

1 Mark P. Robinson, Jr., Esq., State Bar No. 054426
2 Scot D. Wilson, Esq., State Bar No. 223367
3 Henry Pan, Esq., State Bar No. 279240
4 ROBINSON CALCAGNIE ROBINSON
5 SHAPIRO DAVIS, INC.
6 19 Corporate Plaza Drive
7 Newport Beach, CA 92660
8 Tel.: (949) 720-1288
9 Fax: (949) 720-1292
10 mrobinson@rcrsd.com
11 swilson@rcrsd.com
12 hpan@rcrsd.com

13 Attorneys for Plaintiff
14 Faustino Solorio

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

16 **COUNTY OF SAN BERNARDINO – SAN BERNARDINO DISTRICT CIVIL DIVISION**

17 FAUSTINO TORRES SOLORIO, an individual,

18 Plaintiff,

19 v.

20 NISSAN OF FONTANA, INC., individually and
21 dba NISSAN OF SAN BERNARDINO; NISSAN
22 OF SAN BERNARDINO; NISSAN OF
23 FONTANA, INC., individually and dba METRO
24 NISSAN OF REDLANDS; METRO NISSAN OF
25 REDLANDS; GUNNAR AYALA; LOUIE
26 AYALA, JR., individually and dba L.A.G.D.J.
27 Courier Services; L.A.G.D.J. Courier Services;
28 and DOES 1-100, inclusive,

Defendants.

Case No.

CIVDS1512469

COMPLAINT FOR DAMAGES

UNLIMITED CIVIL CASE

DEMAND FOR JURY TRIAL

Plaintiff Faustino Torres Solorio ("Plaintiff" or "Mr. Solorio") brings this complaint against Defendants Nissan of Fontana, Inc., Nissan of San Bernardino, Metro Nissan of Redlands (together the "Nissan Defendants"), Gunnar Ayala ("Gunnar"), Louie Ayala, Jr. ("Mr. Ayala"), L.A.G.D.J. Courier Services ("LAGDJ"), and Does 1 through 100 (collectively "Defendants") and alleges as follows:

I. INTRODUCTION

1. On September 10, 2013, Plaintiff Faustino Solorio was catastrophically injured when he was hit by a car that was being driven by a parts delivery driver who worked for the Nissan Defendants.

2. The incident and the injuries to Mr. Solorio happened because of the negligence of Gunnar Ayala ("Gunnar"), who was an employee of the Nissan Defendants, and was driving dangerously and negligently at the time of the incident. The Nissan Defendants are vicariously liable and responsible for the negligence of Gunnar, their employee, and the harm suffered by Mr. Solorio. Gunnar was driving his own personal vehicle which was owned by his father, Mr. Ayala, and which the Nissan Defendants required Gunnar to use as part of his job as a parts delivery driver for the Nissan Defendants.

3. On September 10, 2013, just after finishing his shift as a parts delivery driver at Nissan of San Bernardino, Gunnar was driving to a gas station in Redlands, California. After exiting the freeway, Gunnar Ayala made a right turn and hit Mr. Solorio who was a pedestrian. Mr. Solorio worked as a landscaper. Before the incident, Mr. Solorio had been in a truck with a co-worker. Their landscaping truck ran out of gas and had been parked on the shoulder and side of the road on Alabama Street. Mr. Solorio got out of the passenger side of the truck and went behind the truck to get a gas can to put gas in the landscaping truck. Mr. Solorio was standing behind the tailgate of the truck when he was struck.

4. The impact between Gunnar's vehicle and Mr. Solorio was horrific. Although Gunnar claims he was going only fifteen (15) miles per hour, the severity of the impact and injuries to Mr. Solorio indicates that he was going much faster. The force of the impact drove Mr. Solorio through the front windshield of the vehicle that Gunnar was driving, resulting in Mr. Solorio ending up in the front passenger seat of the vehicle.

5. Mr. Solorio was severely injured. Mr. Solorio suffered serious injuries to his left leg which ultimately led to his left leg having to be amputated above the knee. In addition, the collision also resulted in a major laceration of Mr. Solorio's spleen which had to be removed because of his injuries. He also suffered multiple broken bones, including multiple fractures to his ribs, right collar bone, lower spine, and right leg. He also had deep cuts and lacerations all over his body. He has needed substantial medical care, including multiple surgeries, and will require medical care for the rest of his life. Mr. Solorio has endured and continues to suffer severe pain, physical, mental, and emotional harm.

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7. Venue is proper in this Court. The incident that resulted in the injuries to Plaintiff occurred in San Bernardino County, California. *See* Cal. Code Civ. Proc. § 395.5. In addition, several of the defendants in this case reside in San Bernardino County, California.

9. Defendant Gunnar Ayala is an adult and is a resident of San Bernardino County, California. He was eighteen (18) years old at the time of the incident.

11. Defendant Nissan of Fontana, Inc. is a California corporation and does business in San Bernardino County as Nissan of San Bernardino and Metro Nissan of Redlands (together the “Nissan Defendants”). Nissan of San Bernardino and Metro Nissan of Redlands are Nissan dealerships in San Bernardino County. The Nissan Defendants are engaged in the business of selling automobiles and selling and delivering automobile parts to customers throughout San Bernardino County.

12. The true names and capacities of the defendants sued herein as Does 1 through 100 are presently unknown. Plaintiff alleges that each of the Doe defendants is legally responsible in some manner for the matters alleged herein. Plaintiff alleges that each defendant, including Does 1 through 100, was the agent and/or employee of each other, and in doing the things alleged herein was acting in the scope of his authority as such agent or employee such that the imposition of vicarious liability is appropriate. Plaintiff will seek leave of court to amend this complaint to state defendants' true names and capacities after they have been ascertained.

1 **IV. GENERAL ALLEGATIONS AND BACKGROUND**

2 **A. The September 10, 2013 Incident**

3 13. The incident in this case – the collision in which Mr. Solorio was catastrophically injured
4 – occurred just after 4:00 p.m. in the afternoon on September 10, 2013 in Redlands.

