COHELAN KHOURY & SINGER
Michael D. Singer (SBN 115301)
msinger@ckslaw.com
Maggie K. Realin (SBN 263639)
mrealin@ckslaw.com
605 C Street, Suite 200
San Diego, CA 92101
Telephone: (619) 595-3001/Facsimile: (619) 595-3000

D.LAW, INC.
Emil Davtyan (SBN 299363)
emil@d.law
400 N. Brand Blvd., 7th Floor
Glendale, CA 91203
Telephone: (818) 875-2008/Facsimile: (818) 722-3974

MARA LAW FIRM, PC
David Mara (SBN 230498)
dmara@maralawfirm.com
2650 Camino Del Rio North, Suite 302
San Diego, CA 92108
Telephone: (619) 234-2833/Facsimile: (619) 234-4048

Attorneys for Plaintiff Angel Cuellar

Electronically Filed
Superior Court of California
County of San Joaquin
2024-09-16 12:54:44
Clerk: Cristina Arreola

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN JOAQUIN

ANGEL CUELLAR, on behalf of himself and all others similarly situated,

Plaintiff,

v.

NEW BERN TRANSPORT CORPORATION, a Delaware Corporation; PEPSI-COLA SALES AND DISTRIBUTION, INC., a Delaware Corporation; PEPSICO, INC., a North Carolina Corporation; and Does 1-10, Inclusive,

Defendants.

Case No. STK-CV-UOE-2024-0008803

FIRST AMENDED CLASS AND REPRESENTATIVE ACTION COMPLAINT FOR:

1) **Failure to Pay Minimum and Regular Wages;**
2) **Failure to Pay Sick Leave at Correct Rate;**
3) **Failure to Authorize and Permit Rest Periods;**
4) **Failure to Provide Compliant Meal Periods;**
5) **Failure to Reimburse Business Expenses;**
6) **Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions;**
7) **Failure to Pay All Wages Due at Termination of Employment; and**
8) **Violation of Unfair Competition Law**

9) Violation of Private Attorneys General Act ("PAGA")

DEMAND FOR JURY TRIAL

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605 C Street, Suite 200
San Diego, CA 92101

Plaintiff ANGEL CUELLAR, on behalf of himself and all other similarly-situated employees, alleges:

NATURE OF CLAIM

1. ANGEL CUELLAR ("Plaintiff") brings this action on behalf of himself and a proposed Class of current and former non-exempt, hourly-paid Drivers of NEW BERN TRANSPORT CORPORATION, a Delaware Corporation; PEPSI-COLA SALES AND DISTRIBUTION, INC., a Delaware Corporation; PEPSICO, INC., a North Carolina Corporation; and DOES 1 through 10, Inclusive ("Defendants") ("Class Members") from the date four years prior to filing this Complaint through the date of trial ("Class Period") for unlawful employment policies and/or practices that denied, and continue to deny, proposed Class Members the wages and benefits to which they are lawfully entitled.

2. Plaintiff, on behalf of himself and other Class Members, brings this action pursuant to California Code of Civil Procedure section 1021.5; California Labor Code sections 201, 202, 203, 218, 218.5, 218.6, 226, 226.7, 246, 512, 516, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, and 2802; the applicable Industrial Welfare Commission ("IWC") Wage Order(s); Business and Professions Code sections 17200, *et seq*., 17203, and 17204, and the Private Attorneys General Act of 2004 (Labor Code §§ 2698, *et seq*.) seeking unpaid wages, liquidated damages, penalties, equitable relief, prejudgment interest, reasonable attorneys' fees and costs, and any other relief this Court deems proper.

PARTIES

3. Plaintiff ANGEL CUELLAR is a resident of California. Plaintiff worked as an hourly, non-exempt salesperson for Defendants from approximately 2021-2022 and as a truck driver for Defendants from approximately 2022 through approximately August, 2023, making deliveries throughout the Stockton, California area.

4. Plaintiff is informed, believes, and thereon alleges that Defendant NEW BERN TRANSPORT CORPORATION is a corporation registered in Delaware and doing business throughout the State of California. NEW BERN TRANSPORT CORPORATION operates as a subsidiary of Defendant PEPSICO., INC., one of the world's leading food a beverage

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company.[1] Defendant PEPSI-COLA SALES AND DISTRIBUTION, INC. is a subsidiary of PEPSICO., INC. All Defendants do substantial business throughout California.

5. Does 1 through 10, inclusive, are persons or entities whose true names and identities are now unknown to Plaintiff, and who are sued by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when known. Plaintiff is informed and believes each Doe defendant is the agent, representative, or parent or subsidiary corporation of Defendants, is responsible in some manner for the occurrences and injuries alleged, and that harm suffered by Plaintiff and members of the Class was proximately caused by them in addition to Defendants NEW BERN TRANSPORT CORPORATION, PEPSI-COLA SALES AND DISTRIBUTION, INC., and PEPSICO, INC.

6. Plaintiff is informed, believes, and alleges each Defendant, including each Doe defendant, acted in concert with each and every other Defendant, intended to and did participate in the practices alleged, and was a proximate cause of damage and injury to Plaintiff and Class Members.

7. At all relevant times each Defendant was the agent or employee of each of the other Defendants and was acting within the course and scope of such agency or employment.

JURISDICTION AND VENUE

8. Venue as to each Defendant is proper in this judicial district, pursuant to Code of Civil Procedure, section 395. Defendants conduct business in San Joaquim County, California and each Defendant is within the jurisdiction of this Court for service of process purposes. The unlawful acts alleged have a direct effect on Plaintiff and Class Members within the State of California and San Joaquim County. Defendants employed Plaintiff and numerous Class Members within San Joaquim County. There is no federal question at issue, as the issues are based solely on California statutes and law, including the Labor Code, the applicable Industrial Wage Order, Code of Civil Procedure, Civil Code, and Business and Professions Code.

9. Business and Professions Code section 17203 provides that any person who engages in unfair competition may be enjoined in any court of competent jurisdiction. Business

[1] https://contact.pepsico.com/pepsi/about-us; last visited on June 27, 2024.

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and Professions Code section 17204 provides that any person, acting on his own behalf, may bring an action in a court of competent jurisdiction.

10. No federal question is raised and the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), does not apply, or in the alternative, local case or controversy exceptions apply and prohibit removal of this action. Based on his rate of pay, Plaintiff's individual claims do not meet the amount in controversy to implicate traditional diversity jurisdiction.

GENERAL ALLEGATIONS

11. Plaintiff worked for Defendants from May of 2012 until he was terminated in August 2023. Plaintiff worked in Sales until approximately 2021-2022 and then as a Driver delivering Pepsi products within Stockton, California, until approximately August 2023.

