Rick A. Waltman (State Bar No. 306463)
RICK WALTMAN LAW, APC
501 W. Broadway, Ste. 800
San Diego, California 92101
(619) 320-5666
rick@rickwaltmanlaw.com

Attorneys for Plaintiff Adam Saffiote

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
06/15/2023 at 04:47:06 PM
Clerk of the Superior Court
By Gabriel Lopez, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

ADAM SAFFIOTE, an individual on behalf of all others similarly situated,

Plaintiff,

vs.

LAST MILE LOGISTICS, INC., a California corporation; CRAIG ZIMMER, an individual; and DOES 1 through 50, inclusive,

Defendants.

Case No. 37-2023-00025104-CU-OE-CTL

REPRESENTATIVE ACTION COMPLAINT

1. Failure to Pay All Overtime and Regular Wages
2. Meal Period Violations
3. Rest Period Violations
4. Untimely Payment of Wages
5. Wage Statement Violations
6. Failure to Pay at End of Employment

Plaintiff Adam Saffiote ("Plaintiff"), as an individual and on behalf of all other similarly situated current and former California employees and the State of California, bring this representative action against Defendant Last Mile Logistics, Inc. ("Last Mile"), Craig Zimmer, and DOES 1 through 50 (collectively, "Defendants"), and on information and belief allege as follows:

INTRODUCTION

1. Plaintiff brings this representative action filed for wage and hour violations of the California Labor Code. Defendants failed to pay Plaintiff and other aggrieved employees at the proper overtime rate based on their "regular rate of pay." Defendants failed to account for bonuses in calculating the regular rate of pay for overtime purposes, and thus underpaid overtime to Plaintiff and other aggrieved employees.

2. Defendants also required Plaintiff and other employees to work through their meal and rest breaks as a matter of policy, and failed to pay Plaintiff and other employees for such time or premiums. This resulted in an underpayment of regular and overtime hours worked each pay period for Plaintiff and others. Defendants thus failed to provide compliant meal and rest periods (or premiums in lieu thereof).

3. As a result of these violations, Defendants failed to timely pay Plaintiff and aggrieved employees each pay period on paydays and upon separation of employment, and thus are liable for waiting time and other statutory penalties.

4. Defendants' employment policies and practices and payroll administration systems enabled and facilitated these violations on a company-wide basis with respect to the aggrieved employees.

JURISDICTION & VENUE

5. Jurisdiction of this action is proper in this Court under Article VI, Section 10 of the California Constitution.

6. Venue as to each defendant is proper in this judicial district under Code of Civil Procedure §§ 395(a) and 395.5 because Defendants conduct business in this county, and committed the alleged violations in this county.

/

PARTIES

A. Plaintiff

7. Plaintiff ADAM SAFFIOTE is a citizen of California over 18 years of age who worked for Defendants in San Diego County as an hourly, non-exempt employee of Defendants.

8. Plaintiff worked for Defendants in California from October 12, 2021 to March 2023 as a driver.

B. Defendants

9. Defendant Last Mile Logistics, Inc. ("Defendant" or "Last Mile") is an Amazon delivery service company registered to do business in the State of California. Last Mile employs hourly drivers and other non-exempt employees in the state of California.

10. Plaintiff is informed, believes, and alleges that Defendant Craig Zimmer is a California resident and an officer, member, director, agent, and/or owner of the above corporate Defendants at all relevant times stated herein.

11. The true names and capacities, whether individual, corporate, or otherwise, of the parties sued as DOES 1 through 50, are presently unknown to Plaintiff, who sues them by such fictitious names under Code of Civil Procedure section 474. Plaintiff is informed, believes and alleges that each of the fictious defendants is responsible in some manner for the acts and omissions alleged herein. Plaintiff will seek leave to amend this Complaint to reflect their true names and capacities when they become known.

12. Plaintiff is informed, believes, and alleges that each defendant acted in all respects pertinent to this action as an alter-ego, agent, servant, joint employer, joint venturer, co-conspirator, partner, in an integrated enterprise, or in some other capacity on behalf of all other co-defendants, such that the acts and omissions of each defendant are legally attributable to all others.

13. Plaintiff is informed, believes and alleges that the above-mentioned defendants violated and/or caused to be violated Labor Code and IWC Wage Order provisions and/or regulating minimum wages and days of work and other provisions of the Labor Code with respect to the group of aggrieved employees. As a result, they may be held personally liable under Labor

Code sections 558, 558.1, and 1197.1. (*See, e.g., Atempa v. Pedrazzani* (2018) 27 Cal. App. 5th 809.

GENERAL ALLEGATIONS

14. Defendants failed to consistently provide timely, off-duty 30-minute meal periods to Aggrieved employees within the first five hours of work, and timely second off-duty 30-minute meal periods to the extent they worked shifts of 10 hours or more, in violation of Labor Code sections 226.7, 512 and section 11 of the applicable IWC Wage Orders. (*See, e.g., Ferra v. Loews HollySaffiote Hotel, LLC* (2021) 11 Cal. 5th 858, 863 [“We hold that the terms are synonymous: “regular rate of compensation” under section 226.7(c), like “regular rate of pay” under section 510(a), encompasses all nondiscretionary payments, not just hourly wages.”])

