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Superior Court of California
County of Fresno
By: A. Ramos, Deputy

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Attorneys for Plaintiff and the Aggrieved Employees

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF FRESNO

MARY ANN AUDLER, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

PEGASUS TRUCKING LLC and DOES 1 to
100, inclusive,

Defendants.

Case No.: [20CECG02641](#)

**REPRESENTATIVE ACTION COMPLAINT
FOR:**

1. Penalties Pursuant to Labor Code § 2699, *et seq.*
for violations of Labor Code § 2802 and Labor
Code § 226;

1 Plaintiff MARY ANN AUDLER, ("Plaintiff"), on behalf of the people of the State of
2 California and as an "Aggrieved Employee" acting as a private attorney general under the
3 California Labor Code Private Attorneys General Act of 2004, § 2698, *et seq.*, ("PAGA")
4 complains of Defendant PEGASUS TRUCKING LLC. ("Defendant") as follows:

5 **OVERVIEW OF CLAIMS**

6 1. Plaintiff brings this action on behalf of herself and as a representative action, and on
7 behalf of the California general public, against Defendant Pegasus Trucking LLC ("Pegasus" or
8 "Defendant") and Does 1 to 100 (collectively, "Defendants") for PAGA penalties based on
9 Defendant's failure to reimburse its current and former non-exempt employees for their work-
10 related cell phone expenses in California for which they have not been fully reimbursed. As a
11 result of the foregoing, Defendants have violated California statutory laws as described below.

12 2. The "PAGA Period" is designated as the period from one year prior to Plaintiff's
13 mailing of the LWDA notice letter (*i.e.* June 16, 2019) through the present.

14 **VENUE**

15 3. Venue is proper in this county under section 395.5 of the California Code of Civil
16 Procedure as Defendant is located in the County of Los Angeles. Further, Pegasus' headquarters is
17 in the city of Los Angeles, California. Venue is therefore proper in Los Angeles County.

18 **JURISDICTION**

19 4. Defendant is within the jurisdiction of this Court. Defendant operates numerous
20 discount stores throughout the California. Thus, Defendant has obtained the benefits of the laws of
21 the State of California. In addition, Plaintiff asserts no claims arising under federal law. Rather,
22 Plaintiff brings causes of action based solely on, and arising from, California law.

23 **THE PARTIES**

24 5. Plaintiff Mary Ann Audler resides in Madera, California in Madera County of
25 California. Pegasus employed Plaintiff as a non-exempt store manager. From at least September
26 30, 2019 through the present, Pegasus' non-exempt employees, including Plaintiff during her
27 employment, were not reimbursed for incurred business expenses in the course of carrying out their
28 job duties in California, specifically including cell phone expenses.

6. Plaintiff represents the State of California and the following group of employees: *Plaintiff and all other California residents who are or were employed by Defendant as non-exempt employee and who worked at least one shift in California from June 16, 2019 to the present* (the “Aggrieved Employees”). All such Aggrieved Employees are and were subject to Defendant’s unlawful cell phone reimbursement policy, as described in further detail below.

7. Defendant Pegasus Trucking LLC is a California Limited Liability Corporation that keeps and maintains its headquarters in Los Angeles, California. Pegasus is a discount chain store with numerous locations throughout California.

8. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendant sued herein as DOES 1 to 100 inclusive, are currently unknown to Plaintiff, who therefore sues Defendant by such fictitious names under Code of Civil Procedure § 474. Plaintiff is informed and believes, and based thereon alleges, that each of the Defendants designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and capacities of the Defendants designated hereinafter as DOES when such identities become known.

9. Plaintiff is informed and believes, and based thereon alleges, that each Defendant acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are legally attributable to the other Defendants. Furthermore, Defendants in all respects acted as the employer and/or joint employer of Plaintiff, and the other Aggrieved Employees. Further, Labor Code § 558.1 explicitly allows Plaintiff to name any owner, director, officer, or managing agent of Pegasus as a Doe Defendant for violations of Labor Code § 2802.

FACTUAL ALLEGATIONS

10. Defendant operates and, at all times during the PAGA Period, has done and does business in California by operating numerous discount stores throughout the State of California. Defendant, in the course of operating their business in California during the PAGA Period, employed Plaintiff and the Aggrieved Employees.

11. Since at least September 30, 2019, Plaintiff and the Aggrieved Employees at the

1 direction of Defendant and/or with Defendant's knowledge and acquiescence, have been required
2 to use their personal cell phones to remain in contact with their managers, district managers and
3 salespeople to perform necessary work-related duties in Defendant's California stores. Among
4 other things, Defendant requires and required its non-exempt employees, store managers, key sales
5 associates, sales associate, and cashiers to use their personal cell phones for a number of reasons,
6 including *inter alia*:

- 7 • to call and/or text message ("text") the management or the main office;
- 8 • to receive text messages from the management regarding daily schedules, start
9 times and deliveries;
- 10 • to call outside of each store;
- 11 • to call supervisors or management if there was a need for any items;
- 12 • to call the management and supervisors for conference-calls with all supervisors;
- 13 • to call and/or text the main office to report any shortage of supplies;
- 14 • to send pictures of items missing in each store to the main office and upper
15 management.

