necessary to the performance of a job, such tools and equipment
25 shall be provided and maintained by the employer.

26 81. During the relevant time period, Plaintiff and class members were required to
27 purchase their own tools and equipment, which were necessary for the performance of their job. As
28 a result, Plaintiff and class members incurred necessary business-related costs that were not

1 reimbursed by Defendants including, but not limited to, certain tools and equipment, non-slip
2 shoes, mileage reimbursement and cell phone expenses, among other things.

3 82. During the relevant time period, Defendants failed to indemnify Plaintiff and class
4 members for the purchase of tools and equipment and non-slip shoes, mileage costs and cell phone
5 expenses as a result of Defendants' requirement that Plaintiff and class members purchase specific
6 tools and equipment and non-slip shoes, attend mandatory off-site training seminars requiring non-
7 commute travel in their personal vehicles and use their personal cell phones for work-related
8 purposes as a condition of employment and continued employment.

9 83. Defendants have intentionally and willfully failed to reimburse Plaintiff and class
10 members for necessary business-related costs and expenses. As a result, Plaintiff and class
11 members have suffered and continue to suffer substantial losses relating to the use and enjoyment
12 of such monies, costs and expenses and attorney's fees.

13 SEVENTH CAUSE OF ACTION

14 VIOLATION OF LABOR CODE §§ 2698, ET SEQ.

15 (Alleged by Plaintiff Individually and On Behalf of All Other Aggrieved Employees,
16 Against All Defendants)

17 84. Plaintiff hereby re-alleges and incorporates by reference each and every paragraph of
18 this Complaint as though fully set forth herein.

19 85. Pursuant to Labor Code §§ 2698, *et seq.*, any provision of the Labor Code that
20 provides for a civil penalty to be assessed and collected by the Labor and Workforce Development
21 Agency ("LWDA") or any of its departments, divisions, commissions, boards, agencies or
22 employees for violation of the code may, as an alternative, be recovered through a civil action
23 brought by an aggrieved employee on behalf of himself and other current or former employees
24 pursuant to the procedures specified in Labor Code § 2699.3.

25 86. Defendants' conduct violates numerous Labor Code sections including, but not
26 limited to, the following:

- 27 (a) Violation of Labor Code §§ 1194, 1197 and 1197.1 for failure to pay
28 Plaintiff and other aggrieved employees minimum wages as herein alleged;

- 1 (b) Violation of Labor Code §§ 510 and 1194 for failure to compensate Plaintiff
2 and other aggrieved employees with all required overtime pay as herein
3 alleged;
- 4 (c) Violation of Labor Code § 226 for failure to provide accurate itemized wage
5 statements to Plaintiff and other aggrieved employees as herein alleged;
- 6 (d) Violation of Labor Code §§ 1174 and 1174.5 for failure to maintain accurate
7 records for Plaintiff and other aggrieved employees as herein alleged;
- 8 (e) Violation of Labor Code §§ 201, 202, 203 and 204 for failure to timely pay
9 all earned wages owed to Plaintiff and other aggrieved employees during
10 employment and upon separation of employment as herein alleged; and
- 11 (f) Violation of Labor Code §§ 2800 and 2802 for failure to reimburse Plaintiff
12 and other aggrieved employees for all business expenditures as herein
13 alleged.

14 87. Plaintiff is an "aggrieved employee" because he was employed by the alleged
15 violators and had one or more of the alleged violations committed against him, and therefore is
16 properly suited to represent the interests of all other aggrieved employees.

17 88. On April 10, 2013, Plaintiff sent written notice, via certified mail, to the LWDA and
18 Defendants regarding the specific provisions of the Labor Code that were violated, including the
19 facts and theories to support the alleged violations. Attached hereto as Exhibit A is a true and
20 correct copy of the Notice correspondence showing compliance with Labor Code § 2699.3. No
21 notice of intent to investigate the alleged violations was provided within 33 calendar days of the
22 postmark date of Plaintiff's notice to the LWDA. As a consequence, Plaintiff has exhausted
23 administrative remedies, on behalf of himself and all other aggrieved current and former employees
24 of Defendants. Plaintiff, therefore, pursues this cause of action as permitted by Labor Code §§
25 2699, et seq.