15. Defendants encouraged Plaintiff and other employees to work through meal periods, to clock out for their meal periods despite continuing to perform work, and to change their time entries to reflect lawful and timely meal periods when meal periods were in fact taken late or not at all. Plaintiff and Aggrieved employees also experienced other meal period violations due to deliveries, poor staffing, and customer demands. Upon information and believe, Plaintiff alleges that Defendants edit employees’ time entries to fraudulently demonstrate compliance with meal break laws.

16. Plaintiff and other employees were similarly usually unable to take any rest breaks during shifts due to the steady business with insufficient staff.

17. When Plaintiff and other employees were unable to take a compliant meal and/or rest break, Defendants failed to pay one hour of premium pay at the employees’ regular rate of pay as required by California law.

18. Defendants were aware that Plaintiff and other aggrieved worked through meal and rest periods because Defendants set the policies and schedules that prevented employees from taking lawful breaks.

19. Defendants failed to pay all minimum, regular, overtime, and premium wages to employees as a result of their practice of editing employees’ time records and automatically deducting employees’ meal periods and forcing them to work through meal periods. This resulted

in an underpayment of hours worked each pay period for employees, as Aggrieved employees worked during those periods marked as unpaid meal periods. Defendants failed to pay Plaintiff and other employees for all hours worked during meal breaks, and for overtime hours during which Plaintiff and others performed work, but were not paid. Aggrieved employees did not receive compensation for those hours worked. Defendants also engaged in a pattern of editing employees' time records that resulted in an underpayment of regular and overtime wages to Plaintiff and other non-exempt employees. The revisions were made without employees' consent.

20. Defendants also failed to include all forms of remuneration in the regular rate of pay when calculating the overtime rate and meal period premium pay for Plaintiff and other aggrieved employees. Defendants instead paid overtime at a simple 1.5x multiple of Plaintiff's and others' base hourly rate. Defendants excluded the remuneration itemized as "Bonus" from the regular rate of pay. This company-wide policy and practice of not including bonus payments—as well as other forms of non-excludable remuneration—was applied to other aggrieved employees and is a matter of common payroll administration. Defendants thus failed to include all forms of non-exempted remuneration in the "regular rate of pay" for purposes of paying overtime to aggrieved employees.

21. With respect to the underpaid overtime wages, and meal and rest period premiums owed to Plaintiff and other employees, Defendants failed to pay those wages on time each pay period or upon separation of employment. (*See Naranjo v. Spectrum Security Services, Inc*. (2022) 13 Cal. 5th 93.) Defendants similarly failed to timely pay all wages owed each pay day or upon separation of employment (or within 72 hours thereof), in violation of Labor Code sections 201 through 203 (waiting time) and 204 and 204b (paydays).

22. Defendants equally failed in their affirmative obligation to provide accurate itemized wage statements each pay period to Plaintiff and other employees. Defendants issued wage statements to Plaintiff and, on information and belief, other employees, which contain a number of distinct violations. <u>First</u>, on each wage statement furnished, Defendants failed to accurately state the "gross wages earned" and "net wages earned" in violation of Labor Code § 226(a)(1) and (5), as Plaintiff and other employees were not paid for off the clock work during meal periods and earned

overtime at one and one-half times their regular rate of pay, but were underpaid regular wages and overtime on an hourly basis, and were deprived of all meal and rest period premiums earned at the lawful rate, resulting in an inaccurate itemization of gross and net wages earned on those wage statements. Second, Defendants violated Labor Code section 226(a)(2) by failing to list employees' "total hours worked," as aggrieved employees worked off-the-clock, including during uncompensated meal periods, rendering the total hours listed as an inaccurate reflection of hours worked. Third, Defendants failed to state the proper overtime rate whenever overtime hours were worked during the same period as bonus income was earned.

23. Defendants' wage statement issues described above rendered the wage statements inaccurate and confusing to Plaintiff and other employees, concealing the underpayments and presenting a false portrayal of accuracy on the wage statements relied upon by Plaintiff and other employees as the sole documentary evidence of their respective earnings.

24. Plaintiff and other employees suffered injury in the form of confusion regarding amounts paid for hours worked, and in the form of concealment of the common payroll practices causing the violations and underpayment of wages and wage statement deficiencies as addressed in this Complaint.

25. Plaintiff and, on information and belief, other employees were misinformed and misled by the wage statements wages, hours, rates, and earnings. As a result of the inaccuracies on the wage statements, Plaintiff and, on information and belief, other employees were led to believe that the hourly rates and net and gross wages reflected were a complete and accurate reflection of the wages actually earned under California law.

26. Defendants' wage statement violations were knowing and intentional as a matter of law with respect to Plaintiff and California employees given that the legal obligation was not disputed, the wage statement and wage laws are clear and unambiguous as written, and because Defendants nevertheless failed to comply despite the means and ability to do so.

27. Plaintiff is informed, believes, and alleges that Defendants' acts and omissions have knowingly and intentionally caused harm to Plaintiff and other employees. Plaintiff is informed, believes, and alleges that Defendants have engaged in systemic violations of the Labor Code and

IWC Wage Orders by maintaining practices, policies, and customs that are inconsistent with their obligations under California law.

PAGA ALLEGATIONS

28. Plaintiff seeks to recover civil penalties as individual aggrieved employees and on behalf of the State of California and all current and former non-exempt hourly employees who worked for Defendants in the State of California during the one-year period preceding the date of the PAGA Notice through the current date and the date of final judgment in any pending action (the "aggrieved employees" and the "PAGA Period").

