

Jonathan M. Lebe (SBN 284605)
Jon@lebelaw.com
Zachary T. Gershman (SBN 328004)
Zachary@lebelaw.com
Ryan C. Ely (SBN 349318)
Ryan@lebelaw.com
LEBE LAW, APLC
777 S. Alameda Street, Second Floor
Los Angeles, CA 90021
Telephone: (213) 444-1973

Attorneys for Plaintiff Samson Jiwan,
As a Private Attorney General on behalf of the State of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

Samson Jiwan, as a Private Attorney
General on behalf of the State of
California,

Plaintiff,

vs.

Walmart, Inc.; Spark Delivery; and DOES
1-20, inclusive,

Defendants.

Case No. **24CV074391**

**REPRESENTATIVE ACTION COMPLAINT
FOR:**

**VIOLATION OF THE CALIFORNIA LABOR
CODE PRIVATE ATTORNEYS GENERAL
ACT OF 2004 (CAL. LAB. CODE §§ 2698, *ET
SEQ.*)**

1 Plaintiff Samson Jiwan (“Plaintiff”), as a Private Attorney General on behalf of the State of
2 California, hereby alleges as follows:

3 **NATURE OF ACTION AND INTRODUCTORY STATEMENT**

4 1. Plaintiff brings this representative action against Defendants Walmart, Inc.
5 (“Defendant Walmart”), Spark Delivery (“Defendant Spark Delivery”), and DOES 1 through 20,
6 inclusive, (collectively, “Defendants”) pursuant to the Private Attorneys General Act of 2004,
7 California Labor Code §§ 2698, *et seq.*, (“PAGA”) on behalf of himself individually, the State of
8 California as a Private Attorney General, and regarding all other aggrieved employees – defined as
9 all individuals who performed work for Defendants in the state of California who were classified as
10 independent contractors from one (1) year before the date Plaintiff gave notice of these claims to the
11 California Labor & Workforce Development Agency (“LWDA”), plus any applicable tolling, to the
12 date of trial.

13 2. Defendant Walmart is an Arkansas-based, multinational grocery and department store
14 chain with retail locations and conducting business throughout the state of California.

15 3. Defendant Spark Delivery is California-based delivery company and corporate
16 subsidiary of Defendant Walmart, conducting business throughout the state of California.

17 4. Through this action, Plaintiff alleges that Defendants willfully misclassified their
18 workers in violation of *Dynamex Operations West, Inc. v. Superior Court*, (2018) 4 Cal. 5th 903, and
19 California Labor Code section 2775, *et seq.* and have thereby engaged in a systematic pattern of
20 wage and hour violations under the California Labor Code (“Labor Code”).

21 5. Plaintiff is informed and believes, and thereon alleges, that during the relevant time
22 period, Defendants had a consistent policy of violating state wage and hour laws by, among other
23 things:

- 24 (a) Willfully misclassifying Plaintiff and other aggrieved employees as
25 independent contractors;
26 (b) Failing to pay all wages for all hours worked, including minimum and
27 overtime wages;
28

- (c) Failing to authorize or permit rest breaks or provide compensation in lieu thereof;
- (d) Failing to provide meal periods or compensation in lieu thereof;
- (e) Failing to reimburse all business expenses incurred by workers in direct consequence of the discharge of their duties;
- (f) Failing to provide accurate itemized wage statements;
- (g) Failing to pay all wages during employment;
- (h) Failing to pay all wages due upon separation of employment;
- (i) Failing to produce all employment records; and
- (j) Failing to provide workers' compensation coverage and insurance.

6. Plaintiff brings this representative action seeking monetary relief against Defendants on behalf of himself, other aggrieved employees, and the State of California to recover, among other things, penalties, attorneys' fees, costs, and expenses pursuant to the PAGA.

JURISDICTION AND VENUE

7. The monetary relief sought by Plaintiff exceeds the minimal jurisdictional limits of the Superior Court and will be established according to proof at trial.

