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12 Individually and on Behalf of All Similarly Situated Individuals

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF ALAMEDA**

15 RAMON GARCIA, an individual,
VICTOR RAMIREZ, an individual;
16 ADRIAN VALENTE, an individual;
MARIO PINON, an individual; MYNOR
17 CABRERA, an individual; Individually,
and on Behalf of All Similarly Situated
18 Individuals,

19 Plaintiffs,

20 vs.

21 MACY'S WEST STORES, INC., an
Ohio corporation; JOSEPH ELETTO
22 TRANSFER, INC., a New York
corporation; XPO LOGISTICS, LLC, an
23 Ohio corporation; and DOES 1 through
24 25, Inclusive,

25 Defendants.

CASE NO. RG 16821800

[CLASS ACTION]

COMPLAINT FOR:

1. UNPAID WAGES (LABOR CODE §§ 216 and 1194)
2. FAILURE TO PAY MINIMUM WAGE (LABOR CODE § 1194)
3. FAILURE TO PAY OVERTIME COMPENSATION (LABOR CODE §§ 510 and 1194);
4. FAILURE TO PROVIDE MEAL AND REST PERIODS (LABOR CODE §§ 512 and 226.7);
5. FAILURE TO FURNISH ACCURATE WAGE AND HOUR STATEMENTS (LABOR CODE § 226);
6. WAITING TIME PENALTIES (LABOR CODE §§ 201-203);
7. INDEMNIFICATION (LABOR CODE §§ 2800 and 2802);
8. CONVERSION (LABOR CODE §§ 3336 and 3294); and
9. UNFAIR COMPETITION (LABOR CODE §§ 17200 *et seq.*).

JURY TRIAL DEMANDED

BY FAX

1 Plaintiffs Ramon Garcia, Victor Ramirez, Adrian Valente, Mario Pinon, and Mynor
2 Cabrera (“Plaintiffs”), individually and on behalf of all similarly situated individuals, allege as
3 follows:

4 **GENERAL ALLEGATIONS**

5 1. This is a proposed class action brought against Defendants MACY’S WEST
6 STORES, INC., JOSEPH ELETTO TRANSFER, INC., XPO LOGISTICS, LLC and DOES 1-
7 25, inclusive (collectively, “Defendants”), on behalf of Plaintiffs and all other non-employee
8 workers who worked in California as a Driver and/or Helper for Defendants at any time during
9 the four years preceding the filing of this action, and continuing while this action is pending
10 (“Class Period”), who were denied the benefits and protections required under the California
11 Labor Code and other statutes and regulations applicable to California employees.

12 2. During the Class Period, Defendants:

- 13 a. failed to pay wages for all hours worked by Drivers and Helpers;
- 14 b. failed to pay Drivers and Helpers the applicable legal minimum wage;
- 15 c. failed to pay overtime wages due to Drivers and Helpers;
- 16 d. failed to provide meal and rest periods due to Drivers and Helpers;
- 17 e. failed to provide the Drivers and Helpers with timely and accurate wage
18 and hour statements;
- 19 f. failed to pay the Drivers and Helpers compensation in a timely manner
20 upon their termination or resignation;
- 21 g. failed to maintain complete and accurate payroll records for the Drivers
22 and Helpers;
- 23 h. wrongfully withheld wages and compensation due to the Drivers and
24 Helpers; and
- 25 i. committed unfair business practices in an effort to increase profits and to
26 gain an unfair business advantage at the expense of the Drivers and
27 Helpers and the public.

28 ///

1 3. The foregoing acts and other acts by Defendants - committed throughout
2 California and Alameda County - violated provisions of the California Labor Code, including
3 sections 201, 202, 203, 204, 226, 226.7, 226.8, 510, 512, 515, 551, 552, 558, 1194, and 1198
4 (collectively, “Employment Laws”), violated the applicable Wage Orders issued by California’s
5 Industrial Welfare Commission, including Wage Orders 5-2001 during the Class Period
6 (“Regulations”), violated California’s Unfair Business Practices Act, California Business &
7 Professions Code sections 17200 *et seq.*, and violated Plaintiffs’ rights.

8 **JURISDICTION AND VENUE**

9 4. Venue is proper in this Judicial District and the County of Alameda because work
10 was performed by Plaintiffs and other members of the Class for Defendants in the County of
11 Alameda, California, and Defendants’ obligations under the Employment Laws and Regulations
12 to pay overtime wages, to provide meal and rest periods and accurate wage statements to
13 Plaintiffs and other members of the Class arose and were breached in the County of Alameda.

14 5. The California Superior Court has jurisdiction in this matter because Plaintiffs are
15 all residents of California, and Defendants are corporations qualified to do business in California
16 and regularly conduct business in California. Further, no federal question is at issue as the
17 claims are based solely on California law.

18 **THE PARTIES**

19 6. Plaintiff Ramon Garcia is, and at all relevant times was, a competent adult
20 residing in California. Mr. Garcia brings suit on behalf of himself and all similarly situated
21 individuals pursuant to California Code of Civil Procedure section 382, and California Business
22 & Professions Code sections 17200, *et seq.* Mr. Garcia is unlawfully classified by Defendants as
23 an independent contractor and currently works as a Helper out of Macy’s Logistics and
24 Operations Center located in Union City, California.