29. The State of California, via the Labor and Workforce Development Agency ("LWDA"), is the real party in interest in this action with respect to the PAGA claims. (*Kim v. Reins Int'l California, Inc.* (2020) 9 Cal. 5th 73, 81 [The "government entity on whose behalf the Plaintiff files suit is always the real party in interest."])

30. Plaintiff is an "aggrieved employees" because Plaintiff was employed by Defendants and personally experienced one or more of the alleged violations. Therefore, Plaintiff is properly suited to act on behalf of the State of California and collect civil penalties for all violations committed against all other current and former aggrieved employees of Defendants. (*See, e.g., Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal. App. 5th 745, 751 ["PAGA allows an "aggrieved employee"—a person affected by one Labor Code violation committed by an employer—to pursue penalties for all the Labor Code violations committed by that employer."])

31. "Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3." (Labor Code § 2699(a)).

32. Now that at least 65 days have passed from Plaintiff first notifying Defendants and the LWDA on **March 27, 2023** of the specific provisions of the Labor Code alleged to have been violated (including the supporting facts and theories) without LWDA intervention—and without

Defendants giving written notice by certified mail to Plaintiff providing a description of any actions taken to cure the alleged violations within 33 days—Plaintiff exhausted all prerequisites and commences this civil action under Labor Code § 2699 with respect to the PAGA notice and any amendments or supplements thereto. A true and correct copy of the PAGA Notice, incorporated by reference as though fully set forth herein, is attached hereto as **Exhibit A.**

33. All allegations regarding violations of the IWC Wage Orders are enforceable as violations of Labor Code section 1198, which states: "[t]he employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.")

FIRST CAUSE OF ACTION

DAMAGES AND CIVIL PENALTIES FOR FAILURE TO PAY ALL REGULAR AND OVERTIME WAGES

55. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

56. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code §§ 204, 510, 558, 1194, and 1198, which require non-exempt employees be timely paid overtime wages at 1.5 times their "regular rate of pay" for all overtime hours worked, and which further provide a private right of action for an employer's failure to pay all overtime compensation for overtime hours worked.

57. Labor Code section 510 requires "[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee;" and "any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee;" and "any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee."

58. Like federal law, under the California Labor Code, the "regular rate" is not simply a straight time multiple of an employee's base rate, but rather must include "all remuneration for employment paid to … the employee," except the eight items specifically enumerated in 29 U.S.C. §

207(e)(1)-(8). Remuneration like bonuses and incentives must be included in the hourly overtime rate. (*See, e.g., Howell v. Advantage RN, LLC* (S.D. Cal. 2019) 401 F. Supp. 3d 1078, 1093 ("Such non-discretionary bonuses … cannot be lawfully excluded from the regular rate").

59. Labor Code sections 558 and 1197.1 contain civil penalties for violating this provision of those provisions of the IWC Wage Orders, including sections 3 and 4 and the standing Minimum Wage Order. Labor Code section prohibits payment of a wage less than the legal overtime compensation applicable to the employee. Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful and Labor Code section 1199 renders payment of wages contrary to the forging Labor Code and Wage Order provisions unlawful.

60. Defendants failed to include all forms of remuneration in the regular rate of pay when calculating the overtime rate for Plaintiff and other aggrieved employees. Defendants instead paid overtime at a simple 1.5x multiple of Plaintiff's and others' base hourly rate. Defendants excluded the remuneration itemized as "Bonus." This company-wide policy and practice of not including bonus payments—as well as other forms of non-excludable remuneration—was applied to other aggrieved employees and is a matter of common payroll administration. Defendants thus failed to include all forms of non-exempted remuneration in the "regular rate of pay" for purposes of paying overtime to aggrieved employees.

61. Defendants willfully failed in their affirmative obligation to pay Plaintiff and aggrieved employees no less than one and one-half times their respective "regular rate of pay" for all hours worked in excess of eight hours in one day, 40 hours in one week, or the first eight hours worked on the seventh day of work in any one workweek, and no less than twice their respective "regular rate of pay" for all hours over 12 hours in one day and any work in excess of eight hours on any seventh day of a workweek in violation of Labor Code sections 204, 510, 558, 1194, and 1198 and the IWC Wage Orders (the "Hours and Days of Work" sections of the applicable orders).

34. Labor Code section 2699(f) provides: "For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows: … (2) If, at the time of the alleged violation, the person employs

one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation."

35. Labor Code section 558(a) provides: "Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows: (1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. (2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages."

36. Labor Code section 1197.1(a) provides: "Any employer or other person acting either individually or as an officer, agent, or employee of another person, who pays or causes to be paid to any employee a wage less than the minimum fixed by an applicable state or local law, or by an order of the commission, shall be subject to a civil penalty ... and any applicable penalties imposed pursuant to Section 203 as follows: (1) For any initial violation that is intentionally committed, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee is underpaid … and any applicable penalties imposed pursuant to Section 203. (2) For each subsequent violation for the same specific offense, two hundred fifty dollars ($250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed."

37. Defendants willfully failed in their affirmative obligation to pay Plaintiff and aggrieved employees at least the lawful minimum wage for all hours worked in violation of Labor Code sections 1182.12, 1194, 1197 and 1198 and the IWC Wage Orders (the "Hours and Days of Work" and "Minimum Wages" sections of the applicable orders).

