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Attorneys for Plaintiff Susana Acosta,
on behalf of herself and all others similarly situated

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SUSANA ACOSTA, individually and on
behalf of all others similarly situated,

Plaintiffs,

vs.

EXPRESS MESSENGER SYSTEMS,
INC., a Delaware Corporation; and
DOES 1 through 10, inclusive,

Defendants.

Case No. 8:17-cv-00391-DOC-JDE

Assigned for all purposes to
The Honorable David O. Carter

FIRST AMENDED COMPLAINT

1) Penalties Under the Private
Attorneys' General Act

1 Plaintiff Susana Acosta (“Plaintiff”), by and through counsel of record,
2 brings this action against her former employer, Defendant Express Messenger
3 Systems, Inc., doing business as OnTrac (“Defendant” or “OnTrac”), on behalf of
4 herself and other current and former employees who are similarly situated, and
5 alleges as follows:

6 **NATURE OF THE ACTION**

7 1. This representative action under the Private Attorneys General Act,
8 Labor Code section 2698 et seq. (“PAGA”) arises from OnTrac’s wrongful
9 scheme to deny its employees earned wages for all overtime hours worked and for
10 all hours worked “off-the-clock” in violation of California wage and hour laws.

11 2. Plaintiff brings this representative action to seek penalties under
12 PAGA on behalf of herself and on behalf of all persons who are or have been
13 employed by Express Messenger Systems, Inc. in the State of California as non-
14 exempt employees in sorter, loader, unloader, courier, or package handler
15 positions, and similar and incidental positions (the “aggrieved employees”) during
16 the relevant time period.

17 3. OnTrac’s wrongful acts against Plaintiff and other Aggrieved
18 employees arose from OnTrac’s failure to provide Aggrieved employees with
19 statutorily required meal and rest breaks and its failure to pay its employees all
20 wages earned and due for hours worked, including their failure to properly
21 calculate and pay for all overtime hours worked and for hours worked “off-the-
22 clock.”

23 4. OnTrac accomplished its wage and hour violations through systematic
24 policies and/or practices that effectively coerced and pressured its non-exempt
25 employees, like Ms. Acosta, to shorten or forego meal and rest periods and to
26 otherwise work beyond the hours that they were properly compensated for by
27 OnTrac. The result is that OnTrac failed to properly pay Plaintiff and other
28 members of the aggrieved group for all hours worked and for hours worked in

1 excess of forty (40) hours in a workweek and/or eight (8) hours in a workday at
2 time and one-half their regular rate in violation of the law.

3 5. OnTrac also failed to properly pay all earned wages, including at least
4 minimum wage for each hour worked, as OnTrac issued payment for wages to its
5 employees, like Ms. Acosta and the Aggrieved employees, in the form of a debit
6 card. However, upon information and belief, certain unauthorized debits, charges,
7 and unlawful deductions were taken by OnTrac and/or the financial institution
8 issuing the debit card from the funds loaded on the employee's debit card (wages
9 earned), such that that the employee was paid less than all wages owed for hours
10 worked. In addition, OnTrac's timekeeping practices resulted in employees not
11 being fully paid for all hours worked.

12 6. OnTrac also failed to reimburse aggrieved employees for all necessary
13 expenses incurred, including for the purchase of back braces and other items
14 required for the performance of the employee's job duties.

15 7. OnTrac has violated and continues to violate the following: California
16 Labor Code §§ 201 - 204, 212, 221-224, 225.5, 226, 226.7, 510, 512, 516, 1194,
17 1194.2, 1197, 1198, 2802; and applicable California Industrial Welfare
18 Commission ("IWC") Wage Orders.

19 **THE PARTIES**

20 8. Plaintiff was employed by OnTrac in 2015 as a full-time sorter
21 assigned to OnTrac's Santa Ana, California facility.

22 9. At all relevant times, Plaintiff was a citizen and resident of Orange
23 County, California.

24 10. Defendant Express Messenger Systems, Inc. is a Delaware
25 corporation registered to do business in California with its headquarters in Arizona.
26 Express Messenger has at all relevant times mentioned herein conducted and
27 continues to conduct substantial and regular business throughout the State of
28 California.