25 7. Plaintiff Victor Ramirez is, and at all relevant times was, a competent adult
26 residing in California. Mr. Ramirez brings suit on behalf of himself and all similarly situated
27 individuals pursuant to California Code of Civil Procedure section 382, and California Business
28 & Professions Code sections 17200, *et seq.* Mr. Ramirez is unlawfully classified by Defendants

1 as an independent contractor and currently works as a Driver out of Macy's Logistics and
2 Operations Center located in Union City, California.

3 8. Plaintiff Adrian Valente is, and at all relevant times was, a competent adult
4 residing in California. Mr. Valente brings suit on behalf of himself and all similarly situated
5 individuals pursuant to California Code of Civil Procedure section 382, and California Business
6 & Professions Code sections 17200, *et seq.* Mr. Valenta was unlawfully classified by Defendants
7 as an independent contractor and currently works as a Helper out of Macy's Logistics and
8 Operations Center located in Union City, California.

9 9. Plaintiff Mario Pinon is, and at all relevant times was, a competent adult residing
10 in California. Mr. Pinon brings suit on behalf of himself and all similarly situated individuals
11 pursuant to California Code of Civil Procedure section 382, and California Business &
12 Professions Code sections 17200, *et seq.* Mr. Pinon was unlawfully classified by Defendants as
13 an independent contractor and works as a Driver out of Macy's Logistics and Operations Center
14 located in Union City, California.

15 10. Plaintiff Mynor Cabrera is, and at all relevant times was, a competent adult
16 residing in California. Mr. Cabrera brings suit on behalf of himself and all similarly situated
17 individuals pursuant to California Code of Civil Procedure section 382, and California Business
18 & Professions Code sections 17200, *et seq.* Mr. Cabrera was unlawfully classified by
19 Defendants as an independent contractor and works as a Driver out of Macy's Logistics and
20 Operations Center located in the Union City, California.

21 11. Defendant Macy's West Stores, Inc. is, and at all relevant times was, an Ohio
22 corporation registered with the State of California's Secretary of State. Macy's is one of the
23 nation's premier chain of department stores and is a retailer of a variety of private and in-store
24 brands. Macy's conducts business throughout the State of California, including Alameda
25 County.

26 12. Defendant Joseph Eletto Transfer, Inc. is, and at all relevant times was, a New
27 York corporation registered with the State of California's Secretary of State. Eletto is a carrier
28 for department stores providing logistics management. Defendants have engaged in unlawful

1 employment practices addressed in this Complaint throughout California and in Alameda
2 County.

3 13. Defendant XPO Logistics, LLC is, and at all relevant times was, an Ohio
4 corporation registered with the State of California's Secretary of State. Like Eletto, XPO is a
5 provider of managed transportation services including the planning and execution for delivery of
6 Macy's products. XPO and Defendants have engaged in unlawful employment practices
7 addressed in this Complaint throughout California and in Alameda County.

8 14. Defendants Macy's, Eletto, and XPO are, and at all relevant times were,
9 corporations conducting business in the State of California, including the County of Alameda.
10 Plaintiffs are informed and believe, and based upon such information and belief, allege that
11 Macy's exercised control over the operations of Eletto and XPO from its resources, preparation,
12 and management, to Eletto and XPO utilizing Macy's criteria and standards for hiring personnel
13 and performing deliveries.

14 15. The degree of control exercised by Macy's over Eletto and XPO is enough to
15 reasonably deem Eletto and XPO as agents of Macy's under traditional agency principles. Eletto
16 and XPO can legitimately be described as only a means through which Macy's acts and conducts
17 its global business. Defendants Eletto, XPO, and Macy's have such a unity of interest and
18 ownership that the separate personalities do not in reality exist and that the corporate structure is
19 just a shield for the alter ego of each other. Plaintiffs therefore are informed and believe and
20 thereupon allege Eletto, XPO, and Macy's, and each of them, were their employer under
21 California law, that Defendants herein did acts consistent with the existence of an employer-
22 employee relationship with Plaintiffs - despite their unlawful classification of Plaintiffs as
23 independent contractors - and that Eletto and XPO were owned, controlled, directly or indirectly,
24 by Macy's.

25 16. Plaintiffs are informed and believe and based thereon allege that Defendants
26 uniformly apply their pay practices, and overtime policies to all Drivers and Driver Assistants.

27 17. Plaintiffs are currently unaware of the true names and capacities of the defendants
28 sued in this action by the fictitious names DOES 1 through 25, inclusive, and therefore sue those

1 defendants by such fictitious names. Plaintiffs will amend this Complaint to allege the true
2 names and capacities of such fictitiously named defendants when they are ascertained.

3 18. Plaintiffs are informed and believe and based thereon allege that each defendant
4 sued in this action, including each defendant sued by the fictitious names DOES 1 through 25,
5 inclusive, is responsible in some manner for the occurrences, controversies and damages alleged
6 below.

7 19. Plaintiffs are informed and believe and based thereon allege that DOES 1 through
8 25, inclusive were the agents, servants and/or employees of Defendants and, in doing the things
9 hereinafter alleged and at all times, were acting within the scope of their authority as such agents,
10 servants and employees, and with the permission and consent of Defendants.

11 20. Plaintiffs are informed and believe and based thereon allege that Defendants
12 ratified, authorized, and consented to each and all of the acts and conduct of each other as alleged
13 herein.