12. As a Driver, Plaintiff was required to use a timeclock box on the wall in the facility he reported to every day to record his work hours. At least once a week, Plaintiff had to wait in line to be able to clock in, which could take minutes. When Plaintiff arrived at the facility, he had to wait 5-10 minutes for the front door to be opened if it was locked. If this wait made him late to clock in, Defendants did not pay for the time he was waiting to be let inside. Plaintiff estimates this occurred at least once a week. Additionally, Plaintiff often spent time outside his work hours speaking with supervisors or co-workers. If Plaintiff was in the middle of a conversation when his shift ended, he was told to clock out so he did not clock out late, and then continue the conversation. Plaintiff estimates this occurred at least once a week and that the conversations lasted 5-10 minutes. Furthermore, Plaintiff was required to use his personal cell phone while off the clock for work-related activities. Plaintiff was also required to respond to calls/messages during unpaid meal periods. Defendants pressured Plaintiff and other drivers to complete the assigned deliveries as quickly as possible and called Plaintiff on a daily basis asking him why he was still at a certain location, and how soon he would be at the next location. Defendants were tracking Plaintiff and other drivers through an electronic application, and the drivers' trucks also contained GPS devices. Plaintiff received messages on an employee group chat every day for at least 5 minutes per day. Plaintiff was not compensated for any of this off-the-clock time.

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13. As a driver, Plaintiff drove 8 to 10 hours per day on average. He worked 10- to 12-hour shifts approximately 3-4 times per week. He was often not provided rest or meal periods on any of shifts, often eating while driving. He was told he could not leave his truck and he had to be within eyesight of his truck. In addition, for most of Plaintiff's shifts, it was impossible for Plaintiff to find a safe place to park his truck in order to have an uninterrupted meal break and/or rest break. There were typically no parking lots for trucks in the areas where Plaintiff and other drivers made their deliveries. When making deliveries, Plaintiff was often parked on a street where he could not remain for a meal and/or rest break. Defendants reminded Plaintiff and other drivers of their policy that a failure to record a meal break could result in discipline up and including termination of employment. In addition, very often, Plaintiff had to forego meal breaks not to get behind with his deliveries. Thus, whether or not he was able to take a meal break, Plaintiff was required to record it in his time record. Plaintiff used an application on his cell phone to record his meal breaks. Defendants deducted wages from Plaintiff and members of the Class for time spent working during meal periods, even though for most of the time, Plaintiff was not able to take a meal break, and/or had to answer managers' while clocked out for a meal break. Plaintiff was not paid any meal or rest break premiums for missed, late, or short meal breaks or missed rest breaks, nor wages for off-the-clock time worked while Plaintiff was clocked out for a meal break.

14. Defendants failed to provide Plaintiff and Class Members all required wages for time worked or subject to Defendants' control off-the-clock, including while waiting at a security gate to be let into the work premises and pre-shift work and pre-trip inspection activities, as well as post-shift work activities. At times, Defendants failed to provide Plaintiff and Class Members required wages for time spent being available to and perform work-related duties off-the-clock during meal periods.

15. Defendants failed to reimburse Plaintiff and Class Members for reasonable and necessary business-related expenses. For instance, Defendants required Plaintiff and Class Members to use personal cell phones for work-related purposes but did not reimburse work-related cell phone expenses. Even though Defendants provided Plaintiff and other drivers with

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company phones, it was more convenient for Defendants to call or messaged Plaintiff on his personal cellphone and they frequently did so. Defendants also required that Plaintiff and Class Members wear clothing with Pepsi logo, such as shirts, vests and/or pants, but did not reimburse them for the costs related to maintain these items.

16. Defendants failed to pay Plaintiff and Class Members sick pay at the correct rate. Plaintiff and Class Members received non-discretionary compensation such as “Recognition/Service Awards” and/or other remuneration, but those additional amounts were not included when calculating sick pay wages. For example, Plaintiff’s January 2023 wage statement lists sick pay hours at a lower rate, even though the regular rate in the same pay period is higher. Plaintiff and Class Members were paid sick pay at the base hourly pay rate instead of the regular rate of pay.

17. Defendants failed to provide accurate itemized wage statements to Plaintiff and members of the Class since they did not include, among other things, the total number of hours worked, and the meal and rest break premium wages, as well as sick pay wages calculated at a correct regular rate of pay. Because Defendants failed to compensate Plaintiff and members of the Class for all hours worked, and failed to pay premium wages for non-compliant meal and rest breaks, the wage statements provided by Defendants to Plaintiff and members of the Class were incomplete and inaccurate and fail to comply with the requirements of Labor Code section 226(a).

18. Defendants failed to pay Plaintiff and members of the Class all wages due upon separation, in violation of California state wage and hour laws. Because Defendants failed to pay all wages during employment, final wages paid to Plaintiff and members of the Class were underpaid, as they did not include these amounts.

19. Defendants’ failure to: pay wages for time worked off the clock including during meal periods; provide meal and rest breaks, use the regular rate of pay to pay sick pay; reimburse necessary business expenses; provide accurate, itemized wage statements; and timely provide payment of wages to Plaintiff and members of the Class upon separation are the result of Defendants’ centrally devised and uniformly implemented policies and/or practices.

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20. In addition to other remedies, Plaintiff, on behalf of himself and members of the Class, seeks declaratory and injunctive relief, restitution, and disgorgement of all benefits obtained by Defendants as a result of violations alleged. Business and Professions Code §§ 17200, *et seq*.

<u>EXHAUSTION OF PAGA NOTICE REQUIREMENT</u>

21. Plaintiff exhausted the notice requirement by filing a complaint with the Labor and Workforce Development Agency ("LWDA") in his letter dated July 10, 2024, as required under the California Labor Code Private Attorneys General Act ("PAGA"). A true and correct copy of Plaintiff's letter is attached hereto as **Exhibit A** and is incorporated herein by reference. The LWDA did not assume jurisdiction over the applicable penalty claims alleged; therefore, Plaintiff has exhausted the procedural requirement under the PAGA to pursue any and all penalty claims as provided under the PAGA.

<u>CLASS ACTION ALLEGATIONS</u>

22. Plaintiff seeks to represent and certify a Class of:

> **<u>Class</u>**
> All California-based, non-exempt, hourly-paid Drivers, employed by Defendants at any time during the four years before the filing of this Complaint through the date of trial.

23. Plaintiff seeks to certify a subclass of employees defined as:

> **<u>Unpaid Wages Subclass</u>**
> All members of the Class who worked at least one shift.

24. Plaintiff seeks to certify a subclass of employees defined as:

> **<u>Sick Leave Subclass</u>**
> All members of the Class who were not paid sick leave pay at their regular rate of pay.

25. Plaintiff seeks to certify a subclass of employees defined as:

> **<u>Rest Period Subclass</u>**
> All members of the Class who worked at least one shift longer than three and a half hours in a workday.

26. Plaintiff seeks to certify a subclass of employees defined as:

> **<u>First Meal Period Subclass</u>**
> All members of the Class who worked at least one shift longer than five hours

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in a workday.

27. Plaintiff seeks to certify a subclass of employees defined as:

Second Meal Period Subclass
All members of the Class who worked at least one shift longer than ten hours in a workday.

28. Plaintiff seeks to certify a subclass of employees defined as:

Expense Reimbursement Subclass
All members of the Class who incurred business-related expenses, including but not limited to cell phone and uniform maintenance expenses.

29. Plaintiff seeks to certify a subclass of employees defined as:

Wage Statement Subclass
All members of the Class who received one or more itemized wage statements during the one year preceding the filing of this Complaint.

30. Plaintiff seeks to certify a subclass of employees defined as:

Waiting Time Subclass
All members of the Class whose employment ended any time during the three years preceding the filing of this Complaint.

31. Plaintiff seeks to certify a subclass of employees defined as:

UCL Subclass
All Class and Subclass Members who were subject to Defendants' unlawful or unfair business acts or practices.

