

03/02/2021 TUE 14:58 FAX

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FILED BY FAX

ALAMEDA COUNTY

March 03, 2021

CLERK OF
THE SUPERIOR COURT
By Lynn Wiley, Deputy

CASE NUMBER:

RG21090364**ACKERMANN & TILAJEF, P.C.**

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*Attorneys for Plaintiffs, the LWDA, the Class, and the Aggrieved Employees***IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA****FOR THE COUNTY OF ALAMEDA**DON RYAN ASIATICO, ALEXANDER
BOYLE, individually and on behalf of all
others similarly situated,

PLAINTIFFS,

v.

ELODIE, INC., a California Corporation, and
DOES 1-10, inclusive,

DEFENDANT.

CASE NO:**PLAINTIFFS' CLASS ACTION AND
REPRESENTATIVE ACTION COMPLAINT
FOR:**(1) PAGA PENALTIES FOR DEFENDANT'S
WILLFUL MISCLASSIFICATION IN
VIOLATION OF LABOR CODE SECTION
226.8 AND 2698, ET SEQ.;(2) FAILURE TO PAY OVERTIME (LABOR
CODE § 510;(3) FAILURE TO PROVIDE COMPLIANT
REST PERIODS AND PAY MISSED REST
BREAK PREMIUMS (LABOR CODE §§ 226.7;
IWC WAGE ORDER NO. 4);(4) FAILURE TO PROVIDE MEAL PERIODS
AND PAY MISSED MEAL PERIOD
PREMIUMS (LABOR CODE §§ 226.7, 512, IWC
WAGE ORDER NO. 4);(5) FAILURE TO PROVIDE COMPLETE
WAGE STATEMENTS (LABOR CODE § 226);(6) FAILURE TO PAY TIMELY WAGES
(LABOR CODE §§ 204, 210)(7) FAILURE TO REIMBURSE BUSINESS
EXPENSES (LABOR CODE § 2802);(8) UCL VIOLATIONS (BUS. & PROF. CODE
§§ 17200-17204); AND(9) PAGA AND OTHER PENALTIES (LABOR
CODE §§ 2698 – 2699.5);

DEMAND FOR JURY TRIAL

1 Plaintiffs Don Ryan Asiatico and Alexander Boyle (“Plaintiffs”), on behalf of themselves,
2 the State of California, other aggrieved employees, the California General public, and all others
3 similarly situated (hereinafter “Class Members”), complain and allege as follows:

4 **OVERVIEW OF CLAIMS**

5 1. Plaintiffs bring this action on behalf of themselves and all others similarly situated,
6 as a class action, as a representative action pursuant to Labor Code § 2699, *et seq.*, and on behalf
7 of the California general public and the LWDA, against Defendant Elodie, Inc. (“Defendant”) for
8 (1) its willful misclassification of Plaintiffs and other Class Members and Aggrieved Employees as
9 independent contractors; (2) its failure to pay overtime wages to misclassified employees; (3) its
10 failure to provide compliant rest breaks and pay missed rest break premiums to its current and
11 former misclassified employees in California; (4) its failure to provide compliant meal breaks and
12 pay missed meal break premiums to its current and former misclassified employees in California;
13 (5) its failure to provide complete wage statements to its current and former misclassified
14 employees in California within the one year prior to the filing of this Complaint; (6) its failure to
15 pay timely wages to employees based on the foregoing; (7) its failure to reimburse business
16 expenses for misclassified expenses; (8) unfair business practices based on the foregoing; and (9)
17 PAGA and other penalties based on the foregoing. As a result of the foregoing, Defendant has
18 violated California statutory laws as described below.

19 2. The “Class Period” is designated as the period from four years prior to the filing of
20 this action through the date of class certification. The PAGA Period is one year from the sending
21 of the PAGA letter to the LWDA through the present and on-going. Defendant’s violations of
22 California’s wage and hour laws and unfair competition laws, as described more fully below, have
23 been ongoing throughout the Class Period and the PAGA Period.

24 **VENUE**

25 3. Venue is proper in this county under section 395.5 of the California Code of Civil
26 Procedure. Many of the putative Class Members and Aggrieved Employees were employed by
27 Defendant in Alameda County and/or performed work for Defendant in Alameda County during
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1 the Class Period and the PAGA Period. Defendant operates a marijuana dispensary and marijuana
2 distribution facility in the county of Alameda. Many of the acts alleged herein, including
3 Defendant's willful misclassification of its marijuana dispensary workers, its failure to pay
4 overtime pay to them, its failure to provide Labor Code compliant meal and rest breaks to them,
5 and its failure to pay missed meal and rest break premiums to them occurred in Alameda County.
6 Moreover, the majority of the business conducted by Defendant in California is located in Alameda
7 county. Venue is therefore proper in Alameda County.

8 **JURISDICTION**

9 4. Defendant is within the jurisdiction of this Court. Defendant transacts millions of
10 dollars of business by providing marijuana distribution services in California. Thus, Defendant
11 has obtained the benefits of the laws of the State of California. In addition, Plaintiff asserts no
12 claims arising under federal law. Rather, Plaintiff brings causes of action based solely on, and
13 arising from, California law. The claims of the class are also based solely on California law
14 described herein. Furthermore, the total amount at issue in this case, inclusive of attorneys' fees, is
15 less than \$5 million. Thus, jurisdiction is proper in Alameda County Superior Court.

16 **THE PARTIES**

17 5. Plaintiff Don Asiatico is a California resident and, since July 2020 was
18 misclassified as an independent contractor but was actually an employee of Defendant performing
19 the duties of distribution and delivery of marijuana in California. Plaintiff Alexander Boyle is a
20 California resident and from July 2020 until December 2020 was misclassified as an independent
21 contractor but was actually an employee of Defendant performing the duties of distribution and
22 delivery of marijuana in California. From at least four years prior to the filing of this complaint
23 through the present, and on-going, Defendant's delivery and sales crew, including Plaintiffs, were
24 willfully misclassified as independent contractors; were not provided compliant rest and meal
25 periods; were not paid overtime wages; did not receive premium payments for not being provided
26 compliant rest and meal periods; were not provided accurate and/or complete wage statements; did
27 not receive timely wages; and did not receive reimbursement for all business expenses.

1 6. Plaintiff Asiatico represent the state of California and the following group of
2 aggrieved employees defined as:

3 All individuals whose wages were reported on an IRS Form 1099, instead of an IRS Form
4 W2, and who worked for Defendant in California as marijuana delivery and crew staff
5 members or in other non-exempt positions during the PAGA period (hereinafter referred to
as “Aggrieved Employees”).

6 7. By way of this action, Plaintiffs also seek to represent the following Class
7 Members:

8 All individuals whose wages were reported on an IRS Form 1099, instead of an IRS Form
9 W2, and who worked for Defendant in California as marijuana delivery crew staff or in
10 other non-exempt positions during the Class period, hereinafter referred to as “Class
Members.”

11 8. Defendant is a California corporation with its principal place of business in
12 Oakland, California. Defendant is a marijuana distribution company that transacts millions of
13 dollars of business each year by distributing marijuana to consumers throughout California.

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

21 10. Plaintiffs are informed and believe, and based thereon alleges, that each Defendant
22 acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint
23 scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are
24 legally attributable to the other Defendants. Furthermore, Defendants in all respects acted as the
25 employer and/or joint employer of Plaintiffs, the Class, and the Aggrieved Employees.

