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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

JAMES ABERNATHY, as an individual
and on behalf of all others similarly
situated,

Plaintiff,

vs.

DEACON CONSTRUCTION, LLC, an
Oregon limited liability company; and
DOES 1 through 50, inclusive,

Defendants.

Case No.:

20CV367327

**CLASS AND REPRESENTATIVE ACTION
COMPLAINT:**

- 1. VIOLATION OF LABOR CODE §§ 226.7 AND 512;**
- 2. VIOLATION OF LABOR CODE § 2802;**
- 3. VIOLATION OF LABOR CODE § 226;**
- 4. VIOLATION OF BUSINESS AND PROFESSIONS CODE § 17200, *ET SEQ.***
- 5. VIOLATION OF LAB. CODE § 2698, *ET SEQ.***

DEMAND OVER \$25,000.00

1 Plaintiff James Abernathy (“Plaintiff”) hereby submits this Class and Representative
2 Action Complaint (“Complaint”) against Defendant Deacon Construction, LLC (“Defendant”),
3 and Does 1 through 50 (collectively, “Defendants”), as an individual and on behalf of a class of
4 all other similarly situated current and former employees of Defendant for damages and/or
5 penalties for violations of the California Labor Code, including without limitation, failure to
6 provide timely off-duty meal breaks, reimburse business expenses, and provide accurate payroll
7 records, as follows:

8 **INTRODUCTION**

9 1. This representative action is within the Court’s jurisdiction under California
10 Labor Code sections 226, 226.7, 512, 1174, 1198, 1199, 2802, and 2698, *et seq.*, the Private
11 Attorneys General Act (“PAGA”), Business and Professions Code section 17200, *et seq.* (the
12 “UCL”), and the applicable Wage Orders of the California Industrial Welfare Commission
13 (“IWC”).

14 2. This Complaint challenges systemic illegal employment practices resulting in
15 violations of the California Labor Code against individuals who worked for Defendant.

16 3. Plaintiff is informed and believes, and based thereon alleges, that Defendants,
17 jointly and severally, have acted intentionally and with deliberate indifference and conscious
18 disregard to the rights of all employees by failing to provide timely off-duty meal periods,
19 reimburse business expenses, and provide and maintain accurate payroll records for its
20 employees.

21 4. Plaintiff is informed and believes, and based thereon alleges, that Defendants
22 have engaged in, among other things a system of willful violations of the California Labor code
23 and the applicable IWC Wage Orders by creating and maintaining policies, practices and
24 customs that knowingly deny employees the above stated rights and benefits.

25 **JURISDICTION AND VENUE**

26 5. The Court has jurisdiction over the violations of the California Labor Code
27 sections 226, 226.7, 512, 1174, 1198, 1199, 2802, and 2698, *et seq.*, the UCL, and the applicable
28 Wage Orders.

6. Venue is proper in Santa Clara County because Plaintiff worked for Defendants in Mountain View, California.

PARTIES

7. Plaintiff was employed by Defendants as a construction worker from about December 2019 to about April 7, 2020. Plaintiff worked as an hourly non-exempt employee.

8. Plaintiff was and is the victims of the policies, practices, and customs of Defendant complained of in this action in ways that have deprived him of the rights guaranteed by California Labor Code sections 226, 226.7, 512, 1174, 1198, 1199, 2802, and 2698, *et seq.*, and the UCL.

9. Plaintiff is informed and believes, and based thereon alleges, that Deacon Construction, LLC is an Oregon limited liability company that operates locations in the State of California, including in Santa Clara County, California. On information and belief, Defendant maintains its corporate headquarters in California.

10. Plaintiff is informed and believes, and based thereon alleges, that at all times herein mentioned Does 1 through 50, are and were corporations, business entities, individuals, and partnerships, licensed to do business and actually doing business in the State of California. As such, and based upon all the facts and circumstances incident to Defendants' business, Defendants are subject to the California Labor Code and the UCL.

11. Plaintiff does not know the true names or capacities, whether individual, partner or corporate, of the defendants sued herein as Does 1 through 50, inclusive, and for that reason, said defendants are sued under such fictitious names, and Plaintiff prays for leave to amend this complaint when the true names and capacities are known. Plaintiff is informed and believes and based thereon alleges that each of said fictitious defendants was responsible in some way for the matters alleged herein and proximately caused Plaintiff and members of the general public and class to be subject to the illegal employment practices, wrongs and injuries complained of herein.

