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behalf of all others similarly situated, and the general public

**ENDORSED  
FILED  
ALAMEDA COUNTY**

SEP 07 2015

CLERK OF THE SUPERIOR COURT  
By Xian-Xii Bowie

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA**

PATRICK MALONE, as an individual, on  
behalf of himself, all others similarly  
situated, and the general public,

Plaintiff,

v.

KAG WEST LLC., a corporation, and  
DOES 1-100,

Defendants.

Case No. **RG 15784137**

**CLASS ACTION COMPLAINT FOR  
DAMAGES AND INJUNCTIVE RELIEF**

1. **FAILURE TO PAY MEAL AND  
REST PERIOD COMPENSATION  
(CAL. LABOR CODE §§ 226.7, 512)**
2. **FAILURE TO PAY  
COMPENSATION FOR ALL  
HOURS WORKED AND MINIMUM  
WAGE VIOLATIONS (CAL. LABOR  
CODE §§ 216, 1194, 1194.2, 1197)**
3. **FAILURE TO PROVIDE  
ACCURATE ITEMIZED  
STATEMENTS (CAL. LABOR  
CODE § 226)**
4. **WAITING TIME PENALTIES (CAL.  
LABOR CODE § 203)**
5. **FAILURE TO PAY ALL WAGES BY  
THE APPROPRIATE PAY PERIOD  
(CAL. LABOR CODE § 204)**
6. **FAILURE TO REIMBURSE**

**BUSINESS EXPENSES (CAL.  
LABOR CODE § 2802)**

**7. PRIVATE ATTORNEY GENERAL  
ACT (CAL. LABOR CODE §§ 2698,  
ET SEQ.)**

**8. UNFAIR BUSINESS PRACTICES  
(CALIFORNIA BUSINESS &  
PROFESSIONS CODE § 17200, ET  
SEQ.)**

**DEMAND FOR JURY TRIAL**

Plaintiff PATRICK MALONE ("PLAINTIFF"), as an individual and on behalf of himself, all others similarly situated, and the general public, complains and alleges on information and belief the following against KAG WEST LLC., a limited liability corporation, and DOES 1-100 (collectively "DEFENDANTS"):

**INTRODUCTION**

1. This case arises out of DEFENDANTS' systematic, company-wide, unlawful treatment of PLAINTIFF and hundreds of similarly situated employees in violation of numerous provisions of the California Labor Code and California's Unfair Compensation Law (Business and Professions Code Section 17200 et seq. ["UCL"]).

2. DEFENDANTS operate a tanker truck transportation and logistics company which delivers fuel products to customers. PLAINTIFF and all other similarly situated employees were/are employed by DEFENDANTS as truck drivers in California and deliver fuel products for DEFENDANTS in California.

3. PLAINTIFF alleges in this lawsuit that he and other drivers were not provided with lawful meal and rest periods as required by California state law. PLAINTIFF further alleges that he and other similarly situated drivers were required to work off-the-clock, which violates state minimum wage laws, and that they were not reimbursed for all business related expenses associated with the use of their personal cell phones for work, among other claims.

1  
2 4. This action further alleges that DEFENDANTS have violated California Business  
3 and Professions Code Section 17200, et seq., based on their violations of California's Labor laws  
4 and the Fair Labor Standards Act ("FLSA"). Concerning PLAINTIFF's UCL claims predicated  
5 on the FLSA, PLAINTIFF alleges that he and other similarly situated truck drivers were deprived  
6 of overtime pay. PLAINTIFF and all other similarly situated drivers are intrastate drivers with no  
7 reasonable expectation of being required to drive out of the state. In addition, PLAINTIFF and  
8 all other similarly situated employees are not indiscriminately chosen for the infrequent, out-of-  
9 state deliveries that DEFENDANTS make. Instead, the same limited pool of drivers is used for  
10 the out-of-state driving. Thus, the Motor Carrier Exemption does not apply to PLAINTIFF or  
11 other similarly situated drivers.

12 5. The violations described in this lawsuit entitle PLAINTIFF and the PLAINTIFF  
13 CLASS to unpaid wages, including minimum wage and overtime pay, all applicable statutory and  
14 civil penalties, including civil penalties recoverable pursuant to the Private Attorney General Act  
15 ("PAGA"), attorneys' fees, costs, and interest. PLAINTIFF, on behalf of the PLAINTIFF  
16 CLASS (defined below), also seeks to certify his non-PAGA claims under California Code of  
17 Civil Procedure Section 382. With respect to his PAGA claim, PLAINTIFF intends to pursue a  
18 representative action on behalf of all aggrieved employees like PLAINTIFF.

#### 19 JURISDICTION AND VENUE

20 6. The Court has personal jurisdiction over DEFENDANTS because they are  
21 residents of and/or doing business in the state of California. DEFENDANT KAG WEST, LLC, is  
22 subject to personal jurisdiction as a resident of California and as a limited liability corporation  
23 conducting substantial and continuous commercial activities in California. This case arises from  
24 DEFENDANTS' wrongful conduct in California, where DEFENDANTS employed PLAINTIFF  
25 and members of the proposed PLAINTIFF CLASS (defined below).

26 7. Venue is proper in this Court in accordance with Section 395(a) of the California  
27 Code of Civil Procedure because DEFENDANTS employed some members of the PLAINTIFF  
28 CLASS in Alameda County and some of the harms occurred in Alameda County.

1  
2 8. PLAINTIFF does not seek more than seventy-five thousand dollars (\$75,000) and  
3 waives seeking more than seventy-five thousand dollars (\$75,000), including attorney's fees but  
4 excluding costs and interest, as to his share or portion of penalties or any other recovery with  
5 respect to the violations alleged herein against DEFENDANTS. This case also raises no federal  
6 questions.

7 **PARTIES**

8 9. PLAINTIFF is a resident of American Canyon, California. PLAINTIFF was  
9 formerly employed by DEFENDANTS as a driver at the Martinez Terminal from May, 2013 until  
10 January 14, 2015. PLAINTIFF only made, and was expected to make intrastate deliveries.

11 10. PLAINTIFF is informed, believes, and alleges that DEFENDANTS have been  
12 doing business in California at all relevant times. Defendant KAG WEST, LLC, is a California  
13 limited liability corporation which has been doing business in California at all relevant times.

14 11. Section 2(G) of Industrial Wage Commission ("IWC") Order Number 9-2004  
15 defines an "employer" as any "person as defined in Section 18 of the [California] Labor Code,  
16 who directly or indirectly, or through an agent or any other person, employs or exercises control  
17 over the wages, hours, or working conditions of any person." PLAINTIFF is informed, believes,  
18 and alleges that DEFENDANTS directly, indirectly, or acting through the agency of each other,  
19 employ or exercise control over the wages, hours, or working conditions of PLAINTIFF and the  
20 rest of the class. Furthermore, on information and belief, a centralized payroll and accounting  
21 system is used to pay the wages of PLAINTIFF and all members of the class at all  
22 DEFENDANTS' locations in California. Specifically, DEFENDANTS pay the wages and other  
23 benefits of all PLAINTIFF CLASS members and direct and control, with the assistance of or  
24 through the other named DEFENDANTS, the terms and conditions of all class members'  
25 employment. Accordingly, DEFENDANTS are deemed joint employers of PLAINTIFF and the  
26 rest of the PLAINTIFF CLASS.

27 12. The true names and capacities of Defendants named as DOES 1-100, inclusive,  
28 whether individual, corporate, associate, or otherwise, are unknown to PLAINTIFF, who

1 therefore sues such Defendants by such fictitious names. PLAINTIFF will amend this Complaint  
2 to show true names and capacities when they have been determined.

3 13. At all times mentioned, DEFENDANTS, and each of them, were the agents,  
4 representatives, employees, successors, assigns, parents, subsidiaries, and / or affiliates, each of  
5 the other and, at all pertinent times, were acting within the course and scope of their authority as  
6 such agents, representatives, employees, successors, assigns, parents, subsidiaries, and / or  
7 affiliates. PLAINTIFF also alleges that DEFENDANTS were, at all relevant times, the alter egos  
8 of each other. All references made to DEFENDANTS herein is intended to include all of the  
9 named Defendants as well as the DOE Defendants. Each of the fictitiously named DOE  
10 Defendants is responsible in manner for the occurrences alleged and proximately caused  
11 PLAINTIFF's damages as well as damages of members of the class.

12 **CLASS ACTION ALLEGATIONS**

13 14. PLAINTIFF brings this action on behalf of herself and all others similarly situated  
14 as a class action pursuant to California Code of Civil Procedure Section 382, on behalf of the  
15 following class (referred to as the "PLAINTIFF CLASS"). The PLAINTIFF CLASS is  
16 composed of and defined as follows:

17 All California citizens who worked as truck drivers at any of DEFENDANTS'  
18 locations in California at any time within four (4) years prior to the filing of this Complaint  
19 until the final judgment (hereinafter "the Class Period").