38. As a result, Defendants violated the Labor Code and IWC Wage Orders and are liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as required by Labor Code sections 558, 1197.1, and 2699(a) and (f)(2), in addition to interest,

attorneys' fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

39. Plaintiff is also entitled to the unpaid wages owed to him, in addition to attorneys' fees and costs for enforcement.

SECOND CAUSE OF ACTION

CIVIL PENALTIES FOR MEAL PERIOD VIOLATIONS

62. Plaintiff incorporate all outside paragraphs of this Complaint as if set forth herein.

63. Defendants willfully failed in their affirmative obligation to consistently provide Plaintiff and aggrieved employees compliant, duty-free meal periods of not less than 30 minutes beginning before the fifth hour of hour for each work period of more than five hours per day and a second on-duty meal period of not less than 30 minutes beginning before the tenth hour of hour of work in violation of Labor Code sections 226.7, 512, 1198 and the IWC Wage Orders (the "Meal Periods" sections of the applicable orders).

64. Further, Defendants willfully failed in their affirmative obligation to consistently pay Plaintiff and aggrieved employees one additional hour of pay at the respective regular rate of compensation for each workday that a fully compliant meal period was not provided, in violation of Labor Code sections 226.7, 1198 and the IWC Wage Orders.

65. As a result, Defendants violated the Labor Code and IWC Wage Orders and are liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys' fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

THIRD CAUSE OF ACTION

CIVIL PENALTIES FOR REST PERIOD VIOLATIONS

66. Plaintiff incorporate all outside paragraphs of this Complaint as if set forth herein.

67. Defendants willfully failed in their affirmative obligation to consistently authorize and permit Plaintiff and aggrieved employees to receive compliant, duty-free rest periods of not less than ten (10) minutes for every four hours worked (or major fraction thereof) in violation of Labor

Code sections 226.7, 516, 1198 and the IWC Wage Orders (the "Rest Periods" sections of the applicable orders).

68. Further, Defendants willfully failed in their affirmative obligation to consistently pay Plaintiff and aggrieved employees one additional hour of pay at the respective regular rate of compensation for each workday that a fully compliant rest period was not provided, in violation of Labor Code sections 226.7, 1198 and the IWC Wage Orders.

69. As a result, Defendants violated the Labor Code and IWC Wage Orders and are liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys' fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

FOURTH CAUSE OF ACTION

CIVL PENALTIES FOR UNTIMELY PAYMENT OF WAGES

55. Plaintiff incorporate all outside paragraphs of this Complaint as if set forth herein.

56. Defendants willfully failed in their affirmative obligation to timely pay all wages and premiums earned by Plaintiff and aggrieved employees twice during each calendar month on days designated in advance by the employer as regular paydays (for employees paid on a non-weekly basis) and on the regularly-scheduled weekly payday for any weekly employees, as applicable, in violation of Labor Code sections 204,204b, 210 and the IWC Wage Orders (the "Minimum Wages" sections of the applicable orders).

57. As a result, Defendants violated the Labor Code and IWC Wage Orders and are liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys' fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

FIFTH CAUSE OF ACTION

CIVIL PENALTIES FOR WAGE STATEMENT VIOLATIONS

58. Plaintiff incorporate all outside paragraphs of this Complaint as if set forth herein.

59. Labor Code section 226.3 provides: "Any 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 citation 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 records required in subdivision (a) of Section 226. The civil penalties provided for in this section are in addition to any other penalty provided by law."

60. Defendants failed in their affirmative obligation provide accurate itemized wage statements to Plaintiff and aggrieved employees in violation of Labor Code section 226(a).

61. As a result, Defendants violated the Labor Code and IWC Wage Orders and are liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as required by Labor Code sections 226.3 and 2699(a) and (f)(2), in addition to interest, attorneys' fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

SIXTH CAUSE OF ACTION

CIVIL PENALTIES FOR FAILURE TO PAY AT END OF EMPLOYMENT

62. Plaintiff incorporate all outside paragraphs of this Complaint as if set forth herein.

63. Defendants willfully failed in their affirmative obligation to pay all wages earned and unpaid to Plaintiff and aggrieved employees immediately upon termination of employment or within 72 hours thereafter for employees who did not provide at least 72 hours prior notice of his or her intention to quit, and further failed to pay those sums for 30 days thereafter in violation of Labor Code sections 201 through 203 and the IWC Wage Orders.

64. As a result, Defendants violated the Labor Code and IWC Wage Orders and are liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys' fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

PRAYER

Plaintiff prays for judgment as follows:

a. For unpaid wages owed to Plaintiff;

b. For all recoverable pre- and post-judgment interest;

c. For recovery of all civil and statutory penalties;

d. For disgorgement of all amounts wrongfully obtained;

e. For restitution and injunctive relief;

f. For reasonable attorneys' fees and costs of suit, including expert fees, to the extent permitted by law, including (without limitation) under Labor Code §§ 218.5, 226, 1194, 2802, and Code of Civil Procedure section 1021.5;

g. For Plaintiff and counsel to be provided with all enforcement capability as if the action were brought by the State of California or the California Division of Labor Enforcement;

h. For an award of all civil penalties under the Labor Code section 2698 et seq.;

i. For reasonable attorneys' fees and costs of suit, including expert fees, to the extent permitted by law, including under California Labor Code sections 218.5, 226, 1194, 2802, 2699(g) and Code of Civil Procedure section 1021.5; and

j. For such other relief the Court deems just and proper.

