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34-2021-00307297

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

DON ASIATICO and GEORGE LUIS,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

WESTERN MESSENGER SERVICES INC.,
a California Corporation,

Defendants.

CASE NO:

**CLASS ACTION AND REPRESENTATIVE
ACTION COMPLAINT FOR**

- (1) FAILURE TO PAY MINIMUM WAGES (LABOR CODE §§ 1194, 1194.2; IWC WAGE ORDER 9-2001)
 - (2) FAILURE TO PROVIDE TIMELY, DUTY-FREE MEAL PERIODS AND/OR PAY MEAL PERIOD PREMIUMS (LABOR CODE §§ 226.7, 512; IWC WAGE ORDER 9-2001);
 - (3) FAILURE TO PROVIDE TIMELY, DUTY-FREE REST PERIODS AND/OR PAY REST PERIOD PREMIUMS (LABOR CODE § 226.7; IWC WAGE ORDER 9-2001);
 - (4) FAILURE TO PAY OVERTIME (LABOR CODE § 510);
 - (5) FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS (LABOR CODE § 226);
 - (6) WAITING TIME PENALTIES (LABOR CODE § 201 – 203);
 - (7) FAILURE TO PAY TIMELY WAGES (LABOR CODE §§ 204, 210);
 - (8) FAILURE TO REIMBURSE FOR NECESSARY BUSINESS EXPENSES (LABOR CODE § 2802);
 - (9) UCL VIOLATIONS (BUS. & PROF. CODE §§ 17200-17204); AND
 - (10) PAGA AND OTHER PENALTIES (LABOR CODE §§ 2698 – 2699.5);
- DEMAND FOR JURY TRIAL**

BY FAX

1 Plaintiffs Don Asiatico and George Luis, on behalf of themselves, the State of California,
2 other aggrieved employees, and all others similarly situated (hereinafter “Class Members”) complain
3 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, and as a representative action pursuant to Labor Code § 2699, *et seq.*, and on behalf
7 of the California general public, against Defendant Western Messenger Services Inc., (“Defendant”)
8 for their (1) failure to pay minimum wages for all hours worked; (2) failure to provide timely, duty-
9 free meal periods and/or pay meal period premiums; (3) failure to provide timely, duty-free rest
10 periods for every four hours of work or major fraction thereof and/or pay rest period premiums; (4)
11 failure to provide overtime wages; (5) failure to provide accurate itemized wage statements
12 containing total hours worked within the one year prior to the filing of this Complaint; (6) failure to
13 pay all wages due to former employees based on the foregoing; (7) failure to pay timely wages based
14 on the foregoing; (8) failure to reimburse for business expenses; (9) UCL violations based on the
15 foregoing; and (10) PAGA and other penalties based on the foregoing. As a result of the foregoing,
16 Defendant has violated California statutory laws as described below.

17 2. The “Class Period” is designated as the period from April 2, 2017 through August
18 31, 2021. The “PAGA Period” is designated as the period from one year prior to the sending of the
19 PAGA letter to the LWDA (*i.e.*, on or around January 29, 2020) through August 31, 2021 and on-
20 going. Defendant’s violations of California’s wage and hour laws and unfair competition laws, as
21 described more fully below, have been ongoing throughout the Class Period.

22 **VENUE**

23 3. Venue is proper in this county under section 395.5 of the California Code of Civil
24 Procedure. Some of the putative Class Members were employed and/or performed work during the
25 Class Period by Defendants in Sacramento County. At times, Plaintiffs Don Asiatico and George
26 Luis delivered courier and mail to Defendant’s clients located in Sacramento County. Many of the
27 acts alleged herein occurred in Sacramento County. Venue is therefore proper in Sacramento
28 County.

1 **JURISDICTION**

2 4. Defendants are within the jurisdiction of this Court. Defendants transact hundreds of
3 thousands of dollars by managing and operating a transportation company throughout the State of
4 California, including in the County of Sacramento. Thus, Defendants have obtained the benefits of
5 the laws of the State of California. In addition, Plaintiffs assert no claims arising under federal law.
6 Rather, Plaintiffs bring causes of action based solely on, and arising from, California law. The
7 claims of the Class and the claims of the aggrieved employees are also based solely on California
8 law described herein.

9 **THE PARTIES**

10 **A. The Plaintiffs**

11 5. Plaintiffs are California residents and were messenger and delivery drivers employed
12 by Defendant in California during the relevant time period. From at least four years from the filing
13 of this complaint through the present, and on-going, Defendant's delivery employees, including
14 Plaintiffs during their employment, were not paid all minimum wages for all hours worked, were
15 not provided timely and duty-free meal and rest periods and/or provided meal and rest period
16 premiums; were not provided accurate and/or complete wage statements; did not receive their
17 overtime wages; did not receive reimbursement for all business expenses incurred, did not receive
18 all of their wages due upon termination of employment, and did not receive all wages timely.

19 6. Defendant paid all their employees within 9 days after the end of each pay period in
20 violation of California Labor Code 204.

21 7. Plaintiffs represent the state of California and groups of aggrieved employees defined
22 as:

23 Plaintiffs and all other non-exempt individuals who are or were employed by Defendant as
24 a driver, messenger, courier, or in a similar position in the State of California and who
25 worked one or more shifts during the PAGA Period (hereinafter referred to as "Aggrieved
26 Employees").

27 8. By way of this action, Plaintiffs also seek to represent the following Classes:

28 Plaintiffs and all other California residents who are or were employed by Defendant as

1 drivers, messengers, couriers, or in a similar position, who worked at least one shift during
2 the Class Period (hereinafter referred to as “Class Members” or the “Class”).

