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8 Attorney for Plaintiff

9 HUMBERTO PADILLA, in his
10 representative capacity

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF SAN BERNARDINO

13 HUMBERTO PADILLA, in his
14 representative capacity,

15 Plaintiff,

16 v.

17 HOPSKIPDRIVE, INC., a Delaware
18 Corporation; KIDLIVERY, LLC, a
19 California limited liability company, and
20 DOES 1-10,

21 Defendants.

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

MAY 29 2020

LaShondra Richardson

CASE NO.

CIV DS 2014080

REPRESENTATIVE ACTION

**COMPLAINT FOR CIVIL PENALTIES
PURSUANT TO THE PRIVATE
ATTORNEYS GENERAL ACT OF 2004
200728-0384**

1 Plaintiff Humberto Padilla hereby brings this representative action for civil penalties
2 pursuant to the Private Attorneys General Act of 2004 against Defendants HopSkipDrive, Inc.
3 and Kidlivery, LLC. Plaintiff brings this action on behalf of all current and former drivers
4 employed by Defendants during the relevant statute of limitations period (the “aggrieved
5 employees”).

6 **SUMMARY OF THE CASE**

7 1. This PAGA action is based on Defendants’ willful misclassification of its drivers
8 as independent contractors, giving rise to numerous violations of California labor law.
9 HopSkipDrive, Inc. and/or Kidlivery, LLC (collectively “HSD”) is a transportation company
10 designed to transport children to and from school and their daily activities. HSD is essentially an
11 “UBER or Lyft for Kids” that is designed to assist families in “getting their kids to where they
12 need to go.” The company operates under the brand name “HopSkipDrive”. HSD offers services
13 in 13 major markets across eight states and Washington, D.C., including but not limited to
14 operations in both Southern and Northern California, and specifically within San Bernardino
15 County. HSD has partnered with 200+ school and districts to offer alternative transportation
16 solutions for homeless students and foster families. HSD has a dedicated and passionate team of
17 more than 100 employees and has enabled more than 1 million trips to and from schools across
18 7+ million miles.

19 2. HSD’s success is, unfortunately, built on the backs of a misclassified and
20 underpaid work force. HSD employs hundreds, if not thousands, of individuals to act as drivers
21 to transport children on contracted rides. Drivers are paid based on a formula comprised, in part,
22 of the length of time to complete a trip and the distance traveled. Drivers login to an App to book
23 rides in advance. Drivers are not paid until a child is in their car, at which time a Driver clocks in
24 for that trip. When the child exits the car, the Driver clocks out. Drivers are not paid for all time
25 worked, including time driving to the pick-up location and/or driving home after a job is
26 completed and/or the time a driver is traveling to another job. HSD charges drivers a Platform
27 Fee to book a ride and a “Processing Fee” for paying drivers their earnings through Stripe.

28 3. These practices, set forth in more detail below, violate various provisions of the

1 California Labor Code. Pursuant to the Private Attorneys General Act of 2004, codified in Labor
2 Code § 2698 *et seq.* ("PAGA"), Plaintiff brings this action to recover civil penalties on behalf of
3 all current and former individuals employed by Defendants as drivers during the relevant statute
4 of limitations period.

5 JURISDICTION & VENUE

6 4. This Court has jurisdiction over this action pursuant to California Code of Civil
7 Procedure § 410.10 and Labor Code § 2698 *et seq.* Pursuant to Labor Code § 2698 *et seq.*,
8 Plaintiff brings this action in his representative capacity on behalf of the aggrieved employees.
9 This representative action asserts claims by Plaintiff only in his representative capacity for civil
10 penalties pursuant to PAGA and does not assert individual claims.

11 5. This Court has personal jurisdiction over Defendants because Defendants conduct
12 business in the State of California, Defendants conduct business within San Bernardino County,
13 some of the aggrieved employees at issue in this lawsuit transport children within San Bernardino
14 County at the direction and control of Defendants, and accordingly, Defendants have caused
15 injuries within San Bernardino County, as well as throughout the State of California, through its
16 acts and omissions, and by and through its violations of the Labor Code.

17 6. Venue as to Defendants is proper in this judicial district pursuant to Code of Civil
18 Procedure § 395(a) and 395.5 because Defendants transact business in this County that is the
19 subject of this lawsuit, some of the aggrieved employees at issue in this lawsuit work and
20 transport children within San Bernardino County, because the cause of action accrued in part
21 within San Bernardino County, and because Defendants are otherwise within this Court's
22 jurisdiction. The unlawful acts alleged herein have a direct effect on aggrieved employees within
23 this County and throughout the State of California.

24 PARTIES

25 7. At all relevant times alleged herein, Plaintiff Humberto Padilla is and was a citizen
26 of the State of California.

27 8. On information and belief, Defendant HopSkipDrive, Inc. is a corporation
28 organized under the laws of the State of Delaware with its principal place of business in Los

1 Angeles, California.

2 9. On information and belief, Defendant Kidlivery, LLC is a limited liability
3 company organized under the laws of the State of California with its principal place of business in
4 Los Angeles, California.