Dated: June 15, 2023

RICK WALTMAN LAW, APC

Rick A. Waltman
Attorney for Plaintiff Adam Saffiote

EXHIBIT A

RICK WALTMAN LAW, APC

501 W. Broadway, Ste. 800
San Diego, CA 92101

(619) 320-5666
rick@rickwaltmanlaw.com

March 27, 2023

NOTICE OF LABOR CODE VIOLATIONS
CALIFORNIA LABOR CODE SECTIONS 2698 *et seq*.

PAGA CLAIM NOTICE AND FILING FEE VIA ONLINE SUBMISSION

California Labor and Workforce Development Agency

VIA CERTIFIED U.S. MAIL AND EMAIL

Last Mile Logistics, Inc.
Craig Zimmer
12813 Baywind Pt.
San Diego, CA 92130

Dear Labor Enforcement Officer and Company Representatives:

This letter serves as written notice on behalf of Claimant Adam Saffiote ("Claimant") and other aggrieved employees under California Labor Code section 2699.3 against Last Mile Logistics, Inc., along with the company's owner(s) (including Craig Zimmer), and any other related individuals or employer entities who may be later added ("Defendants").

If the California Labor and Workforce Development Agency ("LWDA") does not investigate the facts, allegations, and violations set forth in this notice within the statutorily prescribed period under Labor Code section 2699.3, Claimant shall seek and recover civil penalties as a proxy and agent of the State of California on behalf of other aggrieved employees under the California Private Attorneys General Act ("PAGA").

"PAGA allows an 'aggrieved employee'—a person affected by at least one Labor Code violation committed by an employer—to pursue penalties for all the Labor Code violations committed by that employer." *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal. App. 5th 745, 751; *see also Kim v. Reins International California, Inc.* (2020) 9 Cal. 73, 79.

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FACTUAL STATEMENT

Defendants operate a logistics company that delivers interstate goods to their final destination. Defendants employ hourly, non-exempt employees throughout the state of California, including in San Diego, who are entitled to wage and hour protections under the California Labor Code and IWC Wage Orders.

Defendants engaged, suffered and permitted Claimant and the other "aggrieved employees," as defined below, to work, exercised control over their respective wages, hours, and working conditions, and at all times was an agent and/or ostensible agent of any other employers, and the joint employer of Claimant and other aggrieved employees. Defendants legally employed Claimant and the other aggrieved employees under California law. Additionally, Defendants and their agents are liable under Labor Code sections 558, 558.1, 1197.1 and 2699 *et seq.* based on the acts and omissions set forth herein.

Claimant worked as a driver for Defendants from October 12, 2021 to March 2023. Claimant was an hourly, non-exempt employee during his entire employment with Defendants. Claimant last performed work for Defendants on or around August 2, 2022.

Claimant and other aggrieved employees were often unable to take meal and rest periods in compliance with California law, as is discussed further below. When Claimant and other employees were unable to take a compliant meal and/or rest break, Defendants failed to pay one hour of premium pay at the employees' regular rate of pay as required by California law. Defendants were aware that Claimant and other aggrieved worked through meal and rest periods because Defendants set the policies and schedules that prevented employees from taking lawful breaks. Defendants encouraged Claimant and other employees to work through meal periods, to clock out for their meal periods despite continuing to perform work, and to change their time entries to reflect lawful and timely meal periods when meal periods were in fact taken late or not at all. Upon information and believe, Claimant alleges that Defendants edit employees' time entries to fraudulently demonstrate compliance with meal break laws.

Defendants also failed to include all forms of remuneration in the regular rate of pay when calculating the overtime rate for Claimant and other aggrieved employees. Defendants instead paid overtime at a simple 1.5x multiple of Claimant's and others' base hourly rate. Defendants excluded the remuneration itemized as "Bonus" from the regular rate of pay. This company-wide policy and practice of not including bonus payments—as well as other forms of non-excludable remuneration—was applied to other aggrieved employees and is a matter of common payroll administration. Defendants thus failed to include all forms of non-exempted remuneration in the "regular rate of pay" for purposes of paying overtime to aggrieved employees.

Through this notice, Claimant informs the LWDA of the Labor Code violations set forth herein. The aggrieved employees who Claimant seeks to represent include the following individuals:

> All current and former non-exempt hourly employees who worked for Defendants in the State of California during one-year period preceding the date of this notice through the current date and the date of final judgment in any pending action (the "aggrieved employees" and the "PAGA Period").

Claimant seeks all recoverable civil penalties for Defendants' violations and reserves the right to supplement this notice as further investigation is completed and further facts, witnesses, and violations are uncovered. Claimant reserves the right to narrow the definition of the "aggrieved employees" in the forthcoming civil action.