32. Plaintiff reserves the right to amend or modify the Class or Subclass descriptions, including by division into further subclasses or limitation to particular issues. California Rule of Court 3.765(b).

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

34. **Ascertainable Class**: The proposed Class and Subclasses are ascertainable because they can be identified and located using Defendants' payroll and personnel records.

35. **Numerosity**: The potential members of the Class and Subclasses as defined are so numerous that joinder of all members would be unfeasible and impractical. The disposition of their claims through this class action will benefit the parties and this Court. The number of members of the Class and Subclasses is unknown to Plaintiff, but is estimated to be in excess of

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100 individuals. The number and identity of members can be readily ascertained using Defendants' records.

36. **Typicality**: The claims of Plaintiff are typical of the claims of all members of the Class and Subclasses because all members of the Class and Subclasses sustained similar injuries and damages caused by Defendants' common course of conduct in violation of law.

37. **Adequacy**: Plaintiff is an adequate representative of the Class and Subclasses, will fairly protect the interests of the Class and Subclass Members and has no interests antagonistic to them, and will vigorously pursue this suit. Plaintiff's attorneys are competent, skilled, and experienced in litigating large employment law class actions.

38. **Superiority**: A class action is superior to other available means for the fair and efficient adjudication of this controversy. Individual joinder of all Class Members is not practicable, and questions of law and fact common to the Class predominate over questions affecting only individual Class Members. A class action will allow those similarly situated to litigate their claims in the most efficient and economical manner for the parties and the judicial system. Plaintiff is unaware of any difficulties likely to be encountered in the management of this action that precludes its maintenance as a class action.

39. The predominating common questions of law and fact include:

a. Whether Defendants have a policy and practice of failing to pay some wages for work performed, or time under Defendants' control, outside of time clocked in;

b. Whether Defendants have a policy or practice of failing to pay sick pay at the regular rate and instead pays it at the base hourly rate;

c. Whether Defendants have a policy or practice of failing to provide compliant rest periods;

d. Whether Defendants have a policy or practice of failing to provide compliant meal periods;

e. Whether Defendants have a policy or practice of failing to reimburse for some necessary business-related expenses, including cell phone and uniform

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maintenance expenses;

f. Whether Defendants have a policy or practice of failing to provide accurate itemized wage statements;

g. Whether Waiting Time Subclass Members are entitled to waiting time penalties under Section 203;

h. Whether Defendants violated Sections 17200, *et seq.* of the Business and Professions Code; and

i. Whether the Class and Subclasses are entitled to equitable relief pursuant to Business and Professions Code, sections 17200, *et seq.*

CAUSES OF ACTION

FIRST CAUSE OF ACTION

Failure to Pay Minimum and Regular Wages
(By Plaintiff and each Member of the Unpaid Wages Subclass)

40. Plaintiff incorporates the preceding paragraphs of this Complaint.

41. Labor Code section 1194, subdivision (a) provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage… is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage… including interest thereon, reasonable attorney's fees, and costs of suit."

42. Pursuant to Labor Code section 1198, it is unlawful to employ persons for longer than the hours set by the Industrial Welfare Commission or under conditions prohibited by the IWC Wage Order(s).

43. Labor Code section 218 provides, in pertinent part, that "[n]othing in this article [California Labor Code, Division 2, Part 1, Chapter 1 – Payment of Wages, Article 1] shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due to them under this article."

44. At all relevant times, California Labor Code sections 1194, 1197, and 1197.1 provide for payment of not less than a minimum wage to employees, and the payment of a lesser wage than the minimum so fixed is unlawful.

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45. Pursuant to the IWC Wage Order(s), Defendants are required to pay Class Members for all hours worked, meaning the time during which an employee is subject to the control of an employer, including all the time the employee is suffered or permitted to work, whether or not required to do so.

46. By failing to pay wages to Plaintiff and the members of the Unpaid Wages Subclass for time they spent under Defendants' control but not clocked in, including pre-shift time, post-shift time, and during meal periods, Defendants violated Labor Code section 1194.

47. Plaintiff and the members of the Unpaid Wages Subclass are entitled to recover these wages, with liquidated damages, and interest, attorneys' fees, and costs. *See* Lab. Code §§ 1194.2, 1194, 218.5, 218.6.

SECOND CAUSE OF ACTION
Failure to Accurately Record and Pay Sick Leave
(By Plaintiff and each Member of the Sick Leave Subclass)

48. Plaintiff incorporates the preceding paragraphs of this Complaint.

49. Labor Code section 246(i) provides that: "an employer shall provide an employee with written notice that sets forth the amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick leave, for use on either the employee's itemized wage statement described in section 226 or in a separate writing provided on the designated pay date with the employee's payment of wages. If an employer provides unlimited paid sick leave or unlimited paid time off to an employee, the employer may satisfy this section by indicating on the notice or the employee's itemized wage statement 'unlimited.' The penalties described in this article for a violation of this subdivision shall be in lieu of the penalties for a violation of section 226."

50. Labor Code section 246 provides that the employer shall calculate paid sick leave by using one of two calculations: (1) "Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek;" or (2) "Paid sick tome for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total

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hours worked in the full pay periods of the prior 90 days of employment."

51. Whenever Defendants paid Plaintiff and the members of the Sick Leave Subclass sick time pursuant to Labor Code section 246, Defendants did so at the incorrect rate of pay. Defendants paid Plaintiff and the members of the Sick Leave Subclass at the base hourly rate of pay, as opposed to the regular rate of pay, which would take into account non-discretionary awards and/or other remuneration, or by dividing the employees' total wages, not including overtime premium pay, by the employees' total hours worked in the full pay periods of the prior 90 days of employment, as required by Labor Code section 246. This resulted in the employees being underpaid for sick time, and resulted in violations of California Labor Code sections 201, 202, and 203, and other derivative Labor Code violations, because Defendants did not pay, or timely pay, Plaintiff and the members of the Sick Leave Subclass all wages owed to them during their employment and at the end of their employment.

52. As a result of the unlawful acts of Defendants, Plaintiff and the members of the Sick Leave Subclass have been deprived of sick pay in amounts to be determined at trial, and are entitled to the recovery of such amounts, plus interests and penalties thereon, attorneys' fees and costs.

THIRD CAUSE OF ACTION
Failure to Authorize and Permit Rest Periods
(By Plaintiff and each Member of the Rest Period Subclass)

53. Plaintiff incorporates the preceding paragraphs of this Complaint.

54. Labor Code section 226.7(b) provides that: "An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health."

55. Labor Code section 516 provides that the Industrial Welfare Commission "may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers."

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56. Section 12(A) of the IWC Wage Order(s) states: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages."

57. Section 12(B) of the IWC Wage Order(s) states: "If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided."

58. The members of the Rest Period Subclass worked over 3.5 hours per shift. In some cases, the members of the Rest Period Subclass worked over ten (10) hours per shift.

59. The members of the Rest Period Subclass were entitled to a rest period of not less than ten (10) minutes prior to exceeding four (4) hours of employment.

60. As a matter of Defendants' established company policy, Defendants failed to always authorize and permit all required rest periods established by Labor Code sections 226.7 and 516 and Section 12 of the IWC Wage Order(s).