8. The Superior Court has jurisdiction over this action pursuant to the California Constitution, Article VI, § 10, which grants the Superior Court original jurisdiction in all causes, except those given by statutes to other courts. The statute under which this action is brought does not specify any other basis for jurisdiction.

9. The Superior Court has jurisdiction over all Defendants because, upon information and belief, they are citizens of California, have sufficient minimum contacts in California, or otherwise intentionally avail themselves of the California market so as to render the exercise of jurisdiction over them by the California courts consistent with traditional notions of fair play and substantial justice.

10. Venue is proper in this Court because, upon information and belief, Defendants transact business in this county, aggrieved employees under the PAGA work in this county, and acts and omissions alleged herein took place in this county.

THE PARTIES

11. Plaintiff is a citizen of California and worked for Defendants in California during the relevant time period as alleged herein.

12. Plaintiff is informed and believes, and thereon alleges, that Defendant Walmart is a corporation doing business throughout the state of California and, at all times hereinafter mentioned, an employer as defined in and subject to the Labor Code and Industrial Welfare Commission (“IWC”) Wage Orders, whose employees are and were engaged throughout this county and the State of California.

13. Plaintiff is informed and believes, and thereon alleges, that Defendant Spark Delivery is a corporation doing business throughout the state of California and, at all times hereinafter mentioned, an employer as defined in and subject to the Labor Code and Industrial Welfare Commission (“IWC”) Wage Orders, whose employees are and were engaged throughout this county and the State of California.

14. Plaintiff is unaware of the true names or capacities of the defendants sued herein under the fictitious names DOES 1 through 20 but will seek leave of this Court to amend this Complaint and serve such fictitiously named defendants once their names and capacities become known.

15. Plaintiff is informed and believes, and thereon alleges, that DOES 1 through 20 are or were the partners, agents, owners, shareholders, managers, or employees of Defendants at all relevant times.

16. Plaintiff is informed and believes, and thereon alleges, that each defendant acted in all respects pertinent to this action as the agent of the other defendant, carried out a joint scheme, business plan, or policy in all respects pertinent hereto, and the acts of each defendant are legally attributable to the other defendant. Furthermore, Defendants in all respects acted as the employers and/or joint employers of Plaintiff and other aggrieved employees.

17. Plaintiff is informed and believes, and thereon alleges, that each and all of the acts and omissions alleged herein were performed by, or are attributable to, Defendant Walmart, Defendant Spark Delivery, and/or DOES 1 through 20, acting as the agent or alter ego for the other,

1 with legal authority to act on the other's behalf. The acts of any and all Defendants were in
2 accordance with, and represent, the official policy of Defendants.

3 18. At all relevant times, Defendants, and each of them, acted within the scope of such
4 agency or employment, or ratified each and every act or omission complained of herein. At all
5 relevant times, Defendants, and each of them, aided and abetted the acts and omissions of each and
6 all the other Defendants in proximately causing the damages herein alleged.

7 19. Plaintiff is informed and believes, and thereon alleges, that each of said Defendants
8 is in some manner intentionally, negligently, or otherwise responsible for the acts, omissions,
9 occurrences, and transactions alleged herein.

10 **GENERAL ALLEGATIONS**

11 20. Defendants are a multinational grocery and department retail chain and grocery
12 delivery company that has conducted business in the state of California during the relevant time
13 period.

14 21. Defendants provide its customers with grocery and other delivery services performed
15 by Plaintiff and other aggrieved employees (referred to by Defendants as its "Spark Drivers") through
16 its "Spark Driver" mobile phone application (the "Spark Driver app"). Specifically, Spark Drivers
17 pick up orders from Defendants' retail chains, load these orders into their personal vehicles, and
18 deliver these order directly to Defendants' customers.

19 22. Defendants employed Plaintiff during the relevant time period.