20 15. The members of the PLAINTIFF CLASS are so numerous that joinder of all  
21 members would be unfeasible and impracticable. The membership of the entire class is greater  
22 than 100 individuals, but the identity of such membership is readily ascertainable via inspection  
23 of the personnel records and other documents maintained by DEFENDANTS.

24 16. There are common questions of law and fact as to members of the class which  
25 predominate over questions affecting only individual members, including, without limitation:

26 A. Whether DEFENDANTS denied PLAINTIFF and the PLAINTIFF CLASS  
27 all of the wages to which they are entitled pursuant to the California Labor Code, the California  
28

1 Industrial Welfare Commission's ("IWC") Wage Orders, and all other applicable Employment  
2 Laws and Regulations.

3 B. Whether DEFENDANTS failed to make meal and rest periods available to  
4 PLAINTIFF and members of the PLAINTIFF CLASS as required by law and/or paid  
5 compensation in lieu thereof;

6 C. Whether DEFENDANTS failed to pay the required state minimum wage to  
7 PLAINTIFF and members of the PLAINTIFF CLASS for every hour where work was performed;

8 D. Whether DEFENDANTS violated California Labor Code Section 204 by  
9 failing to pay all wages earned in a timely manner;

10 E. Whether DEFENDANTS failed to provide PLAINTIFF and members of  
11 the PLAINTIFF CLASS with accurate itemized statements;

12 F. Whether DEFENDANTS owe PLAINTIFF and member of the  
13 PLAINTIFF CLASS waiting time penalties pursuant to California Labor Code Section 203;

14 G. Whether DEFENDANTS failed to reimburse all business related expenses  
15 incurred by PLAINTIFF and the PLAINTIFF CLASS;

16 H. Whether DEFENDANTS engaged in unfair business practices under  
17 Section 17200, *et seq.*, of the California Business and Professions Code;

18 I. Whether DEFENDANTS violated California Business and Professions  
19 Code Section 17200, *et seq.*, by failing to pay members of the PLAINTIFF CLASS overtime  
20 wages as required under the Fair Labor Standards Act.

21 J. The effect upon and the extent of damages suffered by member of the  
22 PLAINTIFF CLASS and the appropriate amount of compensation.

23 17. The claims PLAINTIFF pleads as class action claims are typical of the claims of  
24 all members of the PLAINTIFF CLASS as they arise out of the same course of conduct and are  
25 predicated on the same violation(s) of the law. PLAINTIFF, as a representative party, will fairly  
26 and adequately protect the interests of the class by vigorously pursuing this suit through his  
27 attorneys who are skilled and experienced in handling matters of this type.  
28

1           18.     The nature of this action and the nature of the laws available to the PLAINTIFF  
2 CLASS make use of the class action format, a particularly efficient and appropriate procedure to  
3 afford relief to members of the PLAINTIFF CLASS. Further, this case involves a corporate  
4 employer and a large number of individual employees possessing claims with common issues of  
5 law and fact. If each employee were required to file an individual lawsuit, the corporate  
6 Defendants would necessarily gain an unconscionable advantage since they would be able to  
7 exploit and overwhelm the limited resources of each individual Plaintiff with their vastly superior  
8 financial and legal resources. Requiring each class member to pursue an individual remedy  
9 would also discourage the assertion of lawful claims by employees who would be disinclined to  
10 pursue an action against their present and/or former employer for an appreciable and justifiable  
11 fear of retaliation and permanent damage to their careers at present and/or subsequent  
12 employment. Proof of a common business practice or factual pattern, of which the named  
13 PLAINTIFF experienced, is representative of the PLAINTIFF CLASS and will establish the right  
14 of each of the members of the PLAINTIFF CLASS to recovery on these alleged claims.

15           19.     The prosecution of separate actions by the individual members of the PLAINTIFF  
16 CLASS, even if possible, would create: (a) a substantial risk of inconvenient or varying verdicts  
17 or adjudications with respect to the individual members of the PLAINTIFF CLASS against the  
18 DEFENDANTS; and/or (b) legal determinations with respect to the individual members of the  
19 PLAINTIFF CLASS which would, as a practical matter, be dispositive of the other class  
20 members' claims who are not parties to the adjudications and / or would substantially impair or  
21 impede the ability of class members to protect their interests. Further, the claims of the individual  
22 members of the PLAINTIFF CLASS are not sufficiently large to warrant vigorous individual  
23 prosecution considering all of the associated concomitant costs and expenses. PLAINTIFF is  
24 unaware of any difficulties that are likely to be encountered in the management of this action that  
25 would preclude its maintenance as a class action.

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**FACTS COMMON TO ALL CAUSES OF ACTION**

20. PLAINTIFF PATRICK MALONE was hired by DEFENDANTS in May of 2013 as a delivery truck driver working out of DEFENDANTS' Martinez Facility. PLAINTIFF's main job duties were to deliver fuel and other oil based products to locations within the state of California.

21. Throughout PLAINTIFF's and PLAINTIFF CLASS members' employment with DEFENDANTS, DEFENDANTS routinely failed to provide PLAINTIFF and members of the PLAINTIFF CLASS with meal or rest periods or compensation in lieu thereof as required by California law. Specifically, DEFENDANTS fail to provide a meal period where Drivers are relieved of their duty for a thirty (30) minute period within the first five (5) hours of their shift or pay the premium compensation for the missed meal period. This is because DEFENDANTS only observe federal Hours of Service ("HOS") requirements and instruct drivers to take a meal period before the conclusion of the eighth hour instead of the fifth. In addition, Drivers never receive a second meal period for shifts in excess of ten (10) hours and also do not receive the premium compensation for the missed second meal period. There is no evidence that PLAINTIFF or PLAINTIFF CLASS members have agreed to waive their right to a second meal period with respect to shifts lasting more than ten (10) hours but less than twelve (12) hours.

22. Moreover, DEFENDANTS fail to provide rest periods or compensate PLAINTIFF and members of the PLAINTIFF CLASS for missed rest periods despite their knowledge that such periods are not made available to them. Specifically, pursuant to established policies and procedures applicable to PLAINTIFF and all members of the PLAINTIFF CLASS, DEFENDANTS fail to provide Drivers with a ten (10) minute, work-free rest period for shifts lasting between two (2) and six (6) hours. They are also not provided a second rest period for shifts lasting six (6) to ten (10) hours or a third rest period for shifts in excess of ten (10) hours. DEFENDANTS did not pay PLAINTIFF or members of the PLAINTIFF CLASS the premium compensation for these missed rest periods despite knowing that such rest periods have not been made available to PLAINTIFF and members of the PLAINTIFF CLASS.



1           23. In addition to violating California's wage and hour laws with respect to meal and  
2 rest periods, DEFENDANTS also force drivers, including PLAINTIFF and the PLAINTIFF  
3 CLASS, to complete certain work off-the-clock. In California, by law, any time which is not  
4 compensated automatically constitutes a minimum wage violation. (See *Armenta v. Osmose, Inc.*  
5 (2005) 135 Cal.App.4th 314, 324). DEFENDANTS fail to pay employees the required minimum  
6 wage for all hours worked. In particular, DEFENDANTS compensate PLAINTIFF and the  
7 PLAINTIFF CLASS on an hourly basis but do not pay them for certain pre- and post-trip  
8 responsibilities. With respect to pre-shift duties, PLAINTIFF and the PLAINTIFF CLASS are  
9 not paid for the time it takes them to procure their assignments in the morning and get to their  
10 trucks. In addition, PLAINTIFF and the PLAINTIFF CLASS are not paid for any delays caused  
11 by their trucks not being ready when they arrive for their shift. Concerning post-trip work,  
12 PLAINTIFF and the PLAINTIFF CLASS are not compensated for the time worked after they  
13 return their trucks to the terminal and turn off the engine. This is so despite the fact that  
14 PLAINTIFF and the PLAINTIFF CLASS must wait anywhere from 15 to 30 minutes to obtain  
15 necessary paperwork and thereafter sort the paperwork (sorting white and green copies).  
16 PLAINTIFF and the PLAINTIFF CLASS are also not compensated for completing paperwork at  
17 the conclusion of their shifts.

18           24. DEFENDANTS also provided inaccurate wage statements to PLAINTIFF and  
19 members of the PLAINTIFF CLASS. The wage statements do not show the correct total hours  
20 worked, the correct gross pay earned, and the correct net wages earned, among other deficiencies.  
21 This causes injury because it makes it more difficult for PLAINTIFF and members of the  
22 PLAINTIFF CLASS to determine what compensation they are owed but were not paid.

23           25. PLAINTIFF and members of the PLAINTIFF CLASS were also not provided with  
24 all wages due upon termination or resignation. This is prohibited practice in California.