16 12. Defendant's managers maintained lists of all employees' personal cell phone
17 numbers to facilitate communications with them by phone calls and text messages about necessary
18 work-related tasks.

19 13. Defendant's managers routinely communicated with its employees for necessary
20 business-related matters by calling them on their personal cell phones. Defendant also instructed
21 Plaintiff and the Aggrieved Employees to call managers for various reasons without providing
22 them with any devices, such as Nextel devices, suitable to make such calls. Plaintiff and the
23 Aggrieved Employees throughout their workdays, also use their personal cell phone to remain in
24 contact with their managers, sales associates, supervisors and, in many cases, Defendant's
25 customers, all with the knowledge and/or acquiescence of Defendant.

26 14. Plaintiff and the Aggrieved Employees were thus expected by Defendant to pay for,
27 and have personally paid for, the purchase and maintenance of cell phones used by them in the
28 discharge of their job duties (the "cell phone business expenses"). These expenses ranged, but

1 typically amounted to seventy dollars (\$70.00) per month per Aggrieved Employee.

2 15. Defendant has maintained uniform policies and/or practices relating to the
3 reimbursement of business expenses to the Plaintiff and the Aggrieved Employees that deny lawful
4 reimbursement to them for a reasonable portion of their cell phone business expenses for work
5 performed in California. Defendant's expense-related policies and/or practices require and expect,
6 and/or with Defendant's knowledge thereof permit, Plaintiff and the Aggrieved Employees to pay
7 for cell phone business expenses incurred in direct consequence of discharging their necessary and
8 business-related job duties on behalf of Defendant, without reimbursement in full by Defendant for
9 such expenses, as required by California law.

10 16. While Plaintiff and the Aggrieved Employees used their personal cell phones for
11 necessary work-related purposes to perform their job duties with the knowledge of and/or
12 acquiescence of Defendant, Defendant did not reimburse Plaintiff or the Aggrieved Employees in
13 any amount for any such expenses incurred throughout the PAGA Period. When an employer has
14 knowledge of or reason to know that the employee has incurred an expense, the employer's duty to
15 reimburse is triggered for purposes of California Labor Code section 2802. *Stuart v. RadioShack*
16 *Corp.*, 641 F. Supp. 2d 901, 904 (N.D. Cal. 2009). Once the employer's duty to reimburse is
17 triggered, the employer must "exercise due diligence and take any and all reasonable steps to
18 ensure that the employee is paid for the expense." *Id.* Defendant's failure to reimburse Plaintiff and
19 the Aggrieved Employees for their on-going cell phone business expenses incurred in their
20 discharge of their duties continues through the present day in violation of Cal. Lab. Code § 2802.

21 17. Defendant is aware that Plaintiff and the Aggrieved Employees were required to use
22 their personal cell phones. Per *RadioShack*, once Defendant's were aware of the reasonable and
23 necessary business expenses Plaintiff and the Aggrieved Employees were incurring, Defendant had
24 a duty to reimburse its employees. Compensation is owed as a matter of right once incurred or
25 accrued. *RadioShack*, 641 F. Supp. 2d at 904. An employees' rights under section 2802 of the
26 California labor code is not waivable. *Id.*

27 18. In short, Defendant's policies and/or practices require and expect, and/or with
28 Defendant's knowledge thereof permit, Plaintiff and the Aggrieved Employees to pay for cell

1 phone business expenses incurred in direct consequence of discharging their duties on behalf of
2 Defendant, without reimbursement in full by Defendant for such expenses. Defendant has
3 maintained its policies and/or practices of denying reimbursement in full of Plaintiff's and the
4 Aggrieved Employees' necessarily incurred business expenses, or substantially similar policies,
5 throughout California and throughout the PAGA Period.

6 19. Defendant is aware or should have been aware that Plaintiff and the Aggrieved
7 Employees regularly incur cell phone business expenses in the discharge of their duties as
8 employees by virtue of Defendant's instructions to Plaintiff and the Aggrieved Employees and
9 management's communications with Plaintiff and the Aggrieved Employees via their cell phones.
10 Defendant nevertheless has, throughout the PAGA Period, failed and refused to reimburse Plaintiff
11 and the Aggrieved Employees for such cell phone business expenses incurred by them in
12 connection with their work.

13 20. Plaintiff and the Aggrieved Employees have been harmed by Defendant's unlawful
14 business expense policies and/or practices in that they have not been paid for certain cell phone
15 business expenses incurred while employed by Defendant in California, thereby diminishing their
16 agreed-upon compensation, in substantial amounts to be proven at trial.

17 21. Plaintiff has fully and completely exhausted and/or will have fully and completed
18 and exhausted her administrative remedies under PAGA in order to proceed with the PAGA claim.
19 On June 16, 2020, Plaintiff filed her PAGA Notice online with the Labor Workforce Development
20 Agency ("LWDA") and sent a letter by certified mail to Defendant setting forth the facts and
21 theories of the violations alleged against Defendant, as prescribed by Labor Code § 2698 *et seq.* As
22 required by PAGA, Plaintiff submitted the seventy-five dollars (\$75.00) filing fee with the LWDA
23 by regular mail. On September 1, 2020, Plaintiff amended her PAGA Notice online with the Labor
24 Workforce Development Agency ("LWDA") and sent a letter by certified mail to Defendant.
25 Pursuant to Labor Code § 2699.3(a)(2)(A), as of the end of September 2, 2020, Plaintiff satisfied
26 her administrative pre-requisites after sixty-five (65) calendar days had elapsed following the
27 postmark date of the PAGA notice.