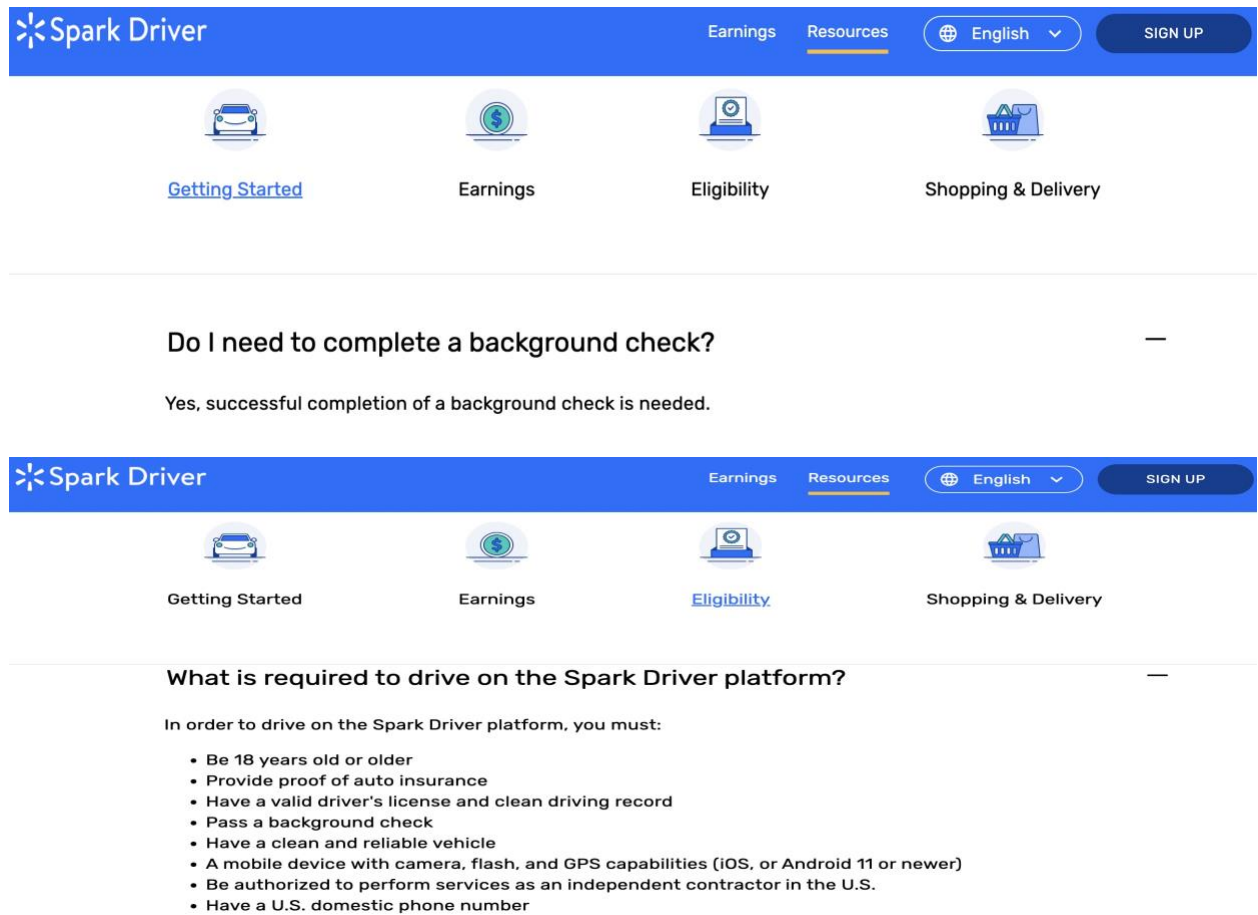
20 23. Plaintiff has worked for Defendants as a Spark Driver since approximately October
21 of 2022.

22 24. During the relevant time period, Plaintiff and other Spark Drivers were classified by
23 Defendants as independent contractors.

24 25. Despite classifying Plaintiff and Spark Drivers as independent contractors,
25 Defendants treat Plaintiff and Spark Drivers as employees.