11. OnTrac operates a national courier/messenger or delivery service and services every zip code in California. OnTrac has its principal office in Arizona and maintains operational facilities in California, including Santa Ana, California and Arizona, Nevada, Oregon, Washington, Utah, Colorado and Idaho, including drop boxes to accept packages for delivery throughout California. OnTrac's website (<https://www.ontrac.com/index.asp>) represents that it offers a variety of shipping services to meet the needs of both large and small customers.

12. The true names and capacities of Defendants, whether individual, corporate, associate, or otherwise, sued herein as DOES 1 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues Defendants by such fictitious names. Plaintiff is informed and believes, and based thereon alleges that each of the Defendants designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and capacities of the Defendants designated hereinafter as DOES when such identities become known.

13. Plaintiff is informed and believes, and based thereon allege, that Defendant acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are legally attributable to the other Defendants.

ALLEGATIONS

14. In 2015, Plaintiff was employed by OnTrac as a full-time sorter at OnTrac's Santa Ana, California facility. As a sorter, Plaintiff's job duties were to process and handle packages to ensure that they are made ready for delivery at OnTrac's Santa Ana facility.

15. During her employment, Plaintiff worked from 1:30 a.m. to 9:00/9:30 a.m. from Tuesday to Saturday; however, her shift varied based on workload and when the trailers arrived at the warehouse location with merchandise. When the

1 merchandise arrived late, Plaintiff and her co-workers were required to work over
2 their scheduled hours.

3 16. Plaintiff and the aggrieved employees were non-exempt employees
4 eligible for overtime compensation and meal and rest periods. They were subject
5 to the protections of the Labor Code and applicable wage order.

6 17. OnTrac maintained a series of policies that effectively coerced and
7 pressured its non-exempt employees, like Plaintiff and the aggrieved employees, to
8 shorten or forego meal and rest periods and to otherwise work beyond the hours
9 that they were properly compensated for by OnTrac. These policies and practices
10 give rise to violations due to failure to pay premium payments, failure to pay
11 overtime wages owed, and failure to pay minimum wages.

12 18. Plaintiff and her co-workers were not timely provided legally
13 compliant meal and rest periods as a consequence of their workloads and
14 production demands, and OnTrac's policies.

15 **Failure to Provide Lawful Meal Periods**

16 19. OnTrac violated Labor Code sections 512, 226.7, and the IWC Wage
17 Order by failing to provide timely, uninterrupted meal periods or compensation in
18 lieu thereof. Pursuant to Labor Code section 512 and the Wage Order, no
19 employer shall employ an employee for a work period of more than five (5) hours
20 without providing a meal break of not less than thirty (30) minutes in which the
21 employee is relieved of all of his or her duties. An employer may not employ an
22 employee for a work period of more than ten (10) hours per day without providing
23 the employee with a second meal period of not less than thirty (30) minutes, except
24 that if the total hours worked is no more than twelve (12) hours, the second meal
25 period may be waived by mutual consent of the employer and the employee only if
26 the first meal period was not waived.

27 20. In this case, OnTrac failed to provide Ms. Acosta and, upon
28 information and belief, the Aggrieved employees, timely, compliant first and

1 second uninterrupted meal periods of not less than thirty (30) minutes. OnTrac
2 implemented and enforced policies and practices which pressured or required
3 employees to work during their meal periods, take untimely meal periods, to
4 forego their meal periods, and/or to return to work from meal periods prior to thirty
5 (30) uninterrupted minutes

6 21. As a result of OnTrac's policies, as well as the productivity
7 requirements and rigorous work schedules implemented and enforced by OnTrac,
8 Plaintiff and aggrieved employees were often unable to take lawful, off duty meal
9 periods and/or were not fully relieved of their duties for meal periods. Plaintiff and
10 other aggrieved employees were required to perform work as directed by OnTrac
11 for more than five (5) and ten (10) hours during a workday (as the case may be)
12 without receiving a lawful meal period(s).