25           26. DEFENDANTS also failed to reimburse PLAINTIFF and members of the  
26 PLAINTIFF CLASS for reasonable business expenses related to cell phone use. Drivers in the  
27 PLAINTIFF CLASS like PLAINTIFF were required to use their personal cell phones for work.  
28

1 DEFENDANTS' managers would call drivers in the PLAINTIFF CLASS on their personal cell  
2 phones to discuss driving routes, deliveries, and other work related issues during their daily  
3 routes. However, PLAINTIFF and members of the PLAINTIFF CLASS are not compensated for  
4 any expenses associated with using their cell phones for work.

5 27. While serving as a delivery truck driver, PLAINTIFF never made any out of state  
6 deliveries. PLAINTIFF did witness infrequent out of state deliveries by the same, small group of  
7 drivers. These drivers were not indiscriminately chosen to occasionally drive out of state,  
8 however. Accordingly, there was no reasonable expectation that PLAINTIFF would make  
9 interstate trips for DEFENDANTS. However, PLAINTIFF was classified as being exempt from  
10 the FLSA under the Motor Carrier Act—a clear violation of California Unfair Competition laws.

11 28. The goods delivered by PLAINTIFF do come from out of state; however, the  
12 goods are refined at various stages of transport and changed into other products, breaking up the  
13 stream of commerce.

14 29. Members of the PLAINTIFF CLASS are employees of DEFENDANTS and  
15 employed as drivers. Members of the PLAINTIFF CLASS perform the same basic job duties as  
16 PLAINTIFF and like PLAINTIFF have been and/or are classified as exempt under the Motor  
17 Carrier Act by DEFENDANTS from federal and state overtime laws in violation of California  
18 Business and Professions Code Section 17200, *et seq.*

19 30. Members of the PLAINTIFF CLASS, save for the same, small handful of drivers,  
20 only drive intrastate and are reasonably expected to only drive intrastate.

21 31. Members of the PLAINTIFF CLASS are not reasonably expected to make  
22 interstate deliveries. Only a handful of DEFENDANTS' drivers are expected to make infrequent  
23 out-of-state deliveries on an extremely limited basis. DEFENDANTS' drivers are not  
24 indiscriminately chosen for these infrequent out-of-state driving.

25 32. Overall, DEFENDANTS' violations of the law were willful and done according to  
26 DEFENDANTS' established policies and procedures, as applicable to PLAINTIFF and all  
27 members of the PLAINTIFF CLASS.  
28

**FIRST CAUSE OF ACTION**

**FAILURE TO PAY MEAL AND REST PERIOD COMPENSATION**

(Cal. Lab. Code §§ 226.7, 512)

By PLAINTIFF in his individual capacity and in his capacity as representative of all similarly situated members of the PLAINTIFF CLASS against DEFENDANTS.

33. PLAINTIFF realleges and incorporates, by reference, as though fully set forth, the allegations contained in paragraphs 1 to 32.

34. Throughout PLAINTIFF's employment with DEFENDANTS, DEFENDANTS failed to make available to PLAINTIFF and members of the PLAINTIFF CLASS uninterrupted, work-free thirty (30) minute meal periods in accordance with the requirements of California law. DEFENDANTS failed to provide a meal period or timely meal period for shifts in excess of five (5) hours worked, failed to provide a second meal period for shifts in excess of ten (10) hours, and failed to compensate employees for these missed or late meal periods, as required by law.

35. Throughout PLAINTIFF's employment with DEFENDANTS, DEFENDANTS failed to make available to PLAINTIFF and members of the PLAINTIFF CLASS any rest period for shifts lasting four (4) hours or a major fraction thereof, as required by law, and failed to compensate them for missed rest periods.

36. PLAINTIFF is informed, believes, and, thereon, alleges, that the failure of DEFENDANTS to make available meal and rest periods and to compensate PLAINTIFF and members of the PLAINTIFF CLASS for these missed meal and rest periods was willful, purposeful, and unlawful and done in accordance with the policies and practices of DEFENDANTS' operations.

37. As a proximate cause of these violations, PLAINTIFF and members of the PLAINTIFF CLASS have been damaged in an amount according to proof at the time of trial, but in an amount in excess of the jurisdiction of this Court. PLAINTIFF and members of the PLAINTIFF CLASS are entitled to recover the unpaid balance of wages owed, penalties, including penalties available pursuant to California Labor Code Sections 226, 226.7, and 558,

1 interest, reasonable attorney fees, and costs of suit pursuant to California Labor Code Sections  
2 218.5 and 1194, et seq.

3  
4 **SECOND CAUSE OF ACTION**

5 **FAILURE TO PAY COMPENSATION FOR ALL HOURS WORKED AND MINIMUM**  
6 **WAGE VIOLATIONS**

7 (Cal. Lab. Code §§ 216, 1194, 1194.2, 1197)

8 By PLAINTIFF in his individual capacity and in his capacity as representative of all similarly  
9 situated members of the PLAINTIFF CLASS against DEFENDANTS.

10 38. PLAINTIFF realleges and incorporates, by reference, as though fully set forth, the  
11 allegations contained in paragraphs 1 to 37.

12 39. PLAINTIFF brings this action to recover unpaid compensation for all hours  
13 worked, defined by the IWC as the time during which an employee is subject to the control of an  
14 employer, including all the time the employee suffers or is permitted to work, whether or not  
15 required to do so.

16 40. DEFENDANTS' conduct described in this Complaint violates California Labor  
17 Code Sections 216, 1194, 1194.2, and 1197, among other things.

18 41. DEFENDANTS failed to pay PLAINTIFF and members of the PLAINTIFF  
19 CLASS for all of the actual hours worked even though PLAINTIFF and members of the  
20 PLAINTIFF CLASS were providing services to DEFENDANTS and were under  
21 DEFENDANTS' control. DEFENDANTS knew or should have known that PLAINTIFF and  
22 members of the PLAINTIFF CLASS were working these hours for which they were not paid.

23 42. PLAINTIFF and members of the PLAINTIFF CLASS are entitled to recover the  
24 unpaid balance of compensation DEFENDANTS owe PLAINTIFF and members of the  
25 PLAINTIFF CLASS, plus interest on that amount, liquidated damages pursuant to California  
26 Labor Code Section 1194.2, reasonable attorney fees, and costs of this suit pursuant to California  
27 Labor Code Section 1194.  
28

1           43. PLAINTIFF and members of the PLAINTIFF CLASS are also entitled to  
2 additional penalties and / or liquidated damages pursuant to statute.

3                                   **THIRD CAUSE OF ACTION**

4                                   **FAILURE TO PROVIDE ACCURATE ITEMIZED STATEMENTS**

5                                   (b) (Cal. Lab. Code § 226)

6           By PLAINTIFF in his individual capacity and in his capacity as representative of all similarly  
7 situated members of the PLAINTIFF CLASS against DEFENDANTS.

8           44. PLAINTIFF realleges and incorporates, by reference, as though fully set forth, the  
9 allegations contained in paragraphs 1 to 43.

10           45. DEFENDANTS failed to provide PLAINTIFF and members of the PLAINTIFF  
11 CLASS with accurate itemized statements as required by California Labor Code Section 226.

12           46. PLAINTIFF is informed, believes, and alleges that the failure of DEFENDANTS  
13 to provide accurate itemized wage statements was knowing and intentional. PLAINTIFF and  
14 members of the PLAINTIFF CLASS have suffered injury as a result of DEFENDANTS' actions  
15 in this regard in that they must expend additional time and incur expenses that otherwise would  
16 not have been expended or incurred in order to determine the amount of wages they are owed but  
17 were never paid. As a result, PLAINTIFF and members of the PLAINTIFF CLASS are entitled  
18 to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in  
19 which a violation occurs and one hundred dollars (\$100) per employee for each violation in a  
20 subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000) and  
21 are entitled to an award of costs and reasonable attorney fees.

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**FOURTH CAUSE OF ACTION**

**WAITING TIME PENALTIES**

(Cal. Lab. Code § 203)

By PLAINTIFF in his individual capacity and in his capacity as representative of all similarly situated members of the PLAINTIFF CLASS against DEFENDANTS.

47. PLAINTIFF realleges and incorporates, by reference, as though fully set forth, the allegations contained in paragraphs 1 to 46.

48. Pursuant to California Labor Code Section 201, if an employer discharges an employee, the wages earned and unpaid at the time of the discharge are due and payable immediately. Pursuant to California Labor Code Section 202, if an employee quits his or her employment, the wages earned and unpaid at the time of the discharge are due and payable within seventy-two (72) hours of resignation.

49. PLAINTIFF and members of the PLAINTIFF CLASS were either terminated by DEFENDANTS or have resigned from their employment with DEFENDANTS. To this day, PLAINTIFF and members of the PLAINTIFF CLASS have not received all of the wages and other compensation they rightfully earned.

50. DEFENDANTS, and each of them, willfully refused and continue to refuse to pay PLAINTIFF and members of the PLAINTIFF CLASS all wages earned, including overtime compensation, in a timely manner, as required by California Labor Code Section 203.