5 14. The incident happened on Alabama Street in an area that was south of the I-10 freeway
6 and north of Industrial Park Avenue.

7 15. September 10, 2013 was a Tuesday. It was a work day for Defendant Gunnar Ayala who
8 worked as a parts delivery driver at Nissan of San Bernardino. The day started off as it normally did for
9 Gunnar. Since May, after graduating high school, Gunnar had been working at Nissan of San
10 Bernardino. He worked as a parts delivery driver. His job was to use his own personal vehicle to deliver
11 Nissan parts to customers of the Nissan Defendants. Just as he did every work day, Gunnar got to work
12 at Nissan of San Bernardino at 8:00 a.m., picked up parts to deliver to the Nissan Defendants' customers,
13 delivered the parts, and returned to the Nissan of San Bernardino dealership at the end of his shift.

14 16. At the end of his shift on September 10, 2013, after leaving the Nissan of San Bernardino
15 dealership, Gunnar was driving his own personal vehicle (the same vehicle that he used as a parts
16 delivery driver for Nissan of San Bernardino).

17 17. Gunnar was on his way home, but knew he needed to get gas for his car in order to make
18 deliveries for Nissan of San Bernardino the next day. (Gunnar was scheduled to work as a parts delivery
19 driver at Nissan of San Bernardino on Wednesday, September 11, 2013). To quickly get gas on his way
20 home, Gunnar intended to go to a gas station on Alabama Street. To get there, Gunnar needed to turn
21 onto Alabama Street.

22 18. While making the turn onto Alabama Street, Gunnar hit Mr. Solorio.

23 19. Mr. Solorio worked as a landscaper. He used a truck as part of his work. Mr. Solorio had
24 been working with a co-worker (Franco Javier Perez). Mr. Perez had been driving the truck, ran out of
25 gas, and pulled over and parked legally on the side of the road next to the shoulder/curb. Mr. Solorio was
26 a passenger in the truck. Mr. Solorio got out on the passenger side and went to the back of the truck to
27 get a gas can to put gas in the truck. While standing by the tailgate behind the truck, Mr. Solorio was
28 struck by the car that was driven by Gunnar.

1 20. Mr. Solorio did nothing wrong. The distance between the number two lane (the right most
2 lane) of Alabama Street and the shoulder where the truck was parked was more than wide enough to
3 accommodate through traffic as well as vehicles parked alongside the curb. Before the collision, other
4 vehicles were able to pass through in the number two lane with the truck parked on the side of the road
5 without any problems.

6 21. Physical damage to the truck shows that Gunnar's vehicle struck both Mr. Solorio and the
7 truck that he was standing behind.

8 22. Paramedics and officers from the Redlands Police Department arrived at the scene.
9 Officer Jennifer Ramstad was in charge of the investigation. Initially, Gunnar told Officer Ramstad that
10 he blacked out the moment before impacting Mr. Solorio with his car and had no idea what happened.
11 But, almost a month later, on October 3, 2013, Gunnar changed his story and told Officer Ramstad that
12 when he turned right onto Alabama Street from the off-ramp, he was approximately six (6) inches behind
13 an SUV that was in the number two (2) lane which obstructed his view before he hit Mr. Solorio. Gunnar
14 has admitted that this was unsafe.

15 23. Even though the speed limit on Alabama Street in the area is 40 miles per hour, Gunnar
16 says that he was going just fifteen (15) miles per hour when he hit Mr. Solorio. However, the damage to
17 his vehicle, the truck and severity of the injuries to Mr. Solorio indicate that he was going much faster.

18 24. Gunnar denies that he was on his cell phone, texting or trying to pass the vehicle in front
19 of him by driving into the right shoulder where Mr. Solorio was standing at the moment of impact, but
20 Gunnar's story and the fact that he was driving just six (6) inches behind the SUV in front of him
21 suggests otherwise. According to Officer Ramstad, Gunnar did not keep a reasonable lookout for
22 pedestrians as he drove south down Alabama Street on September 10, 2013. Gunnar's driver's license
23 was suspended as a result of this incident. In addition, Officer Ramstad cited him for violating California
24 Vehicle Code Section 22107 for making an unsafe turning movement.

25 25. It is legal to temporarily park on the side of the road on Alabama Street in order to fill up
26 gas, and because she concluded that he did nothing wrong, Officer Ramstad did not cite Mr. Solorio for
27 violating any statute, and based on witness statements and physical evidence, Officer Ramstad concluded
28 that Mr. Solorio did not cause or contribute in any way to this incident.

1 **B. Mr. Solorio Has Sustained Severe Injuries And Harm**

2 26. Mr. Solorio, now 53 years old, sustained severe injuries as a result of the incident.

3 27. Mr. Solorio's left leg was injured so severely that it had to be amputated above the knee.
4 He now requires a wheelchair, a walker and crutches. Though he needs a prosthetic leg, he has not been
5 able to get one.

6 28. In addition, the collision also resulted in a major laceration of Mr. Solorio's spleen which
7 had to be removed because of his injuries.

8 29. He also suffered multiple broken bones, including multiple fractures to his ribs, right
9 collar bone, lower spine, and right leg.

10 30. He also had deep cuts and lacerations all over his body.

11 31. He has experienced and continues to feel severe pain, including in his back, left leg
12 (phantom pain and residual limb pain (stump pain), left hip, right leg, right shoulder, neck, right hand,
13 and abdomen.

14 32. The harm to Mr. Solorio is not limited to his physical injuries or the pain that he has felt as
15 a result of them. The harm that he has suffered and continues to suffer is also mental and emotional.
16 He now suffers from depression, gets frustrated when he cannot do what he used to be able to do, has
17 frequent nightmares, has occasional flashbacks, and suffers from emotional problems as a result of the
18 incident, the injuries he sustained, and the way he now feels about himself and what he is no longer
19 capable of doing. He cries very easily and has constant feelings of sadness. He has difficulty sleeping
20 because of the pain that he feels.