Overtime and Minimum Wage Violations
Violation of Labor Code §§ 201-204, 210, 510, 558, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199; IWC Wage Orders

Defendants failed to pay for all hours worked and failed to pay overtime for hours worked in excess of 8 hours per day, in violation of Labor Code sections 201-204, 210, 510, 558, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199, applicable local minimum wage ordinances, and the related sections of the applicable IWC Wage Orders, including sections 3 and 4 and the standing Minimum Wage Order. Claimant and the aggrieved employees were not paid at least minimum wage for all hours worked. Claimant and the aggrieved employees were not paid at their lawful overtime rate (i.e., time and a half or double time based on their regular rate of pay) for all overtime hours worked in excess of 8 hours in a workday, 40 hours in a workweek, or for any hours on any seventh consecutive day of work, to the extent Claimant or other aggrieved worked on a seventh consecutive workday or other such hours as further investigation may reveal.

Labor Code section 204(a) states that all wages earned are due and payable twice during each calendar month on days designated in advance by the employer as regular pay days. Overtime wages are to be paid no later than the payday for the next regular payroll period. (Labor Code § 204(b)(1).) Labor Code § 210 states that, "every person who fails to pay the wages of an employee as provided in Section…204…shall be subject to a civil penalty" of $100 for an initial violation and $200 plus 25% of the amount unlawfully withheld for a subsequent violation.

Labor Code section 1197 states, "[t]he minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful." The "Minimum Wages" section of the applicable IWC Wage Order further provides that "[e]very employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise."

Labor Code section 510 requires "[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than <u>one and one-half times</u> the <u>regular rate of pay</u> for an employee;" and "any work in excess of 12 hours in one day shall be compensated at the rate of no less than <u>twice</u> the <u>regular rate of pay</u> for an employee;" and "any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than <u>twice</u> the <u>regular rate of pay</u> of an employee."

Like federal law, under the California Labor Code, the "regular rate" is not simply a straight time multiple of an employee's base rate, but rather must include "all remuneration for employment paid to … the employee," except the eight items specifically enumerated in 29 U.S.C. § 207(e)(1)-(8). Remuneration like bonuses and incentives must be included in the hourly overtime rate. *See, e.g., Howell v. Advantage RN, LLC* (S.D. Cal. 2019) 401 F. Supp. 3d 1078, 1093 ("Such non-discretionary bonuses … cannot be lawfully excluded from the regular rate"). Additionally, shift differentials and on-call pay (i.e. work paid at different rates) must also be factored in to the regular rate of pay used to calculate overtime for employees. *See, e.g., Bay Ridge Operating Co. v. Aaron* (1948) 334 U.S. 446, 469.

Labor Code sections 558 and 1197.1 contain civil penalties for violating this provision of those provisions of the IWC Wage Orders, including sections 3 and 4 and the standing Minimum Wage Order. Labor Code section prohibits payment of a wage less than the legal overtime compensation applicable to the employee. Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful and Labor Code section 1199 renders payment of wages contrary to the forging Labor Code and Wage Order provisions unlawful.

Defendants failed to include all forms of remuneration in the regular rate of pay when calculating the overtime rate for Claimant and other aggrieved employees. Defendants instead paid overtime at a simple 1.5x multiple of Claimant's and others' base hourly rate. Defendants excluded the remuneration itemized as "Bonus." This company-wide policy and practice of not including bonus payments—as well as other forms of non-excludable remuneration—was applied to other aggrieved employees and is a matter of common payroll administration. Defendants thus failed to include all forms of non-exempted remuneration in the "regular rate of pay" for purposes of paying overtime to aggrieved employees.

Defendants also encouraged and pressured employees to change their time records to indicate that meal breaks had been taken when they in fact were not taken, and to avoid payment of overtime. Upon information and belief, Claimant alleges that Defendants also take it upon themselves to edit employees' time records. As such, Claimant and other aggrieved employees worked "off the clock" for such regular and overtime hours they were not paid.

As a result, Claimant may recover civil penalties on behalf of themselves, the State of California and the aggrieved employees as provided under Labor Code §§ 225.5 ($100/$200), 558 ($50/$100), 1197.1 ($100/$250) and 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

<u>Failure to Provide Meal Periods</u>
Violation of Labor Code §§ 226.7, 512, 1198; IWC Wage Orders

Defendants failed to provide meal periods, or to pay meal period premiums at the lawful regular rate of compensation to Claimant and other aggrieved employees in violation of Labor Code sections 226.7, 512 and 1198, and the related sections of the IWC Wage Orders, including section 11.

Labor Code section 512 requires that employers provide a 30-minute, uninterrupted meal period after no more than five hours of work and a second meal period after no more than 10 hours of work. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1049. Labor Code section 226.7 requires that if a meal period is late, missed, short, or interrupted, the employer must pay for an hour of pay at the employee's "regular rate" of compensation. *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 862 ("We hold that the terms are synonymous: "regular rate of compensation" under section 226.7(c), like "regular rate of pay" under section 510(a), encompasses all nondiscretionary payments, not just hourly wages"). "[T]ime records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage." *Donohue v. AMN Services, LLC* (2021) 11 Cal. 5th 58, 61. Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful.

Furthermore, Section 11(A) of the IWC wage orders permit on-duty meal periods under certain limited circumstances. The California Supreme Court has held that the on-duty meal period exception is "exceedingly narrow" and applies only when (1) "the nature of the work prevents the employee from being relieved of all duty" and (2) *both* "the employer and employee have agreed, in writing, to the on-duty meal period." *Augustus v. AMB Security Services, Inc*. (2016) 2 Cal. 5th 257, 266-276 (emphasis added). If these two requirements are not met, then the employer owes the employee one hour of premium pay for each non-compliant meal period taken under the purported on-duty meal arrangement. *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal. 5th 444, 459.