61. Pursuant to Section 12(B) of the IWC Wage Order(s) and Labor Code section 226.7(c) which states "if an employer fails to provide an employee a meal or rest period or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest or recovery period is not provided," the members of the Rest Period Subclass are entitled to damages in an amount equal to one (1) additional hour of pay at each employee's regular rate of compensation for each work day that the rest period was not so provided.

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62. Pursuant to Labor Code section 218.6, the members of the Rest Period Subclass seek recovery of pre-judgment interest on all amounts recovered herein.

FOURTH CAUSE OF ACTION
Failure to Provide Compliant Meal Periods
(By Plaintiff and each Member or the First Meal Period Subclass and/or Second Meal Period Subclass)

63. Plaintiff incorporates the preceding paragraphs of this Complaint.

64. Labor Code section 226.7(b) provides that: “An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.”

65. Labor Code section 512 provides that: “An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.”

66. Labor Code section 516 provides that the Industrial Welfare Commission “may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.”

67. Section 11(A) of the IWC Wage Orders provides that: “Unless the employee is relieved of all duty during a 30-minute meal period, the meal period shall be considered an “on duty” meal period and counted as time worked. An “on duty” meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

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The written agreement shall state that the employee may, in writing, revoke the agreement at any time."

68. Section 11(B) of the IWC Wage Order(s) provides that: "If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided."

69. On one or more occasions, the members of the First Meal Period Subclass worked over five (5) hours per shift and therefore were entitled to a meal period of not less than thirty (30) minutes prior to exceeding five (5) hours of employment.

70. Further, on one or more occasions, members of the Second Meal Period Subclass worked over ten (10) hours per shift and therefore were entitled to a second meal period of not less than 30 minutes.

71. The members of the First Meal Period Subclass and/or the Second Meal Period Subclass did not validly or legally waive their meal periods, by mutual consent with Defendants or otherwise.

72. The members of the First Meal Period Subclass and/or the Second Meal Period Subclass did not enter into any written agreement with Defendants agreeing to an on-the-job paid meal period.

73. As a matter of Defendants' established company policy, Defendants failed to always comply with the meal period requirements established by Labor Code sections 226.7, 512, and 516, and Section 11 of the IWC Wage Order(s) by failing to always provide the members of the First Meal Period Subclass and/or the Second Meal Period Subclass with a first and in some cases a second legally compliant meal period.

74. Pursuant to Section 11(B) of the IWC Wage Order(s) and Labor Code section 226.7(c) which states "If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and

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Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided," the members of the First Meal Period Subclass and/or the Second Meal Period Subclass are entitled to damages in an amount equal to one (1) additional hour of pay at each employee's regular rate of compensation for each work day that the meal period was not provided, in a sum to be proven at trial.

75. Pursuant to Labor Code section 218.6, the members of the First Meal Period Subclass and/or the Second Meal Period Subclass seek recovery of pre-judgment interest on all amounts recovered herein.

FIFTH CAUSE OF ACTION

Failure to Reimburse Business Expenses

(By Plaintiff and each Member of the Expense Reimbursement Subclass)

76. Plaintiff incorporates the preceding paragraphs of this Complaint.

77. California Labor Code section 2802 provides that an employer must reimburse employees for all necessary expenditures.

78. At all relevant times during the class period, Plaintiff and members of the Expense Reimbursement Subclass incurred necessary business-related expenses and costs that were not fully reimbursed by Defendants, including, but not limited to, personal cellphone usage and costs related to the maintenance of employee uniforms.

79. Defendants have intentionally and willfully failed to fully reimburse Plaintiff and Class Members for necessary business-related expenses and costs. Defendants' conduct violates California Labor Code section 2802.

80. Plaintiffs and members of the Expense Reimbursement Subclass are entitled to recover from Defendants their business-related expenses incurred during the course and scope of their employment, plus interest, pursuant to California Labor Code section 2802.

SIXTH CAUSE OF ACTION

Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions

(By Plaintiff and each Member of the Wage Statement Subclass)

81. Plaintiff incorporates the preceding paragraphs of this Complaint.

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82. Labor Code section 226(a) states in pertinent part: "Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee… (4) all deductions… (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid… (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee….".

83. Further, Section 7(A) of the IWC Wage Order(s) states in pertinent part: "(A) Every employer shall keep accurate information with respect to each employee including the following: (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals, and total daily hours worked shall also be recorded…(5) Total hours worked in the payroll period and applicable rates of pay…."

84. Therefore, pursuant to Labor Code section 226(a) and Section 7(A) of the IWC Wage Order(s), California employers are required to maintain accurate records pertaining to the total hours worked for Defendants by the members of the Wage Statement Subclass, including but not limited to, beginning and ending of each work period, meal periods, the total daily hours worked, meal and rest break premium wages, sick pay wages, and the total hours worked per pay period and applicable rates of pay.

85. In violation of Labor Code section 226, Defendants knowingly and intentionally failed to provide Plaintiff and members of the Wage Statement Subclass with accurate semimonthly itemized wage statements. Plaintiff is informed and believes, and on that basis alleges, that none of the statements provided by Defendants accurately reflected the number of hours Plaintiff and Class Members worked which exceeded eight hours in a workday, and/or more than forty hours in a work week, and/or exceeded twelve (12) hours in a workday, and the statement did not reflect the correct number of meal and rest break premium wages, and the correct rate for the sick pay wages Plaintiff and the members of the Wage Statement Subclass

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were owed.

86. As a direct and proximate result of Defendants' knowing and intentional failure to provide accurate or complete information on the wage statements furnished to Plaintiff and the Wage Statement Subclass as mandated by section 226, Plaintiff and the members of the Wage Statement Class suffered injury.

87. As provided in Labor Code section 226(e), Plaintiff is entitled to, and therefore seeks to recover liquidated damages of fifty ($50.00) dollars for the initial pay period in which the violation occurred, and one hundred ($100.00) dollars for each violation in subsequent pay periods according to proof at the time of trial, for up to four thousand ($4,000.00) for Plaintiff and each respective member of the Wage Statement Subclass, plus reasonable attorney's fees and costs pursuant to Labor Code section 226(g).

88. Labor Code section 226.3 provides that any employer who violates Section 226(a) shall further be subject to a civil penalty of $250 per employee per violation with an initial citation and $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 Section 226(a). Labor Code section 1174.5 provides that any employer who willfully fails to maintain accurate and complete records required by Section 1174 shall be subject to a civil penalty of $500.

89. Defendants have committed and continue to commit the acts alleged herein knowingly and willfully.

90. Such a pattern and practice and uniform administration of corporate policies and practices as described herein is unlawful and creates an entitlement to recovery by the Plaintiff, and the members of the Wage Statement Subclass, in a civil action, for all damages and/or penalties pursuant to Labor Code sections 226 and 1174.5, including interest thereon, attorneys' fees, and costs of suit under Section 226.

SEVENTH CAUSE OF ACTION
Failure to Pay All Wages Due at Termination of Employment
(By Plaintiff and each Member of the Waiting Time Subclass)

91. Plaintiff incorporates the preceding paragraphs of this Complaint.

92. California Labor Code sections 201-203 provide that if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, and that if an employee voluntarily leaves his or her employment, his or her wages shall become due and payable not later than seventy-two hours thereafter, unless the employee has given seventy-two hours prior notice of his or her intention to quit in which case the employee is entitled to his or her wages at the time of quitting.