21 33. In addition to being unable to do the type of work that he used to do, the incident and his
22 injuries have also affected his relationship with his wife, Stacey, and their children. He is unable to do
23 many of the things that he used to do and enjoy as a husband and father.

24 34. He has needed substantial medical care, including multiple surgeries. In addition, Mr.
25 Solorio will require medical care, therapy, and rehabilitation in the future. There is medical care,
26 treatment, rehabilitation, therapy, and prosthetic devices that Mr. Solorio needs but is not getting because
27 he cannot afford it. Mr. Solorio is not and does not feel the same physically, mentally, emotionally or
28 psychologically as he did before the incident.

1 **C. Gunnar Ayala Was Negligent**

2 35. “Negligence is the failure to use reasonable care to prevent harm to oneself or to others.”
3 Judicial Council of California Civil Jury Instruction (“CACI”) No. 401. “A person can be negligent by
4 acting or failing to act.” Id. “A person is negligent if he or she does something that a reasonably careful
5 person would not do in the same situation or fails to do something that a reasonably careful person would
6 do in the same situation.” Id.

7 36. Gunnar Ayala, the Nissan Defendants’ parts delivery driver, was negligent because he
8 failed to use reasonable care in preventing harm to Mr. Solorio. Gunnar was negligent in his operation of
9 the vehicle that he was driving at the time of the incident and was distracted and not paying attention to
10 the roadway, vehicles and pedestrians in front of him. He was driving unsafely and dangerously under
11 the circumstances and his negligence was a substantial factor in causing the incident and the resulting
12 injuries and harm to Mr. Solorio.

13 37. Under California law, “[a] person must use reasonable care in driving a vehicle.” CACI
14 No. 700. “Drivers must keep a lookout for pedestrians, obstacles, and other vehicles.” Id. “They must
15 also control the speed and movement of their vehicles.” Id. “The failure to use reasonable care in driving
16 a vehicle is negligence.” Id. “A driver must use reasonable care when turning.” CACI No. 705. “The
17 duty to use reasonable care does not require the same amount of caution from drivers and pedestrians.”
18 CACI No. 710. “While both drivers and pedestrians must be aware that motor vehicles can cause serious
19 injuries, drivers must use more care than pedestrians.” Id.

20 38. Gunnar had a duty and responsibility to drive his car safely and to pay attention and keep a
21 lookout for pedestrians (like Mr. Solorio), obstacles, and other vehicles. Gunnar failed to do that.
22 Gunnar did not use reasonable care in driving the vehicle at the time of the incident. Gunnar failed to
23 keep a lookout for Mr. Solorio and failed to safely and reasonably control the speed and movement of his
24 vehicle. Gunnar’s failure to use reasonable care in driving the vehicle was negligent.

25 39. Gunnar had a cell phone with him that was in his vehicle at the time of the incident.
26 While it is unknown whether or not Gunnar was using his cell phone or not at the time of the incident, he
27 was certainly distracted by something and was clearly not paying attention when he was turning and
28 struck Mr. Solorio with his car.

1 **D. Gunnar Ayala Was An “Employee” Of The Nissan Defendants**

2 40. The Redlands Police Department responded to the scene and did an investigation in
3 connection with the September 10, 2013 incident in which Mr. Solorio was injured. As part of Redlands
4 Police Department’s investigation, Gunnar was asked about his employment. In response to questions by
5 Officer Jennifer Ramstad of the Redlands Police Department, Gunnar said that he worked as parts
6 delivery driver for Nissan of San Bernardino and used his own personal vehicle to deliver parts for them.

7 41. Based on his answers to her questions at the time, Officer Ramstad believed that Gunnar
8 was an employee of Nissan of San Bernardino.

9 42. As part of its investigation, the Redlands Police Department also took photographs. The
10 photographs taken by the Redlands Police Department show that, at the time of the September 10, 2013
11 incident, Gunnar was wearing a Nissan of San Bernardino shirt (as shown in the photograph below):



27 43. The Nissan Defendants had Gunnar wear the company shirt with the Nissan of San
28 Bernardino logo on it at all times when he worked as a parts delivery driver.

1 44. As part of its investigation, the Redlands Police Department also found that there was at
2 least one Nissan of San Bernardino parts invoice¹ and paperwork in the front passenger seat of Gunnar's
3 vehicle at the time of the incident. The Nissan of San Bernardino invoice caught the attention of Officer
4 Ramstad because Gunnar had told her that he was employed as a delivery driver and that there was
5 paperwork relating to his employment in the passenger seat. Photographs were taken by the Redlands
6 Police Department of the Nissan of San Bernardino parts invoice in the front passenger seat of the vehicle
7 (as shown in the photo below):



1 The Nissan of San Bernardino paperwork that was in front passenger seat was referred to by Nissan of San Bernardino and
2 its delivery drivers as a "parts ticket," which is an invoice that Nissan of San Bernardino gives to its customers when they
3 purchase an item. After a delivery, the bottom (yellow) copy is given to the customer by the delivery driver and the top (white)
4 copy is returned by the delivery driver to the Nissan Defendants along with the payment from the customer that is collected by
5 the parts delivery driver at the end of the day. The fact that Gunnar still had this paperwork in his vehicle at the time of the
6 incident indicates that he may have actually: (a) intended or been required to return to work at Nissan of San Bernardino at the
7 time of the incident; or (b) not completed his shift at the time of the incident.