3 **B. The Defendant**

4 9. Defendant Western Messenger Services, Inc. is a California corporation
5 headquartered in San Francisco, CA. To operate its transportation fleet, Defendant employs
6 messengers, couriers, and drivers, such as Plaintiffs, the Class Members, and the Aggrieved
7 Employees.

8 10. Defendant was and is the employer of Plaintiffs, the Aggrieved Employees and Class
9 Members for all relevant time periods. At any one time during the Class Period, and the PAGA
10 Period, Defendant employed approximately 38 messenger drivers in California. Due to turnover
11 during the Class Period, the total number of Class Members is estimated to be 83.

12 **FACTUAL ALLEGATIONS**

13 11. Defendant operates and, at all times during the PAGA Period and the Class Period,
14 have done and do business in California serving the messenger industry in California. Defendant, in
15 the course of operating its business in California during the Class Period and the PAGA Period,
16 employed Plaintiffs, the Aggrieved Employees and the Class Members.

17 12. Labor Code § 1197 states the California requirement that employees must be paid at
18 least the minimum wage fixed by the Commission, and any payment of less than the minimum wage
19 is unlawful. Similarly, Labor Code § 1194 entitles “any employee receiving less than the legal
20 minimum wage...to recover in a civil action the unpaid balance of the full amount of this minimum
21 wage.” IWC Wage Order 9-2001 also obligates employers to pay each employee minimum wages
22 *for all hours worked*. These minimum wage standards apply to each hour employees worked for
23 which they were not paid. Therefore, an employer’s failure to pay for any particular hour of time
24 worked by an employee is unlawful, even if averaging an employee’s total pay over all hours
25 worked, paid or not, results in an average hourly wage above minimum wage. *Armenta v. Osmose,*
26 *Inc.* (2005) 135 Cal.App.4th 314, 324.

27 13. Furthermore, pursuant to Labor Code § 1198, “[t]he maximum hours of work and the
28 standard conditions of labor fixed by the commission shall be the maximum hours of work and the

1 standard conditions of labor for employees. The employment of any employee for longer hours than
2 those fixed by the order or under conditions of labor prohibited by the order is unlawful.”

3 14. During the relevant time period, Plaintiffs, the Class, and the Aggrieved Employees
4 were paid on a mixed basis of mileage pay, hourly pay and accessorial pay by the Defendant in the
5 state of California.

6 15. Despite the fact that Defendant failed to provide the Class and Aggrieved Employees
7 with timely meal periods of at least thirty (30) minutes in length, Defendant had a policy and practice
8 of automatically deducting thirty (30) minutes from each shift worked in excess of six (6) hours,
9 regardless of whether or not the employee received a duty-free meal period and/or the amount of
10 time spent on the meal period, if any. Therefore, during those regular instances where the Class and
11 Aggrieved Employees did not receive a full thirty-minute meal period (or did not receive a meal
12 period at all), they were deprived of minimum wages for all hours worked during that shift.

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

16 17. Plaintiffs and the other Class Members and Aggrieved Employees suffered and
17 continue to suffer losses related to the use and enjoyment of compensation due and owing to them
18 as a direct result of Defendant’s unlawful acts and Labor Code violations.

19 18. Labor Code § 512 requires employers to provide employees with a thirty (30) minute
20 uninterrupted and duty-free meal period within the first five (5) hours of an employee’s shift.
21 Moreover, an employee who works more than ten (10) hours per day is entitled to receive a second
22 thirty (30) minute uninterrupted and duty-free meal period.

23 19. Under Labor Code § 512, if an employer maintains a uniform policy that does not
24 authorize and permit the amount of duty-free mealtime on or before the fifth hour of work as called
25 for under the law (as specified in the applicable Wage Order), “it has violated the wage order and is
26 liable.” The *Brinker* Court explained in the context of rest breaks that employer liability attaches
27 from adopting an unlawful policy.

28 20. Here, Defendant violated and continue to violate Labor Code § 512 and IWC Wage

Order 9-2001 § 11 by, among other things, failing to provide timely, duty-free meal breaks to Class Members and Aggrieved Employees. and by failing to advise all other Aggrieved Employees of their California meal break rights, failing to provide Class Members and 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-duty and/or late or missed meal breaks. Instead, Defendant 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 Defendant's failure to authorize or permit lawful meal periods, Plaintiffs and the other Class members and Aggrieved Employees frequently did not receive compliant duty-free meal periods within the first five (5) hours of their work.

21. Under Labor Code § 226.7, if an employer maintains a uniform policy that does not authorize and permit the amount of rest time on the schedule called for under the law (as specified in Section 12 of the applicable Wage Order), "it has violated the wage order and is liable." The *Brinker* Court explained in the context of rest breaks that employer liability attaches from adopting an unlawful policy:

An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—***it has violated the wage order and is liable.*** (*Brinker Rest. Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1033.) [emphasis added].

22. Here, Defendant did not authorize Plaintiffs, the Class Members, and the Aggrieved Employees to take their ten-minute rest breaks during each 4 hours of work or major fraction thereof during their shifts. Moreover, Defendant's scheduling practices were often rest break preclusive for Class Members and Aggrieved Employees.

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

24. Here, Defendant hired Plaintiffs, the Class, and the Aggrieved Employees to work as messengers for Defendant's operations. Plaintiffs, the Class, and Aggrieved Employees often worked more than 8 hours and over 40 hours per week and at least six days a week. Defendant only

1 paid Plaintiffs, the Class, and the Aggrieved Employees the regular hourly rate multiple by 1.5 for
2 every overtime hour worked. Defendant did not pay Plaintiffs, the Class, and Aggrieved Employees
3 their overtime rate for the sixth day worked in excess of 40 hours.