13 22. During all relevant periods, OnTrac did not compensate Plaintiff and,
14 upon information and belief, other aggrieved employees for these missed meal
15 periods as required by applicable law in violation of the Labor Code, including
16 section 226.7. Plaintiff and aggrieved employees therefore forfeited meal periods
17 without additional compensation and in accordance with OnTrac's corporate policy
18 and practice.

19 **Failure to Authorize and Permit Rest Periods**

20 23. Labor Code section 226.7(b) provides that an employer shall not
21 require any employee to work during any meal or rest period mandated by an
22 applicable order of the Industrial Welfare Commission.

23 24. Labor Code section 516 provides that the Industrial Welfare
24 Commission may adopt or amend working condition orders with respect to break
25 periods for any workers in California consistent with the health and welfare of
26 those workers.

27 25. The applicable IWC Wage Order 9-2001, section 12 also requires
28 employers to authorize and permit employees to take a net 10-minute rest period

1 for every four hours worked for major fraction thereof, which insofar as practicable
2 shall be taken in the middle of each work period.

3 26. Plaintiff and, upon information and belief, the Aggrieved Employees
4 were systematically not permitted or authorized to take one ten-minute rest period
5 for every four hours worked or major fraction.

6 27. As a result of OnTrac's policies, as well as the productivity
7 requirements and rigorous work schedules implemented and enforced by OnTrac,
8 Plaintiff and the aggrieved employees were not authorized and permitted to take
9 rest periods and/or were not fully relieved of their duties for rest periods.

10 28. Plaintiff and other aggrieved employees were required to perform
11 work as directed by OnTrac for more than three and one half hours in a work day
12 without receiving a rest break for every four hours worked or major fraction
13 thereof.

14 29. Indeed, on shifts where Ms. Acosta and the Aggrieved Employees
15 worked in excess of three and one-half hours they were routinely not permitted and
16 authorized to take lawful rest periods and were not compensated with one hour of
17 wages for every day in which a rest period was missed or untimely as a result of
18 OnTrac's policies, practices, or work demands. By failing to authorize and permit
19 a ten-minute rest period for every four hours or major fraction thereof worked per
20 day by its non-exempt employees, and by failing to provide compensation for such
21 non-provided or shortened rest periods, as alleged above, OnTrac willfully violated
22 the provisions of the Labor Code and IWC Wage Order No. 9-2001.

23 **Unlawful Wage Deductions and Other Violations**

24 **Stemming From Debit Card Practices**

25 30. Labor Code section 212 (a) provides "No person, or agent or officer thereof,
26 shall issue in payment of wages due, or to become due, or as an advance on wages
27 to be earned:
28

1 (1) Any order, check, draft, note, memorandum, or other acknowledgment of
2 indebtedness, unless it is negotiable and payable in cash, on demand,
3 without discount, at some established place of business in the state, the name
4 and address of which must appear on the instrument, and at the time of its
5 issuance and for a reasonable time thereafter, which must be at least 30 days,
6 the maker or drawer has sufficient funds in, or credit, arrangement, or
7 understanding with the drawee for its payment.

8 31. Labor Code section 221 provides “It shall be unlawful for any
9 employer to collect or receive from an employee any part of wages theretofore paid
10 by said employer to said employee.”

11 32. Labor Code section 223 provides “It shall be unlawful for any
12 employer to collect or receive from an employee any part of wages theretofore paid
13 by said employer to said employee.”

14 33. OnTrac has willfully violated the above provisions by tendering
15 payment for wages to its employees, like Plaintiff and the Aggrieved employees, in
16 the form of a debit card from which certain unauthorized debits, charges, and
17 unlawful deductions were taken by OnTrac and/or the financial institution issuing
18 the debit card from the funds loaded on the employee’s debit card.

19 34. OnTrac issued payment to its employees, like Plaintiff and, upon
20 information and belief, the other Aggrieved employees, for wages in the form of a
21 debit card. However, certain unauthorized debits, charges, and unlawful
22 deductions were taken by the employer and/or the financial institution issuing the
23 debit card from the funds loaded on the employee’s debit card (wages earned).