93. During the Class Period, Defendants willfully failed to pay Plaintiff and other members of the Waiting Time Subclass all their earned wages, specifically, meal and rest period premiums not paid for missed or interrupted meal and rest periods, and wages for all hours worked, and sick pay wages at a correct rate, either at the time of discharge or within seventy-two hours of their leaving Defendants' employ in violation of California Labor Code sections 201, 202, and 203.

94. Therefore, Plaintiff and members of the Waiting Time Subclass are entitled to waiting time penalties for each day that has passed that they have not received all wages owed to them, up to 30 days.

EIGHTH CAUSE OF ACTION

Violation of Unfair Competition Law (Bus. & Prof. Code, §17200, *et al.*)
(By Plaintiff and each Member of the UCL Subclass)

95. Plaintiff incorporates the preceding paragraphs of this Complaint.

96. Business and Professions Code section 17200 provides in pertinent part "…[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act…".

97. Business and Professions Code section 17205 provides that unless otherwise expressly provided, the remedies or penalties provided for unfair competition "are cumulative to each other and to the remedies or penalties available under all other laws of this state."

98. Business and Professions Code section 17204 provides that an action for any relief from unfair competition may be prosecuted by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition.

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99. Defendants have engaged in unlawful, unfair and fraudulent business acts or practices prohibited by Business and Professions Code section 17200, including those set forth in the preceding and foregoing paragraphs of the complaint, thereby depriving the members of the UCL Subclass of the minimum working standards and conditions due to them under the Labor Code and/or the IWC Wage Orders, as specifically described herein.

100. Defendants have engaged in unfair business practices in California by practicing, employing and utilizing the employment practices outlined in the preceding paragraphs, specifically, by requiring employees to perform the labor services complained of in this complaint without the requisite compensation.

101. Defendants' use of such practices constitutes an unfair business practice, unfair competition and provides an unfair advantage over Defendants' competitors.

102. Plaintiff and the UCL Subclass have suffered injury in fact and have lost money or property as a result of such unfair competition.

103. Plaintiff and the UCL Subclass seek restitutionary disgorgement from Defendants of monies owed for all hours worked and for unpaid meal and rest period premiums.

104. Plaintiff has assumed the responsibility of enforcement of the laws and public policies specified here by suing on behalf of themselves and other similarly-situated Class Members previously or presently working for Defendants in California. Plaintiff's success in this action will enforce important rights affecting the public interest. Plaintiff will incur a financial burden in pursuing this action in the public interest. Therefore, an award of reasonable attorneys' fees to Plaintiff is appropriate pursuant to Code of Civil Procedure section 1021.5.

105. Plaintiff, on behalf of himself and all others similarly situated, seeks the appointment of a receiver, as necessary, to establish the total monetary relief sought from Defendants.

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San Diego, CA 92101

NINTH CAUSE OF ACTION
Violation of Private Attorneys General Act ("PAGA")
(Cal. Lab. Code §§ 2698, *et seq*.)

106. Plaintiff re-alleges and incorporates all preceding paragraphs as if fully set forth herein.

107. Labor Code sections 2698 and 2699 (The California Private Attorneys General Act of 2004, or "PAGA"), expressly establish that any provision of the California Labor Code which provides for a civil penalty to be assessed and collected by The Labor and Workforce Development Agency ("LWDA"), or any of its departments, divisions, commissions, boards, agencies or employees for a violation of the California Labor Code, may be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself, and other current or former employees.

108. Whenever the LWDA, or any of its departments, divisions, commissions, boards, agencies or employees has discretion to assess a civil penalty, a fact-finder in a civil action is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess a civil penalty.

109. Plaintiff is an "aggrieved employee" as defined by Labor Code section 2699(c), because he is or was an employee of Defendant, and personally experienced the Labor Code violations alleged herein during the relevant time period.

110. Plaintiff asserts all of his claims in this Complaint against Defendant on behalf of himself, and all other members of the Class and/or on behalf of all aggrieved employees, as well as the general public, in his capacity as a "private attorney general", and seeks all statutory penalties available under the Labor Code.

111. By reason of the above and pursuant to Labor Code section 2699, Plaintiff, on behalf of himself, and all other members of the Class and/or on behalf of all aggrieved employees, as well as the general public, is entitled to payment of penalties, plus interest, as provided in the PAGA statute.

112. In addition, Plaintiff, on behalf of himself, and all other members of the Class and/or behalf of all aggrieved employees, as well as the general public, seeks and is entitled to

have 65% of all recovered penalties and interest allocated to the LWDA and 35% to the aggrieved employees. Further, Plaintiff is entitled to seek and recover reasonable attorneys' fees, expenses and costs pursuant to Labor Code section 2699, and any other applicable statutes.

113. Plaintiff complied with the notice requirements of Labor Code section 2699.3(a)(1) prior to commencing this action. A copy of the letter submitted to the California LWDA on July 10, 2024, via online filing, and copied to Defendant's Agent for Service of Process in California on the same date, via certified mail, in accordance with Section 2699.3(a), is attached hereto as **Exhibit A**, and by reference incorporated herein.

114. As of today's date, the LWDA has not responded to Plaintiff's notice.

115. Plaintiff, other members of the Class, and/or aggrieved employees, are also entitled to reasonable attorneys' fees and costs, pursuant to the PAGA statute, California Labor Code sections 2698, *et seq*.

PRAYER

WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, prays for judgment against Defendants as to the appropriate causes of action as follows:

ON THE FIRST CAUSE OF ACTION

1. For all straight-time, minimum, and/or regular wages owed to Plaintiff and each Class Member for all hours worked;
2. For other compensatory damages and/or statutory damages and statutory penalties resulting from improper compensation according to proof;
3. For statutory attorney fees according to proof;
4. For statutory interest according to proof; and
5. For reasonable attorneys' fees and costs pursuant to the Labor Code.

ON THE SECOND CAUSE OF ACTION

1. For unpaid sick leave;
2. For waiting time penalties according to proof;
3. For reasonable attorneys' fees and costs pursuant to statute;

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4. For statutory interest according to proof; and
5. For such other and further relief as the Court deems proper.

ON THE THIRD CAUSE OF ACTION

1. For one hour of wages due to Plaintiff and each Class Member for each work period of more than three and one-half (3 ½) hours when they did not receive an uninterrupted ten (10) minute rest period for each four (4) hours or major fraction thereof worked;
2. For waiting penalties according to proof;
3. For statutory costs according to proof;
4. For statutory interest according to proof; and
5. For reasonable attorneys' fees and costs pursuant to the Labor Code.

ON THE FOURTH CAUSE OF ACTION

1. For one hour of wages due to Plaintiff and each Class Member for each work period of more than five (5) hours and/or more than ten (10) hours when they did not receive an uninterrupted thirty (30) minute first and/or second meal period;
2. For waiting time penalties according to proof;
3. For statutory costs according to proof;
4. For statutory interest according to proof; and
5. For reasonable attorneys' fees and costs pursuant to the Labor Code.

ON THE FIFTH CAUSE OF ACTION

1. For reimbursement of incurred necessary business expenses under Labor Code section 2802;
2. For statutory interest according to proof; and
3. For reasonable attorneys' fees and costs pursuant to the Labor Code.