4 25. Concerning Labor Code section 510 and Section 3(A) of IWC Wage Order No. 4,
5 Defendant did not pay Plaintiff, the Class, and the Aggrieved Employees any overtime wages
6 corresponding to the accurate calculation of one and a half time of Plaintiffs, the Class, and the
7 Aggrieved Employees' hourly rate. Defendant violated Labor Code § 510 by failing to pay Plaintiffs,
8 the Class, and Aggrieved Employees the accurate overtime wages, including daily overtime and
9 night shifts' overtime.

10 26. Labor Code § 226 obligates employers, semi-monthly or at the time of each payment
11 to furnish an itemized wage statement in writing showing:

- 12 (1) gross wages earned;
- 13 (2) total hours worked by the employee;
- 14 (3) the number of piece-rate units earned and any applicable piece rate if the employee
is paid on a piece rate;
- 15 (4) all deductions, provided that all deductions made on written orders of the employee
may be aggregated and shown as one item;
- 16 (5) net wages earned;
- 17 (6) the inclusive dates of the period for which the employee is paid;
- 18 (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;
- 19 (8) the name and address of the legal entity that is the employer...; and,
- 20 (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...

21 Plaintiffs, the Class Members, and the Aggrieved Employees receive a bi-monthly paystub
22 from Defendant that fails to specify the exact number of hours worked and the rate of pay for each
23 hour. Plaintiffs, the Class, and the Aggrieved Employees received compensation based on a system
24 including mileage payment, hourly rates and loading payments. Plaintiffs, the Class, and the
25 Aggrieved Employees' wage statements do not state the total number of hours and the corresponding
26 rate that each employee receives on the wage statement itself during the Class and PAGA Periods.
27 Moreover, due to, *inter alia*, Defendant's failure to pay Plaintiffs, the Class, and the other Aggrieved
28 Employees for all hours worked, and to provide them with lawful and timely meal and rest periods

1 (and/or pay meal and rest break premiums), the wage statements issued by Defendant to Plaintiffs,
2 the Class, and the Aggrieved Employees do not indicate the correct amount of gross wages earned,
3 total hours worked, net wages earned, or the applicable hourly rates in effect during the pay period
4 and the corresponding number of hours worked at each hourly rate in violation of Labor Code §
5 226(a)(1), (2), (5) and (9). Indeed, the wage statements track a form of “fictional time” as a result
6 of the automatic lunch deduction; see *Cornn v. UPS*, No. C03-2001 TEH, 2005 U.S. Dist. LEXIS
7 30419 (N.D. Cal. Aug. 26, 2005), at * 7-8.

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

14 28. Defendant’s failure to furnish accurate itemized wage statements has caused
15 Plaintiffs, the Wage Statement Class Members, and the Aggrieved Employees to incur economic
16 damages in that they were not aware that they were owed and not paid appropriate premiums for
17 their non-compliant statutory meal and rest breaks and the total numbers of hours worked. See
18 *Cicairos v. Summit Logistics*, 133 Cal.App.4th 949, 954 (“If it is left to the employee to add up the
19 daily hours shown on the time cards or other records so that the employee must perform arithmetic
20 computations to determine the total hours worked during the pay period, the requirements of section
21 226 would not be met”); *McKenzie v. Federal Express Corp.*, 765 F. Supp. 2d 1222 (C.D. Cal. 2011)
22 (wage statements violated California Labor Code by not including, inter alia, total hours worked
23 giving rise to claims under both Section 226 and for PAGA penalties); Labor Code § 226(e)(2)(B)
24 (clarifying that injury is established where the wage statement violated Section 226(a)(1), (2), or (5),
25 among other provisions, and where employees cannot easily determine the gross or net wages earned
26 by the employee during the pay period).

27 29. Labor Code § 226(e) provides that an employee is entitled to recover \$50 for initial
28 pay period in which a violation of Section 226 occurs and \$100 for each subsequent pay period, not

1 to exceed \$4,000, as well as an award of costs and reasonable attorney’s fees, for all pay periods in
2 which the employer fails to provide accurate itemized statements to the employee causing the
3 employee to suffer injury.

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

13 31. Labor Code § 203 provides “if an employer willfully fails to pay . . . any wages of an
14 employee who is discharged or who quits, the wages of the employee shall continue as a penalty. .
15 .” for up to 30 days. Lab. Code § 203; *Mamika v. Barca*, (1998) 68 Cal.App.4th 487, 492.

16 32. Due to Defendant’s faulty policies described above, including its failure to pay all
17 minimum wages and overtime owed and for all meal and rest break premiums due, Defendant
18 violated Labor Code § 203, for those employees whose employment ended within the last three years
19 and ongoing (i.e., the Waiting Time Class Members and Waiting Time Aggrieved Employees) by
20 willfully failing to pay them all wages due upon the termination of their employment.

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

26 34. Due to Defendant’s failure to pay Plaintiffs, the Class, and the other Aggrieved
27 Employees all minimum wages and overtime wages owed and meal and rest break period premiums
28

1 owed,¹ Defendant violated Labor Code § 204 by failing to pay all wages due within seven (7) days
2 of the close of the payroll period on a regular and consistent basis. *See Parson v. Golden State FC,*
3 *LLC*, 2016 U.S. Dist. LEXIS 58299, 2016 WL 1734010, at *3-5 (N.D. Cal. May 2, 2016) (finding
4 after *Ling* that a failure to pay rest period premiums can support claims under Labor Code §§ 203
5 and 204). Defendant also violated §204 by paying Class members 9 days after the end of the pay
6 periods, as opposed to the 7 days after the pay period.