26 26. Plaintiff and other Spark Drivers are not free from the control and direction of
27 Defendants in connection with the performance of their duties. Defendants require Spark Driver
28 applicants to undergo background checks and will not hire applicants unless they pass a background

check, possess a smartphone and vehicle, and have automobile insurance and a clean driving record, amongst other requirements:



27. If hired, Defendants control every aspect of how its customers are charged for services and how Spark Drivers are compensated and receive incentives for completing deliveries. Indeed, Defendants set the rates for each delivery and control how Spark Drivers receive delivery orders:

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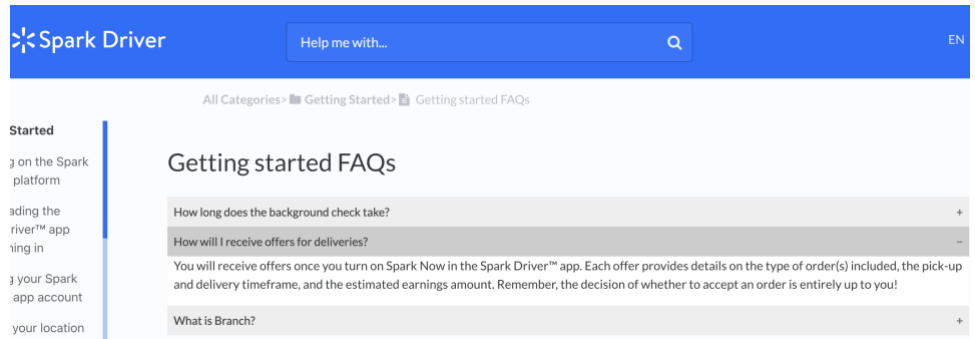
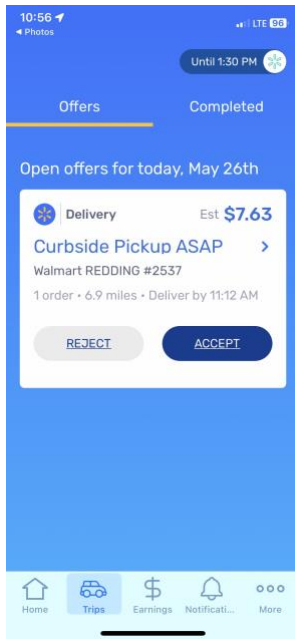
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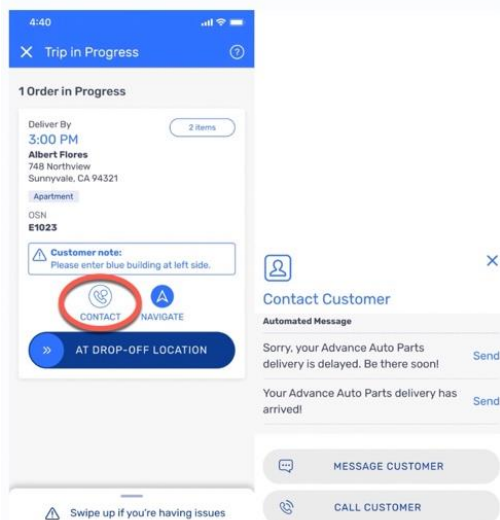
28. Defendants also control the means through which Spark Drivers complete deliveries, requiring Spark Drivers to download the Spark Driver mobile phone application (“Spark Driver app”) on their personal mobile phones.

29. Through the Spark Driver app, Defendants control how Spark Drivers interact with Defendants’ customers and closely monitor Spark Drivers’ location while they are performing deliveries:

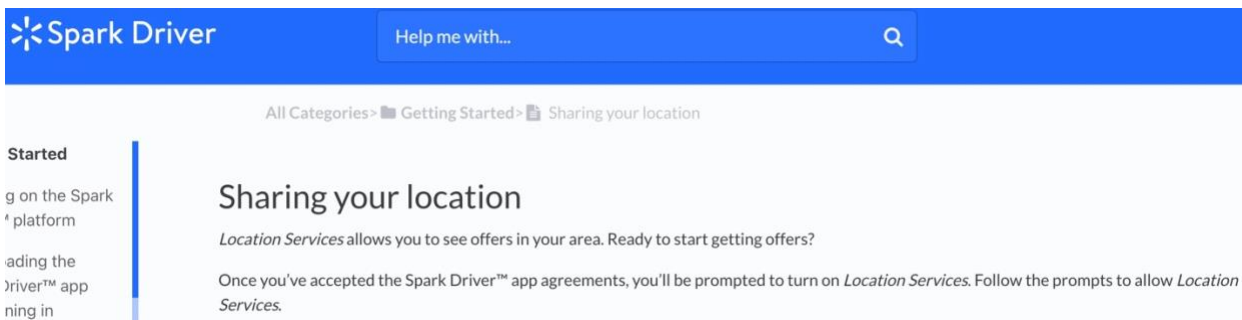
Communicating with customers

It's important not to call or message while you're driving.

If you'd like to call or message a customer during a delivery, you can contact the customer by pressing the **Contact** button. From the *Contact Customer* screen, you can choose to send an automated message, send a text message, or call the customer.



If you would like to contact a customer while completing a shopping order, some zones have an in-store chat feature enabled in the app. This is especially helpful to speak to customers about substitutions. If this feature is enabled in your zone, the app will display this option for you.



30. The work that Spark Drivers perform is within the usual course of Defendants’ business. Spark Drivers, including Plaintiff, provided the service that Defendants sell to their customers throughout California.

31. Defendants are not merely a platform or uninterested bystander between Spark Drivers and Defendants’ customers. Rather, as described above, Defendants perform background checks on its Spark Drivers before allowing them to connect with customers, require them to have a clean driving record, set their pay structure, and track their location.

32. Spark Drivers lack business autonomy. Spark Drivers are each not engaged in an independently-established business.

33. By working for Defendants, Spark Drivers have not independently made the decision to go into business for themselves. Instead, Defendants have unilaterally determined that Plaintiff and Spark Drivers are independent contractors while precluding them from taking the usual steps towards promoting and establishing an independent business.

34. Defendants control the terms of employment. Defendants maintain uniform policies and terms of service which apply to all Spark Drivers

35. Plaintiff is informed and believes, and thereon alleges, that at all times mentioned herein, Defendants were advised by skilled lawyers, employees, and other professionals who were knowledgeable about California wage and hour law, employment and personnel practices, and the requirements of California. Defendants misclassified their workers in violation of *Dynamex Operations West, Inc. v. Superior Court*, (2018) 4 Cal. 5th 903, and Labor Code section 2775, *et seq.*

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GENERAL ALLEGATIONS OF WAGE AND HOUR VIOLATIONS

36. Through this action, Plaintiff alleges that Defendants have engaged in a systematic pattern of wage and hour violations under the California Labor Code and IWC Wage Orders.

37. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or should have known that Plaintiff other aggrieved employees were entitled to receive wages for all time worked (including minimum and overtime wages) and that they were not receiving all wages earned for work that was required to be performed. In violation of the Labor Code and IWC Wage Orders, Plaintiff and aggrieved employees were not paid wages (including minimum and overtime wages) for all hours worked when Defendants failed to pay or underpaid Plaintiff and aggrieved employees for all hours worked, including time spent on standby waiting for orders to be prepared, loading orders into their personal vehicles, compensable travel time incurred when Plaintiff and aggrieved employees traveled from one retail location to another in the same day, and for all non-productive time Plaintiff and aggrieved employees expended while working for Defendants. During the relevant time period, Defendants paid on a per job basis and therefore did not pay the minimum wage for all non-productive time. *Armenta v. Osmose, Inc.* (2005) 135 Cal. App. 4th 314, 325.

38. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or should have known that Plaintiff and aggrieved employees were entitled to receive all rest breaks or payment of one (1) additional hour of pay at Plaintiff and aggrieved employees' regular rate of pay when a rest break was missed and were entitled to payment of wages for time spent when rest breaks were taken. *Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal. App. 5th 98, 111. In violation of the Labor Code and IWC Wage Orders, Plaintiff and aggrieved employees did not receive paid rest breaks or payment of one (1) additional hour of pay at Plaintiff and aggrieved employees' regular rate of pay when a rest break was missed.

39. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or should have known that Plaintiff and aggrieved employees were entitled to receive all meal periods or payment of one (1) additional hour of pay at Plaintiff's and aggrieved employees' regular rate of pay when they did not receive a timely, uninterrupted meal period. In violation of the Labor Code and IWC Wage Orders, Plaintiff and aggrieved employees did not receive all meal periods or

1 payment of one (1) additional hour of pay at Plaintiff's and aggrieved employees' regular rate of pay
2 when they did not receive a timely, uninterrupted meal period. *Ferra v. Loews Hollywood Hotel,*
3 *LLC* (2021) 11 Cal. 5th 858.

4 40. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
5 should have known that Plaintiff and aggrieved employees were entitled to reimbursement for
6 necessary expenditures incurred in connection with the performance and execution of their job duties.
7 In violation of the California Labor Code, Plaintiff and aggrieved employees did not receive adequate
8 reimbursement for necessary business expenses, including but not limited to reimbursement for use
9 of their personal cell phones and personal automobiles or other transportation expenses. During the
10 relevant time period, Defendants required Plaintiff and aggrieved employees to use and maintain
11 their personal automobiles to make deliveries, including paying for tags, fees, fuel, mileage, and
12 maintenance, all without reimbursement. In addition, Defendants required Plaintiff and other
13 aggrieved employees to use their own personal cellular phones to use the Spark Driver app to select
14 delivery jobs and communicate with Defendants and Defendants' customers regarding orders and
15 deliveries. Thus, in violation of the Labor Code, Plaintiff and aggrieved employees did not receive
16 reimbursements for all business expenses.

17 41. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
18 should have known that Plaintiff and aggrieved employees were entitled to receive complete and
19 accurate wage statements in accordance with California law. In violation of the California Labor
20 Code, Plaintiff and aggrieved employees were not furnished with complete and accurate wage
21 statements showing their total hours worked, number of hours worked at each hourly rate, and gross
22 and net wages, among other things.

23 42. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
24 should have known that Plaintiff and aggrieved employees were entitled to timely payment of wages
25 during their employment. In violation of the Labor Code, Plaintiff and aggrieved employees did not
26 receive payment of all wages within permissible time periods.

27 43. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
28 should have known that Plaintiff and aggrieved employees who separated from Defendants were

1 entitled to timely payment of wages upon separation of employment. In violation of the California
2 Labor Code, Plaintiff and aggrieved employees did not receive payment of all wages including, but
3 not limited to, unpaid minimum and overtime wages, meal periods premiums, and rest break
4 premiums within permissible time periods.

5 44. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
6 should have known that Plaintiff and aggrieved employees were entitled to their personal
7 employment records with Defendants upon request. In violation of the California Labor Code,
8 Plaintiff and other aggrieved employees did not receive their personnel file and employment records,
9 including time records, from Defendants within the requisite thirty (30) days of requesting such
10 records.

11 45. Plaintiff is informed and believes, and thereon alleges, that Defendants knew or
12 should have known that Plaintiff and aggrieved employees were entitled to worker's compensation
13 insurance. In violation of the California Labor Code, Plaintiff and aggrieved employees were not
14 provided with worker's compensation insurance.

15 **FIRST CAUSE OF ACTION**

16 **ENFORCEMENT OF LABOR CODE § 2698 ET SEQ. ("PAGA")**

17 46. Plaintiff hereby re-alleges and incorporates by reference all paragraphs above as
18 though fully set forth herein.

19 47. Pursuant to Labor Code § 2699(a), any provision of the Labor Code that provides for
20 a civil penalty to be assessed and collected by the Labor and Workforce Development Agency
21 ("LWDA") or any of its departments, divisions, commissions, boards, agencies or employees for
22 violation of the code may, as an alternative, be recovered through a civil action brought by an
23 aggrieved employee on behalf of themselves and a private attorney general on behalf of the State of
24 California, for both his or her own claims and the claims of other current or former employees
25 pursuant to the procedures specified in Labor Code § 2699.3.

