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8 Attorneys for Plaintiff BRIAN MCKINLAY,
9 on behalf of himself
10 and all others similarly situated

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

BRIAN MCKINLAY, an individual,
on behalf of himself and all others
similarly situated

Plaintiff,

vs.

DURHAM D&M LLC, d/b/a
DURHAM SCHOOL SERVICES, and
DOES 1 through 25, inclusive,

Defendants.

[CLASS ACTION]

CASE NO.

COMPLAINT FOR:

1. UNPAID WAGES (LABOR CODE §§ 216 and 1194)
2. FAILURE TO PAY OVERTIME COMPENSATION (LABOR CODE §§ 510 and 1194);
3. FAILURE TO FURNISH ACCURATE WAGE AND HOUR STATEMENTS (LABOR CODE § 226);
4. WAITING TIME PENALTIES (LABOR CODE §§ 201-203);
5. CONVERSION; and
6. UNFAIR COMPETITION (BUSINESS AND PROFESSIONS CODE § 17200, *et seq.*).

JURY TRIAL DEMANDED

Plaintiff Brian McKinlay ("Plaintiff"), individually and on behalf of all similarly situated individuals, alleges as follows:

CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

NOV 09 2009

John A. Clarke, Executive Officer/Clerk
By SHAUNYA WESLEY, Deputy

BC 425600

1 **GENERAL ALLEGATIONS**

2 1. This is a proposed class action brought against Defendants DURHAM D&M, LLC d/b/a
3 DURHAM SCHOOL SERVICES, and DOES 1-25, inclusive (collectively, "Defendants" or
4 "Durham"), on behalf of Plaintiff and all other individuals who were employed as non-exempt
5 Drivers for Durham in California at any time during the four years preceding the filing of this
6 action, and continuing while this action is pending ("Class Period), and who were denied the
7 benefits and protections required under the California Labor Code and other statutes and
8 regulations applicable to employees in the State of California (collectively, "Drivers").

9 2. During the Class Period, Durham, in conjunction with other Defendants:

- 10 a. failed to pay wages for all hours worked by the Drivers;
11 b. failed to pay overtime wages due to the Drivers;
12 c. failed to provide the Drivers with timely and accurate wage and hour statements;
13 d. failed to pay the Drivers compensation in a timely manner upon their termination
14 or resignation;
15 e. failed to maintain complete and accurate payroll records for the Drivers;
16 f. wrongfully withheld wages and compensation due to the Drivers; and
17 g. committed unfair business practices in an effort to increase profits and to gain an
18 unfair business advantage at the expense of the Drivers and the public.

19 3. The foregoing acts and other acts by Defendants - committed throughout California and
20 Los Angeles County - violated numerous provisions of California law, including California
21 Labor Code sections 201, 202, 203, 226, 226.7, 510, 512, 515, 551, 552, 1194, and 1198 and the
22 applicable Wage Orders issued by California's Industrial Welfare Commission (collectively,
23 "Employment Laws and Regulations"), Business & Professions Code sections 17200 *et seq.*, and
24 violated Plaintiff's rights and the rights of the Drivers.

25 **JURISDICTION AND VENUE**

26
27 4. Venue is proper in this Judicial District and the County of Los Angeles because work was
28 performed by Plaintiff and other members of the Class for Defendants in the County of Los

1 Angeles, California, and Defendants' legal obligations to pay overtime wages and to provide
2 accurate wage statements to Plaintiff and other members of the Class according to the
3 Employment Laws and Regulations arose and were breached in the County of Los Angeles.

4 5. The California Superior Court has jurisdiction in this matter because Plaintiff Brian
5 McKinlay is a resident of California, and Defendant Durham is qualified to do business in
6 California and regularly conducts business in California. Further, no federal question is at issue
7 as the claims are based solely on California law.

8
9 **THE PARTIES**

10 6. Plaintiff Brian McKinlay is, and at all relevant times was, a competent adult residing in
11 California. Mr. McKinlay brings suit on behalf of himself and all similarly situated individuals
12 pursuant to California Code of Civil Procedure section 382, and California Business &
13 Professions Code sections 17200, *et seq.* Mr. McKinlay worked for Durham as a Driver in Los
14 Angeles County, California during the past four years.