26 11. Despite its willful misclassification of Plaintiffs, the Class, and the Aggrieved
27 Employees, Defendant was and is the employer of Plaintiffs, the Aggrieved Employees, and Class
28 Members for all relevant time periods. In fact, Defendant employed Plaintiffs, the Class, and the

1 Aggrieved Employees as marijuana sales and delivery staff in California at various times during
2 the Class Period. Defendant employed approximately 50 marijuana delivery crew or staff
3 members in California during the Class Period, who were all willingly misclassified as
4 independent contractors.

5 **FACTUAL ALLEGATIONS**

6 12. Defendant operates and, at all times during the Class Period and PAGA Period, has
7 done and does business in California providing marijuana dispensary services in California.
8 Defendant, in the course of operating its business in California during the Class Period, employed
9 Plaintiffs, the Class, and the Aggrieved Employees, even though they were misclassified and
10 classified incorrectly as independent contractors.

11 13. During the Class Period, Plaintiffs, like the other members of the Class and
12 Aggrieved Employees, typically worked more than ten hours per day and five days per week.
13 Class Members' and Aggrieved Employees' job duties included marijuana distribution services
14 and marijuana delivery.

15 14. Plaintiffs and the other members of the Class were required to show up at work
16 every day at Defendant's site in Oakland, California. Plaintiffs and the other members of the Class
17 followed the direct instructions of their supervisors in order to distribute the marijuana to all
18 Defendant's clients. For this purpose, Plaintiff and the other members of the Class delivered
19 marijuana throughout the day.

20 15. On average, Plaintiffs and the other members of the Class were required to drive in
21 excess of 200 miles every day using their own vehicles for delivery purposes.

22 16. Since at least four years prior to the filing of this action, including during the PAGA
23 Period, Defendant has maintained policies and practices based on or including the willful
24 misclassification of the Plaintiffs, the Class, and Aggrieved Employees as independent contractors.
25 Under applicable standards of law, Plaintiffs, the Class, and Aggrieved Employees are, or were
26 during their employment by Defendant, employees and not independent contractors.

27 17. The California Supreme Court in *Dynamex Operations West, Inc., v. Superior*
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1 *Court*, 4 Cal. 5th 903, 956-57 (Cal. 2018) set forth the standard for determining whether an
2 individual performing work is an independent contractor or an employee, as follows:

3 We find merit in the concerns noted above regarding the disadvantages, particularly in
4 the wage and hour context, inherent in relying upon a multifactor, all the circumstances
5 standard for distinguishing between employees and independent contractors. As a
6 consequence, we conclude it is appropriate, and most consistent with the history and
7 purpose of the suffer or permit to work standard in California's wage orders, to interpret
8 that standard as: (1) placing the burden on the hiring entity to establish that the worker
9 is an independent contractor who was not intended to be included within the wage
10 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 omitted).

11 18. This standard – set forth by the California Supreme Court – is commonly referred to
12 as the “ABC test,” and was codified by California Assembly Bill 5 (2019). *See* Cal. Labor Code §
13 2750.3(a) (codifying the ABC test set forth by the California Supreme Court in *Dynamex*). Under
14 the ABC Test, Defendant has the burden of establishing that Plaintiffs, the Class, and Aggrieved
15 Employees were independent contractors and not intended to be included within the wage order's
16 coverage. Recently, the *Dynamex* decision was held to be retroactive. *See Vasquez v. Jan-Pro*
17 *Franchising International Inc.*, 2021 WL 127201 (Cal. Jan 14, 2021). Further, Defendant must
18 establish that Plaintiffs, the Class, and Aggrieved Employees meet all three factors of the ABC
19 Test, which Defendant cannot meet.

20 19. At all times, Defendant has retained the right to control the method and manner of
21 how Plaintiffs, the Class, and Aggrieved Employees performed their job duties and retained all
22 necessary control over Plaintiffs, the Class, and Aggrieved Employees during their employment.
23 As described above, Plaintiffs, the Class, and Aggrieved Employees were required to follow
24 detailed requirements imposed on them by Defendant governing their work performance.

25 20. Further, Defendant unilaterally set pay rates of Plaintiffs, the Class, and Aggrieved
26 Employees, without Plaintiffs, the Class, and Aggrieved Employees having an opportunity to
27 negotiate pay rates with Defendant, and directed when and where Plaintiffs, the Class, and
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1 Aggrieved Employees were to perform work by paying per “hour.”

2 21. As a result, under applicable law, Plaintiffs, the Class, and Aggrieved Employees
3 were employees of Defendant and they were willfully misclassified with their pay reported on an
4 IRS Form 1099 basis. *See* Labor Code section 226.8; *see also* *Dynamex Operations West, Inc., v.*
5 *Superior Court*, 4 Cal. 5th 903, 956-57 (Cal. 2018); *Ayala v. Antelope Valley Newspapers, Inc.* 59
6 Cal.App.4th 522 (2014); *Ruiz v. Affinity Logistics, Corp.*, 754 F. Supp. 3d 1093 (9th Cir. 2014)
7 (employer’s right to control detail of employees’ work supports finding of employer-employee
8 relationship); *Alexander v. FedExGround Package System, Inc.* 765 F. Supp. 3d 381 (9th Cir.
9 2014) (independent contractors were deemed employees as a matter of law where Defendant
10 controlled times employees worked and controlled aspects of employees’ work). *See also*
11 *Villapando v. Excel Direct, Inc.*, 2015 WL 15179486 (N.D. Cal. 2015) (granting summary
12 judgment to Plaintiff on Defendant’s defense that the employees at issue were independent
13 contractors).

14 22. Through the performance of their job duties, Plaintiffs, the Class, and Aggrieved
15 Employees performed an integral and entirely essential aspect of Defendant’s business.
16 Defendant’s business includes delivery services and marijuana distribution services. Plaintiffs, the
17 Class, and the Aggrieved Employees were individuals performing the work that was the customary
18 function of Defendant’s practice. As such, there can be no doubt that Plaintiffs, the Class, and
19 Aggrieved Employees performed work in the usual course of Defendant’s business.

20 23. Plaintiffs, the Class, and Aggrieved Employees do not operate as independent
21 businesses. Rather, they provided delivery services to Defendant’s customers and in compliance
22 with Defendant’s policies, practices, and procedures. Plaintiffs, the Class, and Aggrieved
23 Employees did not provide marijuana distribution services for any other company or entity. In
24 short, Plaintiff, the Class, and Aggrieved Employees held themselves out to Defendant’s customers
25 and to the public as employees of Defendant, and not as an independent business.

26 24. Because Defendant cannot meet any part of the ABC test, it is clear that Defendant
27 intentionally and willfully misclassified Plaintiff, the Class, and PAGA Aggrieved Employees as
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1 independent contractors in violation of Labor Code § 226.8(a) and 2750.3. Moreover, the willful
2 misclassification of Plaintiffs, the Class, and PAGA Aggrieved Employees was part of a pattern or
3 practice of Defendant willfully misclassifying their packaging contractors. Accordingly, the
4 stepped-up penalties in Section 226.8 should be recoverable here.

5 25. Labor Code § 1197 states the California requirement that employees must be paid at
6 least the minimum wage fixed by the Commission, and any payment of less than the minimum
7 wage is unlawful. Similarly, Labor Code § 1194 entitles “any employee receiving less than the
8 legal minimum wage...to recover in a civil action the unpaid balance of the full amount of this
9 minimum wage.” IWC Wage Order No. 4 also obligates employers to pay each employee
10 minimum wages for all hours worked.

11 26. These minimum wage standards apply to each hour employees worked for which
12 they were not paid. Therefore, an employer’s failure to pay for any particular hour of time worked
13 by an employee is unlawful, *even if averaging an employee’s total pay over all hours worked,*
14 *paid or not, results in an average hourly wage above minimum wage.* *Armenta v. Osmose,*
15 *Inc.*, 135 Cal.App.4th 314, 324 (2005).