1 45. As a result of the incident and his initial story about "blacking out," Gunnar's driver's
2 license was suspended. Officer Ramstad sent a "Notice of Suspension for Noncompliance" form to the
3 DMV, summarizing the incident as follows:

09/12/13	31		Notice of Suspension for Non-Compliance Hx of injury: Employee struck a legally parked truck and a pedestrian, stating that he "blacked out". He later said he did not see either until it was too late. Pedestrian sustained major injuries including an amputated leg and may not survive.
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8 46. "An employer is responsible for harm caused by the wrongful conduct of its employee
9 while acting within the scope of their employment." CACI No. 3700. A defendant is vicariously
10 responsible if: (1) the person that caused the harm was the defendant's employee; and (2) the person was
11 acting within the scope of their employment when they harmed the plaintiff. CACI No. 3701. The
12 Nissan Defendants say that Gunnar was not their "employee." The Nissan Defendants say that Gunnar
13 was an "independent contractor" who worked for his father and LAGDJ. Where, as here, the existence of
14 a person's status as an "employee" is disputed, CACI No. 3704 is controlling. "In deciding whether [a
15 person] was [the defendant]'s employee, the most important factor is whether [the defendant] had the
16 right to control how [the person] performed the work, rather than just the right to specify the result."
17 CACI 3704. "In addition to the right to control," CACI No. 3704 instructs that the trier of fact "must also
18 consider all of the circumstances" and sets forth nine (9) factors which, "if true, may show that [the
19 person] was the employee of [the defendant]." *Id.* The factors are:

- 20 (a) [The defendant] supplied the equipment, tools and place of work;
21 (b) [The person] was paid by the hour rather than by the job;
22 (c) The work being done by [the person] was part of the regular business of [the
23 defendant];
24 (d) [The defendant] had an unlimited right to end the relationship with [the person];
25 (e) The work being done by [the person] was his only occupation or business;
26 (f) The kind of work performed by [the person] is usually done under the direction of
27 a supervisor rather than by a specialist working without supervision;
28

1 (g) The kind of work performed by [the person] does not require specialized or
2 professional skill;

3 (h) The services performed by [the person] were to be performed over a long period of
4 time; and

5 (i) [The defendant] and [the person] acted as if they had an employer-employee
6 relationship.

7 CACI No. 3704(a)-(i); *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rel.*, 48 Cal.3d 341, 350-55 (1989).

8 47. As set forth below, each of CACI No. 3704 factors and considerations demonstrate that
9 Gunnar was an "employee" of the Nissan Defendants.

10 48. The Nissan Defendants say that Gunnar was not their employee because they called him
11 an "independent contractor" and did not pay taxes or insurance for him as an employee. However,
12 "[t]he label placed by the parties on their relationship is not dispositive, and subterfuges are not
13 countenanced." CACI No. 3704 Sources and Authority (quoting *S.G. Borello & Sons, Inc.* 48 Cal.3d at
14 342 (1989)); accord *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal.App.4th 1, 10 (2007) ("The
15 parties' label is not dispositive and will be ignored if their actual conduct establishes a different
16 relationship."). In other words, it does not matter that the Nissan Defendants called Gunnar, his father, or
17 LAGDJ "independent contractors" – what matters is how they acted and how they actually treated them.
18 And, here, the Nissan Defendants controlled and treated Gunnar as though he was their employee.

19 49. Corporations sometimes misclassify workers as "independent contractors." Corporations
20 are financially incentivized to label workers as "independent contractors" rather than "employee" for
21 several reasons. For example, employees are entitled to minimum wage and overtime pay, meal and rest
22 breaks, reimbursement for work-related expenses, worker's compensation, and businesses have to pay for
23 unemployment insurance and pay taxes for employees. But, they do not have to provide these things for
24 "independent contractors." The Nissan Defendants intentionally misclassified Gunnar an "independent
25 contractor" in order to try to save money even though they treated him and got all of the benefits of him
26 working for them as their "employee." The arrangement between the Nissan Defendants, LAGDJ and
27 Gunnar was a classic subterfuge, façade, and scheme to basically get "employees" who were called
28 "independent contractors" in order to avoid having to pay and provide for all of the things that the law
requires.

1 50. Under California law, there is a presumption that a person who works for a company is an
2 employee and the burden is on the company to prove that the person is an independent contractor.

3 51. Mr. Solorio was harmed by the negligence of Gunnar Ayala. The Nissan Defendants are
4 responsible for the harm because Gunnar was acting as its employee when the incident occurred. Gunnar
5 was an “employee” of the Nissan Defendants. He worked as a parts delivery driver who delivered parts
6 for Nissan of San Bernardino to customers of Nissan of San Bernardino. Gunnar was acting within the
7 scope of his employment when Mr. Solorio was harmed.

8 52. The vehicle that Gunnar hit Mr. Solorio with was the same vehicle that he used as a parts
9 delivery driver for the Nissan Defendants. The Nissan Defendants required Gunnar to use his own
10 personal vehicle to deliver parts for Nissan of San Bernardino.

11 **1. The Nissan Defendants Had The Right to Control Gunnar’s Work As A Parts**
12 **Delivery Driver**

13 53. As stated above, when employee status is disputed, CACI No. 3704 applies. CACI No.
14 3704 states: “In deciding whether [a person] was [the defendant]’s employee, the most important factor is
15 whether [the defendant] had the right to control how [the person] performed the work, rather than just the
16 right to specify the result.” CACI No. 3704. The Nissan Defendants had the right to control how
17 Defendant Gunnar Ayala performed his work as a parts delivery driver and did, in fact, do so.

18 54. The Nissan Defendants had the right to control and did control the work that Defendant
19 Gunnar Ayala did as a parts delivery driver. When arriving to work at the Nissan of San Bernardino
20 dealership every morning, Defendant Gunnar Ayala was told what deliveries he was to make and to
21 which customers.

22 55. When a part is ordered at Nissan of San Bernardino, the invoice is clipped onto a
23 clipboard in the order to be delivered by one of three Nissan of San Bernardino managers and/or
24 employees, Tim Ochoa, Lambert Lugo, or Reyes Martin. These three (3) men were known as the “Parts
25 Guys.” The invoices were arranged such that the bottom invoice on the clipboard was the first delivery to
26 be made that day. In short, the order of parts delivery was directed by the Nissan Defendants’ “Parts
27 Guys.”
28

1 56. Of the three "Parts Guys," Tim Ochoa was more in charge than the others, while John
2 Appel, the Parts Manager for both Nissan of San Bernardino and Metro Nissan of Redlands, was in
3 charge of the whole department on behalf of the Nissan Defendants.