15 7. Defendant Durham is, and at all relevant times was, a company which conducts business
16 throughout the State of California, including in Los Angeles County. Defendants have engaged
17 in unlawful employment practices addressed in this complaint throughout California and in Los
18 Angeles County.

19 8. Plaintiff is informed and believes and based thereon alleges that Durham uniformly
20 applies its labor staffing guidelines and overtime policies to all of its Drivers.

21 9. Plaintiff is currently unaware of the true names and capacities of the defendants sued in
22 this action by the fictitious names DOES 1 through 25, inclusive, and therefore sues those
23 defendants by such fictitious names. Plaintiff will amend this Complaint to allege the true names
24 and capacities of such fictitiously named defendants when they are ascertained. Plaintiff is
25 informed and believes and based thereon states that the persons sued herein as DOES are in some
26 manner responsible for the conduct, injuries and damages herein alleged.

27 10. Plaintiff is informed and believes and based thereon alleges that each defendant sued in
28 this action, including each defendant sued by the fictitious names DOES 1 through 25, inclusive,

1 is responsible in some manner for the occurrences, controversies and damages alleged below.

2 11. Plaintiff is informed and believes and based thereon alleges that DOES 1 through 25,
3 inclusive, were the agents, servants and/or employees of Defendants and, in doing the things
4 hereinafter alleged and at all times, were acting within the scope of their authority as such agents,
5 servants and employees, and with the permission and consent of Defendants.

6 12. Plaintiff is informed and believes and based thereon alleges that Defendants ratified,
7 authorized, and consented to each and all of the acts and conduct of each other as alleged herein.
8 Each of the defendants was the agent and/or employee of the others, and the conduct of each
9 defendant herein alleged was authorized and/or ratified by the others. The conduct of Durham
10 was carried on by and through its authorized agents, including owners, officers, directors,
11 managers and supervisors.

12
13 **FACTS**

14 13. During part of the four years preceding the filing of this action, Brian McKinlay was
15 employed by Defendants as a Driver in Los Angeles County, California, and was a non-
16 exempt/hourly employee under the Employment Laws and Regulations.

17 14. During the time Plaintiff was employed by Defendants, Defendants failed and refused to
18 pay Plaintiff for all hours worked ("off-the-clock" work), including but not limited to driving to
19 the first pick-up location as well as routine maintenance work, all in violation of the Employment
20 Laws and Regulations.

21 15. During Plaintiff's employment with Defendants, Plaintiff was regularly required to work
22 more than eight hours per day and more than forty hours per workweek. Defendants regularly
23 failed and refused to fully compensate Plaintiff for the overtime hours he worked, in violation of
24 the Employment Laws and Regulations.

25 16. During Plaintiff's employment with Defendants, Defendants failed and refused to provide
26 Plaintiff with timely and accurate wage and hour statements in violation of the Employment
27 Laws and Regulations.

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1 17. During Plaintiff's employment with Defendants, Defendants wrongfully withheld from
2 Plaintiff and failed to pay wages and other compensation which was due for all of the hours he
3 worked, for overtime work, and as otherwise required per Employment Laws and Regulations.

4 18. Plaintiff seeks restitution and disgorgement of all sums wrongfully obtained by
5 Defendants through unfair business practices in violation of California's Business & Professions
6 Code sections 17200, *et seq.*, to prevent the Defendants from benefitting from their violations of
7 law and/or unfair acts. Such sums recovered under the Unfair Competition Act and Unfair
8 Businesses Act are equitable in nature and are not to be considered damages. Plaintiff is also
9 entitled to costs, attorney's fees, interest and penalties as provided for by law, including by the
10 California Labor Code, the California Business & Professions Code, and the Private Attorney
11 General Act, California Code of Civil Procedure section 1021.5.

12 19. To the extent that any Driver, including Plaintiff, entered into any arbitration agreement
13 with any Defendant and such agreement purports to require arbitration, such agreement is void
14 and unenforceable. Any such agreement was one of adhesion, executed under duress, lacked
15 consideration and mutuality, and was otherwise void under both California Labor Code section
16 229 and the California Supreme Court case of *Armendariz v. Foundation Health Psychare*
17 *Services, Inc.* (2000) 24 Cal.4th 83.