12. At all times herein mentioned, each defendant participated in the doing of the acts hereinafter alleged to have been done by the named Defendant; and furthermore, Defendants, and each of them, were the agents, servants and employees of each of the other defendants, as

well as the agents of all Defendants, and at all times herein mentioned, were acting within the course and scope of said agency and employment.

13. Plaintiff is informed and believes, and based thereon alleges, that at all times material hereto, each of the Defendants named herein was the agent, employee, alter ego and/or joint venturer of, or working in concert with each of the other co-Defendants and was acting within the course and scope of such agency, employment, joint venture, or concerted activity. To the extent said acts, conduct, and omissions were perpetrated by certain Defendants, each of the remaining Defendants confirmed and ratified said acts, conduct, and omissions of the acting Defendants.

14. At all times herein mentioned, Defendants, and each of them, were members of, and engaged in, a joint venture, partnership and common enterprise, and acting within the course and scope of, and in pursuance of, said joint venture, partnership and common enterprise.

15. At all times herein mentioned, the acts and omissions of various Defendants, and each of them, concurred and contributed to the various acts and omissions of each and all of the other Defendants in proximately causing the injuries and damages as herein alleged. At all times herein mentioned, Defendants, and each of them, ratified each and every act or omission complained of herein. At all times herein mentioned, Defendants, and each of them, aided and abetted the acts and omissions of each and all of the other Defendants in proximately causing the damages as herein alleged.

CLASS ACTION ALLEGATIONS

16. **Definition:** The named individual Plaintiff seeks class certification, pursuant to California Code of Civil Procedure section 382, a class of all current and former non-exempt employees who worked for Defendants at any time during the period of time from April 6, 2016, through the present, in the State of California (the “Class”). The Class also consists of the following subclasses:

- a. All current and former non-exempt employees of Defendants in the State of California, who worked at any time during the period of April 6, 2016, through the present, and who worked more than five hours in any shift (the “Meal Period

Sub-Class”); and

- b. All current and former employees of Defendants in the State of California, who were paid wages at any time during the period of April 6, 2019, through the present (the “Wage Statement Sub-Class”).

17. **Numerosity and Ascertainability:** The members of the Class are so numerous that joinder of all members would be impractical, if not impossible. The identity of the members of the Class is readily ascertainable by review of Defendants’ records, including payroll records. Plaintiff is informed and believes, and based thereon alleges, that Defendants: (a) failed to provide timely off-duty meal breaks in violation of Labor Code §§ 226.7 and 512; (b) failed to reimburse business expenses in violation of Labor Code § 2802; (c) failed to provide accurate, itemized wage statements in violation of Labor Code § 226(a); (d) failed to maintain accurate payroll records in violation of Labor Code § 1174; and (e) engaged in Unfair Business Practices in violation of the UCL, the California Labor Code, and the applicable IWC Wage Orders.

18. **Adequacy of Representation:** The named Plaintiff is fully prepared to take all necessary steps to represent fairly and adequately the interests of the Class defined above. Plaintiff’s attorneys are ready, willing and able to fully and adequately represent the Class and the individual Plaintiff. Plaintiff’s attorneys have prosecuted and settled wage-and-hour class actions in the past and currently have a number of wage-and-hour class actions pending in California state and federal courts.

19. Defendants uniformly administered a corporate policy, practice of: (a) failing to provide timely off-duty meal breaks in violation of Labor Code §§ 226.7 and 512; (b) failing to reimburse business expenses in violation of Labor Code § 2802; (c) failing to provide accurate, itemized wage statements in violation of Labor Code § 226(a); (d) failing to maintain accurate payroll records in violation of Labor Code § 1174; and (e) engaging in Unfair Business Practices in violation of the UCL, the California Labor Code, and the applicable IWC Wage Orders.

20. Plaintiff is informed and believes, and based thereon alleges, that Defendants had a consistent and uniform policy, practice and procedure of willfully failing to comply with Labor Code sections 226, 226.7, 512, 1174, 1198, 1199, and 2802, and the UCL.

1 21. **Common Question of Law and Fact:** There are predominant common questions
2 of law and fact and a community of interest amongst Plaintiff and the claims of the Class
3 concerning Defendants' policy and practice of: (a) failing to provide timely off-duty meal breaks
4 in violation of Labor Code §§ 226.7 and 512; (b) failing to reimburse business expenses in
5 violation of Labor Code § 2802; (c) failing to provide accurate, itemized wage statements in
6 violation of Labor Code § 226(a); (d) failing to maintain accurate payroll records in violation of
7 Labor Code § 1174; and (e) engaging in Unfair Business Practices in violation of the UCL, the
8 California Labor Code, and the applicable IWC Wage Orders.

