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Human Resources
Lyft, Inc.
185 Berry Street, Suite 5000, San
Francisco, CA 94107

Lyft, Inc.
185 Berry Street, Suite 5000, San
Francisco, CA 94107

Re: David Biggs v. Lyft, Inc., et al.,
California Labor Code § 2699 Penalties; Notice of Intent for File Suit

General Counsel:

This office represents Plaintiff David Biggs ("Plaintiff") and a proposed group of current and former drivers employed by Lyft, Inc. ("Lyft" and/or "Defendants"), who have been misclassified as independent contractors in the State of California for violations of California Labor Code §§ 201, 202, 203, 204, 210, 221, 222, 223, 226(a) and (e), 226.2, 226.3, 226.7, 226.8, 401-410, 512, 1182.11, 1194, 1194.2, 1197, 1197.1, 1198,¹ 1199, 1199.5, 2802 as well as IWC Wage Orders 9-2001. Plaintiff wishes to bring a representative action on behalf of himself and the State of California as well as on behalf of the following groups of aggrieved employees:

- (a) all individuals who are or were employed by Lyft and/or its predecessor or merged entities in California who worked as drivers or in any similar capacity, and who were classified as independent contractors from one year prior to the date of this letter and continuing into the present; (the "Aggrieved Employees")
- (b) all individuals who are or were employed by Lyft and/or its predecessor or merged entities in California who worked as drivers or in any similar capacity, and who were classified as independent contractors from one year prior to the date of this letter and continuing into the present and who worked shifts in excess of three and a half hours in a day; ("the Rest Period Aggrieved Employees")
- (c) all individuals who are or were employed by Lyft and/or its predecessor or merged entities in California who worked as drivers or in any similar capacity, and who were classified as independent contractors from one year prior to the date of this letter and

¹ All alleged violations of IWC Wage Orders 1-2001 or 9-2001 are also deemed to be alleged violations of Labor Code § 1198.

- continuing into the present and who worked in excess of five hours in a day; (the “Meal Period Aggrieved Employees”)
- (d) all individuals who are or were employed by Lyft and/or its predecessor or merged entities in California who worked as drivers or in any similar capacity, and who were classified as independent contractors from one year prior to the date of this letter and continuing into the present and who worked in excess of eight hours in a day, or more than forty hours in a workweek; (“the Overtime Aggrieved Employees”)
 - (e) all individuals who are or were employed by Lyft and/or its predecessor or merged entities in California who worked as drivers or in any similar capacity, and who were classified as independent contractors from one year prior to the date of this letter and continuing into the present and who rented vehicles through Lyft; (the “Rental Aggrieved Employees”)

The purpose of this letter is to comply with the Private Attorneys General Act of 2004 (“PAGA”), pursuant to California Labor Code § 2698 *et seq.* We herein set forth some of the facts and theories of California Labor Code violations which we allege Defendant engaged in with respect to our client and all Aggrieved Employees.²

a. Factual Background

Lyft runs a mobile phone application whereby customers can request drivers to take them to specific locations. Lyft contracts with drivers, such as the Plaintiff, to provide transportation services to those customers. It operates in different cities and states throughout the United States, including in the State of California.

Plaintiff began his employment with Lyft in 2016, when he, like the other Aggrieved Employees was hired as a driver, in which he, and the other Aggrieved Employees were tasked to provide driving services to Lyft’s customers. As drivers for Lyft, Plaintiff and the Aggrieved Employees are required to comply with terms of service and provide driving services to Defendants’ customers – taking them where they want to go, when they want to be there, and must adhere to standards of conduct. If Plaintiff and the Aggrieved Employees fail to comply with these standards of conduct, Plaintiff and the Aggrieved Employees’ contracts with Defendants can and will be terminated. Plaintiff and the Aggrieved Employees were provided with information regarding their assignments via Lyft’s mobile phone application. Plaintiff and the Aggrieved Employees were compensated on a piece-rate basis, wherein they are only paid when one of Lyft’s customers is sitting on their vehicles.