14 **FACTS COMMON TO ALL CAUSES OF ACTION**

15 21. Defendants unlawfully classified Plaintiffs and other similarly situated individuals
16 as independent contractors when, in fact, they were heavily regulated through a series of work-
17 related restrictions and directives. Macy's directs Eletto to secure truck owners to have them
18 contract with Macy's for purposes of delivering Macy's products to its customers. These truck
19 owners arrive at Macy's Logistics and Operations Center and go through a hiring process with
20 Macy's employees who office at the same site. Truck owners are hired by Macy's and are
21 required to have a Macy's banner put on the truck. Truck owners then bring on Drivers and
22 Driver Assistant or commonly referred to by Defendants as "Helpers", like Plaintiffs, who are
23 also evaluated by Macy's employees for hiring purposes.

24 22. After Defendants hired Plaintiffs, Macy's instructed Plaintiffs to follow a series of
25 directives related to the delivery of Macy's products. These directives include, but are not
26 limited to, the following:

27 a. the truck must bear a Macy's logo and cannot be used for any others
28 purposes while having the Macy's banner;

- 1 b. the truck must be left at the site at the end of the work day;
- 2 c. the delivery schedules are set and controlled by Macy's and cannot be
3 varied by Drivers or Driver's Assistants, like Plaintiffs;
- 4 d. Plaintiffs were required to purchase at their own cost and wear Macy's
5 distinct uniforms;
- 6 e. Drivers and Helpers, like Plaintiffs, were required to carry personalized
7 Macy's business cards that they give out to customers carrying the Macy's logo ;
- 8 f. Plaintiffs were also required to announce themselves to Macy's customers
9 as "Macy's delivery" and "from Macy's";
- 10 g. Plaintiffs were required to provide felt and plastic at their own cost and
11 expense in connection with delivering Macy's products;
- 12 h. each morning Plaintiffs and other similarly situated Drivers and Helpers
13 were required to go through a process of "role-playing" where Macy's employees evaluate
14 whether the Driver or Helper, like Plaintiffs, met Macy's standards and expectations of delivery
15 and customer service;
- 16 i. on each delivery - and as part of their "role-playing" exercise -
17 Plaintiffs were instructed to use a red carpet provided by Macy's in delivering Macy's products
18 and if that red carpet was lost or destroyed, then the Driver and/or Helper must purchase a red
19 carpet for \$200;
- 20 j. if a customer has furniture and offers it to a Driver or Helper, Macy's
21 considers the donation as Macy's property and it must be delivered and left at the site or
22 warehouse;
- 23 k. Drivers and Helpers must offer to vacuum the floor when they remove
24 furniture;
- 25 l. if Drivers and Helpers are requested to remove mattress, they must do it
26 even if it is covered in bedbugs, feces, or blood;
- 27 m. if any of the furniture is damaged, even if the damage comes from the
28 store, the Driver must pay for it and/or receives a negative evaluation - the negative evaluation is

1 in turn assessed by Macy's employees and is used as a basis to dock pay;

2 n. Drivers and Helpers, including Plaintiffs, were required to leave customers
3 with a performance checklist with "Macy's" printed on it, and customers are encouraged to
4 provide feedback directly to Macy's to rate the performance of the Driver or Helper;

5 o. Plaintiffs were required to obtain worker's compensation insurance and
6 umbrella insurance at their own expense and must purchase the umbrella insurance from Macy's;

7 p. Plaintiffs were graded and/or evaluated for their performance in delivering
8 Macy's products and were either issued nominal monetary bonuses for satisfactory work from
9 Defendants or counseled by Defendants' agents for perceived unsatisfactory work;

10 23. Plaintiffs, including the putative class of Drivers and Helpers they seek to
11 represent, were all compensated on a flat-rate - \$120/day for Drivers and \$100/day for Helpers -
12 regardless of how many hours were actually worked. Plaintiffs received their compensation by
13 personal check issued by the truck owners, and not from Defendants. This "flat rate" also
14 constitutes an unlawful piece-rate compensation system because Drivers and Helpers had no
15 control over how many hours they worked and could do nothing to change the amount of pay
16 through their own efficiencies. This unlawful compensation scheme did not account for all the
17 work performed by Drivers or Helpers, like Plaintiffs, who typically worked 12 to 15 hours a day
18 and performed various non-driving tasks all under the control and direction of Defendants. This
19 compensation scheme is illegal and is in violation of the Employment Laws and Regulations.

20 24. On or about December 27, 2014, Eletto was replaced by XPO Logistics at Macy's
21 Logistics & Operations Center in Union City, California. Plaintiffs and similarly situated Drivers
22 and Helpers continued to be unlawfully classified as independent contractors despite the systemic
23 and pervasive control Macy's and XPO continued to exert on Plaintiffs and the Putative Class.

24 25. During the time Plaintiffs were employed by Defendants and as part of the four
25 years preceding the filing of this action, Defendants failed to provide Plaintiffs and similarly
26 situated Drivers and Helpers with rest periods during work shifts over four hours. Defendants
27 also routinely failed to provide Plaintiffs and similarly-situated employees a 30-minute meal
28 period in which they were relieved of all duties when they worked over five hours. These

1 practices are in violation of the Employment Laws and Regulations.

2 26. During Plaintiffs' employment with Defendants, Plaintiffs and Drivers and
3 Helpers were regularly required to work more than eight hours per day and more than forty hours
4 per workweek. Defendants regularly did not compensate Plaintiffs and Drivers and Helpers for
5 the overtime hours they worked, in violation of the Employment Laws and Regulations.