16 27. Labor Code § 1194.2 authorizes employees to recover liquidated damages in any
17 action under Labor Code § 1194 to recover unpaid minimum wages. Where employees, such as
18 Plaintiffs, were not paid for all hours worked under Labor Code § 1194, the employee may recover
19 minimum wages for the time worked for which they received no compensation. *See Sillah v.*
20 *Command Int’l Sec. Servs.*, 154 F. Supp. 3d 891 (N.D. Cal. 2015) (holding that employees suing
21 for failure to pay overtime could recover liquidated damages under § 1194.2 if they also showed
22 they were paid less than minimum wage); *accord Andrade v. Arby’s Rest. Grp., Inc.*, 2016 U.S.
23 Dist. LEXIS 172319, at *20-21 (N.D. Cal. Dec. 12, 2016).

24 28. Labor Code § 510 requires an employer to compensate an employee who works
25 more than eight (8) hours in one workday, forty (40) hours in a workweek, and for the first eight
26 (8) hours worked on the seventh consecutive day no less than one and one-half times the regular
27 rate of pay for an employee. In accordance with Labor Code § 1194, Plaintiffs, the Class, and the
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1 Aggrieved Employees could not then agree to work for a lesser wage than the amount proscribed
2 by Labor Code §§ 510 and 1194.

3 29. Further, because Plaintiffs, the Class, and the Aggrieved Employees were
4 wrongfully classified as independent contractors, they did not receive the overtime premium pay
5 rates applicable to employees under California law for working in excess of eight hours in a day,
6 or more than forty hours in a workweek, in violation of IWC Wage Order 4-2001, and Labor Code
7 §§ 1194 and 510. On multiple occasions, Plaintiffs, the Class, and the Aggrieved Employees
8 worked shifts that were longer than 8 hours in length without receiving pay at the rate of 1.5 times
9 their regular rate of pay.

10 30. Labor Code § 226.7(b) states that “[a]n employer shall not require an employee to
11 work during a meal or rest or recovery period mandated pursuant to an applicable statute, or
12 applicable regulation, standard, or order of the Industrial Welfare Commission. . . .”

13 31. Section 12 of IWC Wage Order No. 4 states in pertinent part: “Every employer
14 shall authorize and permit all employees to take rest periods, which insofar as practicable shall be
15 in the middle of each work period. The authorized rest period time shall be based on the total
16 hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction
17 thereof.”

18 32. The California Supreme Court explained in the context of rest breaks that employer
19 liability attaches from adopting an unlawful policy: “An employer is required to authorize and
20 permit the amount of rest break time called for under the wage order for its industry. If it does
21 not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for
22 employees working a seven-hour shift when two are required—***it has violated the wage order and***
23 ***is liable.***” *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1033 (2012) (emphasis added).

24 33. Following *Brinker*, the Courts of Appeal have confirmed that liability for on-duty
25 breaks arises when an employer adopts a uniform policy that fails to provide off-duty breaks. For
26 example, in *Faulkinbury v. Boyd & Associates, Inc.*, the California Court of Appeals
27 applied *Brinker*: “In *Faulkinbury I*, we concluded that even if [defendant]’s on-duty meal break
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1 policy was unlawful, [defendant] would be liable only when it actually failed to provide a required
2 off-duty meal break. *Brinker* leads us now to conclude [defendant] would be liable upon a
3 determination that [defendant]’s uniform on-duty meal break policy was unlawful.” *Faulkinbury*,
4 216 Cal. App. 4th 220, 235 (2013). The Court further explained: “the employer’s liability arises by
5 adopting a uniform policy that violates the wage and hour laws. Whether or not the employee was
6 able to take the required break goes to damages...” *Id.* (citations omitted); *see also Benton v.*
7 *Telecom Network Specialists, Inc.*, 220 Cal. App. 4th 701, 728 (2013).

8 34. Here, not only did Defendant fail to promulgate a compliant rest period policy and
9 fail to provide compliant rest periods to Plaintiffs, the Class, and the Aggrieved Employees, but
10 Defendant in fact had a policy that effectively penalized and subjected Plaintiffs, the Class, and the
11 Aggrieved Employees to potential reprimand and/or discipline if Plaintiffs, the Class, and the
12 Aggrieved Employees took rest breaks, which would often cause Plaintiffs, the Class, and the
13 Aggrieved Employees to be late in completing delivery for Defendant. Further, because of the
14 time-pressure nature of the work schedules of Plaintiffs, the Class, and the Aggrieved Employees,
15 Plaintiffs, the Class, and the Aggrieved Employees were never relieved of all duties while working
16 for Defendant.

17 35. In addition to failing to authorize and permit compliant rest periods, Plaintiffs, the
18 Class, and the Aggrieved Employees were not compensated with one (1) hour’s worth of pay at
19 their regular rate of compensation when they were not provided with a compliant rest period in
20 accordance with Labor Code § 226.7(b).

21 36. Furthermore, by virtue of the misclassification, Defendant did not and does not
22 issue adequate wage statements to Plaintiffs, the Class, and the Aggrieved Employees, under Labor
23 Code Section 226(a).

24 37. Plaintiffs, the Class, and the Aggrieved Employees did not receive any wage
25 statements, let alone compliant wage statements, from Defendant. Plaintiffs, the Class, and the
26 Aggrieved Employees received a check on a weekly basis which was for \$15.00 per hour. There
27 was no paystub or wage statement attached to the check or any description of the number of the
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1 hours that each employee worked. Furthermore, Plaintiffs, the Class, and the Aggrieved
2 Employees did not use any clock-in and clock-out system, so Defendant did not track their actual
3 hours worked. They were required to finish every single project on a daily basis.

4 38. Due to, *inter alia*, Defendant's failure to pay Plaintiffs, the Class, and the
5 Aggrieved Employees overtime payments and rest break premiums, as well as Defendant's failure
6 to track actual hours worked, the checks issued by Defendants to Plaintiffs, the Class, and the
7 Aggrieved Employees do not indicate the correct amount of gross wages earned, total hours
8 worked, net wages earned, hours worked, or the applicable hourly rates in effect during the pay
9 period and the corresponding number of hours worked at each hourly rate in violation of Labor
10 Code § 226(a)(1), (2), (5) and (9).

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

17 40. Defendant's failure to furnish accurate itemized wage statements has caused
18 Plaintiffs, the Class, and the Aggrieved Employees to incur economic damages in that they were
19 not aware that they were owed and not paid compensation for their time spent on overtime work.
20 *See Cicairos v. Summit Logistics*, 133 Cal.App.4th 949, 954 ("If it is left to the employee to add up
21 the daily hours shown on the time cards or other records so that the employee must perform
22 arithmetic computations to determine the total hours worked during the pay period, the
23 requirements of section 226 would not be met"); *McKenzie v. Federal Express Corp.*, 765 F. Supp.
24 2d 1222 (C.D. Cal. 2011) (wage statements violated California Labor Code by not including, *inter*
25 *alia*, total hours worked giving rise to claims under both Section 226 and for PAGA penalties);
26 *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 960-961 (2005) (reversing summary
27 judgment for defendants where wage statements did not "give an accurate report of the hours
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1 plaintiff worked, at least not on its face”); Labor Code § 226(e)(2)(B) (clarifying that injury is
2 established where the wage statement violated Section 226(a)(1), (2), or (5), among other
3 provisions, and where employees cannot easily determine the gross or net wages earned by the
4 employee during the pay period).