ON THE SIXTH CAUSE OF ACTION

1. For statutory compensation for any harm caused;
2. For compensatory damages and interest thereon for actual harm caused; and
3. For statutory penalties under Labor Code section 226(e), interest and attorneys' fees and costs.

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ON THE SEVENTH CAUSE OF ACTION

1. For statutory penalties, including thirty (30) days' wages at the correct hourly rate for all wages not timely paid upon termination;
2. For penalty enhancement for willful conduct;
3. For statutory interest according to proof; and
4. For reasonable attorneys' fees and costs pursuant to the Labor Code.

ON THE EIGHTH CAUSE OF ACTION

1. For the equitable, injunctive and declaratory relief;
2. For liquidated damages pursuant to Labor Code section 1194.1;
3. For restitutionary disgorgement pursuant to the UCL; and
4. For reasonable attorneys' fees under Code of Civil Procedure section 1021.5

ON THE NINTH CAUSE OF ACTION

1. For penalties for each violation of the PAGA;
2. For interest on statutory penalties from the date of the violation until paid in full; and
3. For reasonable attorneys' fees, expenses, and costs pursuant to the Labor Code.

ON ALL CAUSES OF ACTION

1. An order that this action may proceed and be maintained as a class action;
2. Reasonable attorney's fees;
3. General, special and consequential damages, to the extent allowed by law;
4. Costs of suit;
5. For attorneys' fees pursuant to Code of Civil Procedure section1021.5;
6. Prejudgment interest at the maximum legal rate; and
7. Such other relief as the Court may deem just and proper.

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Dated: September 16, 2024

By:____________________________
Michael D. Singer
Maggie K. Realin
Attorneys for Plaintiff Angel Cuellar, on behalf of himself and all others similarly situated

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DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury for himself and the class members on all claims so triable.

COHELAN KHOURY & SINGER

Dated: September 16, 2024

By: ______________________

Michael D. Singer
Maggie K. Realin
Attorneys for Plaintiff Angel Cuellar, on behalf of himself and all others similarly situated

COHELAN KHOURY & SINGER
605 C Street, Suite 200
San Diego, CA 92101

EXHIBIT A

COHELAN KHOURY & SINGER

A PARTNERSHIP OF PROFESSIONAL LAW CORPORATIONS

TIMOTHY D. COHELAN, APLC*
ISAM C. KHOURY, APC
DIANA M. KHOURY, APC
MICHAEL D. SINGER, APLC•

(*Also admitted in the District of Columbia)
(•Also admitted in Colorado)

ATTORNEYS AT LAW

605 "C" STREET, SUITE 200
SAN DIEGO, CALIFORNIA 92101-5305
Telephone: (619) 595-3001
Facsimile: (619) 595-3000
www.ckslaw.com

JEFF GERACI
MARTA MANUS
MAGGIE K. REALIN
ROSEMARY C. KHOURY

July 10, 2024

NOTICE VIA ONLINE SUBMISSION
California Labor and Workforce Development Agency ("LWDA")

VIA CERTIFIED U.S. MAIL WITH RETURN RECEIPT

New Bern Transport Corporation
700 Anderson Hill Road
Purchase, NY 10577

Pepsi-Cola Sales and
Distribution, Inc.
700 Anderson Hill Road
Purchase, NY 10577

PepsiCo, Inc.
700 Anderson Hill Road
Purchase, NY 10577

New Bern Transport Corporation
c/o C T Corporation System
330 N. Brand Blvd., Suite 700
Glendale, CA 91203

Pepsi-Cola Sales and
Distribution, Inc.
c/o C T Corporation System
330 N. Brand Blvd., Suite 700
Glendale, CA 91203

PepsiCo, Inc.
c/o C T Corporation System
330 N. Brand Blvd., Suite 700
Glendale, CA 91203

Re: Notice by Angel Cuellar, on behalf of himself and all similarly-situated aggrieved California employees of New Bern Transport Corporation, Pepsi-Cola Sales and Distribution, Inc., and PepsiCo, Inc., as an individual and as a proposed Representative of the State of California

Dear PAGA Administrator and New Bern Transport Corporation, Pepsi-Cola Sales and Distribution, Inc., and PepsiCo, Inc.:

Pursuant to the Labor Code Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab. Code sections 2698, *et seq*. ("PAGA"), Angel Cuellar ("Mr. Cuellar" or "Claimant") intends to bring a civil action against his employers New Bern Transport Corporation, Pepsi-Cola Sales and Distribution, Inc., and PepsiCo, Inc. ("Employers"), individually and on behalf of all other similarly-aggrieved employees. This letter serves as Claimant's written notice pursuant to Labor Code section 2699.3(a)(1)(A) providing the Labor and Workforce Development Agency (hereafter "LWDA") the opportunity to investigate the alleged claims contained herein.

If the LWDA does not intend to investigate the alleged violations, Claimant intends to file a representative civil action for PAGA penalties on behalf of himself and all other aggrieved employees of Employers and shall seek civil penalties under the PAGA on behalf of himself and all other aggrieved employees in the State of California. A copy of this notice is being sent to Employers by certified mail at the address(es) above.

FACTUAL STATEMENT

Claimant worked for Employers from May of 2012 until he was terminated in August 2023. Claimant worked in Sales until approximately 2021-2022 and then as a driver delivering

Pepsi products until approximately August 2023.

As a driver, Claimant was required to use a timeclock box on the wall in the facility he reported to every day to record his work hours. At least once a week, Claimant had to wait in line to be able to clock in, which could take minutes. When Claimant arrived at the facility, he had to wait 5-10 minutes for the front door to be opened if it was locked. If this wait made him late to clock in, Employers did not pay for the time he was waiting to be let inside. Claimant estimates this occurred at least once a week. Additionally, Claimant often spent time outside his work hours speaking with supervisors or co-workers. If Claimant was in the middle of a conversation when his shift ended, he was told to clock out so he did not clock out late, and then continue the conversation. Claimant estimates this occurred at least once a week and that the conversations lasted 5-10 minutes. Furthermore, Claimant was required to use his personal cell phone while off the clock for work-related activities. He received messages on an employee group chat every day for at least 5 minutes per day. Claimant was also not relieved of all duties during unpaid meal periods, because he was always under the duty to respond to messages/calls from Employers. Claimant was not compensated for any of this off-the-clock time, nor reimbursed for using his personal cellphone for business purposes.

As a driver, Claimant drove 8 to 10 hours per day on average. He worked 10- to 12-hour shifts approximately 3-4 times per week. He was often not provided rest or meal periods on any of shifts, often eating while driving. He was told he could not leave his truck and he had to be within eyesight of his truck. He was also duty-bound to respond to calls/messages from Employers during meal periods. Whether or not he was able to take a meal break, Claimant was required to record it in his time record. When Claimant was provided meal periods under Employer's policies, it would many times not be provided before the end of the fifth hour of work. Claimant were not paid any meal or rest break premiums for missed, late, or otherwise non-complaint breaks.

Additionally, Claimant was required to wear a uniform, such as a shirt, vest, and pants with company logo. Claimant was required to pay the cost of maintenance of his uniform without reimbursement for the expense.

