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Attorneys for Plaintiff RAUL CUENCA, on behalf of himself and Others similarly situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF LOS ANGELES**

RAUL CUENCA, on behalf of himself and all  
others similarly situated,

Plaintiff,

v.

PACIFIC WESTERN LOGISTICS, LLC,  
DILIGENT DELIVERY SERVICES, and DOES  
1 through 50, respectively,

Defendants.

Case No.: **23STCV14082**

**CLASS ACTION:**

**COMPLAINT FOR DAMAGES**

1. Willful Misclassification of Plaintiffs and Class Members in Violation of Labor Code 226.8
2. Failure to Pay Minimum and Overtime Wages §1194, Wage Order 9-2001, §3;
3. Failure to Provide Meal Periods or Compensation in Lieu Thereof (Labor Code §§226.7, 512);
4. Failure to Provide Rest Periods or Compensation in Lieu Thereof (Labor Code §§226.7);
5. Failure to Provide Accurate, Itemized Wage Statements Labor Code §226(a)
6. Failure to Reimburse Necessary Business Expenditures Labor Code §2802
7. Unfair Business Practices in Violation of Cal. Bus. & Prof Code §§ 17200, *et seq.*
8. Violation of Labor Code §§ 2698-2699 (Private Attorneys' General Act.

**DEMAND FOR JURY TRIAL**

1 Plaintiff RAUL CUENCA hereby respectfully alleges and complains as follows:

2 **INTRODUCTION**

3 1. This is a class action brought on behalf of Plaintiff RAUL CUENCA (hereinafter  
4 "Plaintiff") and the class he seeks to represent ("Plaintiff Class"), as defined herein, as individuals  
5 who work or worked for Defendants PACIFIC WESTERN LOGISTICS, LLC and/or DILIGENT  
6 DELIVERY SERVICES, (hereinafter "Defendants") as delivery drivers in the State of California  
7 at any time within four years preceding the filing of this action. The "Class Period" is defined as  
8 the four (4) years prior to the filing of the original Complaint in this action through the date final  
9 judgment is entered. Plaintiff reserves the right to amend this Complaint to reflect a different  
10 "Class Period" as further discovery is conducted.

11 2. Plaintiff individually and on behalf the class he seeks to represent, seeks relief  
12 against Defendants for willfully misclassifying delivery driver employees as independent  
13 contractors up until approximately August 2020, such that Defendants failed to apply the wage  
14 and hour protections to which Plaintiff and the Plaintiff Class were entitled under the Labor Code  
15 and Wage Order 9-2001, resulting in (1) failure to pay all wages due, including minimum and  
16 overtime wages, (2) failure to provide meal and rest breaks, (3) failure to provide accurate  
17 itemized wage statements, and (4) failure to reimburse necessary business expenditures Plaintiff  
18 further seeks penalties as set forth in Labor Code section 226.8(c). Subsequent to reclassification  
19 of Plaintiff and the Plaintiff Class to non-exempt, hourly paid employees in or around August  
20 2020, Defendants continued to fail to pay all overtime wages and minimum wages due, failed to  
21 provide mandated meal and rest breaks, and failed to provide accurate, itemized wage statements.  
22 Plaintiff further seeks equitable remedies in the form of injunctive relief, and relief under Business  
23 and Professions Code section 17200 et seq. for unfair business practices.

24 3. At all relevant times herein, Defendants, have consistently maintained and  
25 enforced against Plaintiff Class the following unlawful practices and policies as a consequence  
26 of improperly designating Plaintiff and Plaintiff Class as independent contractors and violations  
27 of the California Labor Code set forth above and herein.

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4. Plaintiff brings this action against his former employer, Defendants PACIFIC WESTERN LOGISTICS, LLC and DILIGENT DELIVERY SERVICES; and DOES 1 through 50, inclusive, for damages arising out of employers' violations of the California Labor Code and applicable Industrial Welfare Commission ("IWC") Wage Orders.

## PARTIES

## The Plaintiff

5. Plaintiff RAUL CUENCA (hereinafter “Plaintiff”) is, and at all times herein mentioned was, a resident of the State of California. Plaintiff was employed by Defendants as a delivery driver but improperly designated as an independent contractor from approximately 2018 through August 2020. Subsequently Plaintiff was reclassified as a non-exempt hourly paid employee from August 2020 to the present. Plaintiff’s job duties consisted of utilizing his own vehicle to transport and deliver auto parts to various auto part dealers/retailers in Southern California.

## The Defendants

6. Plaintiff is informed and believes, and based thereon alleges, that PACIFIC WESTERN LOGISTICS, LLC (hereinafter “Pacific”), is a Texas Limited Liability Company doing business in California and employed and/or supervised Plaintiff during his employment. Plaintiff is informed and believes, and based thereon alleges, that Pacific is conducting business in the State of California independently and through Defendant DILIGENT DELIVERY SERVICES.

7. Defendant DILIGENT DELIVERY SERVICES (hereinafter “Diligent”, collectively with Pacific hereinafter referred to as “Defendants”) is an unknown entity that employed Plaintiff and the Plaintiff Class and operates throughout the State of California.

8. Plaintiff is not aware of the true names and/or capacities of those entities or individuals sued herein as DOES 1 through 50, inclusive, and therefore sues these Defendants by their fictitious names. Plaintiff will seek leave of this Court to amend this Complaint to insert their true names and/or capacities when the same are ascertained.