5 41. Aggrieved Employees will prevail on their claim for PAGA penalties under Labor
6 Code § 226(a) without having to show “willfulness” or “injury.” *See Lopez v. Friant & Assoc.*
7 *LLC*, 15 Cal. App.5th 773, 788 (2017) (a plaintiff seeking PAGA penalties for a violation of Labor
8 Code section 226(a) does not have to show injury or a knowing and intentional violation); *Willner*
9 *v. Manpower Inc.* 35 F. Supp. 3d 1116, 1136 (N.D. Cal. 2014) (To obtain judgment on a PAGA
10 claim, “all [plaintiff] needs to establish is a violation of section 226(a), which she has done, as
11 discussed above.”); *McKenzie v. Fed. Exp. Corp.* 765 F.Supp.2d 1222, 1232 (C.D. Cal. 2011)
12 (holding that “for the purposes of recovering PAGA penalties, one need only prove a violation of
13 Section 226(a), and need not establish a Section 226(e) injury.”); *Aguirre v. Genesis Logistics*,
14 2013 U.S. Dist. LEXIS 189815, at *28 (C.D. Cal. July 3, 2013) (“Plaintiffs do not need to
15 establish a Cal. Lab. Code § 226(e) injury to recover penalties under § 2699(f) of PAGA.”).

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

21 43. Due to Defendant’s failure to pay Plaintiffs, the Class, and the Aggrieved
22 Employees all overtime wages and rest period premiums, Defendant failed to timely pay Plaintiffs,
23 the Class, and the Aggrieved Employees within seven (7) days of the close of the payroll period in
24 accordance with Labor Code § 204 on a regular and consistent basis. *See Parson v. Golden State*
25 *FC, LLC*, 2016 U.S. Dist. LEXIS 58299, 2016 WL 1734010, at *3-5 (N.D. Cal. May 2, 2016)
26 (finding that a failure to pay rest period premiums can support claims under Labor Code §§ 203
27 and 204).

44. Pursuant to Labor Code Section 210, as amended,

(a) In addition to, and 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 201.3, 204, 204b, 204.1, 204.2, 204.11, 205, 205.5, and 1197.5, shall be subject to a 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 percent of the amount unlawfully withheld.

(b) The penalty shall either be recovered by the employee as a statutory penalty pursuant to Section 98 or by the Labor Commissioner as a civil penalty through the issuance of a citation or pursuant to Section 98.3. The procedures for issuing, contesting, and enforcing judgments for citations issued by the Labor Commissioner under this section shall be the same as those set forth in subdivisions (b) through (k), inclusive, of Section 1197.1.

(c) An employee is only entitled to either recover the statutory penalty provided for in this section or to enforce a civil penalty as set forth in subdivision (a) of Section 2699, but not both, for the same violation.

45. Here, Plaintiffs seek to recover all penalties available under Labor Code Section 210 for Defendant's violations of Labor Code Section 204.

46. The administrative prerequisites of PAGA were satisfied after 65 days elapsed from December 22, 2020 (i.e., 65 days since Plaintiff Don Asiatico's mailing of the PAGA notice with no further communication from the LWDA to Plaintiffs' counsel, which occurred on or around February 26, 2021). Plaintiff Don Asiatico has paid the \$75.00 fee and has otherwise satisfied the administrative prerequisites of PAGA, as amended.

47. Plaintiff Don Asiatico by this action seeks to recover, on behalf of himself and all other current and former Aggrieved Employees of Defendant, the civil penalties provided by PAGA, as specified in Labor Code § 2699(f). Plaintiff Don Asiatico 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*, 46 Cal. 4th 969 (2009). Class certification of the PAGA claims is not required. *Id.*

CLASS ACTION ALLEGATIONS

48. Plaintiffs bring this action, on behalf of themselves and all others similarly situated, as a class action pursuant to Code of Civil Procedure § 382. Plaintiffs seek to represent a Class

1 composed of and defined as: All individuals whose wages were reported on an IRS Form 1099,
2 instead of an IRS Form W2, and who worked for Defendant in California as “marijuana distributor
3 or delivery staff or crew members or in other non-exempt positions” during the Class period
4 (hereinafter “Class Members”). All such Class Members were subject to Defendant’s unlawful
5 misclassification, and, as a result, were not paid overtime, and were not provided compliant breaks
6 and did not receive compliant wage statements.

7 49. This action has been brought and may properly be maintained as a class action
8 under Code of Civil Procedure § 382 because there is a well-defined community of interest in the
9 litigation, the proposed class is easily ascertainable, and Plaintiffs are proper representatives of the
10 Class:

11 a. Numerosity: The potential members of the Class as defined are so
12 numerous that joinder of all the members of the Class is impracticable. While the precise number
13 of Class Members has not been determined at this time, Plaintiff is informed and believes that
14 Defendant has employed approximately 50 Class Members as marijuana deliverers in California
15 who were subject to Defendant’s unlawful misclassification. The Class Members are dispersed
16 throughout California. Joinder of all members of the proposed classes is therefore not practicable.

17 b. Commonality: There are questions of law and fact common to Plaintiffs and
18 the Class that predominate over any questions affecting only individual members of the Class.
19 These common questions of law and fact include, without limitation:

20 i. Whether Defendant violated Sections 226.8 and 2750.3(a) of the Labor
21 Code by willfully misclassifying Plaintiffs and Class Members as independent contractors, and
22 whether Defendant engaged in a pattern and practice of such wrongful misclassification;

23 ii. Whether Defendant violated Section 510 of the Labor Code by failing to pay
24 overtime to Plaintiff and the Class during the Class Period;

25 iii. Whether Defendant violated Section 12 of IWC Wage Order No. 4 by
26 failing to provide compliant rest periods to Plaintiffs and the members of the Class in California
27 during the Class Period;

1 iv. Whether Defendant violated Labor Code section 226.7 and section 12 of
2 IWC Wage Order No. 4 by failing to pay one hour of premium pay to each member of the Class for
3 each day that a compliant rest break was not provided during the Class Period;

4 v. Whether Defendant failed to provide Plaintiffs and the members of the Class
5 complete wage statements in violation of Labor Code Section 226(a);

6 vi. Whether Defendant violated Sections 204 and 210 of the Labor Code by
7 failing to pay member of the Class all wages due on a timely basis;

8 vii. Whether Defendant engaged in an unfair practice and violated section 17200
9 of the California Business and Professions Code by failing to provide compliant rest breaks to
10 members of the Class in violation of Section 12 of IWC Wage Order No. 4;

11 viii. Whether Defendant engaged in an unfair practice and violated section 17200
12 of the California Business and Professions Code by failing to provide Plaintiffs and members of
13 the Class with rest period premiums for each day they were not provided a compliant rest break;

14 ix. Whether Plaintiffs and the Class are entitled to restitution under Business
15 and Professions Code § 17200;

16 x. The proper formula(s) for calculating damages, interest, and restitution
17 owed to Plaintiffs and the Class Members;

18 xi. The nature and extent of class-wide damages.

19 c. Typicality: Plaintiffs' claims are typical of the claims of the Class. Both
20 Plaintiffs and Class Members sustained injuries and damages, and were deprived of property
21 rightly belonging to them, arising out of and caused by Defendant's common course of conduct in
22 violation of law as alleged herein, in similar ways and for the same types of unpaid wages.

23 d. Adequacy of Representation: Plaintiffs are members of the Class and will
24 fairly and adequately represent and protect the interests of the Class and Class Members.
25 Plaintiffs' interests do not conflict with those of Class and Class Members. Counsel who represent
26 Plaintiffs are competent and experienced in litigating large wage and hour class actions, including
27 numerous cases virtually identical to this one (i.e., misclassification cases), and other employment
28

1 class actions, and will devote sufficient time and resources to the case and otherwise adequately
2 represent the Class and Class Members.