18 20. All current and former Drivers who were employed in California during the class period,
19 including Plaintiff, are putative class members.

20 21. The Drivers' duties and activities during their respective working hours and each shift are
21 known to and directed by Defendants, and are set and controlled by Defendants.

22 22. During the Class Period, Defendants have routinely failed and refused to compensate
23 Drivers for all of the wages they earned ("off-the-clock" work).

24 23. During the Class Period, Drivers have been required to work more than eight hours
25 per day and more than forty hours per workweek. Defendants have routinely failed and refused
26 to compensate Drivers all of the overtime premium pay wages they earned.

27 24. During the Class Period, Defendants have failed and refused to provide Drivers with
28 timely and accurate wage and hour statements.

1 25. During the Class Period, Defendants have failed and refused to pay accrued wages and
2 other compensation earned and due immediately to Drivers who were terminated, and
3 Defendants have failed and refused to pay accrued wages and other compensation earned and due
4 within seventy-two hours to Drivers who ended their employment.

5 26. During the Class Period, Defendants have failed and refused to maintain complete and
6 accurate payroll records for Drivers showing gross hours earned, total hours worked, all
7 deductions made, net wages earned, the name and address of the legal entity employing the
8 Drivers, and all applicable hourly rates in effect during each pay period and the corresponding
9 number of hours worked at each hourly rate.

10 27. During the Class Period, Defendants have wrongfully withheld and failed to pay Drivers
11 wages and other compensation earned and due them for all hours worked, for overtime premium
12 pay, and as otherwise required pursuant to the Employment Laws and Regulations.

13 28. Plaintiff seeks injunctive relief in the form of an order prohibiting Defendants from
14 requiring Drivers to work without compensation, to work more than eight hours per day, more
15 than forty hours in any workweek, more than six days consecutively, or more than six days per
16 workweek, without payment of overtime premium wages. Plaintiff also seeks payment of
17 overtime premium pay and other compensation, all benefits required pursuant to the Employment
18 Laws and Regulations, plus penalties and interest, owed to Drivers. Plaintiff also seeks
19 attorney's fees and costs as provided by statute.

20 29. The proposed class is ascertainable in that its members can be identified using
21 information contained in Defendants' payroll and personnel records.

22 30. The Drivers are so numerous and geographically dispersed throughout California that
23 joinder of each individual Driver would be impracticable, and the disposition of their claims in a
24 class action, rather than numerous individual actions, will benefit the parties, the Court and the
25 interests of justice.

26 31. Defendants' conduct violated the Employment Laws and Regulations. Defendants'
27 systematic acts and practices also violated, *inter alia*, California Business & Professions Code
28 section 17200, *et seq.*

1 32. There is a well-defined community of interest in the questions of law and fact involved in
2 this action because Defendants' failure to pay Drivers their earned wages or afford them the
3 protections required under the Employment Laws and Regulations affects all Drivers. Common
4 questions of law and fact predominate over questions that affect only individual Drivers because
5 all Drivers' duties and activities have been controlled and directed by Defendants. The
6 predominate questions of law and fact include, but are not limited to:

7 a. Did Defendants devise a scheme and plan to circumvent California wage and hour
8 laws?;

9 b. Was/is Defendants' conduct fraudulent and deceitful?;

10 c. Was/is Defendants' conduct despicable in that it was carried on with a willful and
11 conscious disregard of the rights of others?;

12 d. Was/is Defendant's conduct oppressive in that it subjected people to cruel and
13 unjust hardship in conscious disregard of the rights of others?;

14 e. Was/is Defendant's conduct fraudulent in that consisted of intentional
15 misrepresentations, deceit, or concealment of a material fact known to Defendant with the
16 intention of thereby depriving a person of property or legal rights or otherwise causing injury?;

17 f. Did/does Defendants' conduct violate the Employment Laws and Regulations?;
18 and

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

21 33. Plaintiff's claims are typical of those of the other Drivers because all Drivers share the
22 same or similar employment duties and activities and all have been denied the benefits and
23 protections of the Employment Laws and Regulations in the same manner. As Defendants have
24 uniformly applied the same labor staffing guidelines and overtime policies to all Drivers,
25 Plaintiff's claims are typical of the claims of all Drivers. Plaintiff's claims are also typical
26 because he suffered the same damages as those suffered by all Drivers.