9 22. **Typicality:** The claims of Plaintiff are typical of the claims of all members of the
10 Class in that Plaintiff has suffered the harms alleged in this Complaint in a similar and typical
11 manner as the Class Members. Plaintiff regularly worked shifts in excess of four hours or major
12 fraction thereof without being provided an off-duty meal break. Instead, meal breaks were
13 regularly provided after the fifth hour of work. Plaintiff did not receive premium compensation
14 in lieu of these missed meal breaks. Defendants also did not allow employees, like Plaintiff, to
15 keep track of their accurate hours worked, such as the start and stop time of each work shift and
16 meal periods. Moreover, during his employment Plaintiff was regularly required to use his
17 personal cellular phone to conduct work and incur other business-related expenses. Plaintiff was
18 not reimbursed for these costs. Additionally, Plaintiff was not provided proper and accurate
19 itemized wage statements identifying the pay period start date and the name of the legal entity
20 that was his employer. Rather, the wage statements provided to Plaintiff only identified the pay
21 period end date and identified his employer as "DC LLC – SAC GC," which does not appear to
22 be registered to do business in the State of California. As such, Plaintiff is a member of the Class
23 and has suffered the alleged violations of California Labor Code §§ 226, 226.7, 512, 1174, 1198,
24 1199, and 2802, and the applicable IWC Wage Orders.

25 23. The California Labor Code upon which Plaintiff bases these claims are broadly
26 remedial in nature. These laws and labor standards serve an important public interest in
27 establishing minimum working conditions and standards in California. These laws and labor
28 standards protect the average working employee from exploitation by employers who may seek

1 to take advantage of superior economic and bargaining power in setting onerous terms and
2 conditions of employment.

3 24. The nature of this action and the format of laws available to Plaintiff and
4 members of the Class identified herein make the class action format a particularly efficient and
5 appropriate procedure to redress the wrongs alleged herein. If each employee were required to
6 file an individual lawsuit, the corporate defendants would necessarily gain an unconscionable
7 advantage since it would be able to exploit and overwhelm the limited resources of each
8 individual plaintiff with their vastly superior financial and legal resources. Requiring each Class
9 Member to pursue an individual remedy would also discourage the assertion of lawful claims by
10 employees who would be disinclined to file an action against their former and/or current
11 employer for real and justifiable fear of retaliation and permanent damage to their careers at
12 subsequent employment.

13 25. The prosecution of separate actions by the individual class members, even if
14 possible, would create a substantial risk of (a) inconsistent or varying adjudications with respect
15 to individual Class members against the Defendants and which would establish potentially
16 incompatible standards of conduct for the Defendants, and/or (b) adjudications with respect to
17 individual Class members which would, as a practical matter, be dispositive of the interest of the
18 other Class members not parties to the adjudications or which would substantially impair or
19 impede the ability of the Class members to protect their interests. Further, the claims of the
20 individual members of the Class are not sufficiently large to warrant vigorous individual
21 prosecution considering all of the concomitant costs and expenses.

22 26. Such a pattern, practice and uniform administration of corporate policy regarding
23 illegal employee compensation described herein is unlawful and creates an entitlement to
24 recovery by Plaintiff and the Class identified herein, in a civil action, for unpaid meal period
25 premium pay, applicable penalties, reasonable attorneys' fees, and costs of suit according to the
26 mandate of California Labor Code sections 226, 226.7, 512, 1174, 1198, 1199, and 2802, the
27 UCL, and Code of Civil Procedure section 1021.5.

28 27. Proof of a common business practice or factual pattern, which the named Plaintiff

1 experienced and is representative of, will establish the right of each of the members of the
2 Plaintiff Class to recovery on the causes of action alleged herein.

3 28. The Class is commonly entitled to a specific fund with respect to the
4 compensation illegally and unfairly retained by Defendants. The Class is commonly entitled to
5 restitution of those funds being improperly withheld by Defendants. This action is brought for
6 the benefit of the entire class and will result in the creation of a common fund.

7 **FIRST CAUSE OF ACTION**

8 **VIOLATION OF LABOR CODE §§ 226.7 AND 512**

9 **(BY PLAINTIFF THE CLASS, AND THE MEAL PERIOD SUB-CLASS AGAINST ALL**
10 **DEFENDANTS)**

11 29. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as
12 though fully set forth herein.