6 27. During Plaintiffs' employment with Defendants, Macy's and Eletto failed to
7 provide Plaintiffs with timely and accurate wage and hour statements showing gross hours
8 earned, total hours worked, all deductions made, net wages earned, accrued vacation, and all
9 applicable hourly rates in effect during each pay period, as well as the corresponding number of
10 hours worked at each hourly rate.

11 28. During Plaintiffs' employment with Defendants, Defendants wrongfully withheld
12 from Plaintiffs and failed to pay their wages and other compensation which was due them for all
13 of their hours worked, for overtime work, for missed meal and rest periods, and as otherwise
14 required pursuant to the Employment Laws and Regulations.

15 29. Plaintiffs seek restitution and disgorgement of all sums wrongfully obtained by
16 Defendants through unfair business practices in violation of California's Business & Professions
17 Code sections 17200, *et seq.*, to prevent the Defendants from benefitting from their violations of
18 law and/or unfair acts. Such sums recovered under the Unfair Competition Act and Unfair
19 Businesses Act are equitable in nature and are not to be considered damages. Plaintiffs are also
20 entitled to costs, attorney's fees, interest and penalties as provided for by the California Labor
21 Code, the California Business & Professions Code, and the Private Attorney General Act,
22 California Code of Civil Procedure section 1021.5.

23 30. To the extent that any Class Member, including Plaintiffs, entered into any
24 arbitration agreement with any Defendant and such agreement purports to require arbitration,
25 such agreement is void and unenforceable. Any such agreement was one of adhesion, executed
26 under duress, lacked consideration and mutuality, and was otherwise void under both California
27 Labor Code section 229 and the California Supreme Court case of *Armendariz v. Foundation*
28 *Health Psychare Services, Inc.* (2000) 24 Cal.4th 83.

1 CLASS ACTION ALLEGATIONS

2 31.. Plaintiffs bring these claims as a class action pursuant to Code of Civil Procedure
3 § 382 and Business and Professions Code §§ 17203 & 17204. Plaintiffs bring this action on their
4 own behalf and on behalf of the following class of individuals (the “Class” or “Class Members”):

5 All individuals employed by, or formerly employed by, Defendants as Drivers at
6 Macy’s Logistic and Operations Center located in Union City in the State of
7 California at any time from June 30, 2012, and continuing while this action is
8 pending.

9 All individuals employed by, or formerly employed by, Defendants as Driver
10 Assistants or referred to as “Helpers” at Macy’s Logistic and Operations Center
11 located in Union City in the State of California at any time from June 30, 2012,
12 and continuing while this action is pending.

13 32. All Drivers or Helpers, including Plaintiffs, are putative class members.

14 33. During the Class Period, by virtue of unlawfully classifying Plaintiffs and Class
15 Members as independent contractors and compensating Class Members with a “flat rate”
16 Defendants have routinely failed to compensate Drivers and Helpers all of the wages they are due
17 (“off-the-clock” work).

18 34. During the Class Period, Plaintiffs and Drivers and Helpers were subject to
19 Defendants’ unlawful company practice of classifying them as independent contractors and
20 paying them a daily flat sum of money when in fact they were subjected to the pervasive control
21 of Defendants. All who were subject to this unlawful classification and compensation scheme
22 suffered damages. Defendants applied this illegal wage device uniformly to all Drivers and
23 Helpers who worked out of Macy’s Logistic and Operations Center to the disadvantage of Class
24 Members.

25 35. As a result, during the Class Period, Defendants have failed to provide Drivers
26 and Helpers with accurate wage and hour statements since the daily “flat rate” did not fully
27 compensate Drivers and Helpers for all hours worked. , Defendants have failed to provide
28 Drivers and Helpers with accurate wage and hour statements since the gross hours earned, total
hours worked, all deductions made, net wages earned, and all applicable hourly rates in effect
during each pay period and the corresponding number of hours worked at each hourly rate.

1 36. During the Class Period, Plaintiffs and Drivers and Helpers have been required to
2 work more than eight hours per day and more than forty hours per workweek. Defendants have
3 routinely failed to compensate Drivers and Helpers all of the overtime wages they are due.

4 37. During the Class Period, Defendants have failed to pay accrued wages and other
5 compensation due immediately to Drivers and Helpers who were terminated, and Defendants
6 have failed to pay accrued wages and other compensation due within seventy-two hours to
7 Drivers and Helpers who ended their employment.

8 38. The proposed class is ascertainable in that its members can be identified using
9 information contained in Defendants' payroll and personnel records.

10 39. Numerosity. The Drivers and Helpers are so numerous, conservatively estimated
11 to include over 40 Drivers and Helpers, that joinder of each individual Class Member would be
12 impracticable, and the disposition of their claims in a class action, rather than numerous
13 individual actions, will benefit the parties, the Court and the interests of justice.