27 34. Plaintiff can fairly and adequately represent and protect the interests of all Drivers in that
28 Mr. McKinlay does not have any disabling conflicts of interest which are antagonistic to those of

1 all other Drivers. Plaintiff seeks no relief which is antagonistic or adverse to the other Drivers,
2 and the infringement of his rights and the damages he has suffered are typical of all other
3 Drivers. Plaintiff's counsel is competent and experienced in litigating class actions in California
4 based on large employers' violations of the Employment Laws and Regulations.

5 35. As mentioned above, to the extent that any Driver entered into any arbitration
6 agreement with any defendant and such agreement purports to require arbitration, such
7 agreement is void and unenforceable. Even if such agreement is deemed enforceable, however,
8 classwide arbitration is appropriate and should be utilized to obtain classwide relief.

9 36. The nature of this action and the nature of laws available to Plaintiff and the other Class
10 Members in the putative Class make use of the class action a particularly efficient and effective
11 procedure because:

12 a. For many of the Class Members, individual actions or other individual remedies
13 would be impracticable and litigating individual actions would be too costly;

14 b. The action involves a large corporate employer (Durham) and a large number of
15 individual employees (Plaintiff and the other Class Members), many with relatively small claims
16 and all with common issues of law and fact;

17 c. If the Class Members are forced to bring individual lawsuits, the corporate
18 defendant would necessarily gain an unfair advantage due to its ability to exploit and overwhelm
19 the limited resources of individual Class members with vastly superior financial and legal
20 resources;

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

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

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1 f. Common business practices Plaintiff experienced are representative of those
2 experienced by all Class Members and can establish the right of all Class Members to recover on
3 the alleged claims.

4
5 **CLASS ACTION ALLEGATIONS**

6 37. The duties and business activities of the proposed class action “Class Members” were
7 essentially the same as the duties and activities of the Plaintiff described above. At all times
8 during the Class Period, all of the Class Members were employed in the same or similar job as
9 the Plaintiff (as a Driver) and were paid in the same manner and under the same standard
10 employment procedures and practices as the Plaintiff.

11 38. The Class Members, like the Plaintiff, all were subject to the same unlawful policy or
12 plan to have them perform “off-the-clock” uncompensated work, including for time spent driving
13 to the first passenger pick-up location (henceforth, “pre-trip driving”), for time spent performing
14 routine maintenance work, and to not pay overtime premium pay for overtime hours worked.

15 39. During the Class Period, Defendants were fully aware that Plaintiff and the Class
16 Members were performing “off-the-clock” unpaid work, including pre-trip driving and routine
17 maintenance work, and/or not being paid overtime premium pay in violation of the provisions of
18 the Labor Code.

19 40. Defendants’ violations of the Employment Laws and Regulations were repeated, willful
20 and intentional.

21 41. The Plaintiff and the Class Members have been damaged by said violations of
22 the Employment Laws and Regulations.

23 42. Defendants are liable to the Plaintiff and the Class Members for the full amount of all
24 their earned but unpaid compensation, plus interest, plus the attorneys fees and costs of the
25 Plaintiff and Class Members.

26 43. While the exact number of Class Members is unknown to Plaintiff at the present time,
27 based on information and belief, there are more than 40 such persons. A class action is the most
28 efficient mechanism for resolution of the claims of the Class Members.

1 44. In addition, a class action is superior to other available methods for the fair and efficient
2 adjudication of this controversy since the damages suffered by individual Class Members may be
3 relatively small, and the expense and burden of individual litigation would make it impossible for
4 such Class Members individually to redress the wrongs done to them. Moreover, because of the
5 similarity of the Class members' claims, individual actions would present the risk of inconsistent
6 adjudications subjecting the Defendants to incompatible standards of conduct.