24 35. As a consequence of such practice, Plaintiff and the Aggrieved
25 Employees were paid less than all wages owed for hours worked.

26 36. OnTrac violated the provisions of Labor Code sections 212, 221, 223,
27 510, 1194, and 1197.

28 **Failure to Indemnify Necessary Expenses**

37. Labor Code § 2802 requires Defendant to indemnify Plaintiff and the

1 California Aggrieved Employees for necessary expenditures incurred in direct
2 consequence of the discharge of his or her duties.

3 38. Plaintiff, and on information and belief, the Aggrieved Employees,
4 were required to incur expenses in the performance of their assigned job duties.
5 For example, Plaintiff and the Aggrieved employees were required to incur
6 numerous out of pocket expenses including for boots and back braces.

7 39. Defendant did not reimburse Plaintiff for the expenditures.

8 40. Upon information and belief, the Aggrieved Employees were
9 similarly not reimbursed for such expenditures incurred in direct discharge of their
10 duties.

11 **Failure to Timely Pay Wages after Termination or Resignation**

12 41. OnTrac willfully violated Labor Code sections 201-203 by failing to
13 provide all wages owed at separation from employment. Labor Code sections 201
14 and 202 require an employer to pay their employees all wages due either at time of
15 firing, or within seventy-two (72) hours of voluntary separation, if not sooner.
16 Section 203 of the Labor Code provides that if an employer willfully fails to timely
17 pay such wages the employer must, as a penalty, continue to pay the subject
18 employee's wages until the back wages are paid in full or an action is commenced.
19 The penalty cannot exceed 30 days of wages.

20 42. Plaintiff, and upon information and belief the Aggrieved employees
21 who were separated from employment, are entitled to compensation for all forms
22 of wages earned, including but not limited to unpaid overtime compensation, sums
23 unlawfully withheld, and compensation for non-provided meal and rest periods,
24 but to date have not received such compensation.

25 43. Defendant has failed to pay all wages earned and these premium
26 wages or penalties.

27 **Failure to Pay All Wages Earned, Including Minimum Wages and Overtime**

28 44. During all relevant periods, Plaintiff and the California Aggrieved

1 employees were required to work in excess of eight (8) hours in a workday and/or
2 in excess of forty (40) hours in a workweek without being properly compensated at
3 a rate of one and one-half times their regular rate of pay. Defendant also failed to
4 properly compensate Plaintiff and the California Aggrieved employees for hours
5 worked in excess of twelve (12) hours in one day, or eight hours on the seventh
6 day of a workweek. OnTrac's policy and practice of not paying all minimum
7 wages violates California Labor Code §§ 204, 510, 1194, 1198 and the applicable
8 wage order.

9 45. OnTrac's timekeeping practices and demands resulted in employees
10 not being fully paid for all hours worked. OnTrac imposed excessive workloads,
11 coercive policies and production demands on Plaintiff and the Aggrieved
12 Employees. OnTrac required Plaintiff and the aggrieved employees to work hours
13 off-the-clock—that is, hours for which Plaintiff and the aggrieved employees
14 performed work for OnTrac but were not paid at least minimum wage for each
15 hour worked. OnTrac knew or should have known that employees worked “off-
16 the-clock” to meet the requirements imposed by OnTrac. OnTrac's policy and
17 practice of not paying all minimum wages violates California Labor Code §§ 204,
18 210, 216, 1182.12, 1194, 1197.1, 1198, and the applicable wage order.

19 **Failure to Provide Accurate Itemized Wage Statements**

20 46. OnTrac violated Labor Code section 226 by knowingly and
21 intentionally failing to comply with Labor Code § 226(a) by failing to provide
22 accurate, itemized wage statements with the following information at the time of
23 payment of wages: “(1) gross wages earned, (2) total hours worked by the
24 employee, except for any employee whose compensation is solely based on a
25 salary and who is exempt from payment of overtime under subdivision (a) of
26 Section 515 or any applicable order of the Industrial Welfare Commission, (3) the
27 number of piece-rate units earned and any applicable piece rate if the employee is
28 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.”