When Plaintiff started his employment with Lyft in 2016, he, like the other Aggrieved Employees, was asked to sign an agreement with Lyft, stating that he was an independent contractor of Lyft and paid a driver fare for rideshare services performed for Lyft’s riders. To perform his duties, Plaintiff rents vehicles from Lyft’s preferred rental agency, and Lyft takes the

² See *Cardenas v. McLane FoodServices, Inc.* (C.D. Cal. Jul. 8, 2011) 796 F. Supp. 2d 1246, 1261; *Moua v. Int'l Bus. Machines Corp.* (N.D. Cal. Jan. 31, 2012) No. 5:10-CV-01070 EJD, 2012 WL 370570, at *5; *York v. Starbucks Corp.*, (C.D. Cal. Nov. 1, 2012) No. CV 08-07919 GAF PJWX, 2012 WL 10890355, at *4.

cost of the rental from Plaintiff's compensation. While driving the rental vehicle, Plaintiff is restricted by the contract he signed with Lyft to drive only for Lyft, and not provide transportation services to any other rideshare company. In addition to rental fees, Plaintiff must pay for gasoline costs associated with his rental vehicle.

Further, while Plaintiff and the Aggrieved Employees all agree to certain terms of service, Plaintiff has uniformly opted out of all the arbitration agreements, and as a result, Plaintiff can, and will, seek to litigate his individual claims in addition to bringing this action under PAGA.

b. Claims Asserted by Plaintiff

i. *Plaintiff and the Aggrieved Employees were Misclassified as Independent Contractors*

Recently, the California Supreme Court in *Dynamex Operations West, Inc., v. Superior Court* (2018) 4 Cal. 5th 903, 956-958, a case involving delivery drivers, set forth the standard for determining whether an individual performing work is an independent contractor or an employee, as follows:

We find merit in the concerns noted above regarding the disadvantages, particularly in the wage and hour context, inherent in relying upon a multifactor, all the circumstances standard for distinguishing between employees and independent contractors. As a consequence, we conclude it is appropriate, and most consistent with the history and purpose of the suffer or permit to work standard in California's wage orders, to interpret that standard as: (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test — namely (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; *and* (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 of the same nature as the work performed. [Citations].

The standard is commonly referred to as the "ABC test." Under the ABC Test, Defendants have the burden of establishing that Plaintiff and the Aggrieved Employees are independent contractors and not intended to be included within the wage order's coverage. Further, Defendants must establish that Plaintiff and the Aggrieved Employees meet all three factors of the ABC Test, which as discussed below, they cannot meet.

A. Plaintiff and the Aggrieved Employees Were Subject to Defendants' Direction and Control: Defendants cannot demonstrate that Plaintiff and the Aggrieved Employees were free from the direction and control of the Defendants. At all times, Defendants retained and retains the right to control the method and manner of how Plaintiff and Aggrieved Employees perform their job duties and retained and retains all necessary control over Plaintiff and the Aggrieved Employees during their employment. Among other things, Plaintiff and Aggrieved Employees are required to follow detailed requirements imposed on them by Defendants governing their interaction with customers. Through their mobile phone application, Defendants informed Plaintiff and the Aggrieved Employees with which customers they were to provide services to, where to take said customers, and were informed on how to perform their tasks through Defendants' terms of service. Further, through the use of its bonuses and prime time pricing payments, Defendants affected and controlled where Plaintiff and the Aggrieved Employees worked, when they worked, and how they worked.

Under the Lyft Driver Addendum, Lyft has the right to adjust or withhold all or a portion of the fare or other payment owed to Plaintiff and the Aggrieved Employees if Lyft believes that there was an attempt to defraud or abuse riders, Lyft, or Lyft's payment systems, or in order to resolve a rider complaint.

Thus, Defendants exercised control over Plaintiff and the Aggrieved Employees. Indeed, the California Supreme Court in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal. 4th 522, held that the existence of a contract, and its relevant terms was key to determining control.