3 e. Superiority of Class Action: A class action is superior to other available
4 means for the fair and efficient adjudication of this controversy. Individual joinder of all Class
5 Members is not practicable, and questions of law and fact common to the Class predominate over
6 any questions affecting only individual members of the Class. Each Class Member has been
7 damaged or may be damaged in the future by reason of Defendant's unlawful policies and/or
8 practices. Certification of this case as a class action will allow those similarly situated persons to
9 litigate their claims in the manner that is most efficient and economical for the parties and the
10 judicial system. Certifying this case as a class action is superior because it allows for efficient and
11 full disgorgement of the ill-gotten gains Defendant has enjoyed by maintaining its unlawful
12 misclassification, compensation, and rest break policies, and will thereby effectuate California's
13 strong public policy of protecting employees from deprivation or offsetting of compensation
14 earned in their employment. If this action is not certified as a Class Action, it will be impossible
15 as a practical matter, for many or most Class Members to bring individual actions to recover
16 monies unlawfully withheld from their lawful compensation due from Defendant's, due to the
17 relatively small amounts of such individual recoveries relative to the costs and burdens of
18 litigation.

19 **FIRST CAUSE OF ACTION**

20 **PAGA PENALTIES FOR WILLFUL MISCLASSIFICATION**

21 **[Cal. Labor Code §§ 2698 *et seq.* and 226.8(a)(1) and 226.8(b) or 226.8(c) and 2750.3(a)]**

22 **On behalf of Plaintiffs, the LWDA and the PAGA Aggrieved Employees**

23 50. Plaintiffs re-allege and incorporate by reference each and every allegation set forth
24 in the preceding paragraphs.

25 51. Plaintiffs and similarly situated employees are "Aggrieved Employees" under the
26 PAGA as they were employed by Defendant during the applicable statutory period and suffered
27 the Labor Code violation alleged herein. At all times relevant hereto, Plaintiffs and Aggrieved
28 Employees were employees for purposes of the California Labor Code, although they were
willfully misclassified as independent contractors in violation of Labor Code sections 2750.3(a)

1 and 226.8.

2 52. In violation of the Labor Code provisions cited herein and in willful violation of
3 California law and public policy, Defendant intentionally misclassified Plaintiffs and Aggrieved
4 Employees as independent contractors in violation of Labor Code § 226.8(a). This was part of a
5 pattern as practice of willful misclassification of all, or virtually all, of Defendant's marijuana
6 delivery and crew staff thereby triggering heightened penalties under sections 226.8(b) and (c).

7 53. The administrative prerequisites of PAGA will be satisfied after 66 days have
8 elapsed from December 22, 2020 (i.e., 60 days since Plaintiff Don Asiatico's mailing of the PAGA
9 notice with no further communication from the LWDA to Plaintiffs' counsel). The actionable
10 period is one year prior to the sending of the LWDA letter through the present. Plaintiff Don
11 Asiatico has paid the \$75.00 fee and has otherwise satisfied the administrative prerequisites of
12 PAGA, as amended.

13 54. Plaintiff Don Asiatico by this action seeks to recover, on behalf of himself and all
14 other current and former Aggrieved Employees of Defendant, the civil penalties provided by
15 PAGA, as specified in Labor Code § 2699(f). Plaintiff Don Asiatico seeks to recover the PAGA
16 civil penalties through a representative action as permitted by PAGA and the California Supreme
17 Court in *Arias v. Superior Court*, 46 Cal. 4th 969(2009). Therefore, class certification of the
18 PAGA claims is not required.

19 **SECOND CAUSE OF ACTION**
20 **FAILURE TO PAY OVERTIME WAGES**
21 **[Cal. Labor Code § 510, IWC Wage Order §3(A)]**
22 **On behalf of Plaintiffs and the Class**

23 55. Plaintiffs re-allege and incorporate by reference each and every allegation set forth
24 in the preceding paragraphs.

25 56. The actionable period for this cause of action is three years prior to the filing of the
26 Complaint through the present, and on-going until the violations are corrected, or the Class is
27 certified.

28 57. Labor Code § 510 provides that any work in excess of eight hours on any day, as
well as all hours worked on the seventh consecutive day of a workweek, shall be compensated at

1 the rate of no less than 1.5 times the regular rate of pay. See also Section 3(A) of IWC Wage Order
2 No. 4.

3 58. Here, Defendant hired Plaintiffs and the Class to work as marijuana delivery and
4 crew members in California and to work for Defendant and in its business. Plaintiffs and the Class
5 often worked in excess of 8 hours and over 40 hours per week. On average, Plaintiffs and the
6 Aggrieved Employees worked between 10 to 12 hours on a daily basis. Defendant only paid
7 Plaintiffs and the Class the regular hourly rate for each delivery. To make matters worse,
8 Defendant just issued an invoice sheet and a check for all the hours worked by Plaintiffs and the
9 Class. Plaintiffs and the Class did not receive any overtime compensation for the hours that they
10 worked beyond eight hours per day.

11 59. Concerning Labor Code section 510 and Section 3(A) of IWC Wage Order No. 4,
12 Defendant did not pay Plaintiffs and the Class any overtime wages corresponding to one and a half
13 time of Plaintiffs and the Class' hourly rates of pay. Plaintiffs and the Class often worked eight
14 hours per day and often worked over 40 hours per week. Defendant violated Labor Code § 510 by
15 failing to pay Plaintiffs and the Class their overtime wages at the applicable overtime rates,
16 including daily overtime and weekly overtime, and instead merely paid Plaintiffs and the Class
17 straight time wages for all hours worked.

18 **THIRD CAUSE OF ACTION**
19 **FAILURE TO PROVIDE OFF-DUTY MEAL BREAKS AND FAILURE**
20 **TO PAY MISSED MEAL BREAK PREMIUMS**
21 **[Cal. Labor Code §§ 226.7, 512 and IWC Wage Order §11]**
22 **On behalf of Plaintiffs and the Class**

23 60. Plaintiffs re-allege and incorporate by reference each and every allegation set forth
24 in the preceding paragraphs.

25 61. The actionable period for this cause of action is three years prior to the filing of this
26 action through the present.

27 62. California Labor Code § 226.7(a) provides, "No employer shall require any
28 employee to work during any meal or rest period mandated by an applicable order of the Industrial
Welfare Commission.

63. Section 11(A) and (B) of IWC Wage Order No. 4 provide that:

“No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by mutual consent of the employer and the employee...An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

64. Section 11(C) of IWC Wage Order No. 4 provides that:

Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an —on duty‡ meal period and counted as time worked. An —on duty‡ meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

65. Finally, Section 11(D) of IWC Wage Order No. 4 provides that:

If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, 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.

66. Here, by failing to provide them with duty-free timely 30-minute meal breaks, on their shifts greater than 5 hours in length, Defendant has violated California Labor Code § 226.7 and IWC Wage Order No. 4, and is liable to Plaintiffs and the Class.

67. As a result of the unlawful acts of Defendant, Plaintiffs and the Class were not provided timely duty-free meal breaks and are entitled to recovery under Cal. Labor Code §226.7 in the amount of one additional hour of pay at the employee’s regular rate of compensation for each work period greater than 5 hours in California during each day in which Defendant failed to provide timely duty-free meal periods as required by California law.