For reasons set forth herein, Claimant alleges the following violations of the California Labor Code and the applicable IWC Wage Order on behalf of himself and all other aggrieved employees of Employers. Claimant alleges that Employers:

1. Failed to pay Claimant and other aggrieved employees all wages due including minimum wages and wages at the agreed upon rate;

2. Failed to provide legally compliant off-duty meal periods or pay compensation in lieu thereof;

3. Failed to provide legally compliant duty-free, rest periods or pay compensation in lieu thereof;

4. Failed to pay Claimant and other aggrieved employees all paid sick leave at a regular rate of pay;

5. Failed to reimburse all reasonable and necessary business expenses;

6. Failure to provide accurate and itemized wage statements;

7. Failed to pay all wages due during and upon separation of employment; and

8. Failed to maintain accurate records.

Accordingly, Claimant now seeks civil penalties on behalf of himself and other non-exempt aggrieved employees based on Employers' alleged violations of the California Labor Code and the applicable IWC Wage Order. Claimant's claims are set forth below.

FAILURE TO PAY ALL WAGES AT THE MINIMUM, OR AGREED UPON, RATE
(Labor Code §§ 218, 1194, 1197, 1197.1, 1198, and 1199(c) and the "Minimum Wages" and "Hours and Days of Work" Sections of the applicable Wage Order)

Labor Code section 1194(a) states: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage… is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage… including interest thereon, reasonable attorney's fees, and costs of suit."

Labor Code section 1198 provides: "The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful."

Labor Code section 1199, which is a statute listed for which PAGA default civil penalties are recoverable pursuant to Labor Code sections 2699.5 and 2699(f)((2), provides that:

> Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not less than one hundred dollars ($100) or by imprisonment for not less than 30 days, or by both, who does any of the following:
>
> (a) Requires or causes any employee to work for longer hours than those fixed, or under conditions of labor prohibited by an order of the commission.
> (b) Pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission.
> (c) Violates or refuses or neglects to comply with any provision of this chapter or any order or ruling of the commission.

Labor Code section 1197 states: "The minimum wage for employees fixed by the commission or by any applicable state or local law, is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful. This section does not change the applicability of local minimum wage laws to any entity."

Labor Code section 1197.1 states: "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 order of the commission shall be subject to a civil penalty, restitution of wages, liquidated damages payable to the employee, 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… (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..."

Pursuant to the "Minimum Wages" and "Hours & Days of Work" Sections of the applicable Wage Order, an employer may not pay employees less than the applicable minimum wage for all hours worked.

Employers violated Labor Code sections 218, 1194, 1197, and 1198, and the "Minimum Wages" and "Hours and Days of Work" Sections of the applicable Wage Order because they did not pay Claimant and other aggrieved current and former employees all minimum and regular wages for all hours worked, as a result of Employers' policy of not paying Claimant and other aggrieved employees for time worked while off the clock.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of himself and other aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

FAILURE TO PROVIDE MEAL AND REST PERIODS

(Labor Code §§ 226.7, 512, and 1198, and the "Meal Period" and "Rest Period" Sections of the applicable IWC Wage Order)

Labor Code section 512(a) states in pertinent part: "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes…." Labor Code section 226.7(b) states that "An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission…."

The "Rest Period" Section of the applicable IWC Wage Order states, "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof." If an employer fails to provide an employee a rest period in accordance with the applicable provision of the order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation of reach workday that the rest period is not provided.

During Claimant's employment, Employers failed to provide Claimant and other aggrieved employees with off-duty meal periods and duty-free rest periods as required by Labor Code sections 226.7 and 512, and Sections 11 and 12 of the applicable IWC Wage Order, due to Employers' policy of not providing Claimant and other aggrieved employees with an off-the-clock, uninterrupted, thirty-minute off-duty meal break, and an uninterrupted, net ten-minute off-duty rest break. Furthermore, Employers failed to pay one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal and/or rest period was not provided, in accordance with California law.

Labor Code section 226.7(c) states: "If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided."

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of himself and other aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

FAILURE TO PROVIDE PAID SICK LEAVE AT A CORRECT RATE

(Labor Code §§ 246, 248.5)

Employers must calculate paid sick leave for non-exempt employees in one of two ways:

> (1) Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.
>
> (2) Paid sick time for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.

Labor Code § 246(l).

Claimant was paid sick leave at his base rate of pay, which is less than required under either of the two alternative methods of calculation.

By failing to incorporate "Recognition/Service Awards" and/or other remuneration when calculating Claimant's sick pay rate, Employers violated Cal. Labor Code section 246.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of himself and other aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

FAILURE TO REIMBURSE BUSINESS-RELATED EXPENSES

(Labor Code §§ 2802 and 2804, and the "Uniforms and Equipment" Section of the applicable IWC Wage Order)

Labor Code section 2802(a) provides that "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."

Labor Code section 2802(c) states that "[f]or purposes of [2802], the term 'necessary expenditures or losses' shall include all reasonable costs, including, but not limited to attorney's fees incurred by the employee enforcing the rights granted by [2802]."

Section 9(a) of the applicable IWC Wage Order states in pertinent part: "When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term 'uniform' includes wearing apparel and accessories of distinctive design or color."

Section 9(b) of the applicable IWC Wage Order states in pertinent part: "When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer."

Labor Code section 2802 prohibits employers, such as Employers, from shifting their cost of doing business onto the employee. California Labor Code section 2802 states that employers must "indemnify" an employee for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer." This means that if the expense in question is "necessary" for performance of the job, the employer must reimburse the employee 100% of the cost. An expense is considered "necessary" if it directly results from the employee's performance of his or her work duties. An expense is also "necessary" if it occurs because the employee is following the directions given by the employer.

"Any contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof is null and void, and this article shall not deprive any employee or his personal representative of any right or remedy to which he is entitled to under the laws of this State." Cal. Labor Code § 2804.

Employers failed to comply with Labor Code section 2802 and the applicable IWC Wage Order by failing to reimburse Claimant and other aggrieved employees for necessary business-related expenses incurred in direct consequence of the discharge of their duties. Claimant and other aggrieved employees were required to use their personal cellular device for work-related purposes and to maintain their uniforms without receiving reimbursement for these business expenditures. As such, Employers failed to reimburse Claimant and other aggrieved employees for the costs incurred by employees in direct consequence of the discharge of their duties for Employers.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of himself and other aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

FAILURE TO PROVIDE ACCURATE AND ITEMIZED WAGE STATEMENTS

(Labor Code § 226, and the "Records" Section of the applicable IWC Wage Order)

Labor Code section 226(a) states in pertinent part that every employer shall provide an accurate itemized statement in writing with respect to each one of its employees showing: 1) gross wages earned; 2) total hours worked by an employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission; (3) the number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis; (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item; (5) net wages earned; (6) the inclusive dates of the period for which the employee is paid; (7) the name of the employee and the last four digits of his or him social security number or an employee identification number other than a social security number; (8) the name and address of the legal entity that is the employer . . .; and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

"An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees." Cal. Labor Code § 226(e)(1).

Section 7(A) of the applicable IWC Wage Order provides: "Every employer shall keep accurate information with respect to each employee including the following: … (3) time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded." Employers failed to accurately record the hours worked and meal periods for Claimant and other aggrieved employees.