26 89. Labor Code §§ 2698, et seq. imposes upon Defendants, a penalty of one hundred
27 dollars (\$100.00) for each aggrieved employee per pay period for the initial violation and two
28

1 hundred dollars (\$200.00) for each aggrieved employee per pay period for each subsequent
2 violation in which Defendants violated the Labor Code.

3 90. Pursuant to Labor Code §§ 2699(a), 2699.3 and 2699.5, Plaintiff and all other
4 aggrieved employees are entitled to recover civil penalties against Defendants, in addition to other
5 remedies, for violations of Labor Code §§ 201, 202, 203, 204, 210, 226, 226.3, 510, 558, 1174,
6 1174.5, 1194, 1194.2, 1197, 1197.1, 2800 and 2802.

7 91. For bringing this action, Plaintiff is entitled to attorney's fees and costs incurred
8 herein.

9 **EIGHTH CAUSE OF ACTION**

10 **VIOLATION OF BUSINESS AND PROFESSIONS CODE §§ 17200, *ET SEQ.***
11 (Alleged by Plaintiff Individually and On Behalf of All Others Similarly Situated,
12 Against All Defendants)

13 92. Plaintiff hereby re-alleges and incorporates by reference each and every paragraph of
14 this Complaint as though fully set forth herein.

15 93. Defendants' conduct, as alleged herein, has been and continues to be unfair,
16 unlawful and harmful to Plaintiff, class members and to the general public. Plaintiff seeks to
17 enforce important rights affecting the public interest within the meaning of Code of Civil Procedure
18 § 1021.5.

19 94. Defendants' activities, as alleged herein, violate California law and constitute
20 unlawful business acts or practices in violation of California Business and Professions Code §§
21 17200, *et seq.*

22 95. A violation of Business and Professions Code §§ 17200, *et seq.* may be predicated
23 on the violation of any state or federal law.

24 96. Defendants' policies and practices have violated state law in at least the following
25 respects:

- 26 (a) Failing to pay a separate hourly minimum wage to Plaintiff and class
27 members for time spent waiting for vehicles to repair or performing other
28 non-repair tasks in violation of Labor Code §§ 1194, 1197 and 1197.1;

- 1 (b) Requiring Plaintiff and class members to work overtime without paying
2 them proper compensation in violation of Labor Code §§ 510 and 1194;
3 (c) Failing to provide Plaintiff and class members with accurate itemized wage
4 statements in violation of Labor Code § 226;
5 (d) Failing to maintain the employment records of Plaintiff and class members in
6 violation of Labor Code §§ 1174 and 1174.5;
7 (e) Failing to timely pay all earned wages to Plaintiff and class members during
8 their employment and upon separation of employment in violation of Labor
9 Code §§ 201, 202, 203 and 204; and
10 (f) Failing to reimburse Plaintiff and class members for all business-related
11 expenditures in violation of Labor Code §§ 2800 and 2802.

12 97. Defendants intentionally avoided paying Plaintiff and class members' wages and
13 monies, thereby creating for Defendants an artificially lower cost of doing business in order to
14 undercut their competitors and establish and gain a greater foothold in the marketplace.

15 98. Pursuant to Business and Professions Code §§ 17200, *et seq.* Plaintiff and class
16 members are entitled to restitution of the wages unlawfully withheld and retained by Defendants
17 during a period that commences four years prior to the filing of the Complaint; injunctive relief
18 enjoining Defendants from engaging in the practices alleged herein; disgorgement of profits
19 requiring Defendants to pay all outstanding wages due to Plaintiff and class members; an award of
20 attorney's fees pursuant to Code of Civil Procedure § 1021.5 and other applicable laws; and an
21 award of costs.