14 40. Commonality. There is a well-defined community of interest in the questions of
15 law and fact involved in this action, because Defendants' failure to pay Drivers and Helpers their
16 wages or afford them the protections required under the Employment Laws and Regulations
17 affects all Class Members. Common questions of law and fact predominate over questions that
18 affect only individual Driver and Helpers, because all Drivers and Helpers were subject to the
19 uniform, unlawful pay practices and policies. The predominate questions of law and fact include,
20 but are not limited to:

- 21 a. Did Defendants devise a scheme and plan to circumvent California wage and hour
22 laws?;
- 23 b. Was/is Defendants' conduct fraudulent and deceitful?;
- 24 c. Did/does Defendants' conduct violate the Employment Laws and Regulations?;
- 25 and
- 26 (i) failing to compensate Plaintiff and the Class Members for all
27 hours worked;
- 28 (ii) failing to compensate Plaintiff and the Class Members at the

1 applicable and legally-mandated minimum hourly rate of \$8.00;

2 (iii) failing to provide Plaintiffs and the Class Members with timely and
3 accurate wage and hour statements; and

4 (iv) failing to maintain complete and accurate payroll records for
5 Plaintiffs and the Class Members;

6 d. Do/did Defendants' systematic acts and practices violate, *inter alia*, California
7 Business & Professions Code section 17200, *et seq.*?

8 41. Typicality. Plaintiffs' claims are typical of those of the other Drivers and Helpers
9 because all Drivers and Helpers share the same or similar employment duties and activities, all
10 are automatically classified as independent contractors, and all have been denied the benefits and
11 protections of the Employment Laws and Regulations in the same manner. Since Defendants
12 have uniformly applied the same pay practices and policies to each Driver and Helper, Plaintiffs'
13 claims are typical of the claims of all Drivers and Helpers. Plaintiffs' claims are also typical
14 because they have suffered the same damages as those suffered by all Class Members.

15 42. Adequacy of Representation. Plaintiffs can fairly and adequately represent and
16 protect the interests of all Drivers and Helpers in that neither Plaintiffs have disabling conflicts of
17 interest which are antagonistic to those of all other Drivers and Helpers. Plaintiffs seek no relief
18 which is antagonistic or adverse to the other Class Members, and the infringement of their rights
19 and the damages they have suffered are typical of all other Class Members. Plaintiffs' counsel is
20 competent and experienced in litigating class actions in California based on large employers'
21 violations of the Employment Laws and Regulations.

22 43. As mentioned above, to the extent that any Driver or Helper entered into any
23 arbitration agreement with any Defendant and such agreement purports to require arbitration,
24 such agreement is void and unenforceable. Even if such agreement is deemed enforceable,
25 however, classwide arbitration is appropriate and should be utilized to obtain classwide relief.

26 44. Superiority of Class Action. The nature of this action and the nature of laws
27 available to Plaintiffs and the other Drivers and Helpers in the putative Class make use of the
28 class action a particularly efficient and effective procedure because:

1 a. For many of the Drivers and Helpers, individual actions or other individual
2 remedies would be impracticable and litigating individual actions would be too costly;

3 b. The action involves large corporate employers (Macy's, Eletto, XPO Logistics)
4 and a large number of individual employees (Plaintiffs and the other Class Members), many with
5 relatively small claims and all with common issues of law and fact;

6 c. If the Drivers and Helpers are forced to bring individual lawsuits, the corporate
7 defendants would necessarily gain an unfair advantage, the ability to exploit and overwhelm the
8 limited resources of individual Class Members with vastly superior financial and legal resources;

9 d. The costs of individual suits would likely consume the amounts recovered;

10 e. Requiring each Class Member to pursue an individual remedy would also
11 discourage the assertion of lawful claims by current employees of Defendants, who would be
12 disinclined to pursue an action against their present and/or former employer due to an appreciable
13 and justified fear of retaliation and permanent damage to their immediate and/or future
14 employment; and

15 f. Common business practices Plaintiffs experienced are representative of those
16 experienced by all Drivers and Helpers and can establish the right of all Drivers and Helpers to
17 recover on the alleged claims.

18 **FIRST CAUSE OF ACTION**

19 **(Failure to Pay Compensation For All Hours Worked - Labor Code §§ 216 and 1194**
20 **By Plaintiffs Individually and on Behalf of All Drivers and Helpers)**

21 45. As a separate and distinct cause of action, Plaintiffs complain and reallege all the
22 allegations contained in this complaint, and incorporate them by reference into this cause of
23 action as though fully set forth herein, excepting those allegations which are inconsistent with
24 this cause of action.

25 46. Plaintiffs bring this action to recover their unpaid compensation for all hours
26 worked as defined by the applicable Industrial Welfare Commission wage order as the time
27 during which an employee is subject to the control of an employer, and includes all the time the
28 employee is suffered or permitted to work, whether or not required to do so.

1 47. Drivers and Helpers, including Plaintiffs, were unlawfully classified as
2 independent contractors but were instructed, directed or otherwise controlled by Defendants to
3 perform their work through a series of Defendants' requirements, expectations, and standards for
4 performance. Defendants knew or should have known that Plaintiffs were working these hours
5 because a) Defendants required employees to "swipe-in" and "swipe-out" on an electronic cash
6 register, thus Defendants knew the actual hours worked by employees, and b) Plaintiffs were
7 informed that this directive to not report all hours worked on their hand-written time records
8 came from the highest level of management.

9 48. Current and former employees who were food servers (waiters and waitresses)
10 were instructed to record a meal period on their hand-written time log regardless of the fact that
11 they were not relieved of duty for a meal period. Defendants would "auto-deduct" for a meal
12 period each and every shift without any confirmation that the meal period was provided. This
13 half-hour a day of unpaid time for meal periods not taken is further indicia of "Off the Clock"
14 work and violates the Employment Laws and Regulations.