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

15 36. Pursuant to Labor Code § 2802(a) “[a]n employer shall indemnify his or her
16 employee for all necessary expenditures or losses incurred by the employee in direct consequence
17 of the discharge of his or her duties, or of his or her obedience to the directions of the employer....”
18 The purpose of this statute is “to prevent employers from passing their operating expenses on to their
19 employees.” *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 562 (2007) (quoting legislative
20 history from the 2000 amendment to the statute). Labor Code Section 2802(c) also clarifies that “the

21
22 ¹ Courts have routinely found that employees who do not receive meal/rest periods premiums are entitled to waiting
23 time penalties under Labor Code § 203. *See e.g. In re Autozone, Inc.*, 2016 U.S. Dist. LEXIS 105746 *23 (N.D. Cal.
24 Aug. 10, 2016) (denying the defendant’s motion for summary judgment on the plaintiff’s claim for waiting time penalties
25 based upon the failure to provide rest period premiums and finding that the California Court of Appeals decision in *Ling*
26 *vs. P.F. Chang’s China Bistro, Inc.* (2016) 245 Cal. App. 4th 1242 “concerned only whether ‘a section 203 waiting time
27 claim based on section 226.7 premium pay is an action brought for the non-payment of wages under section 218.5’”);
28 *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 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 term ‘necessary expenditures or losses’ shall include all reasonable costs, including, but not limited
2 to, attorney’s fees incurred by the employee enforcing the rights granted by this section.”

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

9 38. Under Labor Code § 2802, if an employer requires employees to use their cars for
10 work, then Defendant must reimburse employees for their work-related gas and mileage expenses.
11 Here, Plaintiffs, the Class, and the Aggrieved Employees were expected to use their vehicle on a
12 daily basis to deliver letters and parcels and their work-related gas and mileage usage was not
13 reimbursed correctly. Defendant never reimbursed Plaintiffs, the Class, and the Aggrieved
14 Employees for all of the costs of their mileage and vehicle related expenses.

15 39. The administrative prerequisites of PAGA were satisfied after 65 days have elapsed
16 from January 28, 2021 (i.e. 65 days since Plaintiff Don Asiatico’s mailing of the PAGA notice).
17 Plaintiff Don Asiatico has paid the \$75.00 fee and has otherwise satisfied the administrative
18 prerequisites of PAGA, as amended. The parties also agreed to a tolling agreement tolling applicable
19 claims from April 30, 2021 to July 31, 2021, which facilitated pre-suit informal discovery and pre-
20 suit mediation.

21 40. Plaintiffs by this action seeks to recover, on behalf of themselves and all other current
22 and former Aggrieved Employees of Defendant, the civil penalties provided by PAGA, as specified
23 in Labor Code § 2699(f). Plaintiffs seek to recover the PAGA civil penalties through a representative
24 action as permitted by PAGA and the California Supreme Court in *Arias v. Superior Court*, 46 Cal.
25 4th 969 (2009). Class certification of the PAGA claims is not required.

26 **CLASS ACTION ALLEGATIONS**

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

1 composed of and defined as:

2 Plaintiffs and all other California residents who are or were employed by Defendant as
3 drivers, messengers, couriers, or in a similar position, who worked at least one shift during
4 the Class Period. (hereinafter referred to as “Class Members” or the “Class”).

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

8 a. Numerosity: The potential members of the Class as defined are so numerous
9 that joinder of all the members of the Class is impracticable. While the precise number of Class
10 Members has not been determined at this time, Plaintiff is informed and believes that Defendant has,
11 on average, at any one time during the Class Period employed around 38 Class Members as non-
12 exempt employees who were subject to Defendant’s unlawful policies. Due to turnover, the total
13 number of Class Members is estimated to be 83. The Class Members are dispersed throughout
14 Northern California. Joinder of all members of the proposed classes is therefore not practicable.

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

18 i. Whether Defendant violated Labor Code sections 1194, 1197, 1197 and
19 section 4 of IWC Wage Order No. 9 by failing to pay all minimum wages owed to Plaintiffs and the
20 Class in the California during the Class Period;

21 ii. Whether Defendant violated Labor Code sections 226.7 and 512 and Section
22 11 of IWC Wage Order No. 9 by failing to provide timely, duty-free meal periods to Plaintiffs and
23 the members of the Class in California during the Class Period;

24 iii. Whether Defendant violated Labor Code section 226.7 by failing to provide one
25 hour of premium pay to each member of the Class for each day that a timely, duty-free meal period was
26 not provided in California during the Class Period;

27 iv. Whether Defendants violated Labor Code section 510 by failing to provide the
28 correct overtime rate to each member of the Class for each day that worked overtime hours in California

1 during the Class Period;

2 v. Whether Defendant violated Labor Code section 226.7 and Section 12 of IWC
3 Wage Order No. 9 by failing to provide timely, duty-free rest periods to Plaintiffs and the members
4 of the Class in California during the Class Period;

5 vi. Whether Defendant violated Labor Code section 226.7 by failing to provide one
6 hour of premium pay to each member of the Class for each day that a timely, duty-free rest period was
7 not provided in California during the Class Period;

8 vii. Whether Defendant failed to provide Plaintiff and the members of the Wage
9 Statement Class complete wage statements containing all hours worked in violation of Labor Code
10 Section 226(a);

11 viii. Whether Defendant violated Section 203 of the Labor Code by failing to pay
12 members of the Waiting Time Class for all wages due to them (including their unpaid meal and rest
13 break premiums) upon their separation of employment from Defendant;