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FOURTH CAUSE OF ACTION
FAILURE TO PROVIDE COMPLIANT REST PERIODS
AND PAY MISSED REST BREAK PREMIUMS
[Cal. Labor Code §§ 226.7; Section 12 of IWC Wage Order No. 4]
On behalf of Plaintiffs and the Class

68. Plaintiffs re-allege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

69. The actionable period for this cause of action is three years prior to the filing of the Complaint through the present, and on-going until the violations are corrected, or the Class is certified.

70. California Labor Code § 226.7(a) provides, “No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.”

71. Section 12 of IWC Wage Order No. 4 provides: “(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. *Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.*” (emphasis added).

72. As alleged herein, although misclassified, Plaintiffs and the Class were employees of Defendant. By failing to provide its marijuana delivery distributors and crew staff compliant rest periods of 10 minutes for each 4 hours of work, Defendant has violated California Labor Code § 226.7, and is liable to Plaintiffs and the Class.

73. As a result of the unlawful acts of Defendant, Plaintiffs and the Class were not provided compliant rest breaks, and are entitled to recovery under Cal. Labor Code §226.7 in the amount of one additional hour of pay at the employee’s regular rate of compensation for each work period during each day in which Defendant failed to provide compliant rest periods as required by California law.

FIFTH CAUSE OF ACTION
FAILURE TO PROVIDE COMPLIANT WAGE STATEMENTS
[Cal. Labor Code § 226(a)]
On behalf of Plaintiffs and the Wage Statement and Penalty Subclass

74. Plaintiffs re-allege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

75. The actionable period for this cause of action is one year prior to the filing of this Complaint through the present, and on-going until the violations are corrected, or the subclass is certified.

76. Section 226(a) of the California Labor Code provides, in relevant part:

Every employer shall...furnish each of his or her employees...an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (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 and (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...

77. As set forth above, through the Class Period, due to misclassification, Defendant failed to issue wage statements to its delivery drivers in California, including Plaintiffs, that complied with Labor Code Section 226(a).

78. 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") and/or the passage of Section

1 226.2.

2 79. As a result of Defendant's failure to issue itemized wage statements to Plaintiffs
3 and members of the wage statement and penalty subclass (i.e., those members of the class who
4 were employed by Defendant during the actionable period for this cause of action) in violation of
5 section 226(a) of the California Labor Code, Plaintiffs and the Class are each entitled to recover an
6 initial penalty of \$50, and subsequent penalties of \$100, up to an amount not exceeding an
7 aggregate penalty of \$4,000 per Plaintiff and per every member of the Class from Defendant
8 pursuant to section 226(e) of the Labor Code, costs and reasonable attorneys' fees.

9 **SIXTH CAUSE OF ACTION**
10 **FAILURE TO PAY WAGES ON A TIMELY BASIS**
11 **[Cal. Labor Code §§ 204, 210]**
On behalf of Plaintiffs and the Class

12 80. Plaintiffs re-allege and incorporate by reference each and every allegation set forth
13 in the preceding paragraphs.

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

20 82. Due to Defendant's failure to pay Plaintiffs and the other Class Members for
21 overtime wages rest period premiums owed,¹ Defendant violated Labor Code § 204 by failing to

22
23 ¹ Courts have routinely found that employees who do not receive meal/rest periods premiums are entitled to waiting
24 time penalties under Labor Code § 203. *See e.g. In re Autozone, Inc.*, 2016 U.S. Dist. LEXIS 105746 *23 (N.D. Cal.
25 Aug. 10, 2016) (denying the defendant's motion for summary judgment on the plaintiff's claim for waiting time
26 penalties based upon the failure to provide rest period premiums and finding that the California Court of Appeals
27 decision in *Ling vs. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal. App. 4th 1242 "concerned only whether 'a
28 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."]; *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

(continued...)

1 pay all wages due within seven (7) days of the close of the payroll period on a regular and
2 consistent basis. *See Parson v. Golden State FC, LLC*, 2016 U.S. Dist. LEXIS 58299, 2016 WL
3 1734010, at *3-5 (N.D. Cal. May 2, 2016) (finding after *Ling* that a failure to pay rest period
4 premiums can support claims under Labor Code §§ 203 and 204).

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

13 **SEVENTH CAUSE OF ACTION**
14 **FAILURE TO REIMBURSE FOR BUSINESS EXPENSES**
15 **[Cal. Labor Code § 2802(a) and (c)]**
On Behalf of Plaintiffs and the Class Against Defendant

16 84. Plaintiffs re-allege and incorporate by reference each and every allegation set forth
17 in the preceding paragraphs.

18 85. California Labor Code section 2802 requires an employer to "indemnify his or her
19 employee for all necessary expenditures or losses incurred by that employee in direct consequence
20 of the discharge of his or her duties." See Cal. Labor Code section 2802(a); *see also* 2802(c)
21 where necessary is defined to include all “reasonable” costs. As noted, “[t]he elements of a claim
22 under Section 2802 are: (i) the employee made expenditures or incurred losses; (ii) the
23 expenditures or losses were incurred in direct consequence of the employee's discharge of his or
24 her duties, or obedience to the directions of the employer; and (iii) the expenditures or losses were
25 reasonable and necessary.” *Marr v. Bank of America*, 2011 U.S. Dist. LEXIS 24868 (N.D. March
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27 (continued ...)

28 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.

1 8, 2011) (*citing Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007). “In addition,
2 the employer ‘must either know or have reason to know that the employee has incurred [the]
3 expense.’” *Id.* (*citing Stuart v. RadioShack Corp.*, 641 F.Supp. 2d 901 (N.D.Cal. 2009). Where an
4 employer has knowledge that employees are incurring a reimbursable expense, the employer must
5 “exercise due diligence to ensure each employee is reimbursed.” *Marr*, at *1. The right of an
6 employee to expense reimbursements is not waivable. *See* Cal. Labor Code sections 2804 and
7 219(a). Any contract to waive them is null and void. *Edwards v. Arthur Anderson*, 44 Cal. 4th 937,
8 951 (2008).

9 86. Furthermore, under Labor Code section 2802, employers must reimburse employees
10 for all reasonable work-related expenses, regardless of whether or not the employees incurred any
11 additional out-of-pocket expense from that work-related use. *See, Cochran v. Schwan’s Home*
12 *Service, Inc.*, 228 Cal.App.4th 1137 (Cal. Aug. 12, 2014) (“We hold that when employees must
13 use their personal cell phones for work-related calls, Labor Code section 2802 requires the
14 employer to reimburse them. Whether the employees have cell phone plans with unlimited
15 minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone
16 bills.”). Thus, where employees are expected or mandated to use their internet at home for work,
17 courts have held that they incurred home internet expenses in “direct consequence of the discharge
18 of his or her duties” and were entitled to reimbursement. *See Aguilar v. Zep, Inc.*, 2014 US Dist
19 LEXIS 120315, *54 (N.D.Cal. Aug. 27, 2014) (Hon. Edward Chen) (where outside sales reps used
20 home internet and computers for work, and even admitted that they would have incurred the same
21 expenses without work duties, the court nevertheless held that the employer was obligated to
22 reimburse some reasonable portion of these expenses); *see also Ritchie v. Blue Shield of*
23 *California*, 2014 WL 6982943, at *21 (N.D.Cal. Dec. 9, 2014) (Hon. Edward Chen)
24 (certifying class of home office claims processors with 2802 phone reimbursement claims for
25 landline reimbursements where company required claims processors working from home to have a
26 landline, but rejecting certification of claims for home office supplies as individualized).