5 10. Plaintiff is unaware of the true names and capacities, whether individual,
6 association, partnership, corporation, other otherwise, of Does 1 through 10, and therefore sues
7 these defendants by these fictitious names. Each Doe defendant is the principal, agent, or
8 employee of the other and was acting within the scope of such agency or employment to commit
9 the acts alleged herein. Each Doe defendant sued herein aided and abetted the other with the
10 intent that each would be successful in their mutual endeavors. Each Doe defendant contributed
11 to the statutory violations alleged herein. Plaintiff will amend this complaint to allege the Doe
12 defendants' true names and capacities when they become known to Plaintiff.

13 **FACTUAL BACKGROUND**

14 **HSD's Willful Misclassification of Drivers as Independent Contractors**

15 11. In order to circumvent California wage and hour laws, HSD willfully misclassifies
16 its drivers as independent contractors. As recently noted by the California Supreme Court, there
17 are substantial economic incentives for a business to mischaracterize workers as independent
18 contractors rather than employees. *See Dynamex Operations v. Superior Court*, 4 Cal. 5th 903
19 (2018). These include the unfair competitive advantage the business may obtain over competitors
20 that properly classify similar workers as employees and that thereby assume the fiscal and other
21 responsibilities and burdens that an employer owes to its employees. If a worker should properly
22 be classified as an employee, the hiring business bears the responsibility of paying federal Social
23 Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing
24 worker's compensation insurance, and, most relevant here, complying with numerous statutes and
25 regulations governing the wages, hours, and working conditions of employees. On the other
26 hand, if a worker should properly be classified as an independent contractor, the business does not
27 bear any of those costs or responsibilities, the worker obtains none of the numerous labor law
28 benefits, and the public may be required under applicable laws to assume additional financial

1 burdens with respect to such workers and their families. *Id.*

2 12. In *Dynamex*, the Supreme Court adopted what has become known as the “ABC”
3 test in determining whether a worker may properly be categorized as an independent contractor.
4 It is clear under that standard that HSD has misclassified its workforce of chargers. The Supreme
5 Court in held in *Dynamex* that a hiring entity must establish all of the following to support the
6 classification of a worker as an independent contractor:

7 A) that the worker is free from the control and direction of the hiring entity in
8 connection with the performance of the work, both under the contract for the
9 performance of the work and in fact;

10 B) that the worker performs work that is outside the usual course of the hiring
11 entity's business; and

12 C) that the worker is customarily engaged in an independently established trade,
13 occupation, or business.

14 *Dynamex*, 4 Cal. 4th at 964. HSD cannot satisfy any of these requirements with respect to its
15 drivers, let alone all of them as required.

16 13. Perhaps most glaringly, drivers are not performing work that is outside the usual
17 course of HSD’s business. To the contrary, drivers are performing work that is absolutely central
18 to HSD’s business. Absent drivers’ work transporting children, HSD could not operate, and
19 HSD’s business would altogether cease. In sum, the drivers *are* the business. In addition, drivers
20 are not free from the control and direction of HSD when working. Rather, HSD tells drivers
21 exactly where to go, who to pick up, and where to drive. HSD controls all these aspects of its
22 drivers’ work through its HSD app. HSD in some instances docks a driver’s pay if these tasks are
23 not performed in compliance with the company’s requirements. Accordingly, under the *Dynamex*
24 standard, there is no question that drivers must be considered employees, not independent
25 contractors.

26 14. Notably, even under the standard that was applicable prior to *Dynamex*, HSD
27 cannot properly classify its drivers as independent contractors. *See Borello v. Dep’t of Industrial*
28 *Relations*, 48 Cal. 3d 341 (1989) (discussing variety of factors to be considered in determining

1 independent contractor status). Similar to the analysis under the current standard, consideration
2 of those factors leads to the inevitable conclusion that the chargers should be considered
3 employees. HSD has control or the right to control drivers both as to the work done and the
4 manner and means in which it is performed. Drivers are not performing services in an occupation
5 or business distinct from HSD. Driving is instead a part of HSD's regular business – indeed, it is
6 a central and necessary component of the business. HSD instructs drivers where to pick up
7 children, the drop off location, and protocols for picking up children and dropping them off which
8 is standard for all rides. The services provided require no special skill, nor does drivers'
9 opportunity for profit or loss depend on any managerial skill. Services are generally expected to
10 be performed continuously and permanently, as driving is a daily necessity to HSD's continued
11 operation. For these and other reasons, even under the standard applicable prior to *Dynamex*,
12 drivers could not properly be classified as independent contractors.

13 **Plaintiff's Facts**

14 15. Like all other of HSD's California-based drivers, our client, Mr. Padilla, was hired
15 as a driver by HSD and improperly classified as an independent contractor when he should have
16 been classified as an employee. Mr. Padilla performed work for HSD in numerous instances over
17 several months between February 2019 and June 2019. HSD controlled each step in the process
18 of his work. The app instructed him where to go to pick up children, where to drive them to, and
19 the protocols involved in picking up and dropping off minors. HSD required him to use specific
20 equipment that he was required to obtain from HSD. HSD did not pay him for all time worked.
21 Rather, HSD paid him based, in part, on a formula determined by time and distance traveled. In
22 many instances, however, driving to a certain pick up and/or drop off location took an excessive
23 amount of time for which he was not properly compensated. Estimated fares were often incorrect
24 and therefore did not properly pay him for all time worked on a particular trip.