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FIRST CAUSE OF ACTION

LABOR CODE PRIVATE ATTORNEY GENERAL ACT

LABOR CODE §§ 2698-2699.5 BASED ON VIOLATION OF SECTION 2802 AND 226

On Behalf of Plaintiff and the Aggrieved Employees Against All Defendants

22. Plaintiff, on behalf of herself and all Aggrieved Employees, realleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

23. Based on the above allegations incorporated by reference, Pegasus has violated Labor Code § 2802 by failing to reimburse Plaintiff and the Aggrieved Employees their reasonable and necessary business expenses.

24. Based on the above allegations incorporated by reference, Pegasus has violated Labor Code § 226(a) by failing to state the correct rate of pay for double-time pay on Plaintiff's and the Aggrieved Employees' paystubs during the PAGA period.

25. As a result of the acts alleged above, Plaintiff seeks penalties under Labor Code § 2699, et. seq., because of Pegasus' violations of Labor Code §§ 2802 and 226.

26. Plaintiff seeks to recover the PAGA civil penalties through a representative action as permitted by PAGA and the California Supreme Court in *Arias v. Superior Court* (2009), 46 Cal.4th 969. Therefore, class certification hereby of the PAGA claims is not required, but Plaintiff may choose to seek certification of the PAGA claims.

27. Under Labor Code §§ 2699(f)(2) and 2699.5, for each such violation, Plaintiff and all other Aggrieved Employees are entitled to penalties in an amount to be shown at the time of trial subject to the following formula:

\$100 for the initial violation per employee per pay period; and

\$200 for each subsequent violation per employee per pay period.

28. These penalties, if and when recovered, shall be allocated seventy-five percent (75%) to the Labor and Workforce Development Agency (LWDA) and twenty-five percent (25%) to the affected employees. See Labor Code section 2699(i) and (j).

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1 **PRAYER FOR RELIEF**

2 Wherefore, Plaintiff, on behalf of herself and the aggrieved employees, prays for judgment
3 against Defendant as follows:

4 1. On the First Cause of Action:

5 a. A civil penalty against Defendant, in the amount of \$100 for the initial
6 violation and \$200 for each subsequent violation as specified in section 2699(f)(2) of the
7 California Labor Code for Plaintiff and the Aggrieved Employees during all of the pay periods
8 from June 16, 2019 through date of trial;

9 b. An award of reasonable attorney's fees against Defendant as specified in
10 Labor Code § 2699(g)(1), for all the work performed by the undersigned counsel in connection
11 with the PAGA claims;

12 c. An award of all costs incurred by the undersigned counsel for Plaintiff in
13 connection with Plaintiff's and the aggrieved employees' PAGA claim against Defendant, as
14 provided for in Labor Code § 2699(g)(1); and

15 2. All other relief as this Court deems proper.

16 Dated: September 9, 2020

MAHONEY LAW GROUP, APC
EMPLOYMENT RIGHTS LAW GROUP, APC

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18
19 /s/Kevin Mahoney
20 Kevin Mahoney, Esq.
21 Amir Seyedfarshi, Esq.
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EXHIBIT A

June 16, 2020

Via Online Filing with the LWDA & Certified Mail to Defendant

Michael Fallas, Agent for Service of Process
PEGASUS TRUCKING, LLC
15001 S. Figueroa Street
Gardena, CA 90248

PEGASUS TRUCKING, LLC
15001 S. Figueroa Street
Gardena, CA 90248

Re: NOTICE OF INTENT TO FILE SUIT (Labor Code § 2699.3)
Mary Ann Audler v. Pegasus Trucking LLC

Dear Gentlepersons:

This letter is the written notice required by the California Labor Code Private Attorneys General Act of 2004 ("PAGA"), California Labor Code Section 2698 *et seq.*, including without limitation California Labor Code Sections 2699.33 (a)(1), 2699.3(b)(1), and/or 2699.3(c)(1) of the California Labor Code, and any other applicable provision of statute, rule, or law. This letter is being sent simultaneously via online filing to the California Labor and Workforce Development Agency. This letter is an important formal legal notice which may lead to action against you and your company in a court of law and in administrative proceedings, or both and the imposition of substantial penalties and other order and remedies against you and your company.