27 87. Here, Defendant’s failure to reimburse the work-related gas mileage and cell phone
28

1 expenses of Plaintiffs and Class Members violated their non-waivable rights secured to Plaintiffs
2 and Class Members by Labor Code §2802. See Labor Code §2804. Plaintiffs and similarly
3 situated Class Members are thus entitled to reimbursement for these necessary expenditures, plus
4 interest and attorneys' fees and costs, under Labor Code § 2802(c).

5 **EIGHTH CAUSE OF ACTION**
6 **UNFAIR COMPETITION LAW VIOLATIONS**
7 **(BUS. & PROF. CODE § 17200, ET SEQ.)**
8 **On Behalf of Plaintiffs and the Class**

8 88. Plaintiff re-alleges and incorporates by reference each and every allegation set forth
9 in the preceding paragraphs.

10 89. Section 17200 of the California Business & Professions Code prohibits any
11 unlawful, unfair, or fraudulent business practices. Business & Professions Code § 17204 allows
12 “any person who has suffered injury in fact and has lost money or property” to prosecute a civil
13 action for violation of the UCL. Such a person may bring such an action on behalf of himself and
14 others similarly situated who are affected by the unlawful, unfair, or fraudulent business practice.

15 90. Under section 17208 of the California Business and Professions Code, the statute of
16 limitations for a claim under Section 17200 is four years. Accordingly, the actionable period for
17 this cause of action is four years prior to the filing of this Complaint through the present, and on-
18 going until the violations are corrected or the Class is certified.

19 91. Section 90.5(a) of the Labor Code states that it is the public policy of California to
20 enforce vigorously minimum labor standards in order to ensure employees are not required to work
21 under substandard and unlawful conditions, and to protect employers who comply with the law
22 from those who attempt to gain competitive advantage at the expense of their workers by failing to
23 comply with minimum labor standards.

24 92. As a direct and proximate result of Defendant's unlawful business practices,
25 Plaintiffs and the Class Members have suffered economic injuries. Defendant has profited from its
26 unlawful, unfair, and/or fraudulent acts and practices.

27 93. Plaintiffs and similarly situated Class Members are entitled to monetary relief
28 pursuant to Business & Professions Code §§ 17203 and 17208 for all unpaid overtime, and unpaid

1 rest period premiums, from at least four years prior to the filing of this complaint through to the
2 date of such restitution, at rates specified by law. Defendant should be required to disgorge all the
3 profits and gains it has reaped and restore such profits and gains to Plaintiff and Class Members,
4 from whom they were unlawfully taken.

5 94. Through its actions alleged herein, Defendant has engaged in unfair competition
6 within the meaning of section 17200 of the California Business & Professions Code, because
7 Defendant's conduct, as herein alleged has damaged Plaintiff and the Class Members by
8 wrongfully denying them overtime and wrongfully denying them missed rest period premiums,
9 and therefore was substantially injurious to Plaintiff and the Class Members.

10 95. Defendant engaged in unfair competition in violation of sections 17200 et seq. of
11 the California Business & Professions Code by violating Section 1194 of the California Labor
12 Code, and Section 12 of the IWC Wage Order No. 4.

13 96. Defendant's course of conduct, act, and practice in violation of the California laws
14 mentioned above constitute independent violations of sections 17200 et seq. of the California
15 Business and Professions Code.

16 97. Plaintiffs and similarly situated Class Members are entitled to enforce all applicable
17 penalty provisions of the Labor Code pursuant to Business & Professions Code § 17202.

18 98. Plaintiffs have assumed the responsibility of enforcement of the laws and public
19 policies specified herein by suing on behalf of themselves and other similarly situated Class
20 Members previously or presently employed by Defendant in California. Plaintiffs' success in this
21 action will enforce important rights affecting the public interest. Plaintiffs will incur a financial
22 burden in pursuing this action in the public interest. Therefore, an award of reasonable attorneys'
23 fees to Plaintiffs is appropriate pursuant to Code of Civil Procedure §1021.5.

24 **NINTH CAUSE OF ACTION**

25 **LABOR CODE PRIVATE ATTORNEY GENERAL ACT**
26 **PAGA PENALTIES FOR LABOR CODE VIOLATIONS OTHER THAN**
MISCLASSIFICATION
(Labor Code §§ 2698-2699.5)

27 **On Behalf of Plaintiff Don Asiatico and the PAGA Aggrieved Employees and LWDA**

28 99. Plaintiff Don Asiatico re-alleges and incorporates by reference each and every

1 allegation set forth in the preceding paragraphs.

2 100. Plaintiff Don Asiatico and those members of the class who were employed by
3 Defendant within the last year are, “aggrieved employees” under PAGA as they were employed by
4 Defendant during the applicable statutory period and suffered the Labor Code violations alleged
5 herein; specifically, violations of §§ 226, 226.7, 510, 512, 2802, 204, and 210 of the Labor Code.
6 Plaintiff Don Asiatico was employed by Defendant during the one year preceding the submission
7 of a Plaintiff Don Asiatico’s PAGA letter to the LDWA on or around December 22, 2020. As
8 such, Plaintiff Don Asiatico seeks to recover, on behalf of himself and all other current and former
9 aggrieved employees of Defendant, the civil penalties provided by PAGA.

10 101. Under Labor Code §§ 2699(f)(2) and 2699.5, for each such violation, Plaintiffs and
11 all other aggrieved employees are entitled to penalties in an amount to be shown at the time of trial
12 subject to the following formula:

13 \$100 for the initial violation per employee per pay period; and

14 \$200 for each subsequent violation per employee per pay period.

15 These penalties will be allocated 75% to the Labor Workforce Development Agency and 25% to
16 the affected employees.

17 102. The aggrieved employees are all individuals who hold or held the title of marijuana
18 delivery and crew staff, and who are or have been classified as independent contractors by
19 Defendant in California during the PAGA Period. These employees were subject to the
20 aforementioned Labor Code violations, during the period of time from one year prior to the
21 submission of Plaintiff’s letter to the LDWA on December 22, 2020 through the present and on-
22 going.

23 103. In addition, as set forth above, Defendant failed to provide Plaintiff Don Asiatico
24 and all aggrieved employees with accurate itemized wage statements in compliance with Labor
25 Code § 226(a). Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of
26 Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per
27 employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for
28

1 each violation in a subsequent citation, for which the employer fails to provide the employee a
2 wage deduction statement or fails to keep the required in subdivision (a) of Section 226.”

3 104. Pursuant to Labor Code § 226.3, for PAGA penalties associated with the Section
4 226 claim, Plaintiff Don Asiatico and the Aggrieved Employees for the Section 226 claim are
5 entitled to \$250 for each initial pay period with a violation and \$1,000 for each subsequent pay
6 period with a violation. See *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal. App. 5th
7 667, 674-675 (2018) (finding that Labor Code § 226.3 applies to all violations of Labor Code §
8 226(a)); see also *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058, 1109 (N.D. Cal. 2019)
9 (“the Court finds that Cal. Lab. Code § 226.3 penalties are applicable as the appropriate measure of
10 civil penalties under PAGA” for the violation of Labor Code § 226(a).

11 105. Further, Plaintiff Don Asiatico, as Aggrieved Employees, need not demonstrate or
12 prove that Defendant’s conduct in refusing to provide accurate and itemized wage statements was
13 knowing, intentional, or willful. *Lopez v. Friant & Assocs., LLC*, cited above; see also *Willner v.*
14 *Manpower Inc.* 35 F. Supp. 3d 1116, 1136 (N.D. Cal. 2014) (To obtain judgment on a PAGA
15 claim, “all [plaintiff] needs to establish is a violation of section 226(a), which she has done, as
16 discussed above.”); *McKenzie v. Fed. Exp. Corp.* 765 F.Supp.2d 1222, 1232 (C.D. Cal. 2011)
17 (holding that “for the purposes of recovering PAGA penalties, one need only prove a violation of
18 Section 226(a), and need not establish a Section 226(e) injury.”); *Aguirre v. Genesis Logistics*,
19 2013 U.S. Dist. LEXIS 189815, at *28 (C.D. Cal. July 3, 2013) (“Plaintiff do not need to establish
20 a Cal. Lab. Code § 226(e) injury to recover penalties under § 2699(f) of PAGA.”).