7 45. Plaintiff is currently unaware of the identities of all the Class Members. Accordingly,
8 Defendants should be required to provide to Plaintiff a list of all persons employed as a Driver in
9 California beginning four years prior to the filing of this Complaint until the present, stating their
10 last known addresses and telephone numbers, so that Plaintiff can give such Class Members
11 notice of the pendency of this action and an opportunity to make an informed decision about
12 whether to participate in it.

13 46. The Class that Plaintiff seeks to represent is defined as follows:

14 All non-exempt Drivers who are or have been employed by Defendants in the State of
15 California at any time during the four years prior to the commencement of this suit.

16 47. There is a well-defined community of interest in the litigation and the proposed Class is
17 easily ascertainable:

18 a. Numerosity: While the precise number of Class Members has not been
19 determined at this time, Plaintiff is informed and believes that Defendants have employed in
20 excess of 40 persons as Drivers in California during the Class Period.

21 b. Commonality: There are questions of law and fact common to the
22 Plaintiff and the Class that predominate over any questions affecting only individual Class
23 Members. These common questions of law and fact include, without limitation:

24 (i) Whether Defendants violated the Employment Laws and
25 Regulations by failing to compensate Plaintiff and the Class Members for all
26 hours worked;

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1 (ii) Whether Defendants violated the Employment Laws and
2 Regulations by not fully compensating Plaintiff and the Class Members by failing
3 to pay overtime premium pay.

4 c. Typicality: Plaintiff's claims are typical of the claims of the Class.
5 Plaintiff and all Class Members sustained injuries and damages arising out of and caused by
6 Defendants' common course of conduct in violation of law as alleged herein.

7 d. Adequacy of Representation: Plaintiff is a member of the Class and will
8 fairly and adequately represent and protect the interests of the Class Members. Counsel who
9 represent the Plaintiff are competent and experienced in litigating large wage and hour and other
10 employment class actions.

11 e. Superiority of Class Action: A class action is superior to other available
12 means for the fair and efficient adjudication of this controversy. Questions of law and fact
13 common to the Class predominate over any questions affecting only individual Class Members.
14 Each Class Member has been damaged and is entitled to recovery by reason of Defendants'
15 illegal policies and/or practices of failing to pay full and correct wages, including overtime
16 wages, as required by law. An opt-out class action will allow those similarly situated persons to
17 litigate their claims in the manner that is most efficient and economical for the parties and the
18 judicial system.

19
20 **FIRST CAUSE OF ACTION**

21 **(Failure to Pay Compensation For All Hours Worked - By Plaintiff Individually and on**
22 **Behalf of All Class Members: Labor Code §§ 216 and 1194; IWC Wage Orders)**

23 48. As a separate and distinct cause of action, Plaintiff complains and realleges all of the
24 allegations contained in this complaint, and incorporates them by reference into this cause of
25 action as though fully set forth herein, excepting those allegations which are inconsistent with
26 this cause of action.

27 49. Plaintiff brings this action to recover unpaid compensation for all hours worked.

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1 50. The Defendants' conduct described in this Complaint violates, among other things, Labor
2 Code sections 216 and 1194.

3 51. Defendants failed to pay Plaintiff and the Class Members for all of the actual hours
4 worked. Defendants knew or should have known that Plaintiff and the Class Members were
5 working these hours.

6 52. Plaintiff and the Class Members are entitled to recover the unpaid balance of
7 compensation Defendants owe Plaintiff and the Class Members, plus interest on that amount,
8 liquidated damages pursuant to Labor Code section 1194.2 and reasonable attorney fees and costs
9 of this suit pursuant to Labor Code section 1194. Plaintiff and the Class Members are also
10 entitled to additional penalties and/or liquidated damages pursuant to statute.

11 53. Plaintiff and the Class Members are also entitled to penalties pursuant to Paragraph No.
12 20 of the applicable Wage Order which provides, in addition to any other civil penalties provided
13 by law, any employer or any other person acting on behalf of the employer who violates, or
14 causes *to be* violated, the provisions of the Wage Order, shall be subject to a civil penalty of
15 \$50.00 (for initial violations) or \$100.00 (for subsequent violations) for each underpaid employee
16 for each pay period during which the employee was underpaid in addition to the amount which is
17 sufficient to recover unpaid wages.