4 57. Mr. Appel required all of the parts delivery drivers, including Gunnar, to keep track of a
5 log of all of their destinations so he knew when and where they were going.

6 58. Veronica Brimmer, who was also a delivery driver and delivered parts for Nissan of San
7 Bernardino, before leaving every morning was required to write down all of the orders given to her, as
8 well as the location, so that the "Parts Guys" would know exactly what shops she was delivering to that
9 day.

10 59. Veronica was given both verbal orders as well as written parts orders for delivery based on
11 the stated needs of the Nissan Defendants who she reported to and took orders from.

12 60. Veronica would not only get verbal orders on the phone when making deliveries, she also
13 received verbal orders when working at the dealerships. For example, if called at lunch, she would have
14 to drop everything to do whatever the Nissan Defendants asked of her. When given a verbal order by one
15 of the "Parts Guys," Veronica would have to follow that order regardless of whether or not she had
16 previously planned to make the deliveries on a different route or order.

17 61. Defendant Louie Ayala, Jr., who also delivered parts for the Nissan Defendants, did not
18 feel like he was an "independent contractor" for Nissan of San Bernardino because "they kept telling me
19 what to do." Mr. Ayala had to do whatever the Nissan dealerships told him to do. In fact, they would tell
20 him how to do his delivery routes approximately once a week. He was told to check stock orders, check
21 inventory, stock parts as well as put parts away by Nissan of San Bernardino. He did this despite his
22 understanding of only being hired as a delivery driver because he did not want to lose his business with
23 the Nissan Defendants.

24 62. John Appel, the Parts Manager for the Nissan Defendants, demanded Mr. Ayala fire one
25 of his delivery drivers, "Gary," which Mr. Ayala obliged and did. John Appel told Mr. Ayala that if he
26 did not fire "Gary," then he would replace all of his parts delivery drivers with others.

27 63. The Nissan Defendants did not treat the parts delivery drivers like professionals,
28 specialists, or independent contractors.

1 64. For example, Mr. Ayala found it hard to run his business when he had people at Nissan of
2 San Bernardino telling him what to do, including cleaning the floors, shelves, stockroom, boxes and trash
3 of the parts room, which was not part of his job delivering parts.

4 65. In fact, Mr. Ayala often accepted orders from the Nissan Dealerships and gave them the
5 right to control his actions because he did not want to lose their business.

6 66. At times, people at Nissan of San Bernardino and Nissan of Redlands would try to control
7 the way that Mr. Ayala his job, and he let them control him and gave them that right in order not to lose
8 business with the dealerships.

9 **2. The Other CACI No. 3704 Also Show That Gunnar Ayala Was An Employee**
10 **Of The Nissan Defendants**

11 67. The Nissan Defendants had the right to control and did control how Gunnar did his job as
12 a parts delivery driver. “In addition to the right to control,” CACI No. 3704 instructs that the trier of fact
13 “must also consider all of the circumstances” and sets forth nine (9) factors which, “if true, may show
14 that [the person] was the employee of [the defendant].” CACI No. 3704. As with the right to control,
15 each of these factors and considerations under CACI No. 3704 show that Gunnar was an employee of the
16 Nissan Defendants.

17 **a. The Nissan Defendants Supplied Gunnar With The Parts To Deliver,**
18 **The Paperwork That He Had To Use, A Shirt To Wear When He Was**
19 **Working, And The Place To Work**

20 68. The *first* factor to be considered under CACI No. 3704 is whether “[the defendant]
21 supplied the equipment, tools and place of work.” CACI No. 3704(a). Where the defendant supplies the
22 worker with things to use as part of their work, a shirt or uniform or wear, and a place to work, it supports
23 a finding that the worker is an employee.

24 69. The Nissan Defendants provided Gunnar with all of the Nissan parts that he delivered as a
25 parts delivery driver for the Nissan Defendants.

26 70. The Nissan Defendants also provided Gunnar with a Nissan of San Bernardino polo shirt
27 to wear while working as a parts delivery driver. Gunnar wore his Nissan of San Bernardino shirt every
28 day when he worked as a parts delivery driver.

1 71. Other persons who worked as delivery drivers for the Nissan Defendants also always wore
2 Nissan of San Bernardino shirts. For example, Veronica Brimmer, a former parts delivery driver, was
3 told by a manager at Nissan of San Bernardino to always wear the Nissan of San Bernardino shirt while
4 working that so they would be recognized by customers as being with Nissan of San Bernardino. Louie
5 Ayala, Jr., Gunnar's father, also worked as a delivery driver for the Nissan Defendants, and, when
6 making deliveries for the Nissan Defendants, he wore a Nissan of San Bernardino shirt every day.²

7 72. The Nissan Defendants also provided Gunnar with Nissan of San Bernardino paperwork
8 (including invoices) that he was required to use when delivering parts to customers who had ordered
9 parts from the Nissan Defendants. The Nissan Defendants supplied delivery drivers with invoices and
10 paperwork to be used for each delivery, including one copy that was to be provided to the customer (who
11 ordered and was delivered the part) and another copy that was required to be returned by the delivery
12 driver to the Nissan of San Bernardino dealership at the end of the day (along with the payment that was
13 collected by the driver in connection with each delivery).

14 73. In addition, the Nissan Defendants also provided the place where Gunnar's work as a parts
15 delivery driver was done. As a parts delivery driver, Gunnar was required by the Nissan Defendants to
16 show up every morning (entering a back door not open to the public) in the Parts Department at Nissan of
17 San Bernardino. Most days Defendant Gunnar Ayala, along with the other parts delivery drivers for
18 Nissan of San Bernardino, were required by the Nissan Defendants to arrive at the Nissan of San
19 Bernardino dealership at 8:00 a.m. (it was not open to the public business until 9:00 a.m.). At the
20 dealership, Gunnar was given orders by managers at Nissan of San Bernardino regarding which parts to
21 delivery to which particular customers.