The trial court here afforded only cursory attention to the parties' written contract, instead concentrating on the particulars of the parties' many declarations and detailing a dozen or so ways in which delivery practices, or Antelope Valley's exercise of control over those practices, varied from carrier to carrier—e.g., whether carriers were instructed on how to fold papers, whether they bagged or “rubber banded” papers, and whether they followed the delivery order on their route lists. In so doing, the court focused on the wrong legal question—whether and to what extent Antelope Valley exercised control over delivery. But what matters is whether a hirer has the “legal right to control the activities of the alleged agent” (*Malloy v. Fong*, supra, 37 Cal.2d at p. 370, 232 P.2d 241, italics added) and, more specifically, whether the extent of such legal right is commonly provable. In cases where there is a written contract, to answer that question without full examination of the contract will be virtually impossible. (See *Tieberg v. Unemployment Ins.App. Bd.*, supra, 2 Cal.3d at p. 952, 88 Cal.Rptr. 175, 471 P.2d 975 [written agreements are a “significant factor” in assessing the right to control]; *Grant v. Woods*, supra, 71 Cal.App.3d at p. 653, 139 Cal.Rptr. 533 [“Written agreements are of probative significance” in evaluating the extent of a hirer's right to control].) Evidence of variations in how work is done may indicate a hirer has not exercised control over those aspects of a task, but they cannot alone differentiate between cases where the omission arises because the hirer concludes control is unnecessary and those where the omission is due to the hirer's lack of the retained right. That a hirer chooses not to wield power does not

prove it lacks power. (Malloy, at p. 370, 232 P.2d 241 [“It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship.”]; Robinson v. George (1940) 16 Cal.2d 238, 244, 105 P.2d 914 [absence of evidence a hirer “exercised any particular control over the details” of the work does not show the hirer lacked the right to do so].) One must consider the contract as well.

Id. at 534–35. (Emphasis not added).

Thus, as clearly stated in the contracts, Defendants retained and retains the right to control the method and manner of how Plaintiff and Aggrieved Employees performed their job duties and retained and retains all necessary control over Plaintiff and the Aggrieved Employees during their employment. Among other things, Plaintiff and the Aggrieved Employees are required to follow detailed requirements imposed on them by Defendants governing their interaction with customers. Further, Defendants set their compensation. As a result, under applicable law, Plaintiff and the Aggrieved Employees were employees of Defendants. See, e.g. *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal. 4th 522; *Ruiz v. Affinity Logistics, Corp.*, 754 F.Supp.3d 1093 (9th Cir. 2014) (employer’s right to control detail of drivers’ work support finding of employer employee relationship); *Alexander v. FedExGround Package System, Inc.* 765 F.Supp.3d 381 (9th Cir. 2014) (driver were employees as a matter of law where FedEx controlled times drivers worked and controlled aspects of when packages would be delivered); See, also, *Taylor v. Shippers Transport Express, Inc.*, 2014 W.L. 7499046 (C.D. Cal. 2014) (finding employee status for drivers as a matter of law); and *Villapando v. Excel Direct, Inc.*, 2015 W.L. 15179486 (N.D. Cal. 2015) (granting summary judgment to Plaintiffs on Defendant’s defense that the drivers at issue were independent contractors).

Similarly, Defendants retained all necessary control over Plaintiff and the other Aggrieved Employees’ work. Plaintiff and the Aggrieved Employees do not and did not operate distinct businesses, but were integrated into Defendants’ business; Defendants closely monitored the work of their drivers; their jobs did not require substantial skill; Defendants provided the application used by Plaintiff and the Aggrieved Employees to perform their job duties; although Defendants pay Plaintiff and the Aggrieved Employees piece rate compensation, in fact this payment plan resembles a pay arrangement similar to an employee’s pay arrangement; and Plaintiff and the Aggrieved Employees have driven for Defendants for years. Under applicable standards of law, Plaintiff and the Aggrieved Employees are, or were during their employment by Defendants, were employees and not independent contractors.

As such, Defendants kept and maintained control over Plaintiff and the Aggrieved Employees throughout their employment, and thus, Defendants cannot meet their burden of proving that Plaintiff and the Aggrieved Employees are properly classified as independent contractors for this reason alone. But as seen below, Defendants cannot meet the other two factors either.

B. Plaintiff and the Aggrieved Employees Performed Work Within the Usual Course of the Defendants' Business: As described by the Court in *Dynamex*, the work performed within the course of the defendants business is described thusly, "Workers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business." *Dynamex Operations W. v. Superior Court*, *supra*, 4 Cal. 5th at 959. By way of example, the Supreme Court held that:

Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. [citations] On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company [citations], or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes (*cf.*, *e.g.*, *Dole v. Snell* (10th Cir. 1989) 875 F.2d 802, 811), the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor.

Id. at 959-960.