18 54. As a result of Defendants' unlawful acts, Plaintiff and the Class Members have been
19 deprived of compensation in an amount according to proof at the time of trial, and are entitled to
20 recovery of such amounts, plus interest thereon and attorneys' fees and costs, pursuant to Labor
21 Code sections 218.5, 1194 and 2698, in an amount according to proof at the time of trial.

22 55. Labor Code section 201 requires an employer who discharges an employee to pay
23 compensation due and owing to said employee immediately upon discharge. Labor Code section
24 203 provides that if an employer willfully fails to pay compensation promptly upon discharge, as
25 required by section 201, the employer is liable for waiting time penalties in the form of continued
26 compensation for up to 30 work days.

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1 SECOND CAUSE OF ACTION

2 **(Failure to Pay Overtime Compensation - By Plaintiff Individually and on Behalf of All**
3 **Class Members: California Labor Code §§ 510 and 1194)**

4 56. As a separate and distinct cause of action, Plaintiff complains and realleges all of the
5 allegations contained in this complaint, and incorporates 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 57. During the Class Period, Defendants have routinely required Class Members, including
9 Plaintiff, to work over eight hours in a day and over forty hours in a workweek. However,
10 Defendants have failed and refused to pay the Class Members, including Plaintiff, the overtime
11 compensation required by the Employment Laws and Regulations.

12 58. The Class Members, including Plaintiff, have been deprived of their rightfully earned
13 overtime compensation as a direct and proximate result of Defendants' policies and practices and
14 Defendants' failure and refusal to pay that compensation. The Class Members, including
15 Plaintiff, are entitled to recover such amounts, plus interest, attorney's fees and costs.

16 59. As a result of Defendants', and each of their unlawful acts, Plaintiff and the Class
17 Members have been deprived of compensation in an amount according to proof at the time of
18 trial, and are entitled to recovery of such amounts, plus interest thereon and attorneys' fees and
19 costs, pursuant to Labor Code sections 218.5, 1194 and 2698, in an amount according to proof at
20 the time of trial.

21 60. Labor Code section 201 requires an employer who discharges an employee to pay
22 compensation due and owing to said employee immediately upon discharge. Labor Code section
23 203 provides that if an employer willfully fails to pay compensation promptly upon discharge, as
24 required by section 201, the employer is liable for waiting time penalties in the form of continued
25 compensation for up to 30 work days.

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THIRD CAUSE OF ACTION

(Failure to Furnish Accurate Wage and Hour Statements - By Plaintiff Individually and on Behalf of All Class Members: California Labor Code § 226)

61. As a separate and distinct cause of action, Plaintiff complains and realleges all of the allegations contained in this complaint, and incorporates them by reference into this cause of action as though fully set forth herein, excepting those allegations which are inconsistent with this cause of action.

62. During the Class Period, Defendants have routinely failed to provide Class Members, including Plaintiff, with timely and accurate wage and hour statements showing gross hours earned, total hours worked, all deductions made, net wages earned, the name and address of the legal entity employing the Class Members, and all applicable hours rates in effect during each pay period and the corresponding number of hours worked at each hourly rate.

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

64. As a result of Defendants', and each of their unlawful acts, Plaintiff and the Class Members have been deprived of compensation in an amount according to proof at the time of trial, and are entitled to recovery of such amounts, plus interest thereon and attorneys' fees and costs, pursuant to Labor Code sections 218.5, 1194 and 2698, in an amount according to proof at the time of trial.

65. Labor Code section 201 requires an employer who discharges an employee to pay compensation due and owing to said employee immediately upon discharge. Labor Code section 203 provides that if an employer willfully fails to pay compensation promptly upon discharge, as required by section 201, the employer is liable for waiting time penalties in the form of continued compensation for up to 30 work days.

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1 **FOURTH CAUSE OF ACTION**

2 **(For Waiting Time Penalties - By Plaintiff Individually and on Behalf of All Class**

3 **Members: California Labor Code §§ 201-203)**

4 66. As a separate and distinct cause of action, Plaintiff complains and realleges all of the
5 allegations contained in this complaint, and incorporates 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 67. During the Class Period, Defendants failed to pay accrued wages and other compensation
9 due immediately to each Driver who was terminated, and failed to pay accrued wages and other
10 compensation due within seventy-two hours to each Class Member who ended his or her
11 employment.