PLAINTIFF therefore requests restitution and penalties pursuant to California Labor Code Section 203.

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**FIFTH CAUSE OF ACTION**

**FAILURE TO PAY ALL WAGES BY THE APPROPRIATE PAY PERIOD**

(Cal. Lab. Code § 204)

By PLAINTIFF in his individual capacity and in his capacity as representative of all similarly situated members of the PLAINTIFF CLASS against DEFENDANTS.

51. PLAINTIFF realleges and incorporates, by reference, as though fully set forth, the allegations contained in paragraphs 1 to 50.

52. During the Class Period, Labor Code Section 204 applied to DEFENDANTS' employment of PLAINTIFF and members of the PLAINTIFF CLASS. At all relevant times, California Labor Code Section 204 provided that all wages earned by any employee, such as PLAINTIFF and members of the PLAINTIFF CLASS, in any employment between the first (1<sup>st</sup>) and fifteenth (15<sup>th</sup>) days, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the sixteenth (16<sup>th</sup>) and twenty-sixth (26<sup>th</sup>) day of the month during which the work was performed. Furthermore, at all relevant times, California Labor Code Section 204 provided that all wages earned by any employee, such as PLAINTIFF and any member of the PLAINTIFF CLASS, in any employment between the sixteenth (16<sup>th</sup>) and the last day, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the first (1<sup>st</sup>) and tenth (10<sup>th</sup>) day of the following month.

53. During the Class Period, DEFENDANTS failed to pay PLAINTIFF and members of the PLAINTIFF CLASS wages for all hours worked.

54. During the Class Period, DEFENDANTS failed to pay PLAINTIFF and members of the PLAINTIFF CLASS for all wages earned, and, therefore, violating California Labor Code Section 204. Accordingly, PLAINTIFF and members of the PLAINTIFF CLASS are entitled to recover all damages, penalties, and other remedies available for violation of California Labor Code Section 204.

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**SIXTH CAUSE OF ACTION**

**FAILURE TO REIMBURSE BUSINESS EXPENSES**

(Cal. Lab. Code § 2802)

By PLAINTIFF in his individual capacity and in his capacity as representative of all similarly situated members of the PLAINTIFF CLASS against DEFENDANTS.

55. PLAINTIFF realleges and incorporates, by reference, as though fully set forth, the allegations contained in paragraphs 1 to 54.

56. During the Class Period, Labor Code Section 2802 applied to DEFENDANTS' employment of PLAINTIFF and members of the PLAINTIFF CLASS. At all relevant times, California Labor Code Section 2802 required employers to indemnify employees for all expenses that the employees necessarily expend as a direct result of the discharge of their employment duties or at the direction of the employer.

57. During the Class Period, PLAINTIFF and PLAINTIFF CLASS were required to use their personal cell phones for work. DEFENDANT's managers and supervisors call PLAINTIFF and PLAINTIFF CLASS on their personal cell phones to contact them regarding driving routes and other work related issues during the drivers' daily routes. DEFENDANTS failed to pay PLAINTIFF and members of the PLAINTIFF CLASS for these expenditures.

58. During the Class Period, DEFENDANTS failed to pay PLAINTIFF and members of the PLAINTIFF CLASS for all expenditures that employees necessarily expended as a result of their employment, and, therefore, violating California Labor Code Section 2802. Accordingly, PLAINTIFF and members of the PLAINTIFF CLASS are entitled to recover all damages, penalties, and other remedies available for violation of California Labor Code Section 2802.

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**SEVENTH CAUSE OF ACTION**

**PRIVATE ATTORNEY GENERAL ACT**

(Cal. Lab. Code §§ 201-203, 204, 210, 216, 225.5, 226.3, 512, 558, 1174, 1174.5, 1194, 1197, 1197.1, 1199, 2699, et seq.)

By PLAINTIFF in his individual capacity and in his capacity as representative of all similarly situated members of the PLAINTIFF CLASS against DEFENDANTS.

59. PLAINTIFF realleges and incorporates, by reference, as though fully set forth, the allegations contained in paragraphs 1 to 57.

60. PLAINTIFF, individually and on behalf of both the PLAINTIFF CLASS and the general public, alleges that on or about July 22, 2015, he provided written notice to the Labor and Workforce Development Agency ("LWDA") and DEFENDANTS of the specific violations of the California Labor Code that DEFENDANTS have violated and continue to violate.

61. The LWDA did not respond to PLAINTIFF within 33 days of receiving PLAINTIFF's notice. On August 24, 2015, PLAINTIFF sent a supplemental letter to the LWDA clarifying that the entity named in the July 22, 2015 letter – Keenan Advantage Group West, Inc. - was really KAG West, LLC.

62. Pursuant to California Labor Code Section 2699.3(a)(2)(A), PLAINTIFF has exhausted all administrative procedures required of him under California Labor Code Sections 2698, 2699, and 2699.3. As a result, PLAINTIFF is justified as a matter of right in bringing forward this cause of action.

63. As a result of all of these alleged acts, PLAINTIFF seeks penalties under California Labor Code Sections 2698 and 2699 because of DEFENDANTS' violations of numerous provisions of the California Labor Code.

64. Pursuant to California Labor Code Section 2699, PLAINTIFFS should be awarded twenty-five percent (25%) of all penalties due under California Law, including attorney fees and costs.

///

**EIGHTH CAUSE OF ACTION**

**UNFAIR BUSINESS PRACTICES**

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

By PLAINTIFF in his individual capacity and in his capacity as representative of all similarly situated members of the PLAINTIFF CLASS against DEFENDANTS.

65. PLAINTIFF realleges and incorporates, by reference, as though fully set forth, the allegations contained in paragraphs 1 to 64.

66. DEFENDANTS' violations of the employment laws and regulations, as alleged in this Complaint, include, among other things, DEFENDANTS': (1) failure and refusal to provide legally compliant meal and rest periods or compensation in lieu thereof; (2) failure and refusal to pay the minimum wage for all hours worked; and (3) failure and refusal to pay all overtime wages earned by PLAINTIFF and members of the PLAINTIFF CLASS - in accordance with Sections 206, 207 and 216 of the FLSA - pursuant to DEFENDANTS' willful and intentional misclassification of PLAINTIFF and members of the PLAINTIFF CLASS as "exempt" drivers. The aforementioned violations constitute unfair business practices in violation of the Unfair Competition Law, codified in California Business and Professions Code Section 17200, et seq.

67. As a result of DEFENDANTS' unfair business practices, DEFENDANTS have reaped unfair benefits and illegal profits at the expense of PLAINTIFF, members of the PLAINTIFF CLASS, and members of the general public. DEFENDANTS should be compelled to restore such monies to PLAINTIFF and members of the PLAINTIFF CLASS.

**PRAYER FOR RELIEF**

**WHEREFORE**, PLAINTIFF prays for relief as follows:

1. That the Court determines Causes of Action 2-6 and 8 may be maintained as a class action and for Cause of Action 7 to be maintained as a representative action;
2. For payment of all wages owed to PLAINTIFF and the PLAINTIFF CLASS, including, but not limited to, all overtime pay and minimum wage pay;

3. For restitution of all wages, including overtime and minimum wage pay, due to PLAINTIFF and PLAINTIFF CLASS from the unlawful business practices;
4. For waiting time penalties pursuant to California Labor Code § 203;
5. For all statutory and civil penalties recoverable by law, including those available under Labor Code §§ 2698, *et seq.*;
6. For interest accrued to date;
7. For costs of the suit incurred;
8. For attorney fees and costs pursuant to California Labor code Sections 218.5, 226, 1021.5, 1194 and all other applicable law; and
9. For such other and further relief that the Court may deem just and proper.

Dated: August 27, 2015

ALEXANDER KRAKOW + GLICK, LLP

By: 

Michael S. Morrison  
Attorney for Plaintiff  
PATRICK MALONE  
individually and on behalf of all others similarly  
situated

**DEMAND FOR JURY TRIAL**

PLAINTIFF and members of the PLAINTIFF CLASS further request a trial by jury on all issues so triable.

Dated: August 28<sup>th</sup>, 2015

ALEXANDER KRAKOW + GLICK, LLP

By: Michael S. Morrison  
Michael S. Morrison  
Attorney for Plaintiff  
PATRICK MALONE  
individually and on behalf of all others similarly  
situated

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**ENDORSED  
FILED  
ALAMEDA COUNTY**

MAY 04 2016

CLERK OF THE SUPERIOR COURT

By Xian-Xii Bowie

**ALEXANDER KRAKOW + GLICK LLP**

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Attorneys for Plaintiff JAMES SOUZA individually, on  
behalf of all others similarly situated, and the general public

**SUPERIOR COURT FOR THE STATE OF CALIFORNIA**

**IN AND FOR THE COUNTY OF ALAMEDA**

JAMES SOUZA, on behalf of himself  
and all others similarly situated,

Plaintiffs,

vs.