15 49. Plaintiffs are entitled to recover the unpaid balance of compensation Defendants
16 owe Plaintiffs, plus interest, associated statutory penalties, and reasonable attorney fees and costs
17 pursuant to Labor Code section 1194.

18 **SECOND CAUSE OF ACTION**

19 **(Failure to Pay Minimum Wages - Labor Code § 1194**

20 **By Plaintiffs Individually and on Behalf of All Class Members)**

21 50. As a separate and distinct cause of action, Plaintiffs complain and reallege all of
22 the allegations contained in this complaint, and incorporate them by reference into this cause of
23 action as though fully set forth herein, excepting those allegations which are inconsistent with
24 this cause of action.

25 51. At all relevant times, the IWC Wage Order 5-2001 applied to Plaintiffs in
26 Plaintiffs' capacity as employees of Defendants. The Wage Orders and California law provided,
27 among other things, that Plaintiffs must receive minimum wage earnings for all hours worked.

28 ////

1 52. During the Class Period, Defendants have routinely failed to pay Drivers and
2 Helpers, including Plaintiffs, the minimum wage required by the Employment Laws and
3 Regulations for all hours worked. Defendants unlawfully classified Drivers and Helpers as
4 independent contractor and compensated Plaintiffs through an unlawful piece rate - a flat rate -
5 for work. Defendants' unlawful scheme of a "flat rate" violates the provisions of Wage Order 5-
6 2001 as it exceeds the maximum allotted amount that can be charged to an employee.

7 53. Drivers and Helpers, including Plaintiffs, have been deprived of their rightfully
8 earned minimum wages as a direct and proximate result of Defendants' policies and practices
9 and Defendants' failure and refusal to pay said wages for all hours worked. Drivers and Helpers,
10 including Plaintiffs, are entitled to recover the past wages owed to them, under the minimum
11 wage laws, plus an additional equal amount as liquidated damages as permitted under the Wage
12 Orders and California law, plus interest thereon and attorneys' fees and costs, pursuant to Labor
13 Code § 1194, in an amount according to proof at the time of trial.

14 **THIRD CAUSE OF ACTION**

15 **(Failure to Pay Overtime Compensation - By Plaintiffs Individually and on Behalf of All**
16 **Drivers and Helpers: California Labor Code §§ 510 and 1194)**

17 54. As a separate and distinct cause of action, Plaintiffs complain and reallege all the
18 allegations contained in this complaint, and incorporate them by reference into this cause of
19 action as though fully set forth herein, excepting those allegations which are inconsistent with
20 this cause of action.

21 55. During the Class Period, Defendants have routinely required Drivers and Helpers,
22 including Plaintiffs, to work over eight hours in a day and over forty hours in a workweek.
23 However, Defendants have failed and refused to pay the Drivers and Helpers, including
24 Plaintiffs, the overtime compensation required by the Employment Laws and Regulations.

25 56. The Drivers and Helpers, including Plaintiffs, have been deprived of their
26 rightfully earned overtime compensation as a direct and proximate result of Defendants' policies
27 and practices and Defendants' failure and refusal to pay that compensation. Drivers and Helpers,
28 including Plaintiffs, are entitled to recover such amounts, plus interest, attorney's fees and costs.

1 **FOURTH CAUSE OF ACTION**

2 **(Failure to Provide Meal and Rest Periods - By Plaintiffs Individually and on Behalf of All**
3 **Drivers and Helpers: California Labor Code §§ 226.7 and 512)**

4 57. As a separate and distinct cause of action, Plaintiffs complain and reallege all the
5 allegations contained in this complaint, and incorporate them by reference into this cause of
6 action as though fully set forth herein, excepting those allegations which are inconsistent with
7 this cause of action.

8 58. During the Class Period, Defendants have routinely failed to provide employees in
9 the position of Drivers and Helpers, including Plaintiffs, with meal and rest periods during their
10 work shifts, and have failed to compensate these Drivers and Helpers, including Plaintiffs, for
11 those meal and rest periods, as required by California Labor Code section 226.7 and the other
12 applicable sections of the Employment Laws and Regulations.

13 59. Drivers and Helpers, including Plaintiffs, have been deprived of their rightfully
14 earned compensation for meal and rest periods as a direct and proximate result of Defendants'
15 policies and practices and Defendants' failure and refusal to pay that compensation. These
16 Drivers and Helpers, including Plaintiffs, are entitled to recover such amounts pursuant to
17 California Labor Code section 226.7(b), plus interest, attorney's fees and costs.

18 **FIFTH CAUSE OF ACTION**

19 **(Failure to Accurate Furnish Wage and Hour Statements - By Plaintiffs Individually and**
20 **on Behalf of All Drivers and Helpers: California Labor Code § 226)**

21 60. As a separate and distinct cause of action, Plaintiffs complain and reallege all the
22 allegations contained in this complaint, and incorporate them by reference into this cause of
23 action as though fully set forth herein, excepting those allegations which are inconsistent with
24 this cause of action.

25 61. During the Class Period, Defendants have routinely failed to provide Drivers and
26 Helpers, including Plaintiffs, with timely and accurate wage and hour statements showing gross
27 hours earned, total hours worked, all deductions made, net wages earned, the name and address
28 of the legal entity employing the Drivers and Helpers, and all applicable hours rates in effect

1 during each pay period and the corresponding number of hours worked at each hourly rate.