22 74. As a parts delivery driver, Gunnar worked an eight (8) hour shift. At the end of his shift,
23 after delivering parts, Gunnar was required to return to the Nissan of San Bernardino dealership each day
24 in order to drop off all of the payment (cash or checks) that he had collected and return copies of all of
25 the Nissan of San Bernardino invoices at the dealership.

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27
28 ² At some point after the incident, the Nissan Defendants changed their practices. Parts delivery drivers no longer wear Nissan
of San Bernardino logo shirts.

1 **b. Gunnar Was Paid By The Hour**

2 75. The *second* CACI No. 3704 factor is whether “[the person] was paid by the hour rather
3 than by the job.” CACI No. 3704(b). Where drivers are paid hourly or weekly and not by the job, it
4 points toward employee status. *See Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal.App.4th 1, 12
5 (2007).

6 76. The Nissan Defendants paid parts delivery drivers an hourly rate. Parts delivery drivers
7 were not paid by the job or based on the number of deliveries that they completed. In addition, their
8 work schedule was not dependent on any particular number of deliveries. Rather, parts delivery drivers
9 worked an eight (8) hour shift each day and had a set work schedule each week.

10 77. From May 10, 2013 through September 10, 2013, the day of the incident, Gunnar worked
11 five (5) to six (6) days a week as a parts delivery driver delivering parts for Nissan of San Bernardino
12 (i.e., forty (40) to forty-six (46) hours per week).

13 **c. The Delivery Of Parts Was A Regular Part Of The Nissan Defendants’**
14 **Business**

15 78. The *third* factor pursuant to CACI No. 3704 is whether “[t]he work being done by [the
16 person] was part of the regular business of [the defendant].” CACI No. 3704(c). Where the work
17 performed by the driver is “integrated into [the company]’s operation” and where the drivers act and
18 “look like [the company]’s employees” and where customers to whom deliveries are being made are the
19 company’s customers – “not the driver’s customers,” employee status should be found. *Estrada*, 154
20 Cal.App.4th at 9.

21 79. Nissan of San Bernardino has a Parts Department. One of the features that the Nissan
22 Defendants offered to its customers was the complimentary delivery of parts ordered from the Nissan of
23 San Bernardino Parts Department. The delivery of parts by parts delivery drivers to customers of Nissan
24 of San Bernardino was part of the Nissan Defendants’ regular business. In addition, parts delivery
25 drivers acted and looked like they were employees of Nissan of San Bernardino. Moreover, the
26 customers to whom delivery of parts were being made by the delivery drivers, including Gunnar, were
27 customers of the Nissan Defendants – not customers of Gunnar, LAGDJ or anyone else.

1 **d. The Nissan Defendants Had The Unlimited Right To End The**
2 **Relationship – And It In Fact Exercised the Right, Firing Gunnar**
3 **Immediately After They Found Out About The Collision**

4 80. The *fourth* CACI No. 3704 factor is whether “[the defendant] had an unlimited right to
5 end the relationship with [the person].” CACI No. 3704(d). “The right to terminate at will, without cause,
6 is ‘strong evidence in support of an employment relationship.’” *Cotter v. Lyft, Inc.*, 60 F.Supp.3d 1067,
7 1076 (N.D. Cal 2015) (quoting *S.G. Borello & Sons, Inc.*, 48 Cal.3d at 350).

8 81. There was no written contract between the Nissan Defendants, LAGDJ or Gunnar relating
9 to his work as a parts delivery driver. It was, however, understood between all delivery drivers that their
10 work relationship with the Nissan Defendants was at will.

11 82. The Nissan Defendants clearly believed that they had the unlimited right to terminate their
12 relationship with LAGDJ, Louie Ayala, Jr., and Gunnar because – as soon as the Nissan Defendants
13 found out about the September 10, 2013 incident, the Nissan Defendants fired and unilaterally terminated
14 the relationship with LAGDJ, Mr. Ayala, and Gunnar.

15 **e. Delivering Parts For The Nissan Defendants Was Gunnar’s Only**
16 **Occupation And Source of Income**

17 83. The *fifth* factor that must be considered as part of the CACI No. 3704 analysis is whether
18 “[t]he work being done by [the person] was his only occupation or business.” CACI No. 3704(e). Where
19 delivery drivers are “not engaged in a separate profession or business” and work almost exclusively for
20 the company that they are making deliveries for, employee status is likely to be found. *Estrada*, 154
21 Cal.App.4th at 12.

22 84. The work done by Gunnar as a parts delivery driver (delivering parts for the Nissan
23 Defendants to customers of the Nissan Defendants) was his only occupation or business and source of
24 income. Gunnar never delivered parts for anyone other than the Nissan Defendants. The only parts that
25 he ever delivered as a delivery driver was Nissan parts to customers of the Nissan Defendants.

26 85. Gunnar had graduated high school just a couple months before the incident. His work as a
27 parts delivery driver – delivering parts for Nissan of San Bernardino – was his only job and only source
28 of income.

1 86. Likewise, the Nissan Defendants’ dealerships – Metro Nissan of Redlands and Nissan of
2 San Bernardino – were the only entities that LAGDJ made deliveries for. From 2010 to 2011, one
3 hundred percent (100%) of LAGDJ’s business was attributable to Nissan of San Bernardino and Metro
4 Nissan of Redlands. In 2012, about ninety-nine (99%) of LAGDJ’s business was attributable to Nissan
5 of San Bernardino and Metro Nissan of Redlands. And, in 2013, at least ninety-five percent (95%) of
6 LAGDJ’s business was attributable to Nissan of San Bernardino and Metro Nissan of Redlands.

7 **f. Gunnar’s Work As A Delivery Driver Was Done Under The Direction**
8 **And Supervision Of The Nissan Defendants’ Personnel And Managers**

9 87. The *sixth* factor under CACI No. 3704 is whether “[t]he kind of work performed by [the
10 person] is usually done under the direction of a supervisor rather than by a specialist working without
11 supervision.” CACI No. 3704(f). This factor also supports Gunnar’s status as an employee of the Nissan
12 Defendants.