13 30. At all relevant times, Defendants failed in its affirmative obligation to ensure that
14 Plaintiff and Class Members had the opportunity to take and were provided with off-duty meal
15 periods in accordance with the mandates of the California Labor Code and the applicable IWC
16 Wage Order. At all relevant times, Plaintiff and Class Members regularly worked in excess of
17 five (5) hours per day and accordingly had a right to take a 30-minute meal period each day
18 worked in excess of five (5) hours. Plaintiff and Class Members were suffered and permitted to
19 work more than five hours before being provided the opportunity to take their off-duty meal
20 breaks. As such, Defendants are responsible for paying premium compensation for missed meal
21 periods pursuant to Labor Code § 226.7 and the applicable IWC Wage Order. Defendants, as a
22 matter of corporate policy and procedure, regularly failed to pay such premium compensation for
23 each meal period Plaintiff and the Class Members missed.

24 31. Such a pattern, practice and uniform administration of corporate policy as
25 described herein is unlawful and creates an entitlement to recovery by the Plaintiff and the Class
26 identified herein, in a civil action, for the unpaid balance of the unpaid premium compensation
27 pursuant to Labor Code §§ 226.7 and 512, and the applicable IWC Wage Order, including
28 interest thereon, penalties, and costs of suit.

1 **SECOND CAUSE OF ACTION**

2 **VIOLATION OF LABOR CODE § 2802**

3 **(BY PLAINTIFF AND THE CLASS AGAINST ALL DEFENDANTS)**

4 32. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as
5 though fully set forth herein.

6 33. This cause of action is brought pursuant to Labor Code section 2802, which
7 provides that employees are entitled to be indemnified for expenses and losses in discharging the
8 duties of their employers. Defendants violated this provision by failing to reimburse employees
9 for all business-related expenses, including without limitation, the costs incurred with use of
10 personal cellular phones. Defendants regularly required Plaintiff and other employees to view
11 and respond to work-related emails in order to communicate and perform their jobs, and thus, in
12 effect, required employees to use their personal cell phones in order to communicate.

13 34. Defendants had a uniform corporate pattern and practice and procedure regarding
14 the above practices in violation of Labor Code section 2802.

15 35. Such a pattern, practice and uniform administration of corporate policy regarding
16 illegal employee compensation as described herein is unlawful and creates an entitlement to
17 recovery by Plaintiff and the Class identified herein in a civil action, for the unpaid balance of
18 the full amount of damages owed, including interest thereon, penalties, attorneys' fees, and costs
19 of suit according to the mandate of California Labor Code section 2802.

20 **THIRD CAUSE OF ACTION**

21 **VIOLATION OF LABOR CODE § 226(a)**

22 **(BY PLAINTIFF AND THE WAGE STATEMENT SUB-CLASS AGAINST ALL**
23 **DEFENDANTS)**

24 36. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as
25 though fully set forth herein.

26 37. Defendants failed in its affirmative obligation to provide accurate itemized wage
27 statements. Defendants, as a matter of policy and practice, did not provide accurate records in
28 violation of Labor Code § 226(a) by failing to provide accurate payroll records for Plaintiff and

1 the Class.

2 38. The wage statements Defendants issued to Plaintiff and other employees failed to
3 include the pay period start date in violation of Labor Code section 226(a)(6), and the name of
4 the legal entity that is the employer, in violation of Labor Code section 226(a)(8). However, the
5 wage statements provided to Plaintiff and the Class failed to identify such information. Every
6 wage statement provided to employees identified the pay period end date only and identified the
7 employer as “DC LLC – SAC GC,” an entity that is not registered to do business in the State of
8 California.

9 39. Such a pattern, practice and uniform administration of corporate policy as
10 described herein is unlawful and creates an entitlement to recovery by the Plaintiff and the Class
11 identified herein, in a civil action, for all damages or penalties pursuant to Labor Code § 226,
12 including interest thereon, attorneys’ fees, and costs of suit according to the mandate of
13 California Labor Code § 226.

14 **FOURTH CAUSE OF ACTION**

15 **VIOLATION OF BUSINESS AND PROFESSIONS CODE § 17200, *ET SEQ.***
16 **(BY PLAINTIFF, THE CLASS AND THE MEAL PERIOD SUB-CLASS AGAINST ALL**
17 **DEFENDANTS)**

18 40. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as
19 though fully set forth herein.