This office, along with our co-counsel, Amir Seyedarshi, represent Plaintiff Mary Ann Audler ("Plaintiff") and a proposed group (and subgroups) of current and former Aggrieved Employees of Pegasus Trucking LLC dba Fallas Stores, a California limited liability corporation, and its co-employers, successors in interest, and/or merged entities ("Defendants," "Defendant" or "Pegasus Trucking LLC") in connection with her individual and PAGA representative claims for civil penalties, based on, without limitation, Defendant's:

- (1) failure to provide timely meal periods within the first five (5) hours and to provide lawful second meal periods for shifts worked in excess of ten (10) hours and/or pay meal period premiums for late meal breaks in violation of Labor Code §§ 226.7 and 512;
- (2) failure to pay minimum wages for all hours worked based upon Pegasus Trucking LLC's alleged policy and practice of automatically deducting thirty (30) minutes from each shift worked in excess of six (6) hours regardless of whether or not an employee received a meal period and/or the amount of time spent on the meal period (if any), in violation of Labor Code § 1194;

- (3) failure to provide accurate itemized wage statements in violation of Labor Code § 226 based upon the foregoing (since the automatic lunch deduction resulted in the keeping of fictional time, such that the wage statements did not have the accurate hours worked listed on them);
- (4) unfair competition in violation of Bus. & Prof. Code § 17200 based upon the foregoing unpaid wage and premium claims; and
- (5) failure to pay employees all wages and premiums due on a bi-monthly basis when other wages were paid as required by Labor Code sections 204 and 210;
- (6) Failure to reimburse employees for their expenses incurred in connection with work-related usage of their personal cell phones (since there are no land lines in the stores at issue) in violation of Labor Code section 2802;
- (7) statutory penalties under California's Private Attorney General Act ("PAGA") based upon the foregoing under Labor Code sections 2698 et seq.

In connection with his PAGA claims, Plaintiff seeks PAGA penalties from at least one year prior to the date of this Notice and ongoing (the "PAGA Period"). Plaintiff seeks to represent the following groups of aggrieved employees:

a. The "Aggrieved Employees":

All non-exempt individuals who are or were employed by Pegasus Trucking LLC dba Fallas Stores in the State of California and who worked one or more shifts of (5) hours or longer during the PAGA Period.

i. The "Wage Statement Aggrieved Employees":

All Aggrieved Employees who were issued one or more wage statement from Defendants during the PAGA Period;

ii. The "Waiting Time Penalty Aggrieved Employees":

All Aggrieved Employees whose employment with Defendants terminated during the PAGA Period.

iii. The "Reimbursement Aggrieved Employees":

All Aggrieved Employees who did not receive reimbursement for work-related personal cell-phone expenses from Defendants and payment for Aggrieved employees' uniforms including T-shirts and pants that they were required to wear during the PAGA Period.

iv. The Store Manager Aggrieved Employees:

All Aggrieved Employees who worked as store managers on shifts where they were the only store manager and who did not receive duty- free meal and/or rest breaks since they were unable to leave the premises..

DEFENDANTS' MEAL PERIOD VIOLATIONS

Labor Code § 512 requires employers to provide employees with a thirty (30) minute

uninterrupted and duty-free meal period within the first five (5) hours of an employee's shift. Moreover, an employee who works more than ten (10) hours per day is entitled to receive a second thirty (30) minute uninterrupted and duty-free meal period.

Under Labor Code § 512, if an employer maintains a uniform policy that does not authorize and permit the amount of duty-free mealtime called for under the law (as specified in the applicable Wage Order), "it has violated the wage order and is liable." As described above, the *Brinker* Court explained in the context of rest breaks that employer liability attaches from adopting an unlawful policy.

Here, Defendants violated and continue to violate Labor Code § 512 and IWC Wage Order 5-2002 § 11 by, among other things, failing to provide duty-free meal breaks to the Store Managers Aggrieved Employees who could not leave their stores and by failing to advise all other Aggrieved Employees of their meal break rights, failing to provide Aggrieved Employees with thirty-minute, uninterrupted meal periods within the first five (5) hours of their shifts, and failing to pay meal break premiums for on-premises and/or late meal breaks. Instead, Defendants often required employees to take their breaks either on-duty or after five (5) hours from the start time of their shifts. As a result of Defendants' failure to authorize or permit lawful meal periods, including allowing store managers to leave the premises during breaks, Plaintiff and the other Class members and Meal Period Aggrieved Employees frequently did not receive compliant duty-free meal periods within the first five (5) hours of their work.

DEFENDANTS' MINIMUM WAGE VIOLATIONS

Labor Code § 1197 states the California requirement that employees must be paid at least the minimum wage fixed by the Commission, and any payment of less than the minimum wage is unlawful. Similarly, Labor Code § 1194 entitles "any employee receiving less than the legal minimum wage...to recover in a civil action the unpaid balance of the full amount of this minimum wage." IWC Wage Order 5-2001 also obligates employers to pay each employee minimum wages *for all hours worked*. These minimum wage standards apply to each hour employees worked for which they were not paid. Therefore, an employer's failure to pay for any particular hour of time worked by an employee is unlawful, even if averaging an employee's total pay over all hours worked, paid or not, results in an average hourly wage above minimum wage. *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324.

Furthermore, pursuant to Labor Code § 1198, "[t]he maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful."

During the relevant time period, Plaintiff and the Aggrieved Employees were paid on an hourly basis by the Defendants in the state of California.

Despite the fact that Defendants failed to provide Aggrieved Employees with timely meal periods of at least thirty (30) minutes in length, Defendant had a policy and practice of automatically deducting thirty (30) minutes from each shift worked in excess of six (6) hours, regardless of whether or not the employee received a meal period and/or the amount of time spent

on the meal period, if any. Therefore, during those regular instances where Aggrieved Employees did not receive a full thirty-minute meal period (or did not receive a meal period at all), they were deprived of minimum wages for all hours worked during that shift.