13 88. The kind of work done by Gunnar as a parts delivery driver is usually done under the
14 direction of a supervisor, boss or manager and not by a specialist working without supervision. The
15 delivery of parts is not something that was very sophisticated, specialized or complex.

16 89. Gunnar, a recent high school graduate, would show up to work at the Nissan of San
17 Bernardino dealership. He would enter the back-room of the Parts Department. He would be told which
18 parts to deliver by persons at Nissan of San Bernardino and told which customers to deliver them and
19 then use his own car to go deliver the parts. After delivering the parts, he would return to the Nissan
20 Defendants’ dealership and return the invoices and payment that he had collected.

21 90. While making deliveries, every three (3) to four (4) stops, Gunnar would call his
22 supervisors at Nissan of San Bernardino to check in and get assignments (or to modify the delivery
23 schedule if that is what they told him to do). Gunnar would receive calls from the Nissan Defendants
24 regarding priority of various deliveries. Likewise, throughout the day, Gunnar reported back to the
25 Nissan of San Bernardino dealership to check if they had more parts to deliver, typically twice a day. As
26 well, throughout the day he would typically get two to three calls from the Nissan Defendants’ “Parts
27 Guys.”
28

1 91. Gunnar was under the constant supervision of the Nissan Defendants while working as a
2 parts delivery driver. On September 10, 2013, the day of the incident, Gunnar called Nissan of San
3 Bernardino at least eight (8) times and the dealership called him at least eight (8) times. That equates to a
4 telephone call every thirty (30) minutes during Gunnar's eight (8) hour shift. He made and answered
5 these calls while driving his car and delivering parts for the Nissan Defendants throughout the day.

6 **g. Gunnar's Work As A Parts Delivery Driver Required No Special Skill**
7 **Or Professional Training**

8 92. The *seventh* factor under CACI No. 3704 is whether "[t]he kind of work performed by
9 [the person] does not require specialized or professional skill." It did not take any specialized skill or
10 professional training in order to be a delivery driver for the Nissan Defendants. All that was required was
11 the ability to drive a car. No special driver's license, certification, special skill, experience or training
12 was required.

13 **h. There Was No Set Duration Or Specified Time Period In Which**
14 **Gunnar Was To Stop Working As A Parts Delivery Driver For The**
15 **Nissan Defendants**

16 93. The *eighth* CACI No. 3704 factor is whether "[t]he services performed by [the person]
17 were to be performed over a long period of time." CACI No. 3704(h). Typically, when someone is a
18 truly an "independent contractor" they are hired to complete a specific job by a specific, definite time
19 period (i.e., complete a project by a deadline). That was not the case with Gunnar's work as a parts
20 delivery driver for the Nissan Defendants.

21 94. The facts that a driver has not been "hired to perform a specific task for a definite period
22 of time" or there is "no contemplated end to the service relationship" – rather the time period is
23 "indefinite" – also "point toward an employment relationship." *Narayan v. EGL, Inc.*, 616 F.3d 895, 903
24 (9th Cir. 2010). Gunnar was not hired to be a delivery driver, delivering parts for the Nissan Defendants,
25 for any set, specific or definite period of time. There was no scheduled or contemplated end to when
26 Gunnar would stop being a parts delivery driver for the Nissan Defendants. Similarly, there was no
27 contract or agreement between the Nissan Defendants and LAGDJ or Louie Ayala, Jr. regarding how
28 long the relationship between the delivery drivers and the Nissan Defendants would last.

1 **i. The Nissan Defendants And Gunnar Acted As If They Had Employer-**
2 **Employee Relationship**

3 95. The *ninth* factor under CACI No. 3704 is whether “[the defendant] and [the person] acted
4 as if they had an employer-employee relationship. Despite what they may *say* or have *called* their
5 relationship, the Nissan Defendants and Gunnar *acted* as if they had an employer-employee relationship.
6 Consequently, even customers of the Nissan Defendants believed that Gunnar was an employee of Nissan
7 of San Bernardino. And, that was clearly the Nissan Defendants’ goal. That is why the Nissan
8 Defendants provided Gunnar and other parts delivery drivers with a Nissan of San Bernardino logo polo
9 shirt to wear while working. The Nissan Defendants wanted their customers to get the impression that
10 the people who were delivering parts for Nissan of San Bernardino were from Nissan of San Bernardino.

11 96. Where, as here, a driver wears a company shirt or uniform while working, it supports a
12 finding of employee status. *O’Connor v. Uber Technologies, Inc.*, 2015 WL 1069092, *6 (N.D. Cal.
13 Mar. 11, 2015). Parts delivery drivers wore the Nissan of San Bernardino shirt so that customers that had
14 ordered parts would perceive that the parts were being delivered from Nissan of San Bernardino.

15 97. When delivering parts for Nissan of San Bernardino, Gunnar never identified himself as
16 being from LAGDJ. He identified himself as being from Nissan of San Bernardino. Gunnar believes
17 that the customers who he delivered parts to believed that he was an employee of Nissan of San
18 Bernardino. And, Gunnar is right. Customers of the Nissan Defendants who ordered parts from Nissan
19 of San Bernardino did believe that Gunnar was an employee of the Nissan of San Bernardino.

20 98. Likewise, Gunnar acted so much as if he was an employee of the Nissan Defendants that
21 Officer Jennifer Ramstad of the Redlands Police Department believed that he was an employee of Nissan
22 of San Bernardino. When he was asked by Officer Ramstad who he worked for, Gunnar said he worked
23 as a parts delivery driver for Nissan of San Bernardino.