47. OnTrac generally failed to provide any wage statements to employees, such as Plaintiff and the Aggrieved employees, at the time of payment of wages and instead did not supply such statements except upon employee request to management. This constitutes a violation of the provision.

48. In addition, given the violations set forth above and the resulting inaccuracies in the wage statements provided by OnTrac to Plaintiff and the other Aggrieved employees, the wage statements issued by OnTrac are non-compliant.

FIRST CAUSE OF ACTION

Penalties Under the Private Attorneys General Act

(Labor Code Section 2698 et seq.)

49. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

50. Plaintiff complied with notice requirements of California’s Private Attorneys General Act (PAGA) pursuant to Labor Code section 2699.3.

51. Labor Code section 2699.3 provides in relevant part as follows:

(a) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision listed in Section 2699.5 shall commence only after the following requirements have been met:

(1) (A) The aggrieved employee or representative shall give written notice by online filing with the Labor and Workforce Development Agency and by certified mail to the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged

violation.

(B) A notice filed with the Labor and Workforce Development Agency pursuant to subparagraph (A) and any employer response to that notice shall be accompanied by a filing fee of seventy-five dollars (\$75). []

(C) The fees paid pursuant to subparagraph (B) shall be paid into the Labor and Workforce Development Fund and used for the purposes specified in subdivision (j) of Section 2699.

52. Plaintiff has complied with the statutory requirements of PAGA by, *inter alia*, sending the filing fee and written notice via timely online filing to the LWDA of the violations set forth herein. Plaintiff also provided notice by certified mail to Defendant of the alleged violation pursuant to Labor Code Section 2699.3(a)(1)(A).

53. More than 65 days have passed and the LWDA has not notified Plaintiff that it intends to investigate this matter, thereby allowing Plaintiff to bring a PAGA action pursuant to Labor Code section 2699.3(a).

54. Plaintiff is an aggrieved employee as defined in Labor Code § 2699(c) and this action is timely. She brings this cause of action on a representative basis and seeks to represent a Aggrieved Employees of similarly situated aggrieved employees.

55. On information and belief and based thereon, by their policy of:

- a. Failing to pay all wages earned, including minimum wages, hourly wages, and overtime wages;
- b. Failing to provide meal periods or compensation in lieu thereof;
- c. Failing to authorize and permit rest periods or compensation in lieu thereof;
- d. Unlawful deductions;
- e. Paying employees less than the value of all hours worked;
- f. Failing to provide accurate wage statements;
- g. Failing to timely pay all wages earned and owed upon separation from

employment with Defendants; and

h. Failing to indemnify necessary expenditures.

56. Defendants engaged in unlawful activity prohibited by inter alia, Labor Code §§ 201, 202, 203, 204, 210, 212, 216, 221-226, 226.7, 510, 512, 516, 1182.12, 1194, 1197, 1197.1, 1198, 2802, the IWC Wage Order, Cal. Code of Regulations, Title 8, which violation constitutes a violation of fundamental public policy.

57. Pursuant to Labor Code Section 2699(a) Plaintiff seeks to recover civil penalties for which Defendants are liable for the Labor Code violations as set forth in the foregoing.

58. Plaintiff incorporates each and every allegation set forth in all of the foregoing paragraphs as if fully set forth herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

1. For penalties under the Private Attorneys' General Act, Labor Code section 2698 et seq.;
2. An award of attorneys' fees and costs of suit, as allowable under the law;
3. For such other and further relief as the Court deems just and proper.

Dated: October 2, 2019

JAMES HAWKINS APLC

/s/ James R. Hawkins

James R. Hawkins, Esq.
Christina M. Lucio, Esq.,
Attorneys for Plaintiff
Susana Acosta, individually and on behalf of all
others similarly situated

Certificate of Service

The attached was served on all parties and their counsel, through the ECF system, on October 4, 2019.

By: /s/ James R. Hawkins

James R. Hawkins, Esq.