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

16 x. Whether Defendant violated section 2802 of the Labor Code by failing to
17 reimburse Plaintiffs and the Class for all business expenses incurred during the Class Period;

18 xi. Whether Defendant engaged in an unfair practice and violated section 17200
19 of the California Business and Professions Code by failing to provide Plaintiffs and the members of
20 the Class with timely, duty-free meal breaks during the Class Period;

21 xii. Whether Defendant engaged in an unfair practice and violated section 17200
22 of the California Business and Professions Code by failing to provide Plaintiffs and members of the
23 Class with meal period premiums for each day they were not provided a compliant meal break;

24 xiii. Whether Defendant engaged in an unfair practice and violated section 17200
25 of the California Business and Professions Code by failing to provide Plaintiffs and the members of
26 the Class with timely, duty-free rest breaks during the Class Period;

27 xiv. Whether Defendant engaged in an unfair practice and violated section 17200
28 of the California Business and Professions Code by failing to provide Plaintiffs and members of the

1 Class with rest period premiums for each day they were not provided a compliant meal break;

2 xv. Whether Plaintiffs and the Class are entitled to restitution under Business and
3 Professions Code § 17200;

4 xvi. The proper formula(s) for calculating damages, interest, and restitution owed
5 to Plaintiff and the Class Members;

6 xvii. The nature and extent of class-wide damages.

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

11 d. Adequacy of Representation: Plaintiffs are members of the Class and will
12 fairly and adequately represent and protect the interests of the Class and Class Members. Plaintiffs'
13 interests do not conflict with those of Class and Class Members. Counsel who represents Plaintiffs
14 are competent and experienced in litigating large wage and hour class actions, including numerous
15 cases virtually identical to this one (i.e., wage and hour class action cases), and other employment
16 class actions, and will devote sufficient time and resources to the case and otherwise adequately
17 represent the Class and Class Members.

18 e. Superiority of Class Action: A class action is superior to other available
19 means for the fair and efficient adjudication of this controversy. Individual joinder of all Class
20 Members is not practicable, and questions of law and fact common to the Class predominate over
21 any questions affecting only individual members of the Class. Each Class Member has been
22 damaged or may be damaged in the future by reason of Defendant's unlawful policies and/or
23 practices. Certification of this case as a class action will allow those similarly situated persons to
24 litigate their claims in the manner that is most efficient and economical for the parties and the judicial
25 system. Certifying this case as a class action is superior because it allows for efficient and full
26 disgorgement of the ill-gotten gains Defendant has enjoyed by maintaining its unlawful break and
27 compensation policies and will thereby effectuate California's strong public policy of protecting
28 employees from deprivation or offsetting of compensation earned in their employment. If this action

1 is not certified as a Class Action, it will be impossible as a practical matter, for many or most Class
2 Members to bring individual actions to recover monies unlawfully withheld from their lawful
3 compensation due from Defendant, due to the relatively small amounts of such individual recoveries
4 relative to the costs and burdens of litigation.

5
6 **FIRST CAUSE OF ACTION**
7 **FAILURE TO PAY MINIMUM WAGES**
8 **[Cal. Labor Code §§ 1194, 1194.2; Section 4 of IWC Wage Order (9-2001)**
9 **On behalf of Plaintiffs and the Class**

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

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

15 45. Section 1194 of the Labor Code provides, in relevant part:
16 Notwithstanding any agreement to work for a lesser wage, any employee
17 receiving less than minimum wage...applicable to the employee is entitled to
18 recover in a civil action the unpaid balance of the full amount of this minimum
19 wage ..., including interest thereon, reasonable attorney's fees, and costs of suit.

20 46. Section 1194.2 of the Labor Code provides, in relevant part:
21 In any action under...Section 1194 to recover wages because of the payment of
22 a wage less than the minimum wage fixed by an order of the commission, an
23 employee shall be entitled to recover liquidated damages in an amount equal to
24 the wages unlawfully unpaid and interest thereon.

25 47. During the Class Period, Plaintiffs and Class Members were not paid minimum wages
26 owed for all hours worked under Labor Code § 1194.

27 48. In failing to pay for all time worked, Plaintiffs and the Class are entitled to recover,
28 either their unpaid hourly wages due, or minimum wage plus interest and/or liquidated damages in
an additional amount equal to the total amount of wages unlawfully withheld during the Class Period
for rest period time.

49. Pursuant to section 1194.2 of the Labor Code, Plaintiffs and the Class are also entitled
to recover interest, costs, and attorneys' fees associated with this cause of action.

SECOND CAUSE OF ACTION
FAILURE TO PROVIDE TIMELY, DUTY-FREE MEAL BREAKS AND FAILURE
TO PAY MISSED MEAL BREAK PREMIUMS
[Cal. Labor Code §§ 226.7, 512; Section 11 of IWC Wage Order No. 9]
On behalf of Plaintiff and the Class

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

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

52. 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.

53. Section 11(A) and (B) of IWC Wage Order No. 9 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.”

54. Section 11(C) of IWC Wage Order No. 9 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.”

55. Finally, Section 11(D) of IWC Wage Order No. 9 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.”

1 56. Here, by failing to provide them with duty-free timely 30-minute meal breaks, on
2 their shifts greater than 5 hours in length, Defendant has violated California Labor Code § 226.7 and
3 IWC Wage Order No. 9, and is liable to Plaintiffs and the Class.