25 **Overview of Labor Law Violations**

26 16. HSD's willful misclassification of its drivers and other practices set forth herein
27 give rise to numerous other Labor Code violations, including: Willful misclassification and
28 related penalties (Cal. Labor Code §§ 226.8, 3353); Failure to pay all wages and minimum wages

1 and minimum wage violations (Cal. Lab. Code §§ 226.2, 1194, 1194.2, 1197; 1197.1; California
2 Minimum Wage Order MW-2019, Wage Order 9-2001); Failure to pay overtime wages (Cal.
3 Lab. Code §§ 510, 558, 1194; MW-2019, Wage Order 9-2001); Improper deductions and paying
4 less than the agreed-upon wage scale (Cal. Lab. Code §§ 221-224; 225.5); Failure to provide meal
5 and rest periods (Cal. Lab. Code §§ 226.7, 512, and 558); Failure to reimburse expenses or losses
6 incurred as a result of performing work duties (Cal. Lab. Code § 2802); Violations of Paid Sick
7 Day Requirements (Cal. Lab. Code § 245-249); Waiting time penalties (Cal. Lab. Code § 203);
8 Inaccurate wage statements (Cal. Lab. Code §§ 226; 226.3); Failure to pay all wages by the
9 appropriate pay period (Cal. Lab. Code § 204); and PAGA penalties (Cal. Lab. Code §§ 2699 et
10 seq., 201-203, 204, 210, 216, 221-224, 225.5, 226(a), 226.3, 226.7, 510, 512 558, 1197, 1197.1
11 1199, 2699, et seq.). The facts regarding each of these violations are set forth in detail below.

12 Willful Misclassification of Individuals as Independent Contractors

13 17. Labor Code § 226.8 makes clear that any misclassification of workers as
14 Independent Contractors subjects a company to penalties in the range of \$10,000-\$25,000 per
15 employee. As discussed above, and incorporated herein by reference, HSD has unequivocally
16 and intentionally misclassified its drivers as Independent Contractors to avoid California's labor
17 laws. HSD's continued misclassification of its drivers, despite the California Supreme Court's
18 *Dynamex* decision and the passage and implementation of California Assembly Bill 5, constitutes
19 willful misclassification in violation of Labor Code § 226.8 and subjects HSD to significant
20 monetary penalties.

21 Failure to Pay All Wages/Minimum Wage Violations

22 18. For similar reasons, HSD's payment practices also fail to pay drivers the
23 applicable state minimum wage for all hours worked. HSD only compensates drivers for time
24 spent when a child is in the car. Drivers are paid when a child starts a ride until the child's ride
25 ends. Drivers are not paid any time to and from pick up and drop off locations, or for any work
26 needed to be done to maintain their cars in safe working condition, time spent on refueling, time
27 spent on insurance related necessities, among other necessary duties. Moreover, drivers' pay
28 rates often deviate from quoted estimates based on hypothetical time and mileage calculation that

1 sometimes do not account for accidents, traffic, or closed roads, among other things. Sometimes
2 these issues resulted in drivers, such as Plaintiff, being paid less than the minimum wage.

3 19. California law prescribes that it is an automatic minimum wage violation when an
4 employee works but is not compensated for each and every hour worked. *See Gonzalez v.*
5 *Downtown L.A. Motors*, 215 Cal. App. 4th 36, 49-50 (2014); *Lab. Code* § 226.2(a)(4); *Armenta v.*
6 *Osmose, Inc.* (2005) 215 Cal. App. 4th 314, 323-324 (2005); *see also Lab. Code* §§ 221-23.
7 Notably, averaging wages over the workweek to meet minimum wage obligations is not permitted
8 under the California Labor Code.

9 Failure to Pay All Overtime Wages Earned

10 20. HSD also fails to pay drivers all the overtime pay for which they are entitled, or
11 indeed any overtime pay at all. Because HSD does not track or pay drivers for all time worked,
12 HSD fails to accurately assess how much is due in overtime wages to the drivers and, thus, fails
13 to pay drivers accurate overtime wages.

14 Meal and Rest Period Violations

15 21. HSD also does not provide meal and rest periods in accordance with California
16 law. Employees paid on a piece-rate system must also be separately compensated for rest
17 periods, which HSD fails to do. *See Labor Code* § 226.2(a)(1); 226.2(a)(3)(A); *Bluford v.*
18 *Safeway Stores, Inc.*, 216 Cal.App.4th 864 (2013); *Cardenas v. McLane FoodServices, Inc.*, 796
19 F.Supp.2d 1246, 1252 (C.D. Cal. 2011) (piece-rate pay system that did not separately pay truck
20 drivers for non-driving duties and rest periods violates California law requiring compensation for
21 each hour worked); *Reinhardt v. Gemini Motor Transport*, 869 F.Supp.2d 1158, 1168 (E.D. Cal.
22 2012) (piece-rate pay system that did not separately pay truck drivers for non-driving duties
23 violates California law requiring compensation for each hour worked).

24 Failure to Reimburse for Business Expenses

25 22. HSD also fails to reimburse drivers with respect to the expenses required to
26 perform their jobs, including but not limited to the following: vehicle expenses, gas, parking,
27 repairs, phone usage, vehicle wear and tear, tickets, parking fines, tolls, and insurance, among
28 other necessary expenses. HSD is therefore in violation of Labor Code Sections 558, 1197.1,

1 2802 and 2689 *et seq.*

2
3 Violations of Paid Sick Day Requirements

4 23. HSD also violates Labor Code Section 246 by not having policies and practices in
5 place for workers to accrue and take paid sick leave. HSD maintains no such sick day policy for
6 its drivers. Accordingly, Defendant HSD is therefore liable for civil penalties pursuant to Labor
7 Code Section 248.5.