24 99. Under California law, Gunnar was clearly an “employee” of the Nissan Defendants –
25 notwithstanding the Nissan Defendants’ efforts to call him something else in furtherance of their own
26 self-serving and financially motivated agenda.³

27
28 ³ See CACI No. 3704. Multiple courts in California (both state and federal courts) have recently held that drivers who provide
a service for a company are employees under California law. See, e.g., *Toyota Motor Sales U.S.A., Inc. v. Superior Court*, 220

1 **E. The Vehicle Use Exception To The Going And Coming Rule Applies**

2 100. Typically, an employee is not considered to be within the scope of his employment while
3 he is commuting to and from work. In this case, even though Gunnar's shift as a parts delivery driver at
4 Nissan of San Bernardino had ended for the day and he was on his way home after intending to get gas at
5 the gas station for the next day's parts deliveries when the incident happened, the Nissan Defendants are
6 still vicariously liable for Gunnar's negligence and the harm to Mr. Solorio. Judicial Council of
7 California Civil Jury Instruction ("CACI") No. 375, titled *Vehicle-Use Exception to the Going-and-*
8 *Coming Rule*, states:

9 In general, an employee is not acting within the scope of employment while traveling to
10 and from the workplace. But if an employer requires an employee to drive to and from the
11 workplace so that the vehicle is available for the employer's business, then the drive to
12 and from work is within the scope of employment. The employer's requirement may be
either express or implied.

13 The drive to and from work may also be within the scope of employment if the use of the
14 employee's vehicle provides some direct or incidental benefit to the employer. There may
15 be a benefit to the employer if (1) the employee has agreed to make the vehicle available
16 as an accommodation to the employer, and (2) the employer has reasonably come to rely
on the vehicle's use and expects the employee to make it available regularly. The
employee's agreement may be either express or implied.

17 CACI No. 3725. *See also Lobo v. Tamco*, 182 Cal.App.4th 297, 301 (2010).

18 101. The Nissan Defendants required Defendant Gunnar Ayala to use his own vehicle to
19 deliver parts as a parts delivery driver so that it was available for the Nissan Defendants' business.

20
21 Cal.App.3d 864 (1990) (holding that pizza delivery driver was employee); *JKH Enterps., Inc. v. Dep't of Indus. Rel.*, 142
22 Cal.App.4th 1046 (2006) (affirming conclusion that drivers were employees); *Air Couriers Int'l v. Emp. Dev. Dep't*, 150
23 Cal.App.4th 923 (2007) (affirming trial court's finding that courier drivers were employees and not independent contractors);
24 *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal.App.4th 1 (2007) (holding that drivers were employees rather than
independent contractors); *Narayan v. EGL, Inc.*, 616 F.3d 895 (9th Cir. 2010) (reversing order granting summary judgment on
25 the grounds that whether drivers were employees was a question of fact for the jury to decide); *Arzate v. Bridge Terminal*
26 *Transport, Inc.*, 192 Cal.App.4th 419 (2011) (reversing order granting summary judgment there were triable issues of fact as
to whether drivers were employees or independent contractors); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093 (9th Cir. 2014)
27 (holding that furniture and appliance delivery drivers were employees – not independent contractors – under California law
and reversing trial court's order granting summary judgment and remanding with instructions to find that they were
28 employees); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 986 (9th Cir. 2014) (reversing order granting
summary judgment and remanding with instructions to find that drivers were, as a matter of law, employees); *O'Connor v.*
Uber Technologies, Inc., 2015 WL 1069092 (N.D. Cal. Mar. 11, 2015) (denying defendant's motion for summary judgment
because issues of fact existed as to whether drivers were employees); *Cotter v. Lyft, Inc.*, 60 F.Supp.3d 1067 (N.D. Cal. 2015)
(denying plaintiffs' and defendant's cross motions for summary judgment because issues of fact as to driver's status as an
employee or independent contractor had to be decided by the jury).

102. In addition, the use of Gunnar's personal vehicle also provided a benefit to the Nissan Defendants. Gunnar agreed to make his own personal vehicle available as an accommodation to the Nissan Defendants and to use in the course of his work as a parts delivery driver for the Nissan Defendants. In addition, the Nissan Defendants expected and relied on the use of Gunnar's personal vehicle and expected Gunnar to use it at all times as a parts delivery driver for the Nissan Defendants.

103. Consequently, even though his shift had ended, and even though he was planning to stop at the gas station to get gas (in order to make parts deliveries the next day) and was on his way home, the vehicle use exception to the coming-going rule applies and the imposition of vicarious liability is warranted.

104. Accordingly, the Nissan Defendants are vicariously responsible and liable for the negligence of their parts delivery driver and employee, Defendant Gunnar Ayala. Defendant Louie Ayala, Jr., was the owner of the vehicle that his son, Gunnar, was driving at the time of the incident and which he used to deliver parts for the Nissan Defendants. Defendant Louie Ayala, Jr. gave permission to Gunnar to use the vehicle.

V. CAUSES OF ACTION

FIRST CAUSE OF ACTION – NEGLIGENCE

(Against All Defendants)

105. Plaintiff re-alleges and incorporates by reference as though fully set forth herein the allegations in paragraphs 1 through 99 above.

106. Mr. Solorio claims that he was harmed by Defendants' negligence.

107. Defendants were negligent.

108. Mr. Solorio was harmed.

109. Defendants' negligence was a substantial factor in causing Mr. Solorio's harm.

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VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff Faustino Solorio respectfully prays for a judgment against Defendants as follows:

110. For past and future special damages in an amount according to proof at the time of trial;

111. For past and future medical and related expenses according to proof at the time of trial;

112. For past and future general damages, including pain, suffering, loss of enjoyment and impairment of life, emotional distress and mental anguish, grief, and harm, in an amount according to proof at the time of trial;

113. For prejudgment interest as provided by law and according to proof;

114. For costs of suit incurred herein; and

115. For such other and further relief as the Court may deem just and proper.

Dated: August 31, 2015

ROBINSON CALCAGNIE ROBINSON
SHAPIRO DAVIS, INC.

By: Mark P. Robinson, Jr.
Mark P. Robinson, Jr.
Attorneys for Plaintiff
Faustino Solorio

VII. DEMAND FOR TRIAL BY JURY

Plaintiff Faustino Solorio hereby demands a jury trial.

Dated: August 31, 2015

ROBINSON CALCAGNIE ROBINSON
SHAPIRO DAVIS, INC.

By: Mark P. Robinson, Jr.
Mark P. Robinson, Jr.
Attorneys for Plaintiff
Faustino Solorio