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1           9.     The above Defendants named herein will be collectively referred to as  
2 “Defendant” or “Defendants.”

3           10.    Plaintiff is informed and believes, and based thereon alleges, that at all material  
4 times, each of the Defendants were the agents and/or employees of each of the remaining  
5 Defendants, and each of them was at all material times acting within the purpose and scope of  
6 such agency and employment.

7           11.    Plaintiff is informed and believes, and based thereon alleges, that at all material  
8 times, one or more of each named and/or unnamed Defendants was in some fashion, by contract  
9 or otherwise, the predecessors, affiliates, alter egos, assigns, joint ventures, co-ventures or  
10 partners of one or more of the remaining named and /or unnamed Defendants, and as hereinafter  
11 alleged, was acting within that capacity.

12          12.    Plaintiff is further informed and believes, and on that basis, alleges, that one or  
13 more of the remaining named and/or unnamed Defendants are the successors of one or more of  
14 the remaining named and/or unnamed Defendants. Such successors are liable for the occurrences,  
15 damages and injuries alleged herein to the same extent its predecessors are liable for the alleged  
16 occurrences, damages and injuries.

17          13.    Plaintiff alleges that Defendants acted as the employers and/or joint employers of  
18 Plaintiff and the Plaintiff Class, and that they shared control of Plaintiff and the Plaintiff Class  
19 as an employee, either directly or indirectly. This control included, but was not limited to, the  
20 authority to hire and fire, assign work tasks, engage in day-to day supervision of employees, and  
21 control over employee records and wages.

22          14.    Plaintiff alleges that Defendants were the alter-egos of one or more of the  
23 remaining named and/or unnamed Defendants, and as hereinafter alleged, was acting for their  
24 own benefit and/or the benefit of one or more of the remaining named and/or unnamed  
25 Defendants. Plaintiff alleges that Defendants were acting on behalf of each other in the  
26 establishment of, ratification of, and/or execution of the illegal practices and policies as set forth  
27 in this pleading. Plaintiff is further informed and believes, and thereon alleges, that all times  
28 relevant hereto Defendants had decision making responsibility for, and establishment and

1 execution of, illegal practices and policies for each other and are, therefore, liable on the causes  
2 of action herein.

3 15. Plaintiff is further informed and believes, and on that basis alleges, that Defendants  
4 failed to adhere to corporate and/or legal formalities. Plaintiff is informed and believes, and based  
5 thereon alleges, that at all material times, one or more of each unnamed Defendants was in some  
6 fashion, by statute, law or otherwise, the agent, agency, branch, department or the like of one or  
7 more of the remaining named and/or unnamed Defendants for the acts alleged herein and was  
8 acting within that capacity.

9 16. Plaintiff is further informed, and believes, and on that basis, alleges, that there  
10 exists a unity of interest and ownership between Defendants that the individuality and  
11 separateness of those Defendants have ceased to exist. The business affairs of Defendants are,  
12 and at all times relevant hereto were, so mixed and intermingled that the same cannot reasonably  
13 be segregated, and the same are in inextricable confusion. Defendants were used as mere shells  
14 and conduits for the conduct of certain other Defendants' affairs. The recognition of the separate  
15 existence of Defendants would not promote justice, in that it would permit Defendants to insulate  
16 themselves from liability to Plaintiff. Accordingly, Defendants constitute the alter egos of each  
17 other and/or an integrated or single enterprise, and the fiction of their separate existence must be  
18 disregarded at law and in equity, because such disregard is necessary to avoid fraud and injustice  
19 to Plaintiff herein. Unless otherwise specified herein, each DOE defendant was the agent and  
20 employee of each Defendant, and in doing the things hereinafter mentioned, were at all times  
21 acting within the course and scope of that agency and employment.

#### 22 **JURISDICTION AND VENUE**

23 17. This Court is an appropriate venue for this action under Code of Civil Procedure  
24 sections 395 and 395.5 because the acts that give rise to the causes of action alleged herein  
25 occurred in the County of San Francisco, State of California. Plaintiffs hereby designate the  
26 County of San Francisco, State of California as the place of proper venue.

27 18. Defendant is a provider of transportation and logistical services. Defendant  
28 maintains and operates depot/service centers in San Francisco, Los Angeles and Commerce,

California. Defendant's drivers run routes which includes most, if not all, major terminals in the State of California. This Court has personal jurisdiction over Defendant because Defendant conducts business in the State of California, and a substantial portion of the acts, omissions, events, and transactions constituting the causes of action alleged herein occurred within the State of California, and more specifically, in the County of San Francisco. (See Code of Civil Procedure section 410.10).

19. This Court has subject matter jurisdiction over the causes of action alleged in this Complaint because the Court is a court of general subject matter jurisdiction and is not otherwise excluded from exercising subject matter jurisdiction over said causes of action.

20. Pursuant to the California Supreme Court's unanimous decision in *Dynamex Operations West, Inc. v. Superior Court* (2018), 4 Cal. 5<sup>th</sup> 903, in order for an employer's designation of a worker as an independent contractor rather than an employee subject to the wage and hour protections of the Labor Code and applicable Wage Order, to be legally upheld, the employer must meet the three-prong "ABC" test set forth in *Dynamex*.

21. Specifically, the employer must meet all three prongs, which consist of showing: (a) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (b) the worker performs work that is outside the usual course of the hiring entity's business and (c) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. (*Dynamex* at 956-7, 964.)