Labor Code § 1194 provides, in part, that any employee receiving less than the legal minimum wage is entitled to recover in a civil action the unpaid balance of the minimum wage, including interest thereon, reasonable attorney's fees, and costs of suit.

Plaintiff and the other Minimum Wage Aggrieved Employees suffered and continue to suffer losses related to the use and enjoyment of compensation due and owing to them as a direct result of Defendants' unlawful acts and Labor Code violations.

DEFENDANTS' WAGE STATEMENT VIOLATIONS

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...

Due to, *inter alia*, Defendants' failure to pay Plaintiff and the other Aggrieved Employees for all hours worked (as a result of Defendant's automatic lunch deductions), and to provide them with lawful and timely meal periods (and/or pay late meal break premiums), the wage statements issued by Defendants to Plaintiff and the other Wage Statement Aggrieved Employees do not indicate the correct amount of gross wages earned, total hours worked, net wages earned, or the 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 § 226(a)(1), (2), (5) and (9). Indeed, the wage statements track a form of "fictional time" as a result of the automatic lunch deduction; see *Cornn v. UPS*, No. C03-2001 TEH, 2005 U.S. Dist. LEXIS 30419 (N.D. Cal. Aug. 26, 2005), at * 7-8.

Defendants' violation of Labor Code § 226 was knowing and intentional. See *Garnett v. ADT LLC* 139 F. Supp. 3d 1121, 1131 (E.D. Cal. Oct. 6, 2015) (finding that the defendant knowingly and intentionally violated Labor Code § 226 because the "[d]efendant knew that it was not providing total hours worked to plaintiff or other employees paid on commission" even though it believed that employees paid solely on commission or commission and salary "are exempt and

therefore we do not record hours on a wage statement”).

Defendants’ failure to furnish accurate itemized wage statements has caused Plaintiff and the other Wage Statement Aggrieved Employees to incur economic damages in that they were not aware that they were owed and not paid compensation for their time spent on statutory rest breaks and meal periods. *See Cicairos v. Summit Logistics*, 133 Cal.App.4th 949, 954 (“If it is left to the employee to add up the daily hours shown on the time cards or other records so that the employee must perform arithmetic computations to determine the total hours worked during the pay period, the requirements of section 226 would not be met”); *McKenzie v. Federal Express Corp.*, 765 F. Supp. 2d 1222 (C.D. Cal. 2011) (wage statements violated California Labor Code by not including, inter alia, total hours worked giving rise to claims under both Section 226 and for PAGA penalties); *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 960-961 (2005) (reversing summary judgment for defendants where wage statements did not “give an accurate report of the hours plaintiff worked, at least not on its face”); Labor Code § 226(e)(2)(B) (clarifying that injury is established where the wage statement violated Section 226(a)(1), (2), or (5), among other provisions, and where employees cannot easily determine the gross or net wages earned by the employee during the pay period).

Labor Code § 226(e) provides that an employee is entitled to recover \$50 for initial pay period in which a violation of Section 226 occurs and \$100 for each subsequent pay period, not to exceed \$4,000, as well as an award of costs and reasonable attorney’s fees, for all pay periods in which the employer fails to provide accurate itemized statements to the employee causing the employee to suffer injury.

Aggrieved Employees will prevail on their claim for PAGA penalties under Labor Code § 226(a). *See Willner v. Manpower Inc.* 35 F. Supp. 3d 1116, 1136 (N.D. Cal. 2014) (To obtain judgment on a PAGA claim, “all [plaintiff] needs to establish is a violation of section 226(a), which she has done, as discussed above.”); *McKenzie v. Fed. Exp. Corp.* 765 F.Supp.2d 1222, 1232 (C.D. Cal. 2011) (holding that “for the purposes of recovering PAGA penalties, one need only prove a violation of Section 226(a), and need not establish a Section 226(e) injury.”); *Aguirre v. Genesis Logistics*, 2013 U.S. Dist. LEXIS 189815, at *28 (C.D. Cal. July 3, 2013) (“Plaintiffs do not need to establish a Cal. Lab. Code § 226(e) injury to recover penalties under § 2699(f) of PAGA.”).

Further and in addition to the penalties outlined above, Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the required in subdivision (a) of Section 226.” As explained in detail above, Defendants failed to provide Plaintiff and the other Wage Statement Aggrieved Employees with accurate itemized wage statements. Accordingly, Defendants are additionally liable for Labor Code § 226.3 penalties for their violations of Labor Code § 226(a). *See Finder v. Leprino Foods Co.* (E.D. Cal. Mar. 12, 2015) No. 1:13-CV-2059 AWI-BAM, 2015 WL 1137151, at *7 [“the weight of authority counsels that violations of Section 226.3 may be the basis of a PAGA claim.”]; *Pedroza v. PetSmart, Inc.*, No. ED CV 11-298 GHK DTB, 2012 WL 9506073, at *6 (C.D. Cal. June 14, 2012) (“Lab. Code § 226.3 merely provides that failure to perform actions mandated by § 226(a) may trigger civil

penalties.”).¹

DEFENDANT’S FAILURE TO PAY WAGES ON A TIMELY BASIS

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.