2 62. As a consequence of Defendants' actions, Drivers and Helpers are entitled to all
3 available statutory penalties, costs and reasonable attorney's fees, including those provided in
4 California Labor Code section 226(e), as well as all other available remedies.

5 **SIXTH CAUSE OF ACTION**

6 **(For Waiting Time Penalties - By Plaintiffs Individually and on Behalf of All Drivers and**
7 **Helpers: California Labor Code §§ 201-203)**

8 63. As a separate and distinct cause of action, Plaintiffs complain and reallege all the
9 allegations contained in this complaint, and incorporate them by reference into this cause of
10 action as though fully set forth herein, excepting those allegations which are inconsistent with
11 this cause of action.

12 64. During the Class Period, Defendants failed to pay accrued wages and other
13 compensation due immediately to each Driver and Helper who was terminated and failed to pay
14 accrued wages, including meal and rest period wages and other compensation due within
15 seventy-two hours to each Driver and Helper who ended his or her employment.

16 65. As a consequence of Defendants' actions, Drivers and Helpers are entitled to all
17 available statutory penalties, including those provided in California Labor Code section 203, as
18 well as all other available remedies.

19 **SEVENTH CAUSE OF ACTION**

20 **(For Indemnification - By Plaintiffs Individually and on Behalf of All Drivers and Helpers-**
21 **Labor Code § 2802)**

22 66. As a separate and distinct cause of action, Plaintiffs complain and reallege all of
23 the allegations contained in this complaint, and incorporate them by reference into this cause of
24 action as though fully set forth herein, excepting those allegations which are inconsistent with
25 this cause of action.

26 67. Pursuant to Labor Code § 2802(a), an employer shall indemnify its employees for
27 all necessary expenditures or losses incurred by the employees in direct consequence of the
28 discharge of their duties, or of their obedience to the directions of the employer, even though

1 unlawful, unless the employee, at the time of obeying the directions, believed them to be
2 unlawful.

3 68. During the Class Period, the Class Members, including Plaintiffs, were wrongfully
4 classified as independent contractors and incurred necessary business-related expenses and costs
5 that were not fully reimbursed by Defendants, including and without limitations, Defendants'
6 uniforms, transportation equipment such as plastic, felt, Macy's red carpet.

7 69. During the Class Period, Defendants failed to reimburse the Class Members,
8 including Plaintiffs, for necessary business-related expenses and costs.

9 70. The Class Members, including Plaintiffs, are entitled to recover from Defendants
10 their business-related expenses and costs incurred during the course and scope of their activities
11 for Defendants' benefit, plus attorneys' fees, costs and interest accrued from the date on which
12 the employee incurred the necessary expenditures.

13 **EIGHTH CAUSE OF ACTION**

14 **(For Common Law Conversion - By Plaintiffs Individually and on Behalf of All Drivers**
15 **and Helpers: California Civil Code §§ 3336 and 3294)**

16 71. As a separate and distinct cause of action, Plaintiffs complain and reallege all the
17 allegations contained in this complaint, and incorporate them by reference into this cause of
18 action as though fully set forth herein, excepting those allegations which are inconsistent with
19 this cause of action.

20 72. During the Class Period, Defendants have wrongfully withheld and failed to pay
21 Drivers and Helpers, including Plaintiffs, wages and other compensation due them for overtime
22 work, for meal and rest periods, and as otherwise required pursuant to the Employment Laws and
23 Regulations.

24 73. At all relevant times, Defendants have had a legal obligation imposed by statute to
25 pay Drivers and Helpers, including Plaintiffs, all overtime wages and compensation due. Such
26 wages and compensation belong to Drivers and Helpers, including Plaintiffs, at the time the labor
27 and services are provided to Defendants and, accordingly, such wages and compensation are the
28 property of Drivers and Helpers, including Plaintiffs.

1 74. Defendants have knowingly and intentionally failed to pay Drivers and Helpers,
2 including Plaintiffs, the legal minimum wage, overtime wages for hours worked over eight hours
3 in a day and forty hours in a workweek, failed to compensate them for meal and rest periods, and
4 failed to provide them with other compensation due. Defendants have intentionally converted
5 the wages and compensation of Drivers and Helpers, including Plaintiffs, by

6 a. Withholding earned overtime wages and other compensation which the
7 Drivers and Helpers, including Plaintiffs, owned or had the right to own and had the legal right to
8 hold, possess and dispose of, and then,

9 b. Taking the overtime wages and other compensation due to the Drivers and
10 Helpers, including Plaintiffs, and utilizing such wages and compensation for Defendants' own
11 use and benefit.

12 75. Among other thing, by employing an unlawful company practice as demonstrated
13 by Defendants' compensation scheme of paying "flat rate", Defendants have converted such
14 wages and compensation as part of an intentional and deliberate scheme to maximize profits at
15 the expense of Drivers and Helpers, including Plaintiffs. Defendants' conversion has been done
16 with the advance knowledge, express or implied authorization, and/or ratification of Defendants'
17 respective corporate officers, directors and managing agents.

18 76. In refusing to pay all of the wages, overtime wages, expense reimbursements and
19 other compensation due to the Drivers and Helpers, including Plaintiffs, Defendants have
20 knowingly, unlawfully and intentionally taken, appropriated and converted such wages and
21 compensation for Defendants' own use, purpose and benefit. At the time the conversion took
22 place, Drivers and Helpers, including Plaintiffs, were entitled to immediate possession of the
23 wages earned.