22. California *Labor Code* § 1194 provides that notwithstanding any agreement to work for a lesser wage, an employee receiving less than the legal minimum wage is entitled to recover in a civil action the unpaid balance of their unpaid compensation, including interest thereon, reasonable attorneys' fees, and costs of suit.

23. Further, *Business and Professions Code* § 17203 provides that any person who engages in unfair competition may be enjoined in any court of competent jurisdiction. *Business and Professions Code* § 17204 provides that any person who has suffered actual injury and has lost money or property as a result of the unfair competition may bring an action in a court of

competent jurisdiction. During all, or a portion of the Class Period, although improperly designated as independent contractors, Plaintiff and each member of the Plaintiff Class worked for Defendant, in the State of California. Plaintiffs and each of the Plaintiff Class members worked in the non-exempt position of delivery driver covered under one or more Industrial Welfare Commission (IWC) Wage Orders, and *Labor Code* § 1194, and/or other applicable wage orders, regulations and statutes, and each Plaintiff Class member was not subject to an exemption for executive, administrative and professional employees, which imposed obligations on the part of the Defendant to pay Plaintiff and Plaintiff Class members lawful minimum wages.

23. During the Class Period, Defendants was obligated to pay Plaintiff and Plaintiff Class Members for all hours worked at the legally mandated rate.

24. During the Class Period, Defendants was obligated to pay Plaintiff and Plaintiff Class Members minimum wages for all hours worked.

25. Defendant is in the business of providing transportation and logistical services; Plaintiff and Plaintiff Class worked as delivery drivers, an integral and necessary function of any business providing transportation services to customers.

26. Defendant exercised a degree of control over Plaintiff and Plaintiff Class, including but not limited to unpaid meetings, scheduling of deliveries and pick-ups, the number of deliveries and pick-ups per day, and the manner and extent in which Plaintiff and Plaintiff Class presented themselves to customers and the public as employees of Defendant, including but not limited to the wearing of Defendant's uniforms and prohibition of decals on vehicles or clothing other than Defendant's name or logos.

27. Most significantly, the work performed by Plaintiffs and Plaintiff Class was wholly within the usual course of Defendants' business.

28. Accordingly, Defendants' designation of Plaintiff and Plaintiff Class substantially and unequivocally cannot meet the criteria set forth as the ABC test in *Dynamex*, such that Plaintiff and Plaintiff Class should have been afforded all the wage and hour protections set forth in the Labor Code and Wage Order 9-2001.

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29. Plaintiff and the Plaintiff Class regularly and frequently drove their own vehicles to perform work duties substantially beyond 8 hour per day and thus performed non-exempt work in excess of the maximum regular rate hours set by the IWC in the applicable Wage Orders, regulations or statutes, and therefore entitled the Plaintiff and Plaintiff Class members to overtime compensation at time and a half rate, and when applicable, double time rates as set forth by the applicable Wage Orders, regulations and/or statutes, which Defendant failed to pay because they illegally treated Plaintiff and Plaintiff Class as independent contractors no subject to above wage and hour laws.

## CLASS ALLEGATIONS

30. Plaintiff brings this action on behalf of himself and all other similarly situated persons, as a class action pursuant to California Civil Code of Procedure §382 on behalf of themselves and all other similarly situated persons in the Class, which is composed of and defined as follows: All persons who were misclassified as independent contractor and/or as non-exempt employees by Defendants in the State of California who, within the four (4) years of the filing of Plaintiff's original Complaint, that worked as delivery drivers.

- (a) All persons who, at the time this Complaint is filed, are employed or have been employed as delivery drivers by Defendants in the State of California during the four (4) years prior to the filing of this class action through judgment;
- (b) All persons who, at the time this Complaint is filed, are or were classified by Defendants as exempt delivery drivers in the State of California during the four (4) years prior to the filing of this class action through judgment;

31. Plaintiff reserves the right under Rule 1855(b), *California Rules of Court*, to amend or modify the Class description with greater specificity or further division into subclasses or limitation to particular issues.

33. This action has been brought and may be maintained as a class action pursuant to *Code of Civil Procedure* § 382 because there is a well-defined common interest of many persons and it is impractical to bring them all before the court.

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1        34.        This Court should permit this action to be maintained as a class action pursuant to  
2 *Code of Civil Procedure* § 382 because:

- 3        (a)        The questions of law and fact common to the Class predominate over any  
4                question affecting only individual members;
- 5        (b)        A class action is superior to any other available method for the fair and  
6                efficient adjudication of the claims of the members of the Class;
- 7        (c)        The Class is so numerous that it is impractical to bring all member of the  
8                Class before the Court;
- 9        (d)        Plaintiff and the other members of the Class will not be able to  
10               obtain effective and economic legal redress unless the action is maintained as a  
11               class action;
- 12        (e)        Plaintiff and the other members of the Class will not be able to obtain effective  
13               and economic legal redress unless the action is maintained as a class action;
- 14        (f)        There is a community of interest in obtaining appropriate legal and equitable relief  
15               for the common law and statutory violations and other improprieties and in  
16               obtaining adequate compensation for the damages and injuries which Defendants'  
17               actions have inflicted upon the Class;
- 18        (g)        There is a community of interest in ensuring that the combined assets and  
19               available insurance of the Defendants is sufficient to adequately compensate  
20               members of the Class for the injuries sustained;
- 21        (h)        Without class certification, the prosecution of separate actions by individual  
22               members of the Class would create a risk of:
- 23               (1)        Inconsistent or varying adjudications with respect to individual members  
24               of the Class which would establish incompatible standard of conduct for  
25               the Defendant; and/or
- 26               (2)        Adjudications with respect to the individual members which would, as a  
27               practical matter, be dispositive of the interests of other members not parties  
28               to the adjudications, or would substantially impair or impede their ability

1 to protect their interests, including but not limited to the potential for  
2 exhausting the funds available from those parties who is, or may be,  
3 responsible Defendants; and

4 (i) Defendants have acted or refused to act on grounds generally applicable to the  
5 Class, thereby making final injunctive relief appropriate with respect to the Class as a whole.