12 68. As a consequence of Defendants' actions, Class Members are entitled to all available
13 statutory penalties, including those provided in California Labor Code section 203, as well as all
14 other available remedies.

15 69. As a result of Defendants' unlawful acts, Plaintiff and the Class Members have been
16 deprived of compensation in an amount according to proof at the time of trial, and are entitled to
17 recovery of such amounts, plus interest thereon and attorneys' fees and costs, pursuant to Labor
18 Code sections 218.5, 1194 and 2698, in an amount according to proof at the time of trial.

19 70. Labor Code section 201 requires an employer who discharges an employee to pay
20 compensation due and owing to said employee immediately upon discharge. Labor Code section
21 203 provides that if an employer willfully fails to pay compensation promptly upon discharge, as
22 required by section 201, the employer is liable for waiting time penalties in the form of continued
23 compensation for up to 30 work days.

24 71. Defendants, and each of them, willfully failed and refused, and continue to willfully fail
25 and refuse, to timely pay compensation due to Plaintiff and Class Members whose employment
26 was terminated, as required by Labor Code section 201. As a result, Defendants, and each of
27 them, are liable to Plaintiff and all Class Members similarly situated for waiting time penalties,

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1 together with interest thereon and attorneys' fees and costs, pursuant to California Labor Code
2 section 203, in an amount according to proof at the time of trial.

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4 **FIFTH CAUSE OF ACTION**

5 **(For Conversion - By Plaintiff Individually and on Behalf of All Class Members)**

6 72. As a separate and distinct cause of action, Plaintiff complains and realleges all of the
7 allegations contained in this complaint, and incorporates them by reference into this cause of
8 action as though fully set forth herein, excepting those allegations which are inconsistent with
9 this cause of action.

10 73. During the Class Period, Defendants have knowingly and wrongfully withheld and failed
11 to pay Class Members, including Plaintiff, earned wages and other compensation due them.
12 Such wages and compensation belong to and are the property of the Class Members, including
13 Plaintiff. The right to possess said property fully vested at the time the labor and services were
14 provided to Defendants and, accordingly, said wages and compensation are the property of Class
15 Members, including Plaintiff, and not the property of Defendants. Defendants wrongfully and
16 knowingly converted this property as part of an intentional and deliberate scheme to maximize
17 their profits at the expense of the Class Members, including Plaintiff.

18 74. Defendants wrongfully converted the property of the Class Members, including Plaintiff,
19 by

20 a. Withholding property which the Class Members, including Plaintiff, owned and
21 had the legal right to hold, possess and dispose of, and then

22 b. Taking said property and utilizing it for Defendants' own use, purpose and
23 benefit.

24 75. Defendants' conversion has been done with the advance knowledge, express or implied
25 authorization, and/or ratification of Defendants' respective corporate officers, directors and
26 managing agents.

27 76. At the time the conversion took place, Class Members, including Plaintiff, were entitled
28 to immediate possession of said property.

1 77. The Class Members, including Plaintiff, have been injured by Defendants' intentional
2 conversion of said property. The Class Members, including Plaintiff, are entitled to immediate
3 possession of all amounts wrongfully converted by Defendants, with interest, as well as any and
4 all profits, whether direct or indirect, which Defendants' acquired by their unlawful conversion
5 of the property of the Class Members, including Plaintiff.

6 78. As alleged herein, Defendants' conduct was fraudulent, deceitful and despicable in that
7 Defendants' had a scheme and plan to knowingly circumvent California wage and hour laws for
8 Defendants' benefit. Defendants' conduct was despicable in that it was carried on with a willful
9 and conscious disregard of the rights of others. Defendants' conduct was oppressive in that it
10 subjected people to cruel and unjust hardship in conscious disregard of the rights of others.
11 Defendants' conduct was fraudulent in that consisted of intentional misrepresentations, deceit,
12 and/or concealment of a material fact known to Defendants with the intention of thereby
13 depriving a person of property or legal rights or otherwise causing injury. Defendants' systematic
14 acts and practices also violated, inter alia, California Business & Professions Code section
15 17200, et seq.