Due to Defendants’ failure to pay Plaintiff and the other Aggrieved Employees for all hours worked and all meal period premiums owed,² Defendants violated Labor Code § 204 by failing to pay all wages due within seven (7) days of the close of the payroll period on a regular and consistent basis. See *Parson v. Golden State FC, LLC*, 2016 U.S. Dist. LEXIS 58299, 2016 WL 1734010, at *3-5 (N.D. Cal. May 2, 2016) (finding after *Ling* that a failure to pay rest period premiums can support claims under Labor Code §§ 203 and 204).

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.

DEFENDANT’S FAILURE TO PAY ALL WAGES DUE UPON TERMINATION

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.

¹ Accord *Singer v. Becton, Dickinson & Co., Med-Safe Sys.* (S.D.Cal. July 23, 2008) 2008 U.S. Dist. LEXIS 56326, *18; *Yadira v. Fernandez* (N.D. Cal. June 14, 2011) 2011 U.S. Dist. LEXIS 62894, *7-9, 2011 WL 2434043; *Willis v. Xerox Bus. Servs., LLC* (E.D. Cal. Nov. 15, 2013) No. 1:13-CV-01353-LJO, 2013 WL 6053831, at *7.

² Courts have routinely found that employees who do not receive meal/rest periods premiums are entitled to waiting time penalties under Labor Code § 203. See e.g. *In re Autozone, Inc.*, 2016 U.S. Dist. LEXIS 105746 *23 (N.D. Cal. Aug. 10, 2016) (denying the defendant’s motion for summary judgment on the plaintiff’s claim for waiting time penalties based upon the failure to provide rest period premiums and finding that the California Court of Appeals decision in *Ling vs. P.F. Chang’s China Bistro, Inc.* (2016) 245 Cal. App. 4th 1242 “concerned only whether ‘a section 203 waiting time claim based on section 226.7 premium pay is an action brought for the non-payment of wages under section 218.5’”); *Parson v. Golden State FC, LLC*, 2016 U.S. Dist. LEXIS 58299, 2016 WL 1734010, at *3-5 (N.D. Cal. May 2, 2016) (finding after *Ling* that a failure to pay rest period premiums can support claims under Labor Code §§ 203 and 204); *Brewer v. Gen. Nutrition Corp.* (N.D. Cal. Aug. 27, 2015) 2015 WL 5072039, at *19 [denying defendant’s motion for summary judgment because “the premium payments due under section 226.7 are to be considered “wages” for purposes of sections 203 and 226.7.”]; *Abad v. Gen. Nutrition Centers, Inc.* (C.D. Cal. Mar. 7, 2013) 2013 WL 4038617, at *3-4 [distinguishing *Kirby*, and finding “Plaintiffs’ section 203 claim for failure to pay wages...can be based on amounts owed under section 226.7.”]. The issue is currently before the California Supreme Court in the *Naranjo* case. See *Naranjo v. Spectrum Security Services, Inc.*, Cal. Supreme Court Case No. S258966.

Due to Defendant's faulty policies described above, including its failure to pay wages for all hours worked and for meal period premiums, Defendant violated Labor Code § 203, for those employees whose employment ended within the last one year and ongoing (i.e., the Waiting Time Aggrieved Employees) by willfully failing to pay them all wages due upon the termination of their employment.

DEFENDANTS' FAILURE TO REIMBURSE BUSINESS EXPENSES

Pursuant to Labor Code § 2802(a) "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer...." The purpose of this statute is "to prevent employers from passing their operating expenses on to their employees." *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 562 (2007) (quoting legislative history from the 2000 amendment to the statute). Labor Code Section 2802(c) also clarifies that "the term 'necessary expenditures or losses' shall include all reasonable costs, including, but not limited to, attorney's fees incurred by the employee enforcing the rights granted by this section."

Specifically, under Labor Code § 2802, employers must reimburse employees for required work-related use of personal cell phones, regardless of whether they incur any additional out-of-pocket expense from that work-related use. *See Cochran v. Schwan's Home Service*, 228 Cal. App. 4th 1137 (2014) (reversing denial of class certification in cell phone reimbursement class action). *Cochran* held that "[i]f an employee is required to make work-related calls on a personal cell phone, then he or she is incurring an expense for the purposes of section 2802. It does not matter whether the phone bill is paid for by a third person, or at all. . . . It is irrelevant whether the employee changed plans to accommodate work-related cell phone usage. . . . *To show liability under section 2802, an employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed.*" *Id.* at 1144-45 (emphasis added); *see also 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*).

The employer's obligation to reimburse business-related expenses arises when the employer "knew or should have known" that its employees have incurred a business-related expense. *Stuart v. RadioShack Corp.*, 641 F. Supp. 2d 901, 903 (N.D. Cal. 2009) (Hon. Edward Chen); *Wilson v. Kiewit Pacific Co.*, 2010 WL 5059522 (N.D. Cal. Dec. 6, 2010) (Hon. Susan Illston) (adopting the "knew or should have known" standard from *RadioShack*). Notably, these claims are not waivable per Section 2804 of the Labor Code.