6 **FIRST CAUSE OF ACTION**

7 **Willful Misclassification**

8 **(Cal. Lab. Code Section 226.8)**

9 **(Plaintiffs and the Class Against Defendants)**

10 35. Plaintiff realleges and incorporates by reference the preceding paragraphs of this  
11 Complaint as if fully set forth herein.

12 36. Defendants intentionally and willfully characterized Plaintiff and members of the  
13 Class as independent contractors rather than employees in violation of California Labor Code  
14 section 226.8.

15 37. Defendants engaged in a pattern and practice of misclassifying employees as  
16 independent contractors for their own financial benefit.

17 38. As a direct and proximate result of the unlawful acts and/or omissions of  
18 Defendants, Plaintiff and the Plaintiff Class alleged herein are entitled to damages in an amount  
19 to be determined at trial, civil penalties of not less than ten thousand dollars (\$10,000.00) and  
20 not more than twenty-five thousand dollars (\$25,000.00) for each violation, any other penalties  
21 and fines provided by law, interest thereon, attorneys' fees, and costs of suit.

22 39. Wherefore, Plaintiff and the Plaintiff Class request relief as hereinafter provided.

23 **SECOND CAUSE OF ACTION**

24 **Failure to Pay All Wages**

25 **(Cal. Lab. Code §§ 1194, 1194.2, and 226.2)**

26 **(Plaintiffs and the Class Against Defendants)**

27 40. Plaintiff realleges and incorporates by reference the preceding paragraphs of this  
28 Complaint as if fully set forth herein.

1           41. Plaintiff seeks relief against Defendants for the failure to pay all wages due in  
2 violation of the Labor Code and applicable IWC wage orders.

3           42. Plaintiff, seeks relief against Defendants for the failure to pay all wages due in  
4 violation of Labor Code section 1194 and applicable IWC wage orders.

5           43. Labor Code, section 1194 provides that notwithstanding any agreement to work  
6 for  
7 a lesser wage, an employee receiving less than the legal minimum wage or the legal overtime  
8 compensation is entitled to recover in a civil action the unpaid balance of their minimum wage  
9 or overtime compensation, including interest, reasonable attorney's fees and costs of suit.

10           44. Pursuant to IWC Wage Order 9, section 2(k), "hours worked" includes the time  
11 during which an employee is subject to the control of the employer and includes all time the  
12 employee is suffered or permitted to work, whether or not required to do so.

13           45. Defendants willfully violated the Labor Code and applicable IWC wage orders by  
14 improperly misclassifying Plaintiff and the Class during part of the Class Period, sought to  
15 exclude them protections afforded by the Labor Code, including but not limited to, compensating  
16 Plaintiff and the Class for all the time they were subjected to Defendants' control and or were  
17 suffered or permitted to work.

18           46. Accordingly, Plaintiff and the members of the Class were paid a flat rate each  
19 month regardless of the number of hours worked until approximately August 2020. Defendants  
20 did not separately compensate Plaintiff and Class Members on an hourly basis for their time  
21 spent performing work in violation of Labor Code section 1194. As such, Plaintiff and Class  
22 Members were not paid minimum wage and/or overtime pay for all hours worked.

23           47. After Defendants reclassified Plaintiff and Class Members as non-exempt,  
24 Defendants continued to fail to pay them for all hours worked, specifically for time worked  
25 during meal breaks for which Defendants automatically deducted regardless of whether the meal  
26 break was actually able to be taken.

27           48. Additionally, Plaintiff and Plaintiff Class members regularly worked in excess of  
28 eight (8) hours per day. Defendants failed to pay Plaintiff and Plaintiff Class members overtime

premium for hours worked in excess of eight (8) hours. By automatically deducting for meal periods, Defendants failed to pay Plaintiff and Plaintiff Class Members for time worked during meal periods, thereby causing Plaintiff and Plaintiff Class members to work in excess of eight (8) hours per day. As such, Plaintiff and Plaintiff Class seek overtime in an amount according to proof. Pursuant to Labor Code section 1194, the Plaintiff Class members seek the payment of all overtime compensation which they earned and accrued four (4) years prior to filing this Complaint, according to proof.

49. As a direct and proximate result of Defendants' violations, Plaintiff and Class Members are entitled to recover either their unpaid hourly wages due, or minimum wage, overtime wages plus interest and/or liquidated damages in an additional amount equal to the total amount of wages unlawfully withheld during the Class Period.

50. Additionally, Plaintiff is entitled to attorney's fees and costs, pursuant to Labor Code sections 218.5, 1194 and prejudgment interest pursuant to Labor Code, section 218.6 and Code of Civil Procedure section 3287.