KAG WEST, LLC, a California limited  
liability company; and DOES 1 through  
100, inclusive,

Defendants.

CASE NO. **RG16814354**

**COMPLAINT FOR:**

**1. CIVIL PENALTIES UNDER LABOR CODE  
PRIVATE ATTORNEYS GENERAL ACT OF  
2004, LABOR CODE 2698, ET. SEQ**

**DEMAND FOR JURY TRIAL**

**BY FAX**



1 Plaintiff JAMES SOUZA ("Plaintiff"), an individual, hereby files this Complaint against  
2 defendant KAG WEST, LLC, a California limited liability company and Does 1 to 100 (hereinafter  
3 collectively, "Defendant"). Plaintiff is informed and believes and on the basis of that information  
4 and belief alleges as follows:

### 5 INTRODUCTION

6 1. This lawsuit challenges the Defendant's employment practices with respect to its  
7 Drivers employed in the State of California. Defendant operates a transportation company which is  
8 primarily responsible for delivering petroleum based products throughout California. The  
9 "aggrieved" employees Plaintiff seeks to represent on behalf of the state of California are California  
10 based truck drivers which have been subjected to at least one of the violations described herein.  
11 Defendant fails to pay for all straight time hours worked by Drivers, requiring them to perform  
12 certain pre-trip and post-trip duties off-the-clock. Also Defendant fails to provide legally compliant,  
13 work free meal and rest breaks, fails to timely compensate employees for all wages earned, and fails  
14 to properly and accurately report wages earned, hours worked, and wage rates, among other  
15 violations.

16 2. At all times relevant hereto, and with certain defined exceptions, Defendant's  
17 compensation scheme did not fully compensate Plaintiff with at least minimum wages and/or  
18 designated rates for all hours worked.

19 3. At all times relevant hereto, and as a matter of policy and/or practice, Defendant  
20 failed to provide Plaintiff with adequate off-duty meal periods and meal period compensation in  
21 violation of Labor Code sections 226.7, 512, and 516 and IWC Wage Order No. 9.

22 4. At all times relevant hereto, and as a matter of policy and/or practice, Defendant  
23 failed to provide Plaintiff with paid rest periods and rest period compensation in violation of Labor  
24 Code sections 226.7 and 516 and IWC Wage Order No. 9.

25 5. At all times relevant hereto, and as a matter of policy and/or practice, Defendant  
26 knowingly and intentionally provided Plaintiff with wage statements that, among others, do not  
27 accurately show all wages earned, all hours worked, or all applicable rates.

28 6. At all times relevant hereto, and as a matter of policy and/or practice, Defendant

1 failed to maintain accurate documentation of the actual hours worked each day by Plaintiff, all  
2 wages earned and meal breaks taken in violation of Labor Code sections 1174 and IWC Wage Order  
3 No. 9, section 7.

4 7. At all times relevant hereto, and as a matter of policy and/or practice, Defendant  
5 failed to pay Plaintiff all wages due, but not limited to, payment of wages for off-the-clock work,  
6 and missed meal and rest periods compensation.

7 8. In this case, Plaintiff seeks penalties established by Labor Code section 2699, the  
8 Private Attorney Generals Act (PAGA), against Defendant for its unlawful employment practices.

9 **PARTIES**

10 ***Plaintiff James Souza***

11 9. Plaintiff James Souza is an individual over the age of eighteen (18) and is now and/or  
12 at all relevant times mentioned in this Complaint was a resident and domiciliary of the State of  
13 California. Mr. Souza was employed by Defendant from on or about April 16, 2012 to April 15,  
14 2016. Within the timeframe of May 4, 2015 to May 4, 2016 (the "Relevant Time Period"), Mr.  
15 Souza worked for Defendant at Defendant's facilities in both Martinez, California and Fresno,  
16 California. Mr. Souza is bringing this lawsuit in a representative capacity as an aggrieved employee  
17 of Defendant on behalf of the state of California. He is not asserting any individual claims.

18 ***Defendant KAG West, LLC***

19 10. Plaintiff is informed and believes and based thereon alleges that Defendant KAG  
20 West, LLC is now and/or all times mentioned in this Complaint a California limited liability  
21 company licensed to do business and actually doing business in the State of California.

22 11. Plaintiff is informed and believes and based thereon alleges that Defendant is now  
23 and/or at all times mentioned in this Complaint the owner and operator of a business with numerous  
24 locations throughout the State of California, including in Alameda County. Among other things,  
25 Defendant provides services for the pick-up, transportation and delivery of fuel and other oil based  
26 products to the appropriate destinations within the state of California.

27 12. Plaintiff is informed and believes and based thereon alleges that Defendant maintains  
28 and operates facilities in Martinez, California and elsewhere including in Alameda County and that

1 some aggrieved employee Drivers reside in Alameda County.

2 ***Defendants Does 1 through 10, Inclusive***

3 13. DOES 1 through 10 inclusive are now and/or at all times mentioned in this Complaint  
4 were, licensed to do business and/or actually doing business in the State of California. Plaintiff does  
5 not know the true names or capacities, whether individual, partner, or corporate, of DOES 1 through  
6 10, inclusive and for that reason, DOES 1 through 10 are sued under such fictitious names pursuant  
7 to California Code of Civil Procedure, section 474. Plaintiff will seek leave of court to amend this  
8 Complaint to allege such names and capacities as soon as they are ascertained. DOES 1 through 5  
9 are believed to be business entities who were also co-employers of the Plaintiff and the putative class  
10 herein.

11 ***All Defendants***

12 14. Plaintiff is informed and believes and based thereon alleges that at all times herein  
13 mentioned, all Defendant, and each of them, were and are the agents, servants, employees, joint  
14 venturers, and/or partners of each of the other Defendants, and were, at all such times, acting within  
15 the course and scope of said employment and/or agency; furthermore, that each and every Defendant  
16 herein, while acting as a high corporate officer, director and/or managing agent, principal and/or  
17 employer, expressly directed, consented to, approved, affirmed and ratified each and every action  
18 taken by the other co-Defendants, as herein alleged and was responsible in whole or in part for the  
19 matters referred to herein.

20 15. Plaintiff is informed and believes and based thereon alleges that at all times herein  
21 mentioned, Defendant, and each of them, proximately caused Plaintiff, all others similarly situated  
22 and the general public to be subjected to the unlawful practices, wrongs, complaints, injuries and/or  
23 damages alleged in this Complaint.

24 16. Plaintiff is informed and believes and based thereon alleges that Defendant, and each  
25 of them, are now and/or at all times mentioned in this Complaint were members of and/or engaged in  
26 a joint venture, partnership and common enterprise, and were acting within the course and scope of,  
27 and in pursuit of said joint venture, partnership and common enterprise and, as such were co-  
28 employers of the Plaintiff and the putative class herein.

17. Plaintiff is informed and believes and based thereon alleges that Defendant, and each of them, at all times mentioned in this Complaint, concurred with, contributed to, approved of, aided and abetted, condoned and/or otherwise ratified, the various acts and omissions of each and every one of the other Defendants in proximately causing the injuries and/or damages alleged in this Complaint.

## JURISDICTION AND VENUE

18. This Court has jurisdiction over this matter, and under Code of Civil Procedure section 395, venue is proper in that Plaintiff's injuries were incurred, in part, within Alameda County; the actions giving rise to Plaintiff's Complaint and those of others arose in whole or in part within Alameda County; and Defendant operates a terminal in Alameda County. Moreover, there are aggrieved employee Drivers who reside in Alameda County and some of the harms occurred in Alameda County. Plaintiff does not seek more than seventy-five thousand dollars (\$75,000) and waives seeking more than seventy-five thousand dollars (\$75,000), including attorney's fees but excluding costs and interest, as to his share or portion of penalties or any other recovery with respect to the violations alleged herein against Defendant. This case also raises no federal questions.

## FACTUAL ALLEGATIONS

## Background

19. Plaintiff is a former employee for Defendant and worked as a delivery truck driver who worked out of Defendant's Martinez and Fresno facilities. From on or about April 16, 2012 to June 30, 2015, Plaintiff was based out of Defendant's Martinez facility. From July 1, 2015 to when he left the company on April 15, 2016, Plaintiff worked for Defendant out of its Fresno facility. Throughout his employment with Defendant, Plaintiff, like other Drivers, was compensated on an hourly basis

20. The primary work duties of Plaintiff and those similarly situated include, among others, the pick-up, transportation and delivery of fuel and other oil based products to the appropriate destinations within the state of California.

21. Additional job duties include, but are not limited to, arriving before their scheduled start of shift time to obtain their assignments in the morning and get to their trucks, to complete and

1 sort necessary paperwork in connection with the trips they perform on a daily basis, to be ready and  
2 available to answer calls from Defendant's dispatchers and managers at any time before, during, and  
3 after their shifts.