26 48. For all provisions of the Labor Code except those for which a civil penalty is
27 specifically provided, Labor Code § 2699(f) imposes upon Defendants a penalty of one hundred
28 dollars (\$100.00) for each aggrieved employee per pay period for the initial violations and two

1 hundred dollars (\$200.00) for each aggrieved employee per pay period for each subsequent pay
2 period in which Defendants violated these provisions of the Labor Code.

3 49. Defendants' conduct with respect to Plaintiff and other aggrieved employees violates
4 numerous Labor Code sections including, but not limited to, the following:

- 5 (a) Violation of Labor Code § 226.8 for willfully misclassifying Plaintiff and other
6 aggrieved employees as independent contractors as herein alleged;
- 7 (b) Violation of Labor Code §§ 201-204, 210, 218, 256, 510, 1194, 1194.2, 1197,
8 1197.1, 1198, 1199(c), 2699, and the IWC Wage Orders for failure to timely pay
9 all earned wages (including minimum and overtime wages) owed to Plaintiff and
10 other aggrieved employees during employment and upon separation of
11 employment as herein alleged;
- 12 (c) Violation of Labor Code §§ 226.7, 512, 1198 and IWC Wage Orders for failure
13 to provide meal periods and rest breaks to Plaintiff and other aggrieved employees
14 and failure to pay premium wages for missed meal periods and rest breaks as
15 herein alleged;
- 16 (d) Violation of Labor Code §§ 1174 and 1174.5 for failure to maintain accurate and
17 complete records showing the hours worked daily by Plaintiff and other aggrieved
18 employees as herein alleged;
- 19 (e) Violation of Labor Code §§ 2802 and 2804 and IWC Wage Orders for failure to
20 reimburse Plaintiff and other aggrieved employees for all reasonable and
21 necessary business expenses as herein alleged;
- 22 (f) Violation of Labor Code § 226 for failure to provide accurate itemized wage
23 statements to Plaintiff and other aggrieved employees as herein alleged;
- 24 (g) Violation of Labor Code §§ 226 and 1198.5 and IWC Wage Order for failure to
25 produce all employment records;
- 26 (h) Violation of Labor Code §§ 3700, *et seq.*, for failing to secure worker's
27 compensation for Plaintiff and other aggrieved employees as herein alleged.
28

50. Plaintiff is an “aggrieved employee” because he was employed by the alleged violators and had one or more of the alleged violations committed against him and, therefore, is properly suited to represent the interests of all other aggrieved employees.

51. On December 6, 2023, Plaintiff submitted notice to the LWDA and Defendants. To date, the LWDA has not provided notice of its intent to investigate. Plaintiff has exhausted the procedural requirements under Labor Code § 2699.3 as to Defendants and is therefore able to pursue a claim for penalties on behalf of himself and the State of California regarding the claims of other aggrieved employees as a Private Attorney General under the PAGA.

52. Pursuant to Labor Code §§ 2699(a), 2699.3 and 2699.5, Plaintiff is entitled to recover civil penalties for violations of the Labor Code sections cited above.

53. For bringing this action, Plaintiff is entitled to attorneys' fees and costs incurred herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and as a Private Attorney General on behalf of the State of California and as a representative for all aggrieved employees, prays for judgment against Defendants as follows:

1. For civil penalties against Defendants on behalf of all aggrieved employees;

2. For reasonable attorneys' fees and costs of suit to the extent permitted by law, including pursuant to California Labor Code §§ 2699(g) and California Code of Civil Procedure § 1021.5; and

3. For such other relief as the Court deems just and proper.

Dated: May 6, 2024

LEBE LAW, APLC

By:

Jonathan M. Lebe
Zachary T. Gershman
Ryan C. Ely

Attorneys for Plaintiff Samson Jiwan, as a Private
Attorney General on Behalf of the State of California