Employers failed to provide Claimant and other current and former employees with accurate, timely, itemized wage statements complying with the requirements of the Labor Code and the applicable IWC Wage Order. Furthermore, Claimant's wage statements did not include the correct number of hours worked and wages earned due to Employers' policy of not paying Claimant and other aggrieved employees for all hours worked, all meal and rest break premiums owed, and at a correct rate of pay.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of himself and other aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

FAILURE TO TIMELY PAY WAGES DUE DURING AND UPON TERMINATION OF EMPLOYMENT

(Labor Code §§ 201, 202, 203, 204, 256, 1198, and 2699)

Labor Code section 201(a) states: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Labor Code section 202(a) states: "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting."

Labor Code section 203(a) states, in relevant part: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 201.6, 201.8, 201.9, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. An employee who secretes or absents themselves to avoid payment to them, or who refuses to receive the payment when fully tendered to them, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which the employee so avoids payment."

Labor Code section 204(a) states, in pertinent part: "All wages . . . earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays." The "Minimum Wages" Section of the applicable Wage Order further states "every 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."

Labor Code section 256 states: "The Labor Commissioner shall impose a civil penalty in an amount not exceeding 30 days of pay as waiting time under the terms of Section 203."

As detailed above, Employers failed to pay Claimant and other aggrieved employees all wages that were due and owing to them including meal and rest period premiums, and regular/ minimum, within the required time during their employment and upon their separation of employment, in violation of the Labor Code and the applicable IWC Wage Order because of the violations alleged herein. As a result, Employers violated the above sections of the Labor Code.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of himself and other aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

FAILURE TO MAINTAIN ACCURATE RECORDS

(Labor Code §§1174, 1174.5, 2699, and the "Records" Section of the applicable IWC Wage Order)

Labor Code section 1174(d) requires every person, including Employers, employing labor in the state to "[k]eep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned."

Labor Code section 1174.5 provides: "Any person employing labor who willfully fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete records required by subdivision (d) of Section 1174, or to allow any member of the commission or employees of the division to inspect records pursuant to subdivision (b) of Section 1174, shall be subject to a civil penalty of five hundred dollars ($500)."

Section 7(A) of the applicable IWC Wage Order provides: "Every employer shall keep accurate information with respect to each employee including the following: … (3) time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded." Employers failed to accurately record the hours worked and meal periods for Claimant and other aggrieved employees.

Employers failed to maintain accurate payroll records for Claimant and other current and former employees showing the hours worked daily and the wages paid. Claimant alleges that by requiring employees to record a thirty-minute meal break, whether or not a meal break was actually taken, Employers failed to maintain accurate records of all hours worked by Claimant and all other current and former employees.

Accordingly, Claimant now seeks *civil penalties* pursuant to the PAGA on behalf of himself and other aggrieved employees based on the alleged violations of the California Labor Code and applicable IWC Wage Orders.

CIVIL PENALTIES FOR VIOLATION OF THE LABOR CODE AND IWC WAGE ORDERS

(Labor Code §§ 558, 558.1, and 1197.1)

Labor Code section 558 subjects any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of Part 2, Chapter 1, of the Labor Code or any provision regulating hours and days of work in any IWC Wage Order to a civil penalty in the amount of $50 for any initial violation for each pay period in which an employee is underpaid in addition to an amount sufficient to recover underpaid wages, and $100 for each subsequent violation in addition to an amount sufficient to recover underpaid wages, which shall be paid to each affected employee.

Labor Code section 558.1(a) states: "Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation." Labor Code section 558.1(b) expressly defines "other person acting on behalf of an employer" to include a "natural person who is an owner, director, officer, or managing agent of the employer."

Labor Code section 1197.1 states that any employer or other person acting either individually or as an officer, agent or employee of another person, which pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission shall be subject to a civil penalty and restitution of wages payable to the employee in an amount of $100 for the initial violation for each pay period in which an employee underpaid in addition to an amount sufficient to recover underpaid wages, and $250 for each subsequent violation in addition to an amount sufficient to recover underpaid wages, which shall be paid to each affected employee.

As set forth above, Employers violated the IWC Wage Order regulating the hours and days of work, Labor Code sections 1197 and 1198, and caused the employees to be paid less than the minimum set by the IWC Wage Order. As a result, Employers are liable for civil penalties under Labor Code sections 558, 558.1, and 1197.1.

Accordingly, Claimant will pursue *civil penalties* under the PAGA on behalf of himself and other aggrieved employees, including recovery of attorney's fees, costs, and civil penalties to the extent allowed by law.

DUTIES OF EMPLOYER

(Labor Code §§ 1174, 1174.5, 1175, and 1198, and the applicable Wage Order)

Labor Code section 1174 describes certain duties of every employer in this state. Subsection (d) of this labor code section requires that payroll records show the hours worked daily by employees and the corresponding wages to be paid for the hours worked. Employers violated this requirement by their failure to accurately record employee hours worked and/or paid including wages owed for all work performed, including off-the-clock time, and meal and rest period premiums. Labor Code section 1174.5 imposes a civil penalty of $500 for an employer's failure to maintain accurate and complete records. This civil penalty is addition to the civil penalty of $100 per pay period, per aggrieved employee that would be imposed pursuant to Labor Code section 2699 for a violation of Labor Code section 1174(d). Furthermore, Claimant and all other aggrieved current and former employees are entitled to collect 25% of the penalty imposed pursuant to Section 2699.

Employers failed to accurately record all hours worked by Claimant and other aggrieved employees including the beginning and ending period for each work period, failed to record meal periods, and failed to record all accurate wages to be paid, in part as a result of Employers' policy of not paying Claimant and other aggrieved employees for all hours worked.

Claimant will pursue all remedies on behalf of himself and other current and former employees, including recovery of attorney's fees, costs, damages and penalties to the extent allowed by law.

ATTORNEY'S FEES, COSTS, INTEREST AND PENALTIES
(Labor Code §§ 218.6, 226(e), 1194, 1194.2, and 2699, *et seq*.)

Labor Code sections 218.6, 226(e), 1194, 1194.2, and 2699, *et seq*. give employees the right to recover in a civil action the unpaid balance of the full amount of minimum wages, regular wages, damages, liquidated damages, and penalties, including interest thereon, reasonable attorney's fees, and costs of suit.

Pursuant to Labor Code sections 2699, *et seq*., aggrieved employees are entitled to collect 25% of the penalty assessment and 100% of the underpaid wages. Accordingly, Employers are liable for these items in addition to the unpaid wages. Claimant has already incurred in actual damages, costs and attorney's fees and will continue to incur costs as a result of Employers' unlawful actions.

CONCLUSION

Employers violated Labor Code sections as set forth herein. Claimant will pursue all remedies on behalf of himself and other aggrieved employees, including recovery of attorney's fees, costs, and penalties to the extent allowed by law. The facts and claims contained herein are based on the information available at the time of this writing. Therefore, if through discovery and/or expert review, Claimant becomes aware of additional claims, he reserves the right to revise these facts and/or add any new claims by amending the claim letter or by adding applicable causes of action in the complaint.

Should you have any questions, please feel free to contact me at your convenience.

Very truly yours,
COHELAN KHOURY & SINGER

Mkoli

Maggie K. Realin, Esq.

cc (via email only):
Emil Davtyan, Esq.
D.LAW, INC.
400 N. Brand Blvd., 7th Floor
Glendale, CA 91203
emil@d.law

David Mara, Esq.
MARA LAW FIRM, PC
2650 Camino Del Rio North, Suite 302
San Diego, CA 92108
dmara@maralawfirm.com