Here, Defendants cannot establish that Plaintiff and the Aggrieved Employees perform work outside the Defendants' normal course of business. While Defendants have argued that they are technology companies, the sole reason customers download the application onto their smart phones is to utilize transportation services provided by individuals like the Plaintiff and the Aggrieved Employees. Thus, Plaintiff and the Aggrieved Employees were not performing work outside the Defendants' normal course of business, as the Defendants are in the business of providing transportation services to customers, and Plaintiff and the Aggrieved Employees provided those services. For this reason alone, Defendants misclassified Plaintiff and the Aggrieved Employees.

C. The Plaintiff and the Aggrieved Employees Were Not Customarily Engaged in an Independently Established Trade, Occupation, and Or Business of the Same Nature as the Work Performed: As with the A and B of the ABC Test, Defendants cannot establish that Plaintiff and the Aggrieved Employees are employees customarily engaged in an independent occupation, or business. As the Supreme Court in *Dynamex* held:

As a matter of common usage, the term "independent contractor," when applied to an individual worker, ordinarily has been understood to refer to an individual

who *independently* has made the decision to go into business for himself or herself. [citations] Such an individual generally takes the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like. When a worker has not independently decided to engage in an independently established business but instead is simply designated an independent contractor by the unilateral action of a hiring entity, there is a substantial risk that the hiring business is attempting to evade the demands of an applicable wage order through misclassification. A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself.

Dynamex Operations W. v. Superior Court, supra, 4 Cal. 5th at 962.

Here, Plaintiff and the Aggrieved Employees were not part of an independent business – they did not provide independent transportation outside of their work with the Defendants. Nor did Plaintiff and the Aggrieved Employees ever solicit Defendants’ customers to provide independent transportation services to them. In fact, doing so would most likely violate their agreement with Defendants.

Thus, under the standards of the ABC test, Plaintiff and the Aggrieved Employees were clearly employees and not independent contractors. *Dynamex Operations West, Inc., v. Superior Court* (2018) 4 Cal. 5th 903, 956-958; See, e.g. *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal. App. 4th 522; *Ruiz v. Affinity Logistics, Corp.*, 754 F.Supp.3d 1093 (9th Cir. 2014) (employer’s right to control detail of drivers’ work support finding of employer-employee relationship); *Alexander v. FedExGround Package System, Inc.* 765 F.Supp.3d 381 (9th Cir. 2014) (driver were employees as a matter of law where FedEx controlled times drivers worked and controlled aspects of when packages would be delivered); See, also, *Taylor v. Shippers Transport Express, Inc.*, 2014 W.L. 7499046 (C.D. Cal. 2014) (finding employee status for drivers as a matter of law); and *Villapando v. Excel Direct, Inc.*, 2015 W.L. 15179486 (N.D. Cal. 2015) (granting summary judgment to Plaintiffs on Defendant’s defense that the drivers at issue were independent contractors).

And because Defendants could not meet any part of the ABC test, it is clear that Defendants intentionally and willfully misclassified Plaintiff and the Aggrieved Employees as independent contractors in violation of Labor Code § 226.8(a).

ii. *Plaintiff and the Aggrieved Employees Were Not Compensated for All Hours worked*

California Labor Code §226.2 governs compensation paid to piece-rate employees, like Plaintiff and the Aggrieved Employees. It states, in the relevant part:

This section shall apply for employees who are compensated on a piece-rate basis for any work performed during a pay period. This section shall not be construed to limit or alter minimum wage or overtime compensation requirements, or the obligation to compensate employees for all hours worked under any other statute or local ordinance. For the purposes of this section, “applicable minimum wage” means the highest of the federal, state, or local minimum wage that is applicable to the employment, and “other nonproductive time” means time under the employer’s control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis.

(a) For employees compensated on a piece-rate basis during a pay period, the following shall apply for that pay period:

(1) Employees shall be compensated for rest and recovery periods and other nonproductive time separate from any piece-rate compensation.

(2) The itemized statement required by subdivision (a) of Section 226 shall, in addition to the other items specified in that subdivision, separately state the following, to which the provisions of Section 226 shall also be applicable:

(A) The total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods during the pay period.

(B) Except for employers paying compensation for other nonproductive time in accordance with paragraph (7), the total hours of other nonproductive time, as determined under paragraph (5), the rate of compensation, and the gross wages paid for that time during the pay period.