20 41. Defendants, and each of them, have engaged and continue to engage in unfair and
21 unlawful business practices in California by practicing, employing and utilizing the employment
22 practices outlined above, include, to wit, by: (a) failing to provide timely off-duty meal breaks in
23 violation of Labor Code §§ 226.7 and 512; (b) failing to reimburse business expenses in violation
24 of Labor Code § 2802; (c) failing to provide accurate, itemized wage statements in violation of
25 Labor Code § 226(a); and (d) failing to maintain accurate payroll records in violation of Labor
26 Code § 1174.

27 42. Defendants’ utilization of such unfair and unlawful business practices constitutes
28 unfair, unlawful competition and provides an unfair advantage over Defendants’ competitors.

43. Plaintiff seeks, individually and on behalf of other members of the Class similarly situated, full restitution of monies, as necessary and according to proof, to restore any and all monies withheld, acquired and/or converted by the Defendants by means of the unfair practices complained of herein.

44. Plaintiff is informed and believes, and based thereon alleges, that at all times herein mentioned Defendants have engaged in unlawful, deceptive and unfair business practices, as proscribed by California Business and Professions Code section 17200, *et seq.*, including those set forth herein above thereby depriving Plaintiff and other members of the Class the minimum working condition standards and conditions due to them under the California laws and the applicable IWC Wage Orders as specifically described therein.

FIFTH CAUSE OF ACTION

VIOLATION OF LABOR CODE § 2698, *ET SEQ.*

(BY PLAINTIFF AND AGGRIEVED EMPLOYEES AGAINST ALL DEFENDANTS)

45. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as though fully set forth herein.

46. Plaintiff brings this cause of action as a proxy for the State of California and in this capacity, seeks penalties on behalf of all Aggrieved Employees from June 10, 2019, through the present, for Defendants' violations of Labor Code sections 226, 226.7, 512, 1174, 1198, 1199, and 2802, arising from Defendant's failure to provide timely off-duty meal periods, reimburse business expenses, and provide proper payroll records.

47. On or about June 10, 2020, Plaintiff sent written notice to the California Labor & Workforce Development Agency (“LWDA”) of Defendants’ violations of Labor Code sections 226, 226.7, 512, 1174, 1198, 1199, and 2802, pursuant to Labor Code section 2698, *et seq.*, the Private Attorneys General Act (“PAGA”). To date, the LWDA has not responded to Plaintiff’s written notice.

48. As such, pursuant to Labor Code section 2699(a), Plaintiff seeks recovery of any and all applicable civil penalties for Defendants' violation of Labor Code §§ 226, 226.7, 512, 1174, 1198, 1199, and 2802, and the applicable IWC Wage Order for the time period described

above, on behalf of himself and other Aggrieved Employees.

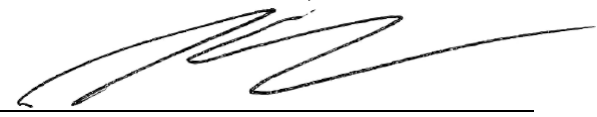
PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment for himself and all others on whose behalf this suit is brought against Defendants, jointly and severally, as follows:

1. For an order certifying the proposed Classes;
2. For an order appointing Plaintiff as the representative of the Classes as described herein;
3. For an order appointing counsel for Plaintiff as class counsel;
4. Upon the First Cause of Action, for damages and/or penalties pursuant to California Labor Code sections 226.7 and 512, and for costs;
5. Upon the Second Cause of Action, for damages and/or penalties pursuant to California Labor Code section 2802, and for costs and attorneys' fees;
6. Upon the Third Cause of Action, for damages or penalties pursuant to statute as set forth in California Labor Code section 226, and for costs and attorneys' fees;
7. Upon the Fourth Cause of Action, for restitution to Plaintiff and other similarly affected members of the general public of all funds unlawfully acquired by Defendants by means of any acts or practices declared by this Court to be in violation of Business and Professions Code section 17200, *et seq.*, for the time periods described above;
8. Upon the Fifth Cause of Action, for civil penalties according to proof pursuant to Labor Code section 2698, *et seq.*, Labor Code section 226.3, and for costs and attorneys' fees;
9. On all causes of action, for attorneys' fees and costs as provided by California Labor Code §§ 218.5, 226, and Code of Civil Procedure § 1021.5; and
10. For such other and further relief as the Court may deem just and proper.

DATED: June 17, 2020

DIVERSITY LAW GROUP, P.C.

By: 

Larry W. Lee

Max W. Gavron

Attorneys for Plaintiff and the Class