8 24. The other alleged violations, including inaccurate wage statements and waiting
9 time penalties, are largely derivative of the failure to pay minimum wage and overtime violations
10 as well as the failure to provide meal and rest periods violations.

11 25. Plaintiff further believes that additional violations may be discovered and therefore
12 reserves his right to allege additional violations of the law as investigation and discovery warrant.
13 In the event Plaintiff discovers additional violations through the discovery process, Plaintiff will
14 seek to amend the operative complaint as necessary.

15 26. On March 16, 2020 Plaintiff submitted notice to the California Labor and
16 Workforce Development Agency ("LWDA") and Defendant informing them of Defendants'
17 alleged Labor Code violations pursuant to PAGA. A true and correct copy of the notice is
18 attached hereto as Exhibit 1 and is incorporated herein by reference. To date, the LWDA has not
19 provided notice of whether it intends to investigate the alleged violations. Therefore, Plaintiff has
20 the right to pursue his claims under PAGA in a representative capacity pursuant to Labor Code §
21 2699.3.

22 PAGA COLLECTIVE

23 27. The proposed PAGA Collective consists of all current and former individuals
24 employed by Defendant as drivers during the relevant statute of limitations period. Plaintiff
25 asserts that members of the PAGA Collective are properly classified as "employees" as the term
26 is used in the Labor Code and IWC Wage Orders regulating wages, hours, and working
27 conditions in the State of California. A more precise definition of the PAGA Collective may be
28 determined after further investigation and discovery. Plaintiff thus reserves the right to redefine

1 the PAGA Collective in accordance with California law.

2
3 **FIRST CAUSE OF ACTION**

4 **(By Plaintiff in his Representative Capacity against Defendants and Does 1-10)**

5 **PRIVATE ATTORNEYS GENERAL ACT OF 2004**

6 **(Labor Code § 2698 *et seq.*)**

7 28. Plaintiff realleges and incorporates by reference the preceding paragraphs as if
8 fully set forth herein.

9 29. Pursuant to PAGA, any provision of the Labor Code allowing for a civil penalty to
10 be assessed and collected by the LWDA, or any of its departments, divisions, commissions,
11 boards, agencies, or employees, for a Labor Code violation, may be recovered through a civil
12 action brought by an aggrieved employee on behalf of himself or herself, and other current or
13 former employees. Labor Code § 2699. Such civil penalties are in addition to any other relief
14 provided under the Labor Code and must be allocated seventy-five percent (75%) to the LWDA
15 and twenty-five percent (25%) to the aggrieved employees pursuant to section 2699(i).

16 30. During all, or a portion of, the one-year period before Plaintiff filed notice of his
17 claims with the LWDA, Plaintiff, and each of the other aggrieved employees, were employed by
18 Defendants in the State of California.

19 31. Plaintiff asserts that Defendants willfully misclassified him and the other
20 aggrieved employees as independent contractors and/or exempt employees when they should
21 instead have been properly classified as non-exempt employees and are therefore subject to the
22 protections of the Labor Code and relevant IWC Wage Orders.

23 32. Plaintiff is an "aggrieved employee" under PAGA, as he was employed by
24 Defendant within the past year and suffered one or more violations of the Labor Code.

25 33. Plaintiff has complied with the notice requirements outlined in Labor Code
26 §2699.3. On March 16, 2020, Plaintiff submitted notice to the LWDA and Defendant informing
27 them of Defendant's alleged Labor Code violations pursuant to PAGA. *See* Exhibit 1. The
28 LWDA had 65 days to provide notice of whether it intended to investigate the alleged violations.

1 To date, the LWDA has not provided notice of whether it intends to investigate the alleged
2 violations. Plaintiff thus has the right to pursue, and does pursue, his claims under PAGA in a
3 representative capacity pursuant to Labor Code § 2699.3.

4 34. As set forth herein, Defendants have committed, and continue to commit,
5 numerous violations for which the Labor Code entitles Plaintiff, in his representative capacity, to
6 recover, on behalf of the aggrieved employees and the general public, attorneys' fees and costs, as
7 well as penalties against Defendants for the alleged Labor Code violations, described herein.

8 35. Plaintiff, in his representative capacity on behalf of the PAGA Collective, is
9 entitled to and thus seeks to recover civil penalties for his PAGA claim through a representative
10 action based on violations of the Labor Code provisions:

- 11 a. Willfully misclassifying the aggrieved employees as independent contractors in
12 violation of Labor Code §§ 226.8(a) and 3353;
- 13 b. Improperly classifying the aggrieved employees as exempt employees in violation
14 of California Law and relevant IWC Wage Orders;
- 15 c. Failure to pay minimum wages and overtime compensation in violation of Labor
16 Code §§ 204, 226.2, 210, 510, 1194, 1197, 1197.1, 1198, and relevant IWC Wage
17 Orders;
- 18 d. Failure to provide legally compliant meal periods or compensation in lieu thereof
19 in violation of Labor Code § 226.7, 512 and relevant IWC Wage Orders;
- 20 e. Failure to provide legally compliant rest periods or compensation in lieu thereof in
21 violation of Labor Code § 226.7 and relevant IWC Wage Orders;
- 22 f. Failure to reimburse for necessary work expenses in violation of Labor Code §§
23 2800, 2802, and relevant IWC Wage Orders;
- 24 g. Failure to have policies and practices in place for workers to accrue and take paid
25 sick leave in violation of Labor Code § 245-249;
- 26 h. Failure to pay wages owed and required waiting time penalties in violation of
27 Labor Code § 201-203;
- 28 i. Failure to furnish accurate itemized wage statements in violation of Labor Code §

1 226, 226.2, and relevant IWC Wage Orders, including the failures to comply with
2 the piece-rate compensation requirements of Labor Code §226.2, detailed above;
3 j. Failure to maintain accurate records in violation of Labor Code §§ 226(a), 1174,
4 and relevant IWC Wage Orders.

5 36. For violations of Labor Code §§ 510 and 512, in addition to any other recovery
6 provided by law, Labor Code § 558 imposes a civil penalty of \$50 per pay period for each
7 underpaid employee for the initial violation and \$100 per pay period for each under paid
8 employee for each subsequent violation of any section of the Labor Code Division 2, Part 2,
9 Chapter 1, or any provision regulating hours and days of work in any order of the IWC. Labor
10 Code § 558 also requires that any recovery of wages be paid to the affected employee. Therefore,
11 Plaintiff and the PAGA Collective are entitled to and do seek such civil penalties.

12 37. Labor Code § 226.3 imposes a civil penalty of \$250 per employee per violation in
13 an initial citation and \$1,000 per employee for each violation in a subsequent citation for
14 violations of Labor Code § 226(a) and 226.2. Plaintiff and the PAGA Collective are thus entitled
15 to and seek the described civil penalty.

16 38. Labor Code § 225.5 imposes a civil penalty of \$100 for each failure to pay each
17 employee, and \$200 for each failure to pay each employee, plus 25 percent of the amount
18 unlawfully withheld for each subsequent violation, or any willful or intentional violation of Labor
19 Code § 223. Therefore, Plaintiff and the PAGA Collective are entitled to and do seek such civil
20 penalties.

21 39. Labor Code § 226.8(b) imposes a civil penalty of not less than \$5,000 and not
22 more than \$15,000 for each violation of Labor Code § 226.8(a). Additionally, when an employer
23 has engaged in or is engaging in a pattern of practice of violation of Labor Code § 226.8(a),
24 pursuant to Labor Code § 226.8(c), a civil penalty of not less than \$10,000 and not more than
25 \$25,000 is imposed for each violation.

26 40. Labor Code § 248.5 imposes a civil penalty not to exceed \$4,000, as liquidated
27 damages in the amount of fifty dollars (\$50) to each employee or person whose rights under
28 Labor Code §§ 245-249 were violated for each day or portion thereof that the violation occurred

1 or continued, plus, if the employer has unlawfully withheld paid sick days to an employee, the
2 dollar amount of paid sick days withheld from the employee multiplied by three; or two hundred
3 fifty dollars (\$250), whichever amount is greater. Plaintiff and the PAGA Collective are
4 therefore entitled to and do seek the above described civil penalty.

5 .41. Labor Code § 2699(f) imposes a civil penalty of \$100 per pay period, per
6 employee for the initial violation, and \$200 per pay period, per employee for each subsequent
7 violation for all Labor Code provisions for which a civil penalty is not specifically provided,
8 including but not limited to Labor Code §§ 201, 202, 203, 204, 223, 226, 226.8, 266.8, 510, 512,
9 1174, 1194, 1197, 1191.1, 1198, 2751, 2800, and 2802. Plaintiff and the PAGA Collective are
10 therefore entitled to and do seek the above described civil penalty.

11 42. Labor Code § 2699(g)(1) provides that an employee who prevails in a civil action
12 brought pursuant to PAGA shall be entitled to an award of reasonable attorneys' fees and costs.
13 As such, Plaintiff, in his representative capacity on behalf of the PAGA Collective, is entitled to
14 and does seek attorneys' fees and costs.

15 43. Plaintiff and the PAGA Collective are further entitled to and seek any and all other
16 applicable penalties authorized by PAGA, including but not limited to any and all different or
17 additional penalties authorized pursuant to Cal. Lab. Code §§ 2699 et seq., as well as §§ 201-203,
18 204, 210, 216, 221-224, 225.5, 226, 226.2, 226.7 226.8, 510, 512, 558, 1194, 1194.2, 1197,
19 1197.1, 1199, and 2802.

20 44. Plaintiff, in his representative capacity on behalf of the PAGA Collective, is
21 entitled to and seeks recovery of reasonable attorneys' fees as provided by Labor Code § 218.5
22 and Civil Procedure Code § 1021.5.

23 45. Plaintiff further requests such additional relief as described in the prayer below.