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

9
10 **THIRD CAUSE OF ACTION**
11 **FAILURE TO PROVIDE TIMELY AND DUTY-FREE REST BREAKS**
12 **AND PAY MISSED REST BREAK PREMIUMS**
13 **[Cal. Labor Code §§ 226.7; Section 12 of IWC Wage Order 9-2001]**
14 **On behalf of Plaintiffs and the Class**

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

17 59. Under Labor Code § 226.7, if an employer maintains a uniform policy that does not
18 authorize and permit the amount of rest time on the schedule called for under the law (as specified
19 in Section 12 of the applicable Wage Order), "it has violated the wage order and is liable." The
20 *Brinker* Court explained in the context of rest breaks that employer liability attaches from adopting
21 an unlawful policy:

22 An employer is required to authorize and permit the amount of rest break time called for
23 under the wage order for its industry. If it does not—if, for example, it adopts a uniform
24 policy authorizing and permitting only one rest break for employees working a seven-hour
25 shift when two are required—***it has violated the wage order and is liable.***

26 (*Brinker Rest. Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1033.) [emphasis added].

27 60. Here, Defendants did not authorize Plaintiffs and the Class Members to take their ten-
28 minute rest breaks during each 4 hours of work or major fraction thereof during their shifts. Plaintiffs
and the Class Members did not receive timely rest breaks during their shifts. Accordingly,
Defendants are liable to Plaintiffs and the Class Members for rest break premiums for all such shifts
on which they were not able to take compliant rest breaks.

///

FOURTH CAUSE OF ACTION
FAILURE TO PAY OVERTIME WAGES
[Cal. Labor Code § 510; IWC Wage Order No. 9, Section 3]
On behalf of Plaintiffs and the Class

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

62. 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 correct or the Class is certified.

63. 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 the rate of no less than 1.5 times the regular rate of pay. See also Section 3(A) of IWC Wage Order No. 9.

64. Here, Defendant hired Plaintiff and the Class to work as messengers for Defendant's operations. Plaintiff and the Class often worked more than 8 hours and over 40 hours per week and at least six days a week. Defendant only paid Plaintiff and the Class the regular hourly rate multiple by 1.5 for every overtime hour worked. Defendant did not pay Plaintiff and the Class their overtime rate for the sixth day worked in excess of 40 hours.

65. Concerning Labor Code section 510 and Section 3(A) of IWC Wage Order No. 9, Defendant did not pay Plaintiffs and the Class any overtime wages corresponding to one and a half time of Plaintiffs and the Class' hourly rates of pay. Plaintiffs and the Class often worked eight hours per day and often worked over 40 hours per week. Defendant violated Labor Code § 510 by failing to pay Plaintiff and the Class their overtime wages at the applicable overtime rates, including daily overtime and weekly overtime, and instead merely paid Plaintiffs and the Class straight time wages for all hours worked.

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

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

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

///

1 “Every employer shall...furnish each of his or her employees...an accurate
2 itemized statement in writing showing (1) gross wages earned, (2) total hours
3 worked by the employee, except for any employee whose compensation is
4 solely based on a salary and who is exempt from payment of overtime under
5 subdivision (a) of Section 515 or any applicable order of the Industrial Welfare
6 Commission, (3) the number of piece-rate units earned and any applicable piece
7 rate if the employee is paid on a piece-rate basis, (4) all deductions, provided
8 that all -deductions made on written orders of the employee may be aggregated
9 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...”

10 68. As set forth above, Defendant’s wage statements issued fail to specify the exact
11 number of hours worked and the rate of pay for each hour. Plaintiffs and the Wage Statement Class
12 Members received compensation based on a system including mileage payment, hourly rates and
13 loading payments. Plaintiffs and the Wage Statement Class Members’ wage statements do not state
14 the total number of hours and the corresponding rate that each employee receives on the wage
15 statement itself during the statutory period. Moreover, due to, *inter alia*, Defendant’s failure to pay
16 Plaintiffs and the other Wage Statement Class Members for all hours worked (as a result of
17 Defendant’s automatic lunch deductions), and to provide them with lawful and timely meal periods
18 (and/or pay late meal break premiums), the wage statements issued by Defendant to Plaintiffs and
19 the other Wage Statement Class Members do not indicate the correct amount of gross wages earned,
20 total hours worked, net wages earned, or the applicable hourly rates in effect during the pay period
21 and the corresponding number of hours worked at each hourly rate in violation of Labor Code §
22 226(a)(1), (2), (5) and (9). Indeed, the wage statements track a form of “fictional time” as a result
23 of the automatic lunch deduction; see *Cornn v. UPS*, No. C03-2001 TEH, 2005 U.S. Dist. LEXIS
24 30419 (N.D. Cal. Aug. 26, 2005), at * 7-8.

25 69. Defendant’s violation of Labor Code § 226 was knowing and intentional. *See Garnett*
26 *v. ADT LLC* 139 F. Supp. 3d 1121, 1131 (E.D. Cal. Oct. 6, 2015) (finding that the defendant
27 knowingly and intentionally violated Labor Code § 226 because the “[d]efendant knew that it was
28 not providing total hours worked to plaintiff or other employees paid on commission” even though

1 it believed that employees paid solely on commission or commission and salary “are exempt and
2 therefore we do not record hours on a wage statement”).

3 70. Defendant’s failure to furnish accurate and complete itemized wage statements with
4 total hours worked included has caused Plaintiffs and the other Wage Statement Class Members to
5 incur economic damages in that they were not aware that they were owed and not paid appropriate
6 premiums for their non-compliant statutory rest breaks and meal periods. *See Cicairos v. Summit*
7 *Logistics*, 133 Cal.App.4th 949, 954 (“If it is left to the employee to add up the daily hours shown
8 on the time cards or other records so that the employee must perform arithmetic computations to
9 determine the total hours worked during the pay period, the requirements of section 226 would not
10 be met”); *McKenzie v. Federal Express Corp.*, 765 F. Supp. 2d 1222 (C.D. Cal. 2011) (wage
11 statements violated California Labor Code by not including, inter alia, total hours worked giving rise
12 to claims under both Section 226 and for PAGA penalties); Labor Code § 226(e)(2)(B) (clarifying
13 that injury is established where the wage statement violated Section 226(a)(1), (2), or (5), among
14 other provisions, and where employees cannot easily determine the gross or net wages earned by the
15 employee during the pay period).