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

25 107. Pursuant to Labor Code § 2699.3 (a), on December 22, 2020, Plaintiff Don Asiatico
26 gave written notice by certified mail to Defendant, and to the Labor and Workforce Development
27 Agency (“LWDA”) of his claims, including the facts and theories supporting all claims outlined in
28

1 this Complaint. Accordingly, Plaintiff Don Asiatico fulfilled all administrative prerequisites to the
2 pursuit of his PAGA claim on behalf of himself and all other current and former aggrieved
3 employees of Defendant after 65 days have elapsed from December 22, 2020.

4 **JURY DEMAND**

5 108. Plaintiffs hereby demand trial by jury of their and the Class's claims against
6 Defendant, except for her PAGA and UCL claims which are properly tried to the Court.

7 **PRAYER FOR RELIEF**

8 Wherefore, Plaintiffs, on behalf of themselves and the members of the Class, prays for
9 judgment against Defendant as follows:

10 1. An Order that this action may proceed and be maintained as a class action;

11 2. On the First Cause of Action:

12 a. That the Court find that Defendant violated California Labor Code §§ 226.8(a)(1)
13 by willfully misclassifying Plaintiffs and Aggrieved Employees as independent contractors.

14 b. That Plaintiffs and other Aggrieved Employees be awarded penalties, at a
15 minimum, as specified in Labor Code §226.8(b).

16 c. That the Court find, additionally, the Defendant engaged in a pattern or practice of
17 willful misclassification of Plaintiffs and the Aggrieved Employees.

18 d. That Plaintiffs and other Aggrieved Employees be awarded penalties, upon a
19 finding of a pattern or practice, as specified in Labor Code § 226.8(c) in lieu of the penalties in
20 226.8(b).

21 e. That the Court award attorneys' fees and costs pursuant to Labor Code §
22 2699(g)(1).

23 3. On the Second Cause of Action:

24 a. A Declaratory judgment that Defendant has violated California Labor Code
25 § 510;

26 b. An award to Plaintiffs and the other members of the Class in the amount of
27 their unpaid overtime compensation for worked performed, plus interest and/or liquidated damages
28

1 during the Class Period;

2 4. On the Third Cause of Action:

3 a. A declaratory judgment that Defendant has violated California Labor Code
4 § 226.7, and Section 12 of IWC Wage Order No. 4-2001;

5 b. Pursuant to Cal. Labor Code § 226.7, an award to Plaintiffs and the Class
6 Members for an hour of pay for each day that a compliant rest period was not provided during the
7 Class Period;

8 5. On the Fourth Cause of Action:

9 a. A declaratory judgment that Defendant has violated California Labor Code
10 sections 226.7, 512. and Section 11 of IWC Wage Order No. 4-2001;

11 b. Pursuant to Cal. Labor Code § 226.7, an award to Plaintiffs and the Class
12 Members for an hour of pay for each day that a compliant meal period was not provided during the
13 Class Period;

14 6. On the Fifth Cause of Action:

15 a. A declaratory judgment that Defendant violated California Labor Code §226
16 by issuing inaccurate and/or incomplete wage statements that failed to include total hours worked
17 and all applicable hourly rates in effect during the pay period and the corresponding number of
18 hours worked at each hourly rate to Plaintiffs and the wage statement and penalty subclass
19 members;

20 b. An award to Plaintiffs and Class Members of \$50 for each initial pay period
21 in which a violation of Section 226 occurred and \$100 for each subsequent pay period in which a
22 violation of Section 226 occurred, not to exceed \$4,000 for each member of the Class, as well as
23 an award of costs and reasonable attorney's fees, pursuant to Labor Code § 226(e).

24 6. On the Sixth Cause of Action:

25 a. A declaratory judgment that Defendant violated California Labor Code §§
26 204 and 210;

27 b. Pursuant to Labor Code §§ 204 and 210, an award to Plaintiffs and the Class
28

1 for penalties pursuant to Labor Code § 210.

2 7. On the Seventh Cause of Action:

- 3 a. A declaratory judgment that Defendant California Labor Code section 2802;
4 b. All reimbursement of all incurred business expenses incurred by Plaintiffs
5 and the Class pursuant to Labor Code section 2802;
6 c. That the Court award attorneys' fees and costs pursuant to Labor Code §
7 2802(c).

8 8. On the Eighth Cause of Action:

- 9 a. That the Court find and declare that Defendants have violated the UCL and
10 committed unfair and unlawful business practices by misclassifying Plaintiffs and Class Members,
11 by failing to pay overtime, failing to pay missed meal rest break premiums, and failing to
12 reimburse business expenses;
13 b. Restitution, including, but not limited to, the relief permitted by sections
14 1194, 510, and 226.7 of the California Labor Code (i.e., pay as specified for overtime and rest and
15 meal period premiums to Plaintiff and the members of the Class during the Class Period);

16 11. On the Ninth Cause of Action:

- 17 a. A civil penalty against Defendant in the amount of \$100 for the initial
18 violation and \$200 for each subsequent violation as specified in section 2699(f)(2) of the
19 California Labor Code for Plaintiffs and for member of the Wage Statement and PAGA Penalty
20 Subclass during all of the pay periods in the one year preceding the filing of this Complaint
21 through the present and on-going until the violations are corrected or this subclass is certified;
22 b. Pursuant to Labor Code § 226.3, for PAGA penalties associated with the
23 Section 226 claim, Plaintiff Don Asiatico is entitled to \$250 for each initial pay period with a
24 violation and \$1,000 for each subsequent pay period with a violation. See *Raines v. Coastal*
25 *Pacific Food Distributors, Inc.*, 23 Cal. App. 5th 667, 674-675 (2018) (finding that Labor Code §
26 226.3 applies to all violations of Labor Code § 226(a)); see also *Magadia v. Wal- Mart Assocs.*,
27 384 F. Supp. 3d. 1058, 1109 (N.D. Cal. 2019) ("the Court finds that Cal. Lab. Code § 226.3
28

1 penalties are applicable as the appropriate measure of civil penalties under PAGA” for the
2 violation of Labor Code § 226(a).

3 c. An award of reasonable attorney’s fees against Defendant as specified in
4 Labor Code § 2699(g)(1), for all the work performed by the undersigned counsel in connection
5 with the PAGA claims;

6 d. An award of all costs incurred by the undersigned counsel for Plaintiff in
7 connection with Plaintiffs’ and Class Members’ PAGA claim against Defendant, as provided for in
8 Labor Code § 2699(g)(1);

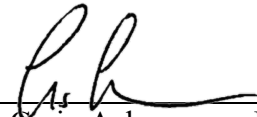
9 12. All other relief as this Court deems proper.

11 Dated: March 1, 2021

Respectfully,

12 ACKERMANN & TILAJEF, P.C.
13 EMPLOYMENT RIGHTS LAW GROUP, APC

15 By:



16 Craig Ackermann, Esq.

17 Amir Seyedfarshi, Esq.

18 *Attorneys for Plaintiffs, the LWDA, the Class,*
19 *and the Aggrieved Employees*