24 **PRAYER FOR RELIEF**

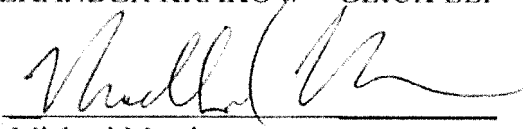
25 WHEREFORE, Plaintiff Humberto Padilla, in his representative capacity on behalf of the
26 PAGA Collective, prays for judgment against Defendants as follows:

27 1. For an order determining that this action may be maintained as a representative
28 action with the named Plaintiff as the representative;

- 1 2. For any wages and benefits due to the PAGA Collective pursuant to PAGA;
- 2 3. For PAGA civil penalties pursuant to Labor Code § 2698 *et seq.* and/or other
- 3 applicable law, as detailed above;
- 4 4. For reasonable attorneys' fees and costs of suit pursuant to Labor Code §§ 203,
- 5 218.5, 226, 1193.6, 1194 and 2699(g), Code of Civil Procedure 1021.5, the "common fund"
- 6 theory, the "substantial benefit" theory, and/or other applicable law;
- 7 5. For pre-judgment and post-judgment interest as provided by California law;
- 8 6. For any appropriate equitable relief pursuant to California law; and
- 9 7. For all other relief the Court may deem just and proper.

10
11
12 DATED: May 29, 2020

ALEXANDER KRAKOW + GLICK LLP

13
14 By: 

15 Michael Morrison
16 Britt L. Karp
17 Attorneys for Plaintiff
18 HUMBERTO PADILLA
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March 16, 2020

VIA CERTIFIED MAIL

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

HopSkipDrive, Inc.
c/o CSC – Lawyers Incorporating Service
2710 Gateway Oaks Drive, Suite 150N
Sacramento, CA 95833
(agent for service of process address)

Kidlivery, LLC
66 Bovet Rd Ste 320
San Mateo, CA 94402
(entity & mailing address)

Re: Padilla v. HopSkipDrive, Inc., Kidlivery, LLC, et al.
Notice of Intent to Bring Civil Action Pursuant to Private Attorneys General Act

To Whom it May Concern:

This letter is to provide notice pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Cal. Labor Code § 2698 *et seq.*, of our intent to pursue a representative civil action on behalf of all drivers employed in California by HopSkipDrive, Inc. and Kidlivery, LLC on behalf of our client, Humberto Padilla. The action will be based on the company’s misclassification of these workers as independent contractors. The misclassification of these workers gives rise to various violations of California labor law, and accordingly makes Mr. Padilla and all drivers employed by the company “aggrieved employees” within the meaning of PAGA. The facts and theories on which the civil action will be based are set forth below.

According to the California Secretary of State’s website, the address for service of process, entity address, and mailing address for HopSkipDrive, Inc. are as follows:

Entity & Mailing Address:

HopSkipDrive, Inc.
1933 S. Broadway, Suite 1144

1900 Avenue of the Stars
Suite 900
Los Angeles
California 90067

T: 310.394.0888
F: 310.394.0811
www.akgllp.com

Employee Justice.

Los Angeles, CA 90007

Address for Service of Process:

HopSkipDrive, Inc.
c/o CSC – Lawyers Incorporating Service
2710 Gateway Oaks Drive, Suite 150N
Sacramento, CA 95833

According to the California Secretary of State's website, the address for service of process, entity address, and mailing address for Kidlivery, LLC are as follows:

Entity & Mailing Address:

Kidlivery, LLC
1933 S. Broadway, Suite 1144
Los Angeles, CA 90007

Address for Service of Process:

Kidlivery, LLC
c/o CSC – Lawyers Incorporating Service
2710 Gateway Oaks Drive, Suite 150N
Sacramento, CA 95833

Facts

HopSkipDrive, Inc. and/or Kidlivery, LLC (collectively "HSD") is a transportation company designed to transport children to and from school and their daily activities. HSD is essentially an "UBER or Lyft for Kids" that is designed to assist families in "getting their kids to where they need to go." The company is based in Los Angeles, California, and operates under the brand name "HopSkipDrive". HSD offers services in 13 major markets across eight states and Washington, D.D., including but not limited to operations in both Southern and Northern California. HSD has partnered with 200+ school and districts to offer alternative transportation solutions for homeless students and foster families. HSD has a dedicated and passionate team of more than 100 employees and has enabled more than 1 million trips to and from schools across 7+ million miles.

HSD's success is, unfortunately, built on the backs of a misclassified and underpaid work force. Just like Uber and Lyft, HSD employs hundreds, if not thousands, of individuals to

act as drivers to transport children on contracted rides. Drivers are paid based on a formula comprised, in part, of the length of time to complete a trip and the distance traveled. Drivers login to an App to book rides in advance. Drivers are not paid until a child is in their car, at which time a Driver clocks in for that trip. When the child exits the car, the Driver clocks out. Drivers are not paid for all time worked, including time driving to the pick up location and/or driving home after a job is completed and/or the time a driver is traveling to another job. HSD charges drivers a Platform Fee to book a ride and a "Processing Fee" for paying drivers their earnings through Stripe.

HSD's Willful Misclassification of Drivers as Independent Contractors

In order to circumvent California wage and hour laws, HSD misclassifies its drivers as independent contractors. As recently noted by the California Supreme Court, there are substantial economic incentives for a business to mischaracterize workers as independent contractors rather than employees. See *Dynamex Operations v. Superior Court*, 4 Cal. 5th 903 (2018). These include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. If a worker should properly be classified as an employee, the hiring business bears the responsibility of paying federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker's compensation insurance, and, most relevant here, complying with numerous statutes and regulations governing the wages, hours, and working conditions of employees. On the other hand, if a worker should properly be classified as an independent contractor, the business does not bear any of those costs or responsibilities, the worker obtains none of the numerous labor law benefits, and the public may be required under applicable laws to assume additional financial burdens with respect to such workers and their families. *Id.* In *Dynamex*, the Supreme Court adopted what has become known as the "ABC" test in determining whether a worker may properly be categorized as an independent contractor. It is clear under that standard that HSD has misclassified its workforce of drivers.