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

21 **SIXTH CAUSE OF ACTION**
22 **WAITING TIME PENALTIES FOR**
23 **FAILURE TO PAY WAGES DUE ON TERMINATION**
24 **[Cal. Labor Code §§ 201-203]**
25 **On Behalf of Plaintiffs and the Waiting Time Class**

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

28 73. 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.

74. Due to Defendant's faulty policies described above, including its failure to pay minimum and overtime wages and for meal and rest break premiums, Defendant violated Labor Code § 203, for those employees whose employment ended within the last three years and ongoing (i.e., the Waiting Time Class Members) by willfully failing to pay them all wages due upon the termination of their employment.

SEVENTH CAUSE OF ACTION
FAILURE TO PAY WAGES ON A TIMELY BASIS
[Cal. Labor Code §§ 204, 210]
On Behalf of Plaintiffs and the Wage Statement Class

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

76. 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.

77. Due to Defendant's failure to pay Plaintiffs and the Class all minimum and overtime wages and meal and rest break period premiums owed,² Defendant 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

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."]; *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.

1 premiums can support claims under Labor Code §§ 203 and 204).

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

10 **EIGHTH CAUSE OF ACTION**
11 **FAILURE TO REIMBURSE BUSINESS EXPENSES**
12 **[Cal. Labor Code § 2802]**
On Behalf of Plaintiffs and the Class

13 79. Plaintiffs re-allege and incorporate by reference each and every allegation set forth
14 in the preceding paragraph.

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

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

1 82. Under Labor Code § 2802, if an employer requires the Class to use their cars for
2 work, then Defendant must reimburse employees for their work-related gas and mileage expenses.
3 Here, Plaintiff and the Class were expected to use their vehicle on a daily basis to deliver letters
4 and parcels and their work-related gas and mileage usage was not reimbursed correctly. Defendant
5 never reimbursed Plaintiff and the Class for the cost of their mileage and vehicle related expenses.

6 83. Accordingly, Defendant violated Labor Code § 2802 and continues to do so by failing
7 to reimburse the Class Members for all mileage expenses they incurred in connection with their job
8 duties to perform their job duties.

9
10 **NINTH CAUSE OF ACTION**
11 **UNFAIR COMPETITION LAW VIOLATIONS**
12 **(BUS. & PROF. CODE § 17200, ET SEQ.)**
13 **On Behalf of Plaintiffs and the Class**

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

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

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

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

 88. As a direct and proximate result of Defendant’s unlawful business practices, Plaintiffs

1 and the Class Members have suffered economic injuries. Defendant has profited from their
2 unlawful, unfair, and/or fraudulent acts and practices.

3 89. Plaintiffs and similarly situated Class Members are entitled to monetary relief
4 pursuant to Business & Professions Code §§ 17203 and 17208 for unpaid minimum and overtime
5 wages, unpaid meal and rest period premiums and unreimbursed business expenses due and interest
6 thereon, from at least four years prior to the filing of this complaint through to the date of such
7 restitution, at rates specified by law. Defendant should be required to disgorge all the profits and
8 gains they have reaped and restore such profits and gains to Plaintiffs and Class Members, from
9 whom they were unlawfully taken.

10 90. Through its actions alleged herein, Defendant has engaged in unfair competition
11 within the meaning of section 17200 of the California Business & Professions Code, because
12 Defendant's conduct, as herein alleged has damaged Plaintiffs and the Class Members by wrongfully
13 denying them all minimum and overtime wages owed, all meal and rest period premiums due, and
14 therefore was substantially injurious to Plaintiffs and the Class Members.

15 91. Defendant engaged in unfair competition in violation of sections 17200 et seq. of the
16 California Business & Professions Code by violating Sections 226.7 and 512 of the California Labor
17 Code, and Sections 11 and 12 of the IWC Wage Order 9-2001.

18 92. Defendant's course of conduct, act and practice in violation of the California laws
19 mentioned above constitute independent violations of sections 17200 et seq. of the California
20 Business and Professions Code.

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

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

TENTH CAUSE OF ACTION
LABOR CODE PRIVATE ATTORNEY GENERAL ACT
PAGA PENALTIES FOR VIOLATIONS OF
LABOR CODE §§ 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 1194, 1194.2, 1197,
1198, AND 2802
(Labor Code §§ 2698-2699.5)
On Behalf of Plaintiffs and the Aggrieved Employees

95. Plaintiffs, on behalf of themselves and all aggrieved employees, reallege and incorporate by reference all previous paragraphs.

96. Based on the above allegations incorporated by reference, Defendant violated Labor Code §§ 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 1194, 1194.2, 1197, 1197, and 2802; as well as IWC Wage Order 9-2001.

97. Under Labor Code §§ 2699(f)(2) and 2699.5, for each such violation, Plaintiffs 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.