22 **PRAYER FOR RELIEF**

23 Plaintiff, on his own behalf and on behalf of all others similarly situated, prays for relief and
24 judgment against Defendants, jointly and severally, as follows:

25 1. For certification of this action as a class action on behalf of a class of current and
26 former employees employed by Defendants as technicians, service technicians or mechanics in
27 California;

28 2. For appointment of Jose Magdaleno as the class representative;

- 1 3. For appointment of Aegis Law Firm, PC and Cohelan Khoury & Singer as class
2 counsel for all purposes;
- 3 4. For general damages;
- 4 5. For special damages;
- 5 6. For liquidated damages pursuant to Labor Code § 1194.2;
- 6 7. For reasonable attorney's fees, costs of suit and interest to the extent permitted by
7 law, including pursuant to Code of Civil Procedure § 1021.5 and Labor Code §§ 1194 and 2698, *et*
8 *seq.*;
- 9 8. For statutory penalties to the extent permitted by law, including those pursuant to
10 the Labor Code and IWC Wage Orders;
- 11 9. For injunctive relief as provided by the Labor Code and Business and Professions
12 Code §§ 17200, *et seq.*;
- 13 10. For restitution as provided by Business and Professions Code §§ 17200, *et seq.*;
- 14 11. For an order requiring Defendants to restore and disgorge all funds to each employee
15 acquired by means of any act or practice declared by this Court to be unlawful, unfair or fraudulent
16 and, therefore, constituting unfair competition under Business and Professions Code §§ 17200, *et*
17 *seq.*;
- 18 12. For an award of damages in the amount of unpaid compensation including, but not
19 limited to, unpaid wages, benefits and penalties;
- 20 13. For pre-judgment interest; and
- 21 14. For such other relief as the Court deems just and proper.

22
23 Dated: 05/14/13

AEGIS LAW FIRM, PC
COHELAN KHOURY & SINGER

24
25 By: Samuel A. Wong
26 Alison M. Miceli

27 Samuel A. Wong
28 Alison M. Miceli
Attorneys for Plaintiff Jose Magdaleno

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial with respect to all issues triable of right by jury.

Dated: 05/14/13

AEGIS LAW FIRM, PC
COHELAN KHOURY & SINGER

By: Alison M. Miceli

Samuel A. Wong
Alison M. Miceli
Attorneys for Plaintiff Jose Magdaleno

Exhibit A



ARGIS LAW FIRM, PC
9811 Irvine Center Drive, Suite 100
Irvine, California 92618
telephone 949-379-6250
facsimile 949-379-6251
www.aegislawfirm.com

April 10, 2013

VIA CERTIFIED MAIL (RETURN RECEIPT REQUESTED)

California Labor and Workforce Development Agency
800 Capitol Mall, Suite 5000, MIC-55
Sacramento, CA 95814

Shelly Automotive, LLC
Shelly Auto Auction, LLC
Shelly Properties, LLC
c/o Dennis W. Ghan, Agent for Service of Process
2603 Main Street, Suite 1300
Irvine, CA 92614

Re: Jose Magdaleno v. Shelly Automotive, LLC, et al.

Dear Labor and Workforce Development Agency, Shelly Automotive, LLC, Shelly Auto Auction, LLC and Shelly Properties, LLC:

Please allow this correspondence to serve as written notice required by California Labor Code § 2699.3(a)(1) of the specific provisions of the Labor Code allegedly violated by Shelly Automotive, LLC, Shelly Auto Auction, LLC and Shelly Properties, LLC (collectively, "Defendants" or "Shelly"), and the facts and theories in support of said allegations. This firm represents Jose Magdaleno ("Claimant") and intends to represent all other members of the general public similarly situated.

Specific Provisions of the Labor Code Allegedly Violated by Defendants

The specific provisions of the Labor Code allegedly violated by Defendants include the following: 201, 202, 203, 204, 210, 221, 222, 223, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 2698, *et seq.*, 2800 and 2802.

Facts and Theories Supporting the Allegations Against Defendants

Claimant was employed by Defendants as a service technician and assigned to their Irvine BMW automobile dealership located at 9881 Research Drive in Irvine, California 92618 from approximately May 16, 2011 until April 2, 2013. Claimant's responsibilities included,

among other things, diagnosing and repairing customer and dealership vehicles, completing assigned repair orders and performing other non-repair tasks directed by Defendants while waiting for other vehicles to repair.