The Supreme Court in held in *Dynamex* that a hiring entity must establish all of the following to support the classification of a worker as an independent contractor:

- A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

B) that the worker performs work that is outside the usual course of the hiring entity's business; and

C) that the worker is customarily engaged in an independently established trade, occupation, or business.

Dynamex, 4 Cal. 4th at 964. HSD cannot satisfy any of these requirements with respect to its driver employees, let alone all of them as required.

Perhaps most glaringly, drivers are not performing work that is outside the usual course of HSD's business. To the contrary, drivers are performing work that is absolutely central to HSD's business. Absent drivers work transporting children, HSD could not operate, and HSD's business would altogether cease. In sum, the drivers ARE the business. In addition, drivers are not free from the control and direction of HSD when working. Rather, HSD tells drivers exactly where to go, who to pick up, and where to drive. HSD controls all these aspects of its drivers' work through its HSD app. HSD in some instances docks a driver's pay if these tasks are not performed in compliance with the company's requirements. Accordingly, under the *Dynamex* standard, there is no question that drivers must be considered employees, not independent contractors.

Notably, even under the standard that was applicable prior to *Dynamex*, HSD cannot properly classify its drivers as independent contractors. See *Borello v. Dep't of Industrial Relations*, 48 Cal. 3d 341 (1989) (discussing variety of factors to be considered in determining independent contractor status). Similar to the analysis under the current standard, consideration of those factors leads to the inevitable conclusion that the drivers should be considered employees. HSD has control or the right to control drivers both as to the work done and the manner and means in which it is performed. Drivers are not performing services in an occupation or business distinct from HSD. Driving is instead a part of HSD's regular business – indeed, it is a central and necessary component of the business. HSD instructs drivers where to pick up children, the drop off location, and protocols for picking up children and dropping them off which is standard for all rides. The services provided require no special skill, nor does drivers' opportunity for profit or loss depend on any managerial skill. Services are generally expected to be performed continuously and permanently, as driving is a daily necessity to HSD's continued operation. For these and other reasons, even under the standard applicable prior to *Dynamex*, drivers could not properly be classified as independent contractors.

Like all other of HSD's California-based drivers, our client, Mr. Padilla, was hired as a driver by HSD and improperly classified as an independent contractor when he should have been classified as an employee. Mr. Padilla performed work for HSD in numerous instances over several months between February 2019 and June 2019. HSD controlled each step in the process of his work. The app instructed him where to go to pick up children, where to drive them to, and the protocols involved in picking up and dropping off minors. HSD required him to use specific equipment that he was required to obtain from HSD. HSD did not pay him for all time worked. Rather, HSD paid him based, in part, on a formula determined by time and distance traveled. In many instances, however, driving to a certain pick up and/or drop off location took an excessive amount of time for which he was not properly compensated. Estimated fares were often incorrect and therefore did not properly pay him for all time worked on a particular trip.

Overview of Labor Law Violations

The intended civil action will assert representative claims pursuant to PAGA based on these facts and HSD's willful misclassification of its driver workforce in California. Specifically, the action will allege with respect to these aggrieved employees:

- Willful misclassification and related penalties (Cal. Labor Code § 226.8);
- Failure to pay all wages and minimum wages and minimum wage violations (Cal. Lab. Code §§ 1194, 1194.2, 1197; 1197.1; California Minimum Wage Order MW-2019, Wage Order 4-2001);
- Failure to pay overtime wages (Cal. Lab. Code §§ 510, 558, 1194; MW-2019, Wage Order 4-2001);
- Improper deductions and paying less than the agreed-upon wage scale (Cal. Lab. Code §§ 221-224; 225.5);
- Failure to provide meal and rest periods (Cal. Lab. Code §§ 226.7, 512, and 558)
- Failure to reimburse expenses or losses incurred as a result of performing work duties (Cal. Lab. Code § 2802);
- Violations of Paid Sick Day Requirements (Cal. Lab. Code § 245-249);
- Waiting time penalties (Cal. Lab. Code § 203);
- Inaccurate wage statements (Cal. Lab. Code §§ 226; 226.3);
- Failure to pay all wages by the appropriate pay period (Cal. Lab. Code § 204);

- PAGA penalties (Cal. Lab. Code §§ 2699 *et seq.*, 201-203, 204, 210, 216, 221-224, 225.5, 226(a), 226.3, 226.7, 510, 512 558, 1197, 1197.1 1199, 2699, *et seq.*).

The facts regarding each of these violations are set forth in detail below.

Willful Misclassification of Individuals as Independent Contractors

Labor Code § 226.8 makes clear that any misclassification of workers as Independent Contractors subjects a company to penalties in the range of \$10,000-\$25,000 per employee. As discussed above, and not recited again herein, HSD has unequivocally and intentionally misclassified its drivers as Independent Contractors to avoid California's labor laws. HSD's continued misclassification of its drivers, despite the California Supreme Court's *Dynamex* decision and the passage and implementation of California Assembly Bill 5, constitutes willful misclassification in violation of Labor Code § 226.8 and subjects HSD to significant monetary penalties.