### **THIRD CAUSE OF ACTION**

#### **Failure to Provide Meal Periods or Compensation in Lieu Thereof**

#### **(Labor Code §§226.7, 512)**

#### **(Plaintiff and Plaintiff Class against all Defendants)**

51. Plaintiff and Plaintiff Class reallege and incorporate by reference all preceding paragraphs of this complaint as though fully set forth herein.

52. California Labor Code section 512 and California Code of Regulations, Title 8, §11160 (10) provides that employers authorize and permit all employees to take meal periods or at least thirty (30) duty-free minutes commencing no later than at the end of fifth (5<sup>th</sup>) hour of work, when the work shift exceeds five (5) hours.

53. At all times relevant hereto, Plaintiff and Plaintiff Class have worked more than five (5) hours in a workday.

54. California Labor Code section 226.7(b) provides that if an employer fails to provide an employee meal period in accordance with Labor Code §512 and/or 8 CCR §11160

(10), 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 in a compliant manner.

55. During the Class Period, Defendants were obligated to provide Plaintiff and putative Class Members with a thirty (30) minute meal period for each and every work shift exceeding five (5) hours, commencing no later than the end of the fifth (5<sup>th</sup>) hour of the shift. Defendants did not require employees to record meal breaks in violation of IWC Wage Order 9-2001, Sect. 6(A)(3). Instead, Defendants just automatically deducted 30 minutes each work day for a meal period regardless of whether the employee actually took a meal period. Plaintiff and the putative Class Members rarely, if ever, received a meal period which commenced at the lawfully prescribed time of no later than the end of the fifth (5<sup>th</sup>) hour of work.

56. By virtue of the Defendants' unlawful failure to provide legally compliant meal periods to Plaintiff and Plaintiff Class as a result of failing to require meal breaks be recorded and maintain and communicate to Plaintiff and Plaintiff Class the requirements for meal breaks, Plaintiff and Plaintiff Class have suffered, and will continue to suffer, damages, in amounts which are presently unknown, but which exceed the jurisdictional limits of this Court and which will be ascertained according to proof at trial.

57. Plaintiff, himself and on behalf of employees similarly situated, request recovery of meal period compensation pursuant to Labor Code § 226.7, which they are owed beginning four (4) years prior to filing this Complaint as well as the assessment of any statutory penalties against Defendant, and each of them, in a sum as provided by the Labor Code and/or any other statute

#### **FOURTH CAUSE OF ACTION**

##### **Failure to Provide Rest Periods or Compensation in Lieu Thereof**

##### **(Labor Code §226.7)**

##### **(Plaintiff and the Class Against Defendants)**

58. Plaintiff realleges and incorporates by reference the preceding paragraphs of this Complaint as if fully set forth herein.

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1           59. California Labor Code section 226.7 and California Code of Regulations, Title 8,  
2 §11160 (11) provides that employers authorize and permit all employees to take rest periods at  
3 the rate of ten (10) minutes rest time per four (4) work hours, or major fraction thereof.

4           60. California Labor Code section 226.7(b) provides that if an employer fails to  
5 provide an employee rest periods in accordance with this section, the employer shall pay the  
6 employee one (1) hour of pay at the employee's regular rate of compensation for each workday  
7 that the rest period is not provided.

8           61. Defendants, and each of them, failed and or refused to implement a relief system  
9 by which Plaintiff and Plaintiff Class could receive rest periods and/or work free rest periods.  
10 Furthermore, due to Defendants' lack of a rest period-compliant relief system, Plaintiff and  
11 Plaintiff Class did not receive their rest periods within the required statutory time frame. By and  
12 through their actions, Defendants intentionally and improperly denied rest periods to the Plaintiff  
13 and Plaintiff Class in violation of Labor Code sections 226.7 and 512.

14           62. At all times relevant hereto, Plaintiff and Plaintiff Class have worked more than  
15 three (3) hours in a workday.

16           63. Defendants failed to pay Plaintiff and Plaintiff Class members who were unable  
17 to take rest breaks, an additional hour of pay for those work days a rest period was made  
18 reasonably available.

19           64. By virtue of the Defendants' unlawful failure to provide rest periods to Plaintiff  
20 and Plaintiff Class as a result of their scheduling and shift relief system, Plaintiff and Plaintiff  
21 Class have suffered, and will continue to suffer, damages, in amounts which are presently  
22 unknown, but which exceed the jurisdictional limits of this Court and which will be ascertained  
23 according to proof at trial.

24           65. Plaintiff, himself and on behalf of employees similarly situated, request recovery  
25 of rest period compensation pursuant to Labor Code § 226.7, which they are owed beginning four  
26 (4) years prior to filing this Complaint as well as the assessment of any statutory penalties against  
27 Defendants, and each of them, in a sum as provided by the Labor Code and/or any other statute.

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1 **FIFTH CAUSE OF ACTION**

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

3 **(Labor Code §§226, 1174)**

4 **(Plaintiff and Class Against Defendants)**

5 66. Plaintiff realleges and incorporates by reference the preceding paragraphs of this  
6 Complaint as if fully set forth herein.

7 67. Labor Code section 1174, subdivision (d) requires an employer to keep at a central  
8 location in California or at the plant or establishment at which the employees are employed,  
9 payroll records showing the hours worked daily, and the wages paid to, each employee. Plaintiff  
10 is informed and believes that Defendants willfully failed to make or keep accurate records for  
11 Plaintiff and Plaintiff Class.