Throughout the course of his employment, Defendants failed to pay Claimant all wages and unlawfully collected wages paid, failed to pay at least the legal minimum wage for all hours worked, failed to pay overtime for all hours worked in excess of eight (8) hours in a day or forty (40) hours in a week, required Claimant to work longer than five hours in a shift before being provided with a meal period, failed to authorize or permit rest breaks and failed to pay state mandated wage premiums for non-compliant meal and rest breaks.

Defendants further failed to provide Claimant with accurate itemized wage statements showing total hours worked, the number of piece-rate units earned and any applicable piece rate, applicable hourly rates in effect and the number of hours worked at each hourly rate, gross and net wages earned and the inclusive dates of the pay period, failed to maintain accurate records showing when each work period began and ended and when meal periods were actually taken, total daily hours worked, total hours worked in the payroll period and applicable rates of pay for all regular time, overtime and waiting time periods, failed to pay all wages due and owing within the required time and following the end of employment and failed to reimburse for business-related expenditures, including tool, equipment and non-slip shoe purchases, mileage costs and cell phone expenses. Based on these violations, Claimant seeks attorney's fees, interest and penalties under the Labor Code.

Thank you for your assistance on this issue. Should you have any questions or comments, please do not hesitate to contact the undersigned.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Alison M. Miceli".

Alison M. Miceli

Aegis | LAW FIRM

9811 Irvine Center Drive, Suite 100
Irvine, California 92618



California Labor and Workforce Development
Agency
800 Capitol Mall, Suite 5000, MIC-55
Sacramento, CA 95814

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 8. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

California Labor and
Workforce Development
Agency
800 Capitol Mall, Suite 5000
MIC-55
Sacramento CA 95814

2. Article Number

(Transfer from service label)

7012 1010 0000 9117 7054

PS Form 3811, February 2004

Domestic Return Receipt

102555-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

Signature ☒ Agent
☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes ☐ No
If YES, enter delivery address below:

3. Service Type

☐ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

PLACE STAMP HERE AT TOP OPEN HERE TO RETURN TO THE POST OFFICE
CERTIFIED MAIL



7012 1010 0000 9117 7054

7012 1010 0000 9117 7054

U.S. Postal Service™ CERTIFIED MAIL™ RECEIPT

(Domestic Mail Only) (No Insurance Coverage Provided)

For a list of restrictions, visit us online at usps.com

Postage

Certified Fee

Return Receipt Fee
(Endorsement Required)

Restricted Delivery Fee
(Endorsement Required)

Total Postage & Fees

\$ 4.60

2.95

2.35

\$ 5.70

Postmark
Jose
Magallanes

Post to:
California Labor & Workforce Development
Street, Apt. No.
800 Capitol Mall, Suite 5000, MIC-55
Sacramento, CA 95814

Aegis | LAW FIRM

9811 Irvine Center Drive, Suite 100
Irvine, California 92618



Dennis W. Ghan, Agent for Service of Process:
Shelly Automotive, LLC
Shelly Auto Auction, LLC
Shelly Properties, LLC
2603 Main Street, Suite 1300
Irvine, CA 92614

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Dennis W. Ghan - Shelly
Auto LLC, Shelly Auto
Auction, LLC, Shelly Properties
LLC
2603 Main Street, Suite 1300
Irvine, CA 92614

2. Article Number

(Transfer from service label)

7012 1010 0000 9117 7047

PS Form 3811, February 2004

Domestic Return Receipt

102584-02-01-1540

COMPLITE THIS SECTION ON DELIVERY

- ☒ Signature ☐ Agent ☐ Addressee
- B. Received by (Printed Name) C. Date of Delivery

- D. Is delivery address different from item 1? ☐ Yes ☐ No
- If YES, enter delivery address below:

- 3. Service Type ☒ Certified Mail ☐ Express Mail ☐ Registered ☐ Return Receipt for Merchandise ☐ Insured Mail ☐ C.O.D.
- 4. Restricted Delivery? (Extra Fee) ☐ Yes ☐ No

Send to
Dennis W. Ghan
2603 Main Street, Suite 1300
Irvine, CA 92614

Postage	\$ 4.60
Certified Fee	2.95
Return Receipt Fee (Endorsement Required)	2.35
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 9.90

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only, No Insurance Coverage Provided)
OFFICIAL USE

7012 1010 0000 9117 7047
7012 1010 0000 9117 7047