Thus, according to Cal. Labor Code §226.2, which codifies the decision in *Armenta v. Osmose, Inc.* (Cal. App. 2d Dist. 2005) 135 Cal. App. 4th 314, employees who are paid on a piece-rate basis, such as Plaintiff and the Aggrieved Employees, must be compensated for all the hours that they work, including non-productive time.

However, and due to Defendants’ misclassification of Plaintiff and the Aggrieved Employees as independent contractors, Plaintiff and the Aggrieved Employees were not paid for non-productive time while employed by the Defendants. Instead, they only received compensation based on the rides provided to Defendants’ customers. Thus, time spent driving to locations which needed more transportation services, or planning their routes, and all other nonproductive tasks typically taking up to an hour or more, was not compensated. As a result, Plaintiff and the Aggrieved Employees were denied compensation for all hours worked, in

violation of Cal. Labor Code §1194, and were denied compensation at the minimum wage in violation of Cal. Labor Code §§1197 and 1199.

Similarly, Labor Code § 1194.2 authorizes employees to recover wages to recover liquidated damages for violations of Labor Code § 1194. Where an employee, as Plaintiff and the Aggrieved Employees are not paid for all hours worked under Labor Code § 1194, the employee may recover minimum wages for the time associated with the overtime for which they received no compensation. (See *Sillah v. Command Int'l Sec. Servs.* (N.D. Cal. 2015) 154 F. Supp. 3d 891 [holding that employees suing for failure to pay overtime could recover liquidated damages under § 1194.2 if they also showed they were paid less than minimum wage]; accord *Andrade v. Arby's Rest. Grp., Inc.* (N.D. Cal. Dec. 12, 2016) No. 15-cv-03175 NC, 2016 U.S. Dist. LEXIS 172319, at *20-2 I.) Since Defendants failed to provide Plaintiff and all Aggrieved Employees with compensation for all hours worked, including overtime hours, each are entitled to recover liquidated damages under Labor Code § 1194.2 through PAGA. Based upon these same factual allegations, Plaintiff also seeks on behalf of all Aggrieved Employees penalties under Labor Code §§ 1199 and 1199.5.

iii. *Plaintiff and the Rest Period Aggrieved Employees Were Not Provided Paid Rest Periods and Were Not Paid Missed Rest Period Premiums*

As a result of Defendants' misclassification of Plaintiff and the Rest Period Aggrieved Employees as independent contractors, Defendants failed to adopt rest break policies consistent with California law applicable to Plaintiff and the Aggrieved Employees on their California routes. By virtue of misclassifying Plaintiff and the Aggrieved Employees as independent contractors and as a result of their per-ride compensation system, Defendants did not maintain a policy authorizing their drivers to take paid rest breaks amounting to 10 minutes of time for each four hours of work or major fraction thereof on their shifts in California.

Under California law, Defendants are and were obligated to pay drivers, including Plaintiff and the Rest Period Aggrieved Employees, separately and hourly for their rest break time in California. See *Bluford v. Safeway Stores, Inc.*, (2013) 216 Cal. App. 4th 864, 872-73 ("Thus, contrary to Safeway's argument, a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law."); *Shook v. Indian Transport Co.*, 2014 WL 7178199 (E.D.Cal. Dec. 15, 2014) (adopting *Bluford* and noting that, "IRT has not identified any split in the California appellate courts that would indicate that there is any disagreement over whether piece-rate workers must be separately compensated for breaks"); *Cardenas v. McLane FoodServices, Inc.* (C.D.Cal.2011) 796 F.Supp.2d 1246, 1252 (piece-rate pay system that did not separately pay truck drivers for rest periods and other nonproductive times violates California law requiring compensation for each hour worked); and, *Gonzalez v. Downtown LA Motors, LP*, (2013) 215 Cal. App. 4th 36, 49 (favorably citing and adopting *Cardenas*).