Failure to Pay All Wages/Minimum Wage Violations

For similar reasons, HSD's payment practices also fail to pay drivers the applicable state minimum wage for all hours worked. HSD only compensates drivers for time spent when a child is in the car. Drivers are paid when a child starts a ride until the child's ride ends. Drivers are not paid any time to and from pick up and drop off locations, or for any work needed to be done to maintain their cars in safe working condition, time spent on refueling, time spent on insurance related necessities, among other necessary duties. Moreover, drivers pay rates often deviate from quoted estimates based on hypothetical time and mileage calculation that sometimes do not account for accidents, traffic, or closed roads, among other things. Sometimes these issues resulted in drivers, such as our client, being paid less than the minimum wage.

California law prescribes that it is an automatic minimum wage violation when an employee works but is not compensated for each and every hour worked. *See*

Gonzalez v. Downtown L.A. Motors, 215 Cal. App. 4th 36, 49-50 (2014); Labor Code § 226.2(a)(4); *Armenta v. Osmose, Inc.* (2005) 215 Cal. App. 4th 314, 323-324 (2005); *see also* Labor Code §§ 221-23. Notably, averaging wages over the workweek to meet minimum wage obligations is not permitted under the California Labor Code.

Failure to Pay All Overtime Wages Earned

HSD also fails to pay installers all the overtime pay for which they are entitled, or indeed any overtime pay at all. Because HSD does not track or pay drivers for ALL time worked, HSD fails to accurately assess how much is due in overtime wages to the drivers and, thus, fails to pay drivers accurate overtime wages.

Meal and Rest Period Violations

HSD also does not provide meal and rest periods in accordance with California law. Employees must also be separately compensated for rest periods, which HSD fails to do. *See* Labor Code § 226.2(a)(1); 226.2(a)(3)(A); *Bluford v. Safeway Stores, Inc.*, 216 Cal.App.4th 864 (2013); *Cardenas v. McLane FoodServices, Inc.*, 796 F.Supp.2d 1246, 1252 (C.D. Cal. 2011) (piece-rate pay system that did not separately pay truck drivers for non-driving duties and rest periods violates California law requiring compensation for each hour worked); *Reinhardt v. Gemini Motor Transport*, 869 F.Supp.2d 1158, 1168 (E.D. Cal. 2012) (piece-rate pay system that did not separately pay truck drivers for non-driving duties violates California law requiring compensation for each hour worked).

Failure to Reimburse for Business Expenses

HSD also fails to reimburse drivers with respect to the expenses required to perform their jobs, including but not limited to the following: vehicle expenses, gas, parking, repairs, phone usage, vehicle wear and tear, tickets, parking fines, tolls, and insurance, among other necessary expenses. HSD is therefore in violation of Labor Code Sections 558, 1197.1, 2802 and 2689 *et seq.*



Employee Justice.

Violations of Paid Sick Day Requirements

HSD also violates Labor Code Section 246 by not having policies and practices in place for workers to accrue and take paid sick leave. HSD maintains no such sick day policy for its drivers. Accordingly, Defendant HSD is therefore liable for civil penalties pursuant to Labor Code Section 248.5.

Other Claims

The other alleged violations, including inaccurate wage statements and waiting time penalties, are largely derivative of the failure to pay minimum wage and overtime claims as well as the failure to provide meal and rest periods claim.

Scope of Anticipated Action

We intend to seek all penalties that are available for the violations described above. These penalties include, but are not limited to, those available under California Labor Code sections 201-203, 204, 210, 216, 221-224, 225.5, 226, 226.3, 226.7, 226.8, 245-249, 510, 512, 558, 1194, 1194.2, 1197, 1197.1, 1199, and 2802. The intended action shall assert only PAGA claims on behalf of all aggrieved employees, including Mr. Padilla, not any individual claims.

Please inform us if you intend to investigate this matter. Should you require any additional information, do not hesitate to contact me.

Sincerely,

S/ Michael Morrison
Michael Morrison, Esq.

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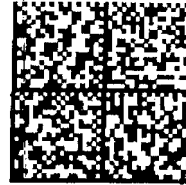
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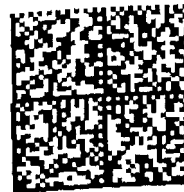
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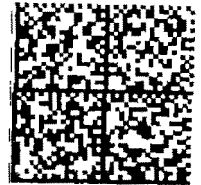
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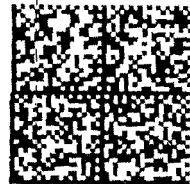
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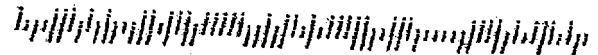
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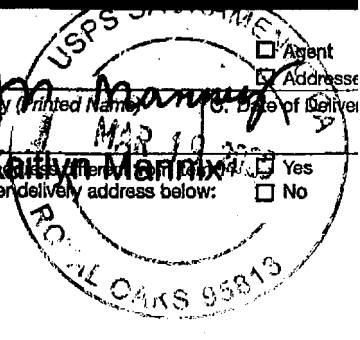
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