Defendants failed to provide compliant and timely meal periods. Defendants required Claimant to work through meal periods and to effectively take meal periods, if any, "on duty." Claimant and other aggrieved employees often could not take timely uninterrupted meal periods within the first five hours of work, if at all. Defendants apply the same pressure to other employees and similarly fails to provide other aggrieved employees with compliant meal periods. When Defendants did not provide compliant meal periods, and Defendants also failed to pay Claimant and other aggrieved employees a meal period premium in violation of Labor Code section 226.7. As such, Defendants are liable for both wages and meal period premiums for any on-duty meal period taken by an aggrieved employee.

As a result, Claimant may recover civil penalties in an individual capacity, and on behalf of the State of California and the aggrieved employees as provided under Labor Code § 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

<u>Failure to Provide Rest Periods</u>
Violation of Labor Code §§ 226.7, 516, 1198; IWC Wage Orders

Defendants failed provide rest periods, and to pay rest period premiums at the lawful regular rate of compensation to Claimant and other aggrieved employees in violation of Labor Code sections 226.7, 516 and 1198, and the related sections of the IWC Wage Orders, including section 12.

Labor Code sections 226.7 and 516, along with the IWC Wage Orders, require that employers authorize and permit a 10-minute, uninterrupted rest period for each four-hour period (or major fraction thereof) that an employee works. Labor Code section 226.7 requires that if a meal period is non-compliant, the employer must pay for an hour of pay at the employee's "regular rate" of compensation. *See Ferra v. Loews Hollywood Hotel*, 11 Cal. 5th at 862. Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful. Defendants required Claimant and other aggrieved employees to effectively waive or otherwise forego their rest periods contrary to the law.

Due to Claimant' and other employees' job responsibilities and pressures from Defendants, Claimant and the aggrieved employees often were not authorized or permitted to take rest periods. Claimant rarely took rest breaks due to the non-stop demands of Defendants' operations and the understaffing. Defendants had a policy and practice of not paying rest period premiums to aggrieved employees who were unable to take rest periods.

As a result, Claimant may recover civil penalties in an individual capacity, and on behalf of the State of California and the aggrieved employees as provided under Labor Code section 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

<u>Untimely Payment of Wages During Employment</u>
Violation of Labor Code §§ 204, 204b, 210

Defendants violated Labor Code sections 204 and 204b requiring payment of all wages on regularly scheduled paydays with respect to Claimant and other aggrieved employees by failing to pay all wages owed on the regular pay days scheduled each pay period. To the extent that Defendants made or make any retroactive payments to Claimant or other aggrieved employees, such amounts are untimely in violation of these payday statutes.

Because Defendants failed to pay all wages in each pay period in which such wages were earned at the lawful rate for overtime, meal/rest premiums and other forms of remuneration, Defendants violated Labor Code section 204 and/or 204b (for weekly employees), which requires timely payment of wages of wages each regular scheduled pay period. Labor Code section 204 requires payment of "all wages" for non-exempt employees at least twice each calendar month. Labor Code section 204b applies to employees paid on a weekly basis and also requires the payment for all labor within the required pay periods. Labor Code section 210 provides that, "every person who fails to pay the wages of an employee as provided in Section…204…shall be subject to a civil penalty" of $100 for an initial violation and $200 plus 25% of the amount unlawfully withheld for a subsequent violation.

As explained above, Defendants underpaid Claimant and other aggrieved employees regular wages and overtime, and failed to pay meal and rest period premiums. Defendants are separately liable for not paying the full amount owed to Claimant and other aggrieved employees each payday in violation of Labor Code sections 204 and/or 204b.

As a result, Claimant may recover civil penalties in an individual capacity, and on behalf of the State of California and the aggrieved employees as provided under Labor Code section 2699 ($100/$200) per violation per pay period per employee, Labor Code section 210 ($100/$200) per violation per pay period, along with all other civil penalties permitted by law.

<u>Untimely Payment of Wages Upon Separation of Employment</u>
Violation of Labor Code §§ 201, 202, 203

Defendants violated Labor Code sections 201, 202 and 203 requiring timely payment of all wages upon separation and waiting time penalties in lieu thereof with respect to aggrieved employees by failing to pay all wages and premiums owed upon termination of employment.

Labor Code section 201 requires that if an employer fires an employee, the wages must be paid immediately. Labor Code section 202 requires that if an employee quits without providing 72 hours' notice, his or her wages must be paid no later than 72 hours thereafter. Labor Code section 202 states that if an employee provides 72 hours' notice, the final wages are payable upon his or her final day of employment. Labor Code section 203 requires an employer who fails to comply with Labor Code sections 201 or 202 to pay a waiting time penalty for each employee, up to a period of 30 days.

Because Defendants failed to pay all wages owed to the aggrieved employees during their employment and failed to properly pay regular and overtime wages at the lawful respective rates, Defendants failed to timely pay all wages owed upon separation of employment in violation of Labor Code sections 201, 202 and 203.

As a result, Claimant may recover civil penalties in an individual capacity, and on behalf of the State of California and the aggrieved employees as provided under Labor Code § 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

<u>Non-Compliant Wage Statements</u>
Violation of Labor Code §§ 226, 226.3

Defendants violated Labor Code section 226 with respect to Claimant and other aggrieved employees by failing to furnish itemized wage statements each pay period that accurately list all information required by Labor Code section 226(a)(1) through (9).