4 ***Defendant's Failure to Pay Minimum Wages and Designated Rates***

5 22. IWC Wage Order, number 9 defines "hours worked" to mean "the time during which  
6 an employee is subject to the control of an employer, and includes all the time the employee is  
7 suffered or permitted to work, whether or not required to do so."

8 23. Labor Code section 1182.12 and IWC Wage Order, number 9, section 4 formerly  
9 provided that on and after January 1, 2008, the minimum wage shall be not less than eight dollars  
10 (\$8.00) per hour.

11 24. Labor Code section 1182.12 and IWC Wage Order, number 9, section 4 provide that  
12 on and after July 1, 2014, the minimum wage for all industries shall be not less than nine dollars (\$9)  
13 per hour, and on and after January 1, 2016, the minimum wage for all industries shall be not less  
14 than ten dollars (\$10) per hour.

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

19 26. Labor Code section 1194.2(a) provides in relevant part: "In any action under Section  
20 1193.6 or Section 1194 to recover wages because of the payment of a wage less than the minimum  
21 wage fixed by an order of the commission, an employee shall be entitled to recover liquidated  
22 damages in an amount equal to the wages unlawfully unpaid and interest thereon."

23 27. Labor Code section 1197 provides: "The minimum wage for employees fixed by the  
24 commission is the minimum wage to be paid to employees, and the payment of a less wage than the  
25 minimum so fixed is unlawful."

26 28. Drivers, including Plaintiff, are paid on an hourly-basis for their time spent picking  
27 up and transporting fuel and other oil based products to the appropriate destinations within  
28 California. Hours worked include, but are not limited to, all hours that an employee is permitted or

1 suffered to work including, but not limited to, off-the-clock work that an employer either knew or  
2 should have known that an employee was performing.

3 29. As a matter of policy and/or practice, Defendant routinely suffered or permitted its  
4 Drivers to work portions of the day during which they were subject to Defendant's control, but  
5 Defendant failed to compensate them.

6 30. Throughout the Relevant Time Period, Defendant routinely required its Drivers,  
7 including Plaintiff, to perform work before and after their scheduled shifts as well as during meal  
8 and rest breaks. Such work includes but is not limited to the time it takes Drivers to procure their  
9 assignments in the morning and get to their trucks. In addition, Drivers, including Plaintiff, are not  
10 paid for any delays caused by their trucks not being ready when they arrive for their shift.  
11 Concerning post-trip work, Drivers and Plaintiff are not compensated for the time worked after they  
12 return their trucks to the terminal and turn off the engine. This is so despite the fact that Drivers,  
13 including Plaintiff, must wait anywhere from 15 to 30 minutes to obtain necessary paperwork and  
14 thereafter sort the paperwork (sorting white and green copies). Drivers, including Plaintiff, are also  
15 not compensated for completing paperwork at the conclusion of their shifts. As a consequence of  
16 KAG WEST, LLC'S uniform policies and/or practices of failing to compensate Drivers, including  
17 Plaintiff, for all of their time worked, Drivers, including Plaintiff, were not paid at least minimum  
18 wages and/or designated rates for all of the hours that they were subject to Defendant's control.

19 31. Additionally, Defendant did not maintain adequate and accurate records of all wages  
20 earned, hours worked, and meal and rest breaks taken.

21 ***Defendant's Failure to Provide Meal Breaks***

22 32. Plaintiff did not waive his meal periods with Defendant, by mutual consent or  
23 otherwise. Plaintiff did not enter into any written agreement with Defendant agreeing to an on-the-  
24 job paid meal period. Nevertheless, Defendant implemented a uniform policy and procedure in  
25 which Drivers, including Plaintiff, were not provided with legally compliant duty-free meal periods.

26 33. Plaintiff is informed and believes and based thereon alleges that Defendant failed to  
27 effectively communicate California meal period requirements to their Drivers including Plaintiff.  
28 This is because Defendant only observes federal Hours of Service ("HOS") requirements and

1 instructs Drivers to take a meal period before the conclusion of the eighth hour instead of the fifth.

2 34. Specifically, throughout the Relevant Time Period, Defendant regularly:

- 3 a. Failed to provide Plaintiff with a first meal period of not less than thirty (30)  
4 minutes during which he was relieved of all duty before working more than five  
5 (5) hours;
- 6 b. Failed to provide Plaintiff with a second meal period of not less than thirty (30)  
7 minutes during which they are relieved of all duty before working more than ten  
8 (10) hours per day; and
- 9 c. Failed to pay Plaintiff and the members of the putative class one hour of pay at  
10 their regular rate of compensation for each workday that a meal period was not  
11 provided.

12 ***Defendant's Failure to Provide Rest Breaks***

13 35. At all times relevant hereto, Labor Code section 226.7 and IWC Wage Order, number  
14 9, section 12 required employers to authorize, permit, and provide a ten (10) minute paid rest for  
15 each four (4) hours of work, during which employees are relieved of all duty.

16 36. At all times relevant hereto, Labor Code Section 226.7(b) and IWC Wage Order,  
17 number 9, section 12 required employers to pay one hour of additional pay at the regular rate of  
18 compensation for each employee and each workday that a proper rest period is not provided.

19 37. Plaintiff is informed and believes and based thereon alleges that Defendant had a  
20 policy of disallowing rest breaks for Plaintiff and other Drivers. As a result, while working for  
21 Defendant, Plaintiff and other Drivers have been unable to take paid ten (10) minute paid rest  
22 periods for every four (4) hours of work, or major fraction thereof, during which they are relieved of  
23 all work-related duties. Defendant also overloads Drivers' schedules with deliveries. Therefore,  
24 even if Drivers were permitted to take rest periods, the amount of work they have dissuades and  
25 discourages them from doing so as taking rest periods will cause the Drivers to fall behind on  
26 deliveries and could result in discipline.

27 38. Consequently, throughout the Relevant Time Period, Plaintiff and other similarly  
28 situated Drivers were routinely denied the rest breaks they were entitled to under California law.

1           39. Specifically, throughout the Relevant Time Period, Defendant regularly:

- 2           a. Failed to provide paid rest periods of ten (10) minutes during which Plaintiff and the  
3           members of the putative class were relieved of all duty for each four (4) hours of  
4           work;  
5           b. Failed to compensate Plaintiff and the members of the putative class for break time  
6           when breaks were taken; and  
7           c. Failed to pay Plaintiff and the members of the putative class one (1) hour of pay at  
8           their regular rate of compensation for each workday that a rest period was not  
9           permitted.

10       ***Defendant's Failure to Reimburse Drivers, Including Plaintiff, For Necessary Business***  
11       ***Expenditures***

12           40. Defendant also failed to reimburse Plaintiff and Defendant's Drivers for reasonable  
13       business expenses related to cell phone use. Drivers like Plaintiff were required to use their personal  
14       cell phones for work. Defendant's managers would call Drivers like Plaintiff on their personal cell  
15       phones to discuss driving routes, deliveries, and other work related issues during their daily routes.  
16       However, Plaintiff and Drivers are not compensated for any expenses associated with using their cell  
17       phones for work.

18       ***Defendant's Failure to Provide Accurate, Itemized Wage Statements***

19           41. At all times relevant hereto, Labor Code section 226 and IWC Wage Order, number  
20       9, section 7 required employers to maintain adequate employment records and provide employees  
21       with accurate itemized wage statements showing gross wages, total hours worked, all applicable  
22       hourly rates worked during each pay period, the corresponding number of hours worked at each  
23       hourly rate, and meal breaks taken.

24           42. Wage statements provided to Drivers including Plaintiff by Defendant do not  
25       accurately show all wages earned, all hours worked, or all applicable rates, in violation of the Labor  
26       Code section 226, IWC Wage Order number 9, section 7, and the UCL.

27           43. Moreover, Defendant did not maintain adequate records of all wages earned, hours  
28       worked and breaks taken.



1 ***Exhaustion of Administrative Remedies***

2 44. Plaintiff has complied with the procedures for bringing suit specified in California  
3 Labor Code Section 2699.3. By letter dated March 29, 2016, Plaintiff, on behalf of himself and the  
4 other aggrieved employees, gave written notice by certified mail to the Labor and Workforce  
5 Development Agency ("LWDA") and Defendant of the specific provisions of the California Labor  
6 Code alleged to have been violated, including the facts and theories to support the alleged violations.

7 45. Because the LWDA did not provide notice within 33 days of the postmark of  
8 Plaintiff's notice advising whether or not the agency intended to investigate his claims, Plaintiff  
9 alleges that he is entitled to commence his civil action pursuant to Labor Code Section 2699. Labor  
10 Code Section 2699.3(2)(A).

11 46. Plaintiff and the other aggrieved employees have therefore exhausted all  
12 administrative procedures required of them under Labor Code Sections 2698, 2699, and 2699.3, and  
13 as a result, are entitled as a matter of right in bringing forward this cause of action.