Furthermore, by virtue of the fact that Defendants provided only unpaid rest breaks to drivers, Defendants fail and failed to provide compliant rest breaks to Plaintiff and the Rest

Period Aggrieved Employees, in accordance with Section 12 of IWC Wage Order No. 9 and applicable law.

iv. *Plaintiff and the Meal Period Aggrieved Employees Were Not Provided with Meal Periods*

Under California Labor Code Section 512 and IWC Wage Order No. 9, no employer shall employ any person for a work period of more than five (5) hours without providing a meal period of not less than thirty (30) minutes. During this meal period of not less than thirty (30) minutes, the employee is to be completely free of the employer's control and must not perform any work for the employer. If the employee does perform work for the employer during the thirty (30) minute meal period, the employee has not been provided a meal period in accordance with the law. Also, the employee is to be compensated for any work performed during the thirty (30) minute meal period. Finally, an employer may not employ an employee for a work period of more than ten (10) hours a day without providing the employee with another meal period of not less than thirty (30) minutes.

Under California Labor Code Section 226.7, if the employer does not provide an employee a meal period in accordance with these requirements, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

Here, as a result of the misclassification of Plaintiff and the Aggrieved Employees as independent contractors, Defendants never authorized Plaintiff and the Aggrieved Employees to take their timely 30-minute duty-free meal breaks, on or before the fifth hours of time shifts, and Defendants never paid any missed meal break premiums to its drivers, including the Plaintiff and the Aggrieved Employees.

v. *Plaintiff and the Aggrieved Employees Are and Were Subjected to Unlawful Deductions from their Pay*

As noted above, Plaintiff and the Rental Vehicle Aggrieved Employees are and were subject to deductions from pay associated with renting vehicles from Lyft's preferred provider. This amount, of approximately \$250 per paycheck, is meant to pay the costs associated with Lyft's provision of vehicles to Plaintiff and the Rental Vehicle Aggrieved Employees.

As a result, Defendants have uniformly violated Cal. Labor Code § 221, by requiring Plaintiff and the Rental Vehicle Aggrieved Employees to pay for incidentals associated with the performance of their duties. Section 221 states, "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee." The California Supreme Court, in *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal. 2d 319, was faced with an employee compensation plan that deducted cash shortages from commissions. In *Kerr*, the Court interpreted this statute to mean that an employee cannot insure the losses of his employer which did not result from the employee's own malfeasance. *Id.* at 327-328. Per the Court:

But some cash shortages, breakage and loss of equipment are inevitable in almost any business operation. It does not seem unjust to require the employer to bear such losses as expenses of management when it is presently the unchallenged practice to require him to bear, as a business expense, the cost of tools and equipment, protective garments and uniforms furnished to the employee by prohibiting in section 9, subdivisions (a), (b) and (c) of Order 5-57, deductions for these costs.

Furthermore, the employer may, and usually does, either pass these costs on to the consumer in the form of higher prices or lower his employees' wages proportionately, thus distributing the losses among a wide group. In addition, the employer is free to discharge any employee whose carelessness causes the losses, and he is not prohibited from deducting for cash shortages caused by the "dishonest or willful act, or by the culpable negligence of the employee."

See also, *Quillian v. Lion Oil Co.*, (1979) 96 Cal. App. 3d 156. Id. at 329.

Here, the deductions made to the pay of Plaintiff and the Rental Vehicle Aggrieved Employees are all, in fact, designed to insure Defendants from the losses resulting from the employment of Plaintiff and the Aggrieved Employees. In fact, Plaintiff and the Rental Vehicle Aggrieved Employees are required to indemnify the Defendants for any losses associated with their employment. These deductions are not due to any dishonest or willful act of Plaintiff and the Rental Vehicle Aggrieved Employees, but rather, are the result of Plaintiff and the Rental Vehicle Aggrieved Employees performing their job duties as required.

Additionally, Labor Code § 223 provides: "Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract."

Labor Code §§ 400 - 410 ("Employee Bond Law") provides the limited circumstances under which an employer can exact a cash bond from its employees. These provisions are designed to protect employees against the very real danger of an employer taking or misappropriating employee funds held by the employer in trust. IWC Wage Order No. 9-2001 Section 8, provides that the only circumstance under which an employer can make a deduction from an employee's wage due to cash shortage, breakage, or loss of equipment is if the employer can show that the shortage, breakage, or loss was the result of the employee's gross negligence, or dishonest or willful act.

These and related statutes, along with California's fundamental public policy protecting wages and wage scales, prohibit employers from subjecting employees to unanticipated or unpredicted reductions in their wages; making employees the insurers of their employer's business losses; otherwise passing the ordinary business losses of the employer onto the employee; taking deductions from wages for business losses unless the employer can establish

that the loss was caused by a dishonest or willful act, or gross negligence of the employee; or taking other unpredictable deductions that may impose a special hardship on employees.