Labor Code section 226(a) requires an employer to furnish wage statements to employees semimonthly or at the time of each payment of wages, "an accurate itemized statement in writing showing:" (1) gross wages earned, (2) total hours worked, (3) the number of piece rate units earned and applicable piece rate in effect, (4) all deductions, (5) net wages earned, (6) the inclusive dates of the pay period, (7) the name of the employee and last four digits of SSN or an EIN, (8) the name and address of the legal name of the employer, and (9) all applicable hourly rates in effect during the pay period and the number of hours worked at each hourly rate by the employee.[1] An employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of $250 per employee per violation for the initial citation and $1,000 per employee for each violation in a subsequent citation, in addition to other penalties allowed by law.

Throughout the relevant statutory period, as a result of the foregoing violations identified in this notice—unpaid regular and overtime wages and premiums—Defendants violated Labor Code section 226(a)(1) by not listing the correct "gross wages earned," as the employees earned regular wages, overtime, and premiums, but were instead underpaid, resulting in an inaccurate reflection and recording of "gross wages earned" on those wage statements. Defendants also violated Labor Code section 226(a)(5) with respect to "net wages earned" for the same reasons, as the "net wages

[1] *See* generally *Lopez v. Friant & Associates, LLC* (2017) 15 Cal. App. 5th 773, 787-88 ("Consistent with the PAGA statutory framework and the plain language of section 226(e), we hold a Claimant seeking civil penalties under PAGA for a violation of section 226(a) does not have to satisfy the "injury" and "knowing and intentional" requirements of section 226(e)(1)"); *see also See Kastler v. Oh My Green, Inc.* (N.D. Cal., Oct. 25, 2019) Case No. 19-CV-02411-HSG ("Injuries from a failure to provide an accurate pay statement include 'possibility of not being paid overtime, employee confusion over whether they received all wages owed them, difficulty and expense involved in reconstructing pay records, and forcing employees to make mathematical computations to analyze whether the wages paid in fact compensated them for all hours worked") (rejecting *Maldonado* defense for class claims).

earned" are depreciated and underpaid resulting in an inaccurate reflection on the pay stub. Moreover, in violation of Labor Code section 226(a)(9), the hours worked are incorrectly listed on Claimant' and the aggrieved employees' wage statements. For the reasons explained in the paragraph above, employees corresponding *hours* are not listed on their wage statements.

Claimant and other aggrieved employees cannot promptly and easily determine from the wage statement alone the wages paid or earned without reference to other documents or information. Indeed, these wage statement violations are significant because they sowed confusion among Claimant and other aggrieved employees with respect to what amounts were owed and paid, the number of hours worked, and how those amounts were calculated. The wage statements reflect a false statement of earnings and concealed the underlying problems and underpayments throughout the relevant period.

As a result, Claimant may recover civil penalties in an individual capacity, and on behalf of the State of California and the aggrieved employees as provided under Labor Code sections 226.3 ($250/$1,000) and/or 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Failure to Maintain Accurate Records
Violation of Labor Code §§ 1174, 1174.5, 1198; IWC Wage Orders

Because of the violations set forth in this notice, including Defendants' failure to accurately maintain records of pay for all hours worked at the appropriate lawful rates of pay, Defendants violated Labor Code section 1174 and the IWC Wage Orders by failing to maintain accurate payroll records showing all hourly rates in effect and hours worked at those rates, and the wages paid to each employee. As a result, Defendants are liable for a civil penalty of $500 per employee to Claimant and each aggrieved employee pursuant to Labor Code section 1174.5.

Attorneys' Fees and Costs
Labor Code § 2699(g)

Claimant were compelled to retain the services of counsel to file this court action to protect Claimant' own interests, the interests of other aggrieved employees, and the State of California. Claimant has thereby incurred and will continue to incur attorneys' fees and costs, which are recoverable on all PAGA causes of action under Labor Code section 2699(g).

Notice of Demand for Defendants
to Change Policies and Practices

Claimant intend to pursue legal action against Defendants based on the violations set forth in this notice. Defendants are hereby notified that any attempt to resolve this case must be conducted in coordination with Claimant' counsel to protect the interests of Claimant, the aggrieved employees, and the State of California via the LWDA. Any and all settlements releasing liability require Court approval in connection with Claimant and their counsel to fully release liability and resolve the claims alleged in this notice. Claimant will establish that (1) this lawsuit was a catalyst in motivating Defendants to change their policies and practices and provide the relief sought through this action, (2) that the forthcoming lawsuit has merit and is based on undisputed violations for which Defendants will be liable at trial, and (3) that Claimant has hereby notified Defendants of their violations and considers this notice an attempt to resolve the matter. *See Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608 (citing *Graham v. Diamler-Chrysler Corp.* (2004) 34 Cal. 4th 553) (authorizing an award of catalyst attorneys' fees against the defendants).

CONCLUSION

If the LWDA does not pursue enforcement, Claimant will bring representative claims on behalf of the State of California and the aggrieved employees seeking all recoverable civil penalties for violations of the Labor Code and the IWC Wage Orders, along with attorneys' fees, costs, interest, and other appropriate relief.

Thank you for your attention to this matter.

Sincerely,

RICK WALTMAN LAW
A Professional Corporation

Rick A. Waltman