14 **FIRST CAUSE OF ACTION**

15 **CIVIL PENALTIES UNDER THE PRIVATE ATTORNEYS GENERAL ACT**

16 **(On Behalf of Plaintiff and the Putative Class Against Defendant)**

17 **Labor Code sections 201-203, 204, 210, 216, 223, 225.5, 226, 226.3, 226.7, 512, 558, 1174,**  
18 **1174.5, 1182, 1194, 1194.2, 1197, 1197.1, 2803, 2968, et seq.**

19 47. Plaintiff incorporates by reference the allegations set forth above. Plaintiff has  
20 complied with the procedures for bringing suit specified in California Labor Code Section 2699.3.

21 48. This action arises out of the allegedly unlawful labor practices of Defendant in  
22 California. Through this private attorneys general action, Plaintiff represents himself, and other  
23 aggrieved employees of Defendant that were in California, against whom Defendant has allegedly  
24 committed labor law violations alleged herein. As a result of the allegedly unlawful conduct  
25 described herein, Plaintiff now seeks to recover civil penalties, including the value of unpaid wages,  
26 attorneys' fees and costs, pursuant to the Labor Code Private Attorneys General Act of 2004, Labor  
27 Code Sections 558 and 2698, *et seq.*

28 49. Labor Code Section 1198 makes it unlawful for an employer to employ an employee

1 under conditions that violate the applicable Wage Order.

2 50. Plaintiff is informed and believes that throughout the Relevant Time Period,  
3 Defendant has applied centrally devised policies and practices to Plaintiff and the other aggrieved  
4 employees with respect to wages, hours, and working conditions.

5 **Failure to Pay Minimum Wages and Designated Rates**

6 51. At all relevant times, California Labor Code sections 1194, 1197 and 1197.1 provide  
7 that the minimum wage for employees fixed by the IWC is the minimum wage to be paid to  
8 employees and the payment of a wage less than the minimum so fixed is unlawful. Additionally,  
9 Code Section 1198 makes it unlawful for an employer to employ an employee under conditions that  
10 violate the applicable Wage Order.

11 52. Where any statute or contract requires an employer to maintain the designated wage  
12 scale, Labor Code Section 223 makes it unlawful for an employer to secretly pay a lower wage while  
13 purporting to pay the wage designated by statute or by contract.

14 53. At all relevant times, Defendant maintained a policy and practice of requiring  
15 Plaintiff and the other aggrieved employees to remain under Defendant's control without paying  
16 therefore, which resulted in them earning less than the legal minimum wage in the State of  
17 California for all hours worked. At all relevant times, Defendant maintained a policy and practice of  
18 requiring Plaintiff and the other aggrieved employees to remain under Defendant's control without  
19 paying therefor, which resulted in them earning less than the legal minimum wage in the State of  
20 California for all hours worked. At all relevant times, Defendant maintained a policy and practice of  
21 failing to pay all wages and compensation earned by Plaintiff and other aggrieved employees within  
22 the time limits prescribed by California Labor Code section 204.

23 54. Defendant's failure to pay Plaintiff and other aggrieved employees minimum wages  
24 and designated rates violates California Labor Code sections 216, 223, 1182.12, 1194, and 1197.  
25 Plaintiff and other aggrieved employees are entitled to recover civil penalties pursuant to sections  
26 1197.1, 225.5 and 2699(a), (f), and (g).

27 **Failure to Provide Meal and Rest Breaks**

28 55. Labor Code Section 512 and Section 11 of the Wage Order impose an affirmative

1 obligation on employers to provide non-exempt employees with uninterrupted, duty-free, meal  
2 periods of at least thirty (30) minutes for each work period of five (5) or more hours, and to provide  
3 them with two uninterrupted, duty-free, meal periods of at least thirty (30) minutes for each work  
4 period of more than ten (10) hours.

5 56. Labor Code Section 226.7 and Section 11 of the Wage Order prohibit employers from  
6 requiring employees to work during required meal periods and require employers to pay non-exempt  
7 employees an additional hour of premium wages on each workday that the employee is not provided  
8 with a required meal period.

9 57. At all relevant times during the applicable limitations period, Defendant failed to  
10 provide Plaintiff, and the other aggrieved employees, with an uninterrupted meal period of at least  
11 thirty (30) minutes on each day that they worked five (5) or more hours, by the conclusion of their  
12 fifth hour of work, as required by Labor Code Section 512 and the Wage Order. Defendant failed to  
13 provide meal breaks in compliance with California law because Defendant only had a policy of  
14 requiring Plaintiff and the other aggrieved employees to take their meal breaks by the conclusion of  
15 their eighth hour of work. Moreover, and separate from Defendant's flawed policy, the schedules  
16 and job duties that Defendant imposed upon Plaintiff and the other aggrieved employees practically  
17 prevented them from taking a meal break before the conclusion of their fifth hour of work. Finally,  
18 to the extent that Plaintiff and the other aggrieved employees were able to take a meal break, they  
19 would not be relieved of all of their work duties as KAG WEST, LLC required them to stay near  
20 their trucks at all times during any breaks, in order to secure the vehicles and their contents from  
21 theft or vandalism.

22 58. At relevant times during the applicable limitations period, Defendant failed to provide  
23 Plaintiff with two uninterrupted meal periods of at least thirty (30) minutes on each day that he  
24 worked ten (10) or more hours, as required by Labor Code Section 512 and the Wage Order, as a  
25 result of duties and schedules that did not permit him to take all legally required meal periods, and as  
26 a result of Defendant's policy and practice of only allowing a single (flawed) meal break per day,  
27 regardless of whether or not Plaintiff worked a shift of over 10 hours in length. Additionally,  
28 Defendant failed to provide Plaintiff with an uninterrupted meal period of at least thirty (30) minutes

1 within five (5) hours of his first meal period, as a result of duties and schedules that did not permit  
2 him to take all legally required meal periods, and as a result of Defendant's policy and practice of  
3 only allowing a single (flawed) meal break per day, regardless of whether or not Plaintiff worked a  
4 shift of over 10 hours in length.

5 59. Plaintiff is informed and believes and thereon alleges that, at relevant times during the  
6 applicable limitations period, Defendant maintained a policy or practice of not providing the other  
7 aggrieved employees with two uninterrupted meal periods of at least thirty (30) minutes on each day  
8 that they worked ten (10) or more hours, as required by Labor Code Section 512 and the Wage  
9 Order, as a result of duties and schedules that do not permit them to take all legally required meal  
10 periods, and as a result of Defendant's policy and practice of only allowing a single (flawed) meal  
11 break per day, regardless of whether or not Plaintiff worked a shift of over 10 hours in length.  
12 Additionally, Defendant maintained a policy or practice of not providing the other aggrieved  
13 employees with an uninterrupted meal period of at least thirty (30) minutes within five (5) hours of  
14 their first meal period, as a result of duties and schedules that do not permit them to take all legally  
15 required meal periods, and as a result of Defendant's policy and practice of only allowing a single  
16 (flawed) meal break per day, regardless of whether or not Plaintiff worked a shift of over 10 hours in  
17 length.

18 60. Section 12 of the Wage Order imposes an affirmative obligation on employers to  
19 permit and authorize employees to take required rest periods at a rate of no less than ten (10) minutes  
20 of net rest time for each four (4) hour work period, or major portion thereof, that must be in the  
21 middle of each work period insofar as is practicable.

22 61. Labor Code Section 226.7 and Section 2 the Wage Order prohibit employers from  
23 requiring employees to work during required rest periods and require employers to pay non-exempt  
24 employees an additional hour of premium wages on each workday that the employee is not provided  
25 with the required rest period.

26 62. At relevant times during the applicable limitations period, Defendant failed to provide  
27 Plaintiff with a net rest period of at least ten (10) minutes for each four (4) hour work period, or  
28 major portion thereof, as required by the Wage Order, as a result of duties and schedules that do not

1 permit Plaintiff to take all legally required rest breaks.

2         63. Plaintiff is informed, believes and thereon alleges that, at relevant times during the  
3 applicable limitations period, Defendant maintained a policy or practice of not providing the other  
4 aggrieved employees with net rest periods of a least ten (10) minutes for each four (4) hour work  
5 period, or major portion thereof, as required by the Wage Order, as a result of duties and schedules  
6 that do not permit them to take all legally required rest breaks.

7                 **Failure to Provide and Maintain Compliant Wage Statements**

8         64. Labor Code Section 1174 requires that every person employing labor in this state  
9 shall keep (1) a record showing the names and addresses of all employees employed and the ages of  
10 all minors; (2) at a central location in the state or at the plants or establishments at which employees  
11 are employed, payroll records showing the hours worked daily by and the wages paid to, and the  
12 number of piece-rate units earned by and any applicable piece rate paid to, employees employed at  
13 the respective plants or establishments; (3) such records in accordance with rules established for this  
14 purpose by the commission, but in any case, on file for not less than three years. This statute also  
15 prevents an employer from prohibiting an employee from maintaining a personal record of hours  
16 worked, or, if paid on a piece-rate basis, piece-rate units earned. Defendant has willfully failed to  
17 keep the records required by Section 1174.