Under Labor Code § 2802, if an employer requires Aggrieved Employees to use their cell phone for work, as is the case here for making phone calls and taking and sending in photos of the

store and displays, then Defendants must reimburse employees for a reasonable portion of their monthly cell phone bills. Here, the Aggrieved Employees did not have access to landlines and were expected to use their cell phones to communicate with headquarters and the outside world (for instance in cases of emergencies). Aggrieved employees routinely used their cell phone to take pictures of items and to report back to their managers.

Accordingly, Defendants violated Labor Code § 2802 and continue to do so by failing to reimburse Reimbursement Aggrieved Employees for all work-related cell phone charges they incurred in connection with their job duties.

Under Labor Code § 2802, if an employer requires that an employee wear a uniform, the employer must pay the cost of the uniform. At all relevant times, Defendant has required Aggrieved Employees to wear mandatory uniform including red T-shirts and black pants. Specifically, Defendants required employees to purchase certain work-related items if they reported to work with incomplete equipment and/or uniforms. Defendant failed to reimburse Aggrieved Employees for the costs of their uniforms and/or uniform maintenance in violation of Section 2802 of the Labor Code, as well as Section 1198 of the Labor Code and the relevant provisions of the IWC Wage Order dealing with uniforms.

This notice is hereby given to and is made against Defendant, and all related and/or alter ego companies, corporations, partnerships, and /or business entities, as well as against any and all officers, owners, directors managers, managing agents, or entities who are or may be liable under law for any of those alleged violations as to any locations or employees who worked at any time in the state of California.

CONCLUSION

Therefore, 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 PAGA representative action (and a class action) against Defendant seeking, *inter alia*, PAGA penalties under Labor Code § 2699, to be brought by the Plaintiff individually and on behalf of the 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. If Defendant is interested in attempting to resolve this matter, including the PAGA claims, please have counsel contact us by July 14, 2020 so that we may discuss an informal discovery plan and the possibility of early mediation.

Very truly yours,



Craig Ackermann, Esq.
Amir Seyedfarshi, Esq.

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T. (310) 997 - 0020

September 1, 2020

Via Online Filing with the LWDA & Certified Mail to Defendant

Pegasus Trucking, LLC
C/O Michael Fallas, Agent for Service of process
15001 S Figueroa Street
Gardena, CA 90248

Pegasus Trucking, LLC
15001 S Figueroa Street
Gardena, CA 90248

**Re: SUPPLEMENTAL NOTICE OF INTENT TO FILE SUIT (Labor
Code § 2699.3) *Mary Ann Audler v. Pegasus Trucking LLC*
LWDA Case No. LWDA-CM-793655-20**

Dear Gentlepersons:

As you are aware, this office represents Plaintiff Mary Ann Audler ("Plaintiff") and a proposed group (and subgroups) of current and former aggrieved employees of Pegasus Trucking LLC (collectively, "Defendant") in the above-referenced matter. The purpose of this letter is to supplement our initial PAGA Notice dated June 16, 2020, which initiated LWDA Case No. LWDA-CM-793655-20. The PAGA Notice is incorporated by reference herein in their entirety.

Although not necessary as PAGA's administrative exhaustion requirement does not require the inclusion of every potential fact or every future theory; rather, it must only "provide reasonably details facts and theories," Plaintiff in an abundance of caution wishes to provide further information in connection with her PAGA case against Defendants. *See Cardenas v. Mclane Food Services, Inc.*, 796 F. Supp. 2d 1246, 1261 (C.D. Cal. Jun 23, 2011); *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 CollJ.*, (C.D. Cal. Nov. 1, 2012) No. CV 08-07919 GAF P.JWX, 2012 WL 10890355, at *4. Plaintiff alleges that Defendant violated, without limitation, California Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 226.7 510, 512 and IWC Wage Order No. 5-2001 with respect to her and the other aggrieved employees.

DEFENDANT'S WAGE STATEMENT VIOLATIONS

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...

Defendant's paystubs fail to provide the accurate rate of pay for any overtime hours that Plaintiff and other Aggrieved Employees worked. Plaintiff's paystubs indicate the same rate for the double time rate as the regular rate. Defendant's violation of Labor Code § 226 was knowing and intentional. *See Garnett v. ADT LLC* 139 F. Supp. 3d 1121, 1131 (E.D. Cal. Oct. 6, 2015) (finding that the defendant knowingly and intentionally violated Labor Code § 226 because the "[d]efendant knew that it was not providing total hours worked to plaintiff or other employees paid on commission" even though it believed that employees paid solely on commission or commission and salary "are exempt and therefore we do not record hours on a wage statement").