12 68. Labor Code section 226, subdivision (a) states that, “every employer shall,  
13 semimonthly or at the time of each payment of wages, furnish each of his or her employees, either  
14 as a detachable part of the check, draft, or voucher paying the employee’s wages, or separately  
15 when wages are paid by personal check or cash, an accurate itemized statement in writing  
16 showing: (1) gross wages earned; (2) total hours worked by the employee; (4) all deductions; (5)  
17 net wages; (6) the inclusive dates of the period for which the employee is paid; (7) the name of  
18 the employee and only the last four digits of his or her social security number or an employee  
19 identification number other than a social security number; (8) the name and address of the legal  
20 entity that is the employer; and (9) all applicable hourly rates in effect during the pay period and  
21 corresponding number of hours worked at each hourly rate by the employee.”

22 69. Industrial Welfare Commission (“IWC”) Wage Order Number 9-2002, paragraph  
23 6(A) requires that every employer shall keep accurate information with respect to each employee,  
24 including time records showing when each employee begins and ends each work period, the total  
25 daily hours worked by each employee and the total hours worked in each payroll period, and  
26 applicable rates of pay. Plaintiff is informed and believes that Defendants *willfully and*  
27 *intentionally* failed to make and/or keep records which accurately reflect the hours worked by  
28 Plaintiff and Plaintiff Class. Specifically, Plaintiff believes that Defendant’s records do not

1 accurately reflect the hours Plaintiff and Plaintiff Class worked during meal periods and the hours  
2 Plaintiff and Plaintiff Class worked in excess of eight (8) hours per day, the wages owed for said  
3 off-the-clock and overtime hours, as well as the wages owed in the form of statutory premiums  
4 for non-compliant meal and rest periods. As these underlying violations were committed  
5 knowingly and intentionally by Defendants, the resulting deficiencies with respect to applicable  
6 earnings statements are intentional as well.

7 70. Plaintiff is informed and believes that Defendants' intentional failure to keep  
8 accurate payroll records, as described above, violated Labor Code, sections 226 and 1174(d) and  
9 the applicable wage order. Plaintiff and the Plaintiff Class are entitled to penalties of one hundred  
10 dollars (\$100.00) for the initial violation and two hundred dollars (\$200.00) for each subsequent  
11 violation for every pay period during which these records and information was not kept by  
12 Defendants.

13 71. An employee suffering injury as a result of a knowing and intentional failure by  
14 an employer to comply with Labor Code sections 226 and 1174 (a) is entitled to recover the  
15 greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation  
16 occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period,  
17 not to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award  
18 of costs and reasonable attorney's fees.

19 72. Plaintiff is informed and believes that Defendants' failure to keep and maintain  
20 accurate records and information, as described above, were willful, and Plaintiff and Plaintiff  
21 Class are entitled to a statutory penalty of five hundred dollars (\$500.00) for Plaintiff and each  
22 member of Plaintiff Class pursuant to Labor Code section 1174.5.

23 **SIXTH CAUSE OF ACTION**

24 **Failure to Indemnify for Necessary Business Expenditures**

25 **(Labor Code §2802)**

26 **(Plaintiff and the Class Against Defendants)**

27 73. Plaintiff realleges and incorporates by reference the preceding paragraphs of this  
28 Complaint as if fully set forth herein.

1           74. Labor Code section 2802 states, “An employer shall indemnify his or her  
2 employee for all necessary expenditures or losses incurred by the employee in direct consequence  
3 of the discharge of his or her duties” (Lab. Code, § 2802.)

4           75. Plaintiff and the Plaintiff Class were not reimbursed by Defendant for necessary  
5 expenditures as a direct consequence of the discharge of their duties.

6           76. Defendants knowingly, willingly and intentionally attempted to offset the cost of  
7 doing business on the Plaintiff and Plaintiff Class.

8           77. When Plaintiff and the Plaintiff Class were classified as independent contractors,  
9 they were required to pay all expenses incurred in utilizing their personal vehicles for delivery.  
10 These costs included, but are not limited to, gas, insurance, maintenance and repairs. Defendants  
11 did not reimburse Plaintiff and the Plaintiff Class for these expenses.

12           78. During the time Plaintiff and the Plaintiff Class were classified as non-exempt  
13 employees, Defendants did not reimburse delivery drivers the actual amount of expense incurred  
14 for mileage reimbursement and provided no reimbursement for insurance costs incurred by  
15 employees to use their own vehicles for Defendants’ business.

16           79. Defendants had a corporate practice and policy of requiring Plaintiff and Plaintiff  
17 Class to shoulder the burden of Defendants’ cost of doing business by failing to reimburse  
18 Plaintiff and Plaintiff Class for necessary expenditures.

19           80. Accordingly, Plaintiff and Plaintiff Class are entitled to an award of “necessary  
20 expenditures or losses” in accordance with Labor Code section 2802, which shall also include all  
21 reasonable costs, including, but not limited to, attorneys’ fees and interest.

22                           **SEVENTH CAUSE OF ACTION**

23                                   **Unfair Business Practices**

24                                           **(Cal. Bus. & Prof Code §§ 17200, *et seq.*)**

25                                                   **(Plaintiff and the Class Against All Defendants)**

26           81. Plaintiff realleges and incorporates by reference all preceding paragraphs of this  
27 Complaint as if fully set forth herein.