18         65. Pursuant to California Labor Code Section 226(a), Plaintiff and the other aggrieved  
19 employees were entitled to receive, semimonthly or at the time of each payment of wages, an  
20 accurate itemized statement showing: (a) gross wages earned; (b) net wages earned; (c) all applicable  
21 hourly rates in effect during the pay period; and (d) the corresponding number of hours worked at  
22 each hourly rate by the employee.

23         66. Defendant failed to provide Plaintiff with accurate itemized statements in accordance  
24 with California Labor Code Section 226(a) by providing Plaintiff with wage statements with  
25 inaccurate entries for hours worked, corresponding rates of pay, and total wages earned as a result of  
26 the unlawful labor and payroll practices described herein.

27         67. Plaintiff is informed and believes and thereon alleges that, at all relevant times during  
28 the applicable limitations period, Defendant maintained a policy or practice of not providing

1 aggrieved employees with accurate itemized wage statements by providing them with wage  
2 statements with inaccurate entries for hours worked, corresponding rates of pay, total wages and  
3 deductions from wages earned as a result of the unlawful labor and payroll practices described  
4 herein.

5 68. Plaintiff is informed and believes and thereon alleges that Defendant's failure to  
6 provide him and the aggrieved employees with accurate written wage statements is knowing and  
7 intentional.

8 69. Plaintiff is informed and believes and thereon alleges that Defendant has the ability to  
9 provide him and the aggrieved employees with accurate wage statements, but intentionally provides  
10 wage statements that it knows are not accurate.

11 70. As a result of being provided with inaccurate wage statements by Defendant, Plaintiff  
12 and the aggrieved employees have suffered an injury. Their legal rights to receive accurate wage  
13 statements were violated and they were misled about the amount of wages they had actually earned  
14 and were owed. In addition, the absence of accurate information on their wage statements prevented  
15 immediate challenges to Defendant's unlawful pay practices, has required discovery and  
16 mathematical computations to determine the amounts of wages owed, has caused difficulty and  
17 expense in attempting to reconstruct time and pay records, and/or has led to the submission of  
18 inaccurate information about wages and amounts deducted from wages to state and federal  
19 government agencies.

20 71. California Labor Code sections 2699(a) and (g) authorize an aggrieved employee, on  
21 behalf of himself and other current or former employees, to bring a civil action to recover civil  
22 penalties pursuant to the procedures specified in California Labor Code Section 2699.3.

### 23 **Section 558 Penalties**

24 72. The PAGA claims are also brought against Defendant pursuant to provisions of the  
25 Labor Code including § 558 which permits liability of persons or employers who violate or cause to  
26 be violated Labor Code and IWC regulations. California Labor Code Section 2699.

27 73. The PAGA states:

28 Notwithstanding any other provision of law, any provision of this code that  
provides for a civil penalty to be assessed and collected by the Labor and

1 Workforce Development Agency or any of its departments, divisions,  
2 commissions, boards, agencies, or employees, for a violation of this code, may, as  
3 an alternative, be recovered through a civil action brought by an aggrieved  
4 employee on behalf of himself or herself and other current or former employees...

74. One provision of law enforceable through PAGA is Labor Code § 558, which states  
the following:

(a). Any employer or other person acting on behalf of an employer who violates,  
or causes to be violated, a section of this chapter or any provision regulating hours  
and days of work in any order of the Industrial Welfare Commission shall be  
subject to a civil penalty as follows:

(1) For any initial violation, fifty dollars (\$50) for each underpaid employee for  
each pay period for which the employee was underpaid in addition to any amount  
sufficient to recover underpaid wages.

(2) For each subsequent violation, one hundred dollars (\$100) for each underpaid  
employee for each pay period for which the employee was underpaid in addition  
to an amount sufficient to recover underpaid wages...

#### **Penalties Authorized by PAGA**

75. Pursuant to California Labor Code sections 2699(a) and (f), Plaintiff and the other  
aggrieved employees of Defendant are entitled to, and seek to, recover civil penalties for  
Defendant's violations of California Labor Code sections 200, 201, 202, 203, 204, 226, 226.7, 512,  
1174, 1198, and 2802, during the applicable limitations period in the following amounts:

a. For violations of California Labor Code sections 200, 201, 202, 203, 226.7, and  
2802, one hundred dollars (\$100.00) for each aggrieved employee per pay period  
for each initial violation and two hundred dollars (\$200.00) for each aggrieved  
employee per pay period for each subsequent violation (penalty amounts established  
by California Labor Code Section 2699(f)(2));

b. For violations of California Labor Code Section 204, one hundred dollars (\$100.00)  
for each aggrieved employee per pay period for each initial violation and two  
hundred dollars and fifty (\$200.00) for each aggrieved employee per pay period for  
each subsequent violation, plus twenty-five percent (25%) of the amount unlawfully  
withheld (penalty amounts established by California Labor Code § 210);

c. For violations of California Labor Code Section 1197, one hundred dollars  
(\$100.00) for each aggrieved employee per pay period for each initial violation  
and two hundred dollars and fifty (\$250.00) for each aggrieved employee per pay

1 period for each subsequent violation regardless of whether the initial violation is  
2 intentionally committed (penalty amounts established by California Labor Code  
3 § 1197.1);

4 d. For violations of California Labor Code Sections 221 and 223 one hundred  
5 dollars (\$100.00) for each aggrieved employee for each initial violation and two  
6 hundred dollars (\$200.00) for each aggrieved employee for each subsequent or  
7 willful violation (penalty amounts established by California Labor Code  
8 §225.5);

9 e. For violations of California Labor Code Section 1174, five hundred dollars  
10 (\$500.00) for each of Defendants' violations in addition to any other penalties or  
11 fines permitted by law (penalty amounts established by California Labor Code §  
12 1174.5);

13 f. For violations of California Labor Code Section 226, two hundred fifty dollars  
14 (\$250.00) per employee for initial violation and one thousand dollars (\$1,000.00)  
15 per employee for each subsequent violation (penalty amounts established by  
16 California Labor Code Section 226.3);

17 g. For violations of California Labor Code Section 1174, five hundred dollars (\$500)  
18 for each of Defendants' violations in addition to any other penalties or fines  
19 permitted by law (penalty amounts established by California Labor Code Section  
20 1174.5);

21 h. For violations of California Labor Code section 512 and, Wage Order 9-2001  
22 Sections 9, 11, and 12, fifty dollars (\$50.00) for each aggrieved employee for  
23 each initial violation for pay period for which the employee was underpaid in  
24 addition to an amount sufficient to recover unpaid wages and one hundred  
25 dollars (\$100.00) for each underpaid employee for each pay period for which the  
26 employee was underpaid in addition to an amount sufficient to recover unpaid  
27 wages (penalty amounts established by California Labor Code Section 558).

28 i. For violations of California Labor Code Section 558, fifty dollars (\$50.00) for



1 initial violation, fifty dollars (\$50.00) for each underpaid employee for each pay  
2 period for which the employee was underpaid in addition to an amount sufficient  
3 to recover unpaid wages; for each subsequent violation, one hundred dollars  
4 (\$100.00) for each underpaid employee for each pay period for which the  
5 employee was underpaid in addition to an amount sufficient to recover underpaid  
6 wages.

7 76. Pursuant to California Labor Code Section 2699(g), Plaintiff, on behalf of himself  
8 and the other aggrieved employees, are entitled to an award of reasonable attorneys' fees and costs.

9 **PRAYER FOR RELIEF**

10 Wherefore, Plaintiff prays for judgment against Defendant as follows:

- 11 a. Civil penalties;  
12 b. Other penalties and fines permitted by law;  
13 c. Costs of suit;  
14 d. Reasonable attorneys' fees; and  
15 e. Such other relief as the Court deems just and proper.  
16 f.

17 DATED: May 4, 2016

**LAW OFFICES OF THOMAS W. FALVEY  
ALEXANDER KRAKOW + GLICK LLP**

18  
19 By: 

Thomas W. Falvey, Esq.  
Michael H. Boyamian, Esq.  
Armand R. Kizirian, Esq.  
Michael S. Morrison, Esq.

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22 Attorneys for Plaintiff JAMES SOUZA individually, on  
23 behalf of all others similarly situated, and the general  
public

24 ///

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**DEMAND FOR JURY TRIAL**

Plaintiff, James Souza, individually and on behalf of all other aggrieved employees,  
demands a jury trial of this matter.

DATED: May 4, 2016

**LAW OFFICES OF THOMAS W. FALVEY  
ALEXANDER KRAKOW + GLICK LLP**

By: \_\_\_\_\_

Thomas W. Falvey, Esq.

Michael H. Boyamian, Esq.

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Attorneys for Plaintiff JAMES SOUZA individually, on  
behalf of all others similarly situated, and the general  
public