As a result of classifying Plaintiff and the Rental Vehicle Aggrieved Employees as independent contractors, and through their form contracts with Plaintiff and the Rental Vehicle Aggrieved Employees, Defendants have violated Cal. Labor Code §§ 221, 223, 400 - 410, and IWC Wage Order No. 9-2001, Section 8 by unlawfully taking deductions from Plaintiff and the Rental Vehicle Aggrieved Employees' pay. As a result of Defendants unlawful deductions from Plaintiff and the Rental Vehicle Aggrieved Employees' compensation, they have violated Labor Code §§ 218.5, 221, 223, and 400 - 410, 1194 as well as IWC Wage Order No. 9-2001, Section 8.

vi. Defendants Violate and Violated Labor Code § 204

Labor Code § 204 expressly requires that “[a]ll wages...earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays.” Pursuant to Labor Code § 204(d), these requirements are “deemed satisfied by the payment of wages for weekly, biweekly or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period.

As discussed in detail above, and as a result of Defendants classifying Plaintiff and the Aggrieved Employees as independent contractors, failing to pay for non-productive time, including rest periods, and failing to pay meal period premiums and rest period premiums, Defendants failed to pay Plaintiff and the other Aggrieved Employees at least twice per month in violation of Labor Code § 204. Defendants regularly and consistently failed to pay Plaintiff and the Aggrieved Employees for all of their hours worked, for rest periods and/or rest period premiums, and meal period premiums.

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

vii. Defendants Violate and Violated Labor Code §§ 201-203

As a result of Defendants' misclassification of Plaintiff and the Aggrieved Employees as independent contractors, and as a result of their failure to pay Plaintiff and all Aggrieved Employees for all hours worked, including non-productive time, and meal/rest period premiums, Defendants violated Labor Code § 203. Labor Code § 203 provides “if an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the

employee shall continue as a penalty. . .” for up to 30 days. Lab. Code § 203; *Mamika v. Barca*, (1998) 68 Cal.App.4th 487, 492.

Due to Defendants faulty policies described above, Plaintiff and all Aggrieved Employees whose employment with Defendant concluded were not compensated for each and every hour worked or at the appropriate rate. Additionally, Defendants have failed to pay all Aggrieved Employees for all hours worked (including at the proper rates), rest period premiums, and meal period premiums, whose sums were certain, at the time of termination or within seventy-two (72) hours of their resignation and have failed to pay those sums for thirty (30) days thereafter.

viii. Defendants Violate and Violated Labor Code §§ 226(a) and 226.3

As to Plaintiff and all Aggrieved Employees, Defendants also failed to provide accurate itemized wage statements in accordance with Labor Code § 226(a)(1, 3, 5, 9). Labor Code § 226 obligates employers, semi-monthly or at the time of each payment to furnish an itemized wage statement in writing showing:

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

Similarly, Labor Code § 226(e) provides:

- (e) (1) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney’s fees.
- (2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.
- (B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly

and easily determine from the wage statement alone one or more of the following:

- (i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).
- (ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).
- (iii) The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer during the pay period.
- (iv) The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number.

By virtue of the misclassification of Plaintiff and the Aggrieved Employees as independent contractors, Defendants do not issue adequate wage statements to its drivers in California, under Labor Code Sections 226(a) and 226.2. Specifically, Defendants have not and do not issue wage statements that include drivers' total hours worked and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate in violation of Labor Code Section 226(a), including for all time spent on Nonproductive times, and time spent on rest periods. See, Labor Code § 226.2.