Defendant's failure to furnish accurate itemized wage statements has caused Plaintiff and the other Wage Statement Aggrieved Employees to incur economic damages in that they were not aware that they were owed and not paid compensation for their time spent on statutory rest breaks and meal periods. *See Cicairos v. Summit Logistics*, 133 Cal.App.4th 949, 954 ("If it is left to the employee to add up the daily hours shown on the time cards or other records so that the employee must perform arithmetic computations to determine the total hours worked during the pay period, the requirements of section 226 would not be met"); *McKenzie v. Federal Express Corp.*, 765 F. Supp. 2d 1222 (C.D. Cal. 2011) (wage statements violated California Labor Code by not including, inter alia, total hours worked giving rise to claims under both Section 226 and for PAGA penalties); *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 960-961 (2005) (reversing summary judgment for defendants where wage statements did not "give an accurate report of the hours plaintiff worked, at least not on its face"); Labor Code § 226(e)(2)(B) (clarifying that injury is established where the wage statement violated Section 226(a)(1), (2), or (5), among other provisions, and where employees cannot easily determine the gross or net wages earned by the employee during the pay period).

Labor Code § 226(e) provides that an employee is entitled to recover \$50 for initial pay period in which a violation of Section 226 occurs and \$100 for each subsequent pay period, not to exceed \$4,000, as well as an award of costs and reasonable attorney's fees, for all pay periods in which the employer fails to provide accurate itemized statements to the employee causing the

employee to suffer injury.

Aggrieved Employees will prevail on their claim for PAGA penalties under Labor Code § 226(a). *See Willner v. Manpower Inc.* 35 F. Supp. 3d 1116, 1136 (N.D. Cal. 2014) (To obtain judgment on a PAGA claim, “all [plaintiff] needs to establish is a violation of section 226(a), which she has done, as discussed above.”); *McKenzie v. Fed. Exp. Corp.* 765 F.Supp.2d 1222, 1232 (C.D. Cal. 2011) (holding that “for the purposes of recovering PAGA penalties, one need only prove a violation of Section 226(a), and need not establish a Section 226(e) injury.”); *Aguirre v. Genesis Logistics*, 2013 U.S. Dist. LEXIS 189815, at *28 (C.D. Cal. July 3, 2013) (“Plaintiffs do not need to establish a Cal. Lab. Code § 226(e) injury to recover penalties under § 2699(f) of PAGA.”).¹

Further and in addition to the penalties outlined above, Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the required in subdivision (a) of Section 226.” As explained in detail above, Defendants failed to provide Plaintiff and the other Wage Statement Aggrieved Employees with accurate itemized wage statements. Accordingly, Defendants are additionally liable for Labor Code § 226.3 penalties for their violations of Labor Code § 226(a). *See Finder v. Leprino Foods Co.* (E.D. Cal. Mar. 12, 2015) No. 1:13-CV-2059 AWI-BAM, 2015 WL 1137151, at *7 [“the weight of authority counsels that violations of Section 226.3 may be the basis of a PAGA claim.”]; *Pedroza v. PetSmart, Inc.*, No. ED CV 11-298 GHK DTB, 2012 WL 9506073, at *6 (C.D. Cal. June 14, 2012) (“Lab. Code § 226.3 merely provides that failure to perform actions mandated by § 226(a) may trigger civil penalties.”).²

¹ *See also York v. Starbucks Corp.*, No. CV 08-07919 GAF PJWX, 2012 WL 10890355, at *2 (C.D. Cal. Nov. 1, 2012) (granting summary adjudication to the plaintiff on his PAGA claim based upon violations of Lab. Code § 226(a) because “the presence or absence of injury is irrelevant to the standing inquiry under PAGA.”) *Pelton v. Panda Restaurant Group, Inc.* (C.D. Cal., May 3, 2011, CV 10-8458 MANx) 2011 WL 1743268 (“[T]he Court rejects defendant’s argument that plaintiff ‘lacks any PAGA injury.’ Pursuant to Cal. Labor Code § 2699, ‘any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency ... may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees.’ Sections 2699.5 and 2699.3(a) provide that such a claim may be brought for a violation of § 226(a)”; *accord Lopez v. G.A.T. Airline Ground Support, Inc.* (S.D. Cal., July 19, 2010, 09-CV-2268-IEG) 2010 WL 2839417, *5-6 (“It is undisputed that GAT’s paychecks do not indicate the applicable hourly rate of pay for the employee’s regular rate, overtime rate, or double-time rate of pay... The failure to provide this information violates Section 226(a)... Because Section 226 does not provide a penalty, Section 2699(f) penalties are available.”).

² *Accord Singer v. Becton, Dickinson & Co., Med-Safe Sys.* (S.D. Cal. July 23, 2008) 2008 U.S. Dist. LEXIS 56326, *18; *Yadira v. Fernandez* (N.D. Cal. June 14, 2011) 2011 U.S. Dist. LEXIS 62894, *7-9, 2011 WL 2434043; *Willis v. Xerox Bus. Servs., LLC* (E.D. Cal. Nov. 15, 2013) No. 1:13-CV-01353-LJO, 2013 WL 6053831, at *7.

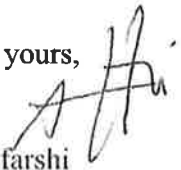
September 1, 2020

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Therefore, pursuant to Labor Code § 2699.3, the foregoing is to update you and the Labor and Workforce Development Agency on the additional facts and information and/or points of clarification set forth above.

Very truly yours,

Amir Seyedfarshi

A handwritten signature in black ink, appearing to be 'Amir Seyedfarshi', written over the printed name.

CC: Kevin Mahoney