24 77. The Drivers and Helpers, including Plaintiffs, have been injured by Defendants'
25 intentional conversion of such wages and compensation. The Drivers and Helpers, including
26 Plaintiffs, are entitled to all monies converted by Defendants, with interest, as well as any and all
27 profits, whether direct or indirect, which Defendants' acquired by their unlawful conversion.

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1 78. Furthermore, Defendants' conversion was oppressive, malicious and/or in
2 conscious disregard of the rights of Drivers and Helpers, including Plaintiffs, who are thus
3 entitled to punitive damages.

4 **NINTH CAUSE OF ACTION**

5 **(For Unfair Competition - By Plaintiffs Individually and on Behalf of All Drivers and**
6 **Helpers: California Business & Professions Code §§ 17200, et seq.)**

7 79. As a separate and distinct cause of action, Plaintiffs complain and reallege all the
8 allegations contained in this complaint, and incorporate them by reference into this cause of
9 action as though fully set forth herein, excepting those allegations which are inconsistent with
10 this cause of action.

11 80. Defendants' violations of the Employment Laws and Regulations as alleged in
12 this Complaint, including Defendants'

13 a. Failure and refusal to pay Drivers and Helpers, including Plaintiffs, wages
14 for all hours worked;

15 b. Failure and refusal to pay Drivers and Helpers, including Plaintiffs, the
16 legal minimum wage of \$8.00;

17 c. Failure and refusal to pay Drivers and Helpers, including Plaintiffs,
18 overtime wages;

19 d. Failure and refusal to provide Drivers and Helpers, including Plaintiffs,
20 with meal and rest periods;

21 e. Failure and refusal to provide Drivers and Helpers, including Plaintiffs,
22 with timely and accurate wage and hour statements;

23 f. Failure to pay Drivers and Helpers, including Plaintiffs, compensation in a
24 timely manner upon their termination or resignation;

25 g. Failure to maintain complete and accurate payroll records for Drivers and
26 Helpers, including Plaintiffs; and

27 h. Wrongful conversion of wages and compensation due to Drivers and
28 Helpers, including Plaintiffs,

1 all constitute unfair business practices in violation of the California Business &
2 Professions Code section 17200, *et seq.*

3 81. Defendants have avoided payment of wages, overtime wages and other benefits as
4 required by the California Labor Code, the California Code of Regulations, and applicable
5 Industrial Welfare Commission Wage Orders.

6 82. As a result of Defendants' unfair business practices, Defendants have reaped
7 unfair benefits and illegal profits at the expense of Drivers and Helpers, including Plaintiffs, and
8 members of the public. Defendants should be made to disgorge their ill-gotten gains and to
9 restore them to Drivers and Helpers, including Plaintiffs.

10 83. Defendants' unfair business practices entitles Plaintiffs to an order that
11 Defendants account for, disgorge and restore to the Drivers and Helpers, including Plaintiffs, the
12 wages and other compensation unlawfully withheld from them.

13 **PRAAYER FOR RELIEF**

14 **WHEREFORE**, Plaintiffs, individually and on behalf of all Drivers and Helpers, pray
15 that the Court enter judgment in their favor and against Defendants as follows:

- 16 1. For an Order requiring and certifying this action as a class action;
- 17 2. For an Order appointing Plaintiffs' counsel as Class Counsel;
- 18 3. For compensatory damages in an amount to be ascertained at trial;
- 19 4. For restitution in an amount to be ascertained at trial;
- 20 5. For punitive damages in an amount to be ascertained at trial;
- 21 6. For penalties as required by the applicable Wage Order or otherwise by law;
- 22 7. For prejudgment interest at the legal rate pursuant to California Labor Code
23 section 218.6 and other applicable sections;
- 24 8. For reasonable attorney's fees pursuant to California Labor Code § 1194;
- 25 9. For cost of suit incurred herein;
- 26 10. For disgorgement of profits garnered as a result of Defendants' unlawful failure to
27 pay overtime premium compensation and meal and rest period compensation; and

28 ////

1 11. For such further relief as the Court may deem appropriate.

2 DATED: June 30, 2016

3 THE LAW OFFICES OF THOMAS W. FALVEY
4 THE LAW OFFICES OF JOSEPH M. LOVRETOVICH

5 By: 

6 MICHAEL H. BOYAMIAN

7 Attorneys for Plaintiffs Ramon Garcia, Victor
8 Ramirez, Adrian Valente, Mario Pinon, and Mynor
9 Cabrera, Individually and on Behalf of All Similarly
10 Situated Individuals

11 **DEMAND FOR JURY TRIAL**

12 Plaintiffs Ramon Garcia, Victor Ramirez, Adrian Valente, Mario Pinon, and Mynor
13 Cabrera, individually and on behalf of all similarly situated individuals, demand jury trial of this
14 matter.

15 DATED: June 30, 2016

16 THE LAW OFFICES OF THOMAS W. FALVEY
17 THE LAW OFFICES OF JOSEPH M. LOVRETOVICH

18 By: 

19 MICHAEL H. BOYAMIAN

20 Attorneys for Plaintiffs Ramon Garcia, Victor
21 Ramirez, Adrian Valente, Mario Pinon, and Mynor
22 Cabrera, Individually and on Behalf of All Similarly
23 Situated Individuals
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