28   /-/-/

1           82. At all relevant times, Defendants were subject to the California Unfair Trade  
2 Practices Act, Business and Professions Code section 17200 et seq., which required them to abide  
3 by the Labor Code.

4           83. Business and Professions Code section 17200 et. seq. (also referred to herein as  
5 the “Unfair Business Practices Act” or “Unfair Competition Law”) prohibits unfair competition  
6 in the form of any unlawful, unfair or fraudulent business act or practice.

7           84. Business and Professions Code section 17204 allows “any person who has suffered  
8 injury in fact and has lost money or property as a result of such unfair competition” to prosecute  
9 a civil action for violation of the Unfair Competition Law (“UCL”). (Bus. & Prof. Code, §  
10 17204.)

11           85. Labor Code section 90.5, subdivision (a) states that it is the public policy of  
12 California to vigorously enforce minimum labor standards in order to ensure employees are not  
13 required to work under substandard and unlawful conditions, and to protect employers who  
14 comply with the law from those who attempt to gain competitive advantage at the expense of their  
15 workers by failing to comply with minimum labor standards.

16           86. Beginning at an exact date unknown to Plaintiff, but at least four (4) years prior to  
17 the filing of this lawsuit, Defendant has committed acts of unfair competition as defined by the  
18 Unfair Business Practices Act, and described herein under the General Allegations of this First  
19 Amended Complaint, as well as the preceding causes of action, by engaging in the unlawful,  
20 unfair and fraudulent business practices and acts described in this Complaint including but not  
21 limited to violations of Labor Code sections 226, 226.7, 226.8, 510, 512, 1174, 1182.12, 1194,  
22 1197, 1198, 2802 and 2698-2699, as well as other statutes.

23           87. Also, by misclassifying Plaintiff and the Class as independent contractors for a  
24 portion of the Class Period, Defendants excluded Plaintiff and the Class from statutory and  
25 regulatory wage and hour protections and thereby engaged in unfair trade practices prohibited  
26 Business and Professions Code section 17200 et seq., by committing acts prohibited by applicable  
27 Labor Code, which include but are not limited to failing to provide wages in compliance with the  
28 California Labor Code, and failing to pay Plaintiff and the Class all wages due and owing, thus

1 giving Defendants a competitive advantage over other employers and businesses with whom  
2 Defendants were in competition with and who were in compliance with the law.

3 88. The violations of these laws and regulations, as well as of the fundamental  
4 California public policies protecting workers, serve as unlawful predicate acts and practices for  
5 purposes of Business and Professions Code section 17200 et. seq.

6 89. The acts and practices described above constitute unfair, unlawful and fraudulent  
7 Business Practices, and unfair competition, within the meaning of Business and Professions Code  
8 section 17200 et. seq. Among other things, the acts and practices have forced Plaintiff and other  
9 similarly situated employees to labor for many hours without receiving rest periods and overtime  
10 compensation, to which they are entitled by law, while enabling Defendant to gain an unfair  
11 competitive advantage over law-abiding employers and competitors.

12 90. Business and Professions Code section 17203 provides that the Court may restore  
13 to any person in interest any money or property that may have been acquired by means of such  
14 unfair competition. Plaintiff and Plaintiff Class are entitled to restitution pursuant to Business  
15 and Professions Code section 17203 for all wages and payments unlawfully withheld from  
16 employees, including the fair value of the rest periods taken away from them, during the four-  
17 year period prior to the filing of this Complaint.

18 91. As a direct and proximate result of Defendant's violations, Plaintiff's and the  
19 Class' rights under the law were violated because she suffered monetary losses. Plaintiff and the  
20 Class seek restitution, together with injunctive relief to prohibit Defendant from violating the  
21 regulations alleged in this complaint, as well as any and all other available remedies.

22 92. Business and Professions Code section 17203 provides that a court may make such  
23 orders or judgments as may be necessary to prevent the use or employment by any person of any  
24 practice which constitutes unfair competition. Injunctive relief is necessary and appropriate to  
25 prevent Defendants from repeating their unlawful, unfair and fraudulent business acts and  
26 business practices alleged above.

27 93. Business and Professions Code section 17202 provides, "Notwithstanding section  
28 3369 of the Civil Code, specific or preventative relief may be granted to enforce a penalty,

1 forfeiture, or penal law in a case of unfair competition.” (Bus. & Prof. Code, § 17202.) Plaintiff  
2 and Plaintiff Class are entitled to enforce all applicable penalty provisions of the Labor Code  
3 pursuant to Business and Professions Code section 17202.

4 94. Plaintiff’s success in this action will enforce important rights affecting public  
5 interest, and in that regard, Plaintiff sues on behalf of the general public, as well as himself and  
6 other similarly situated employees. Plaintiff and Plaintiff Class seek and are entitled to restitution,  
7 civil penalties, declaratory and injunctive relief, and all other equitable remedies owing them.

8 95. Plaintiffs have incurred costs and attorney’s fees in bringing this action and seeks  
9 to recover them.

10 96. Plaintiff herein takes upon himself enforcement of these laws and lawful claims.  
11 There is a financial burden involved in pursuing this action, the action is seeking to vindicate a  
12 public right, and it would be against the interests of justice to penalize Plaintiff by forcing him to  
13 pay attorneys’ fees from the recovery in this action. Attorneys’ fees are appropriate pursuant to  
14 Code of Civ. Proc. section 1021.5 and otherwise.