Courts in California have held, in the summary judgment context, even before the passage of Labor Code Section 226.2, that drivers' hours must be reported on their paystubs, even in cases where drivers are paid on a piece-rate basis. See, *Cicairos v. Summit Logistics* (2005) 133 Cal.App.4th 949, 960-961 ("The "Driver Trip Summary—Report of Earnings" statements, which newspaper carriers received with their earnings statements, did not remedy the deficiencies in the earnings statements. The trip summaries showed a time the driver was dispatched, which was one or more times on a working day. After the dispatch time were columns for how many miles traveled, stops, delay minutes, and other categories. The summaries did not, however, show how many hours the driver worked each day or during the pay period. Thus, the defendant failed to provide the Plaintiff with itemized wage statements that meet the requirements of Labor Code section 226"); *McKenzie v. Federal Express Corp.*, 765 F.Supp.2d 1222, 1229 (C.D.Cal. 2011) ("[T]he Court finds that FedEx violated Section 226(a)(2) by failing to state the "total hours worked by [an] employee" in its wage statements"); *Cornn v. United Parcel Service, Inc.*, 2006 W.L. 449138, *2-3 (N.D.Cal. 2006) (denying defendant's motion for summary judgment on Section 226 claim and noting, "[i]nstead, the Court holds that if UPS failed to report the actual number of hours worked on Plaintiff's wage statements, then the company violated section 226."). This is also now clear from Labor Code Section 226.2(a)(1)-(2).

Furthermore, for purposes of establishing a claim for PAGA penalties based on Labor

Code Section 226, Plaintiff need not establish any “injury” other than showing that the paystubs lacked the hours worked required by Labor Code section 226(a)(2). See, *McKenzie v. Fed. Express Corp.*, 765 F.Supp.2d 1222 (C.D. 2011) (holding that newspaper carriers’ wage statements were deficient because, inter alia, the statements lacked newspaper carriers’ total hours worked, and also determining that to recover PAGA penalties based on a deficient wage statement, a Plaintiff need not prove an “injury”, and could move for summary judgment on behalf of other Class Members).

ix. *Defendants Violate and Violated Labor Code § 2802*

As a result of Defendants’ misclassification of Plaintiff and the Aggrieved Employees as independent contractors, Defendants do not maintain an expense reimbursement policy and/or practice stating that Defendants will affirmatively reimburse Plaintiff or the Aggrieved Employees for a reasonable portion of their monthly personal cell phone bills and other expenses, necessarily incurred in their discharge of their duties, as required by *Cochran v. Schwan’s Home Service, Inc.*, 228 Cal.App.4th 1137 (Cal. Aug. 12, 2014) (“We hold that when employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills.”) (reversing denial of class certification in cell phone reimbursement class action and setting forth the applicable law for these claims); *Aguilar v. Zep, Inc.*, 2014 WL 4245988 *17 (N.D.Cal. Aug. 27, 2014) (granting plaintiffs’ motion for partial summary judgment on the plaintiffs’ cell phone reimbursement claim); *Ritchie v. Blue Shield of California*, 2014 WL 6982943, at *21 (N.D.Cal. Dec. 9, 2014) (Hon. Edward Chen) (certifying class of cell phone reimbursement claim and adopting the logic of Cochran).

By virtue of its willful misclassification of Plaintiff and the Aggrieved Employees, Defendants violated Labor Code § 2802 by failing to reimburse Plaintiff and the Aggrieved Employees, for their business-related expenses including cell phones bills, maintenance, and repairs. As a result, Plaintiff and the Aggrieved Employees spent hundreds of dollars each month on non-reimbursed business-related expenses that should have been paid for by the Defendants. Specifically, by virtue of its willful misclassification of Plaintiff and the Aggrieved Employees, Defendants violated Labor Code § 2802 by failing to reimburse Plaintiff and the Aggrieved Employees for their business-related expenses including gas expenses incurred, license plate registration and fees, insurance expenses for operating their vehicles, and costs of maintenance and repairs.

CONCLUSION

Pursuant to Labor Code § 2699.3, we write to inform you and the Labor and Workforce Development Agency, with whom this PAGA Notice has been filed, of our intent to pursue a class and PAGA representative action against Defendants seeking PAGA penalties under Labor Code § 2699 to be brought by the Plaintiff, individually and on behalf of all Aggrieved Employees, as defined above.

Nevertheless, it is the policy of this firm to attempt to negotiate an early resolution of all matters where possible and beneficial to the Aggrieved Employees and all putative class members. If Defendants are interested in attempting to resolve this matter on a classwide basis, including the PAGA claims, please contact me or have your lawyer contact me so that we can discuss an informal discovery plan and the possibility of early mediation on or before **March 25, 2020**. If we do not hear from you on or before March 25, 2020 we will proceed with this matter with the understanding that Defendants do not wish to negotiate an early resolution of this matter.

Respectfully submitted,



Jim Treglio

POTTER HANDY, LLP