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

98. As set forth above, Defendant failed to provide Plaintiffs and all aggrieved employees with accurate itemized wage statements in compliance with Labor Code § 226(a). 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.” Also, with respect to all pay periods in which a missed or late meal break premium was paid, Defendant failed to make any associated PAGA penalties that were triggered by same. In these instances, when Defendant paid late or missed meal break premiums to Plaintiffs and the Aggrieved Employees, pursuant to Labor Code section 226.7, these late or missed meal break premiums demonstrated violations of Labor Code section 226.7, as

1 well as Section 512 of the Labor Code, that give rise to independent PAGA penalty claims. *See Kim*
2 *v. Reins International California, Inc.*, 9 Cal.5th 73 (Mar. 12, 2020) (“For example, employers can
3 pay an additional hour of wages as a remedy for failing to provide meal and rest breaks. (section
4 226.7(c)) But we have held that payment of this statutory remedy “does not excuse a section
5 226.7 violation.” (*Kirby v. Immoos Fire Protection, Inc.* (2012), 53 Cal.4th 1244, 1256”).

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

16 100. As a result of the acts alleged above, Plaintiffs seek penalties under Labor Code
17 § 2699, et seq. because of Defendants’ violation of Labor Code §§ Labor Code §§ 201, 202, 203,
18 204, 210, 226, 226.3, 226.7, 510, 512, 1194, 1194.2, 1197, 1198, and 2802; as well as IWC Wage
19 Order 9-2001.

20 **JURY DEMAND**

21 101. Plaintiffs hereby demands trial by jury of his and the Class’ claims against Defendant,
22 and of all claims except for the PAGA and UCL claims which are subject to a bench trial.

23 **PRAYER FOR RELIEF**

24 Wherefore, Plaintiffs, on behalf of themselves and the members of the Class, pray for
25 judgment against Defendants as follows:

- 26 1. An Order than this action may proceed and be maintained as a class action;
- 27 2. On the First Cause of Action:
 - 28 a. A declaratory judgment that Defendant violated California Labor Code

1 sections 1194, 1194.2, and section 4 of IWC Wage Order 9-2001;

2 b. An award to Plaintiffs and other members of the Class in the amount of their
3 unpaid wages owed to them, plus interest and/or liquidated damages during the class period;

4 c. An award to Plaintiffs and the Class Members of their attorneys' fees and
5 costs of suit to the extent permitted by law, including, but not limited to, section 1194 of the
6 California Labor Code and section 1021.5 of the California Code of Civil Procedure;

7 3. On the Second Cause of Action:

8 a. A declaratory judgment that Defendant violated California Labor Code §
9 226.7, and Section 11 of IWC Wage Order 9-2001;

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

13 4. On the Third Cause of Action:

14 a. A declaratory judgment that Defendant violated California Labor Code §
15 226.7, and Section 12 of IWC Wage Order 9-2001;

16 b. Pursuant to Cal. Labor Code § 226.7, an award to Plaintiffs and the Class
17 Members for an hour of pay for each day that a timely, duty-free rest period was not provided during
18 the Class Period.

19 5. On the Fourth Cause of Action:

20 A declaratory judgment that Defendant violated California Labor Code § 510.

21 6. On the Fifth Cause of Action:

22 a. A declaratory judgment that Defendant violated California Labor Code §226
23 by issuing inaccurate and/or incomplete wage statements to Plaintiffs and the wage statement Class
24 Members;

25 b. An award to Plaintiffs and Class Members of \$50 for each initial pay period,
26 one year prior to the filing of this Complaint through the date of trial, in which a violation of Section
27 226 occurred and \$100 for each subsequent pay period, one year prior to the filing of this Complaint
28 through the date of trial, in which a violation of Section 226 occurred, not to exceed \$4,000 for each

1 member of the Class, as well as an award of costs and reasonable attorney's fees, pursuant to Labor
2 Code § 226(e).

3 7. On the Sixth Cause of Action:

4 a. A declaratory judgment that Defendant violated California Labor Code §§
5 201 through 203;

6 b. Pursuant to Cal. Labor Code §§ 201 through 203, an award to Plaintiffs and
7 the Waiting Time Class members for waiting time penalties in the amount of 30 days' wages per
8 waiting time Class Member.

9 8. On the Seventh Cause of Action:

10 a. A declaratory judgment that Defendant violated California Labor Code §§
11 204 and 210;

12 b. Pursuant to Labor Code §§ 204 and 210, an award to Plaintiffs and the Class
13 for penalties pursuant to Labor Code § 210.

14 9. On the Eighth Cause of Action:

15 a. A declaratory judgment that Defendant violated California Labor Code §
16 2802;

17 b. Pursuant to Labor Code § 2802, an award to Plaintiffs and the Class for
18 penalties pursuant to Labor Code § 2802.

19 10. On the Ninth Cause of Action:

20 a. That the Court find and declare that Defendant has violated the UCL and
21 committed unfair and unlawful business practices by failing to pay minimum and overtime wages
22 and meal and rest break premiums;

23 b. Restitution, including, but not limited to, the relief permitted by section 226.7,
24 1194, and 2802 of the California Labor Code (i.e., pay as specified for minimum wages owed, meal
25 and rest period premiums, and reimbursement of all business-related expenses to Plaintiffs and the
26 members of the Class during the Class Period.

27 11. On the Tenth Cause of Action:

28 a. A civil penalty against Defendant in the amount of \$100 for the initial

violation and \$200 for each subsequent violation as specified in section 2699(f)(2) of the California Labor Code for Plaintiff and the Aggrieved Employees during all of the pay periods in the PAGA Period in which an underlying Labor Code violation occurred, and on-going until the violations are corrected; ;

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

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

12. All other relief as this Court deems proper.

Dated: August 31, 2021

Respectfully,

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

By: 

Craig Ackermann, Esq.

Amir Seyedfarshi, Esq.

*Counsel for Plaintiffs, the Class, the LWDA, and
the Aggrieved Employees*