15 **EIGHTH CAUSE OF ACTION**

16 **Violation of the California Labor Code Private Attorneys’ General Act (“PAGA”) – Cal.**

17 **Labor Code §§2698-2699, et seq.**

18 **(Plaintiff and Plaintiff Class Against Defendants)**

19 97. Plaintiff realleges and incorporates by reference all preceding paragraphs of this  
20 Complaint as if fully set forth herein.

21 98. Labor Code sections 2698 through 2699, also known as the Private Attorneys’  
22 General Act of 2004 provides for a civil penalty to be assessed and collected by the Labor and  
23 Workforce Development Agency, or any of its departments, divisions, commissions, boards  
24 agencies or employees for a violation of the Labor Code, may be recovered through a civil action  
25 by an aggrieved employee on behalf of himself or herself, and collectively on behalf of all other  
26 current or former employees.

27 99. Whenever the Labor and Workforce Development Agency (“LWDA”), or any of  
28 its departments, divisions, commissions, boards agencies or employees has discretion to assess a

1 civil penalty, a court in a civil action is authorized to exercise the same discretion, subject to the  
2 same limitations and conditions to assess a civil penalty.

3 100. Plaintiff and Plaintiff Class are “aggrieved employees” as defined by Cal. Labor  
4 Code section 2699 in that they are all current or former employees of Defendant, and one or more  
5 of the alleged violations was committed against them.

6 101. Prior to filing this Complaint, on January 31, 2023, Plaintiff gave written notice  
7 by certified mail to the LWDA and to Defendants, of the specific provisions alleged to have been  
8 violated, including the facts and theories to support the alleged violations as required by Labor  
9 Code section 2699.3. This letter is attached as Exhibit “A.” As of the filing of this complaint  
10 which is hereby incorporated by reference. The LWDA did not respond to Plaintiff’s notice of  
11 alleged violations contained in this complaint within 65 days of its submission.

12 102. Plaintiff asserts all of the claims in this Complaint against Defendant, individually  
13 and on behalf of all aggrieved employees of the Plaintiff Class, in his capacity as private attorney  
14 general, and seeks all statutory penalties available under the Labor Code.

15 103. Pursuant to Labor Code section 2699 Plaintiff, individually and on behalf of all  
16 aggrieved employees, request and are entitled to recover from Defendant; unpaid wages, overtime  
17 compensation, meal and rest period compensation and penalties, waiting period wages and  
18 penalties according to proof, penalties for failure to keep accurate payroll records, interest,  
19 attorneys’ fees and costs pursuant to Labor Code sections 218.5 and 1194, subdivision (a), and  
20 1174, as well as all statutory penalties, and attorney’s fees against Defendant, including but not  
21 limited to:

- 22 a. Penalties under Labor Code section 2699 in the amount of one hundred dollars  
23 (\$100) for each aggrieved employee per pay period for each initial violation, and  
24 two hundred dollars (\$200) for each aggrieved employee per pay period for each  
25 subsequent violation;
- 26 b. Penalties under Code of Regulations Title 8 section 11070 in the amount of fifty  
27 dollars (\$50) for each aggrieved employee per pay period for the initial violation,  
28

and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation; and;

- c. Any and all additional penalties and sums as provided by the Labor Code and/or other statutes.

104. In addition, thereto, Plaintiff seeks and is entitled to fifty percent (50%) of all penalties obtained under Labor Code section 2699 to be allocated to the General Fund, and twenty five percent (25%) of all penalties obtained to be allocated to the Labor and Workforce Development Agency, for education of employers and employees about their rights and responsibilities under the Labor Code and 25% to all aggrieved employees.

105. Further, Plaintiff is entitled to seek and recover reasonable attorneys' fees and costs pursuant to Labor Code sections 2699(g)(1), 1194 and any other applicable statute

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs pray for the following relief:

1. For compensatory damages in an amount according to proof;
2. For general damages in an amount according to proof;
3. For statutory penalties in an amount according to proof;
4. For civil penalties in an amount according to proof at trial;
5. Injunctive relief, enjoining Defendants from engaging in the unlawful and unfair business practices complained herein.
6. For declaratory relief, enjoining Defendants' practices as unlawful and unfair business practices within the meaning of Business and Professions Code sections 17200 et seq.,

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- 1           7.     For reasonable attorneys' fees and expenses pursuant to the Labor Code, including  
2                 but not limited to Labor Code §§218.5, 1194, 2802, 2699 (g), Cal. Civil Code  
3                 §1021.5 and any other applicable statute;  
4           8.     For restitution of all monies due to Plaintiff and Plaintiff Class, and disgorged  
5                 profits from the unlawful business practices of Defendants;  
6           9.     For such other and further relief as this Court may deem just and proper.

7  
8  
9   Dated: June 16, 2023

**MAHONEY LAW GROUP, APC**

10  
11           By:



Kevin Mahoney, Esq.  
Katherine J. Odenbreit, Esq.  
Laura Theriault, Esq.  
Attorneys for Plaintiff RAUL CUENCA

**DEMAND FOR JURY TRIAL**

Plaintiffs RAUL CUENCA hereby demands a jury trial on all issues so triable.

Dated: June 16, 2023

**MAHONEY LAW GROUP, APC**

By: 

Kevin Mahoney, Esq.

Katherine J. Odenbreit, Esq.

Laura Theriault, Esq.

Attorneys for Plaintiff RAUL CUENCA