16 79. In committing the foregoing acts, Defendants were guilty of oppression, fraud and/or
17 malice, and, in addition to the actual damages caused thereby, the Class Members, including
18 Plaintiff, are entitled to recover damages for the sake of example and by way of punishing
19 Defendants.

20
21 **SIXTH CAUSE OF ACTION**

22 **(For Unfair Competition - By Plaintiff Individually and on Behalf of All Class Members:**
23 **California Business & Professions Code §§ 17200, et seq.)**

24 80. As a separate and distinct cause of action, Plaintiff complains and realleges all of the
25 allegations contained in this complaint, and incorporates them by reference into this cause of
26 action as though fully set forth herein, excepting those allegations which are inconsistent with
27 this cause of action.

28 ///

1 81. Defendants' violations of the Employment Laws and Regulations as alleged in this
2 Complaint, including Defendants'

3 a. Failure and refusal to pay Class Members, including Plaintiff, wages for all hours
4 worked;

5 b. Failure and refusal to pay Class Members, including Plaintiff, overtime wages;

6 c. Failure and refusal to provide Class Members, including Plaintiff, with timely and
7 accurate wage and hour statements;

8 d. Failure to pay Class Members, including Plaintiff, compensation in a timely
9 manner upon their termination or resignation;

10 e. Failure to maintain complete and accurate payroll records for Class Members,
11 including Plaintiff; and

12 f. Wrongful conversion of property of Class Members, including Plaintiff,
13 all of which constitute unfair business practices in violation of the California Business &
14 Professions Code section 17200, *et seq.*

15 82. Defendants have avoided payment of wages, overtime wages and other benefits as
16 required by the California Labor Code, the California Code of Regulations, and applicable
17 Industrial Welfare Commission Wage Orders. Further, Defendants have failed to record, report
18 and pay the correct sums of assessment to the State authorities under the California Labor Code
19 and other applicable regulations.

20 83. As a result of Defendants' unfair business practices, Defendants have reaped unfair
21 benefits and illegal profits at the expense of Class Members, including Plaintiff, and members of
22 the public. Defendants should be made to disgorge their ill-gotten gains and to restore them to
23 Class Members, including Plaintiff.

24 84. Defendants' unfair business practices entitles Plaintiff to seek preliminary and permanent
25 injunctive relief including, but not limited to, orders that Defendants account for, disgorge and
26 restore to the Class Members, including Plaintiff, the wages and other compensation unlawfully
27 withheld from them.

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1 **PRAYER FOR RELIEF**

2 **WHEREFORE**, Plaintiff, individually and on behalf of all Class Members, prays that the
3 Court enter judgment in his favor and against Defendants as follows:

- 4 1. For an Order requiring and certifying this action to be a class action;
5 2. For an Order appointing Plaintiff's counsel as Class counsel;
6 3. For appropriate preliminary and permanent injunctive relief;
7 4. For compensatory damages in an amount to be ascertained at trial;
8 5. For punitive and exemplary damages in an amount to be ascertained at trial;
9 6. For penalties as required by law;
10 7. For prejudgment interest at the legal rate pursuant to California Labor Code
11 section 218.6 and other applicable sections;
12 8. For reasonable attorney's fees pursuant to California Labor Code section 218.5
13 and other applicable sections;
14 9. For cost of suit incurred herein;
15 10. For disgorgement of profits garnered as a result of Defendants' unlawful failure to
16 pay wages, including overtime wages, earned; and
17 11. For such further relief as the Court may deem appropriate.

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20 DATED: November 8, 2009

LAW OFFICES OF THOMAS W. FALVEY

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22
23 By: 

J.D. HENDERSON

Attorneys for Plaintiff Brian McKinlay, individually
and on behalf of all similarly situated individuals

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DEMAND FOR JURY TRIAL

Plaintiff Brian McKinlay, individually and on behalf of all similarly situated individuals,
demands jury trial of this matter.

DATED: November 8, 2009

LAW OFFICES OF THOMAS W. FALVEY

By: 

J.D. HENDERSON

Attorneys for Plaintiff Brian McKinlay, individually
and on behalf of all similarly situated individuals

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