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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT
APR 05 2021

BY Jacqueline Harness
JACQUELINE HARNESS, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

JOHN ERVING, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

LAZER SPOT, INC., a Georgia Corporation;
and DOES 1 through 100,

Defendants.

CASE NO. CIVSB2101370

**FIRST AMENDED CLASS AND
REPRESENTATIVE ACTION
COMPLAINT:**

- (1) **FAILURE TO REIMBURSE
NECESSARY BUSINESS EXPENSES
(LABOR CODE §§ 2802, 2804, et seq.)**
- (2) **UNFAIR COMPETITION (BUS &
PROF CODE § 17200 et seq.); AND**
- (3) **CIVIL PENALTIES UNDER THE
PRIVATE ATTORNEYS GENERAL
ACT (LABOR CODE § 2698 et seq.).**

**DEMAND FOR JURY TRIAL
UNLIMITED CIVIL CASE**

1 Plaintiff John Erving (“Plaintiff”), on behalf of himself and all others similarly situated,
2 hereby brings this First Amended Class and Representative Action Complaint (“Complaint”)
3 against Lazer Spot, Inc., a Georgia Corporation; and Does 1 through 100, inclusive (collectively
4 “Defendants”), and on information and belief alleges as follows:

5 **JURISDICTION**

6 1. Plaintiff, on behalf of himself and all others similarly situated, hereby brings this
7 action for recovery of unreimbursed expenses under California Labor Code §§ 558, 2802, 2804,
8 and 2698 *et seq.*, and IWC Wage Order No. 9-2001 (“Wage Order 9”) in addition to seeking
9 declaratory relief, injunctive relief, and restitution. This class action is brought pursuant to
10 California Code of Civil Procedure § 382. This Court has jurisdiction over Defendants’ violations
11 of the California Labor Code because the amount in controversy exceeds this Court’s
12 jurisdictional minimum.

13 **VENUE**

14 2. Venue is proper in this judicial district pursuant to California Code of Civil
15 Procedure §§ 395(a) and 395.5, as Defendants’ principal place of business is located in the County
16 of San Bernardino. Defendants own, maintain offices, transact business, have an agent or agents
17 within the County of San Bernardino, and/or otherwise are found within the County of San
18 Bernardino, and Defendants are within the jurisdiction of this Court for purposes of service of
19 process.

20 **PARTIES**

21 3. Plaintiff is an individual over the age of eighteen (18). At all relevant times herein,
22 Plaintiff was, and currently is, a California resident, residing in the County of San Bernardino.
23 During the one year immediately preceding the filing of this action, and within the statute of
24 limitations periods applicable to each cause of action pled herein, Plaintiff was employed by
25 Defendants as a non-exempt employee in the County of San Bernardino. Plaintiff was, and is, a
26 victim of Defendants’ policies and/or practices complained of herein, lost money and/or property,
27 and has been deprived of the rights guaranteed to him by California Labor Code §§ 558, 2802,
28 2804, and 2698 *et seq.*, California Business and Professions Code § 17200 *et seq.* (Unfair

Competition), and Wage Order 9, which sets employment standards for the transportation industry.

4. Plaintiff is informed and believes, and based thereon alleges, that during the four years preceding the filing of this action and continuing to the present, Defendants did (and do) business by providing trucking services including dispatching and hauling trailers, and employed Plaintiff and other, similarly-situated non-exempt employees within San Bernardino County and the state of California and, therefore, were (and are) doing business in San Bernardino County and the State of California.

5. Plaintiff does not know the true names or capacities, whether individual, partner, or corporate, of the defendants sued herein as DOES 1 through 100, and for that reason, said defendants are sued under such fictitious names, and Plaintiff will seek leave from this Court to further amend this Complaint when such true names and capacities are discovered. Plaintiff is informed and believes, and based thereon alleges, that each of said fictitious defendants, whether individual, partner, or corporate, were responsible in some manner for the acts and omissions alleged herein, and proximately caused Plaintiff and the Class (as defined herein) to be subject to the unlawful employment practices, wrongs, injuries, and damages complained of herein.

6. Plaintiff is informed and believes, and based thereon alleges, that at all times mentioned herein, Defendants were and are the employers of Plaintiff and all similarly situated employees.

7. At all times herein mentioned, each of said Defendants participated in the doing of the acts hereinafter alleged to have been done by the named Defendants; and furthermore, the Defendants, and each of them, were the agents, servants, and employees of each and every one 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. Defendants, and each of them, approved of, condoned, and/or otherwise ratified each and every one of the acts or omissions complained of herein.

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

1 and scope of and in pursuance of said joint venture, partnership, and common enterprise. Further,
2 Plaintiff alleges that all Defendants were joint employers for all purposes of Plaintiff and all
3 members of the Class (as defined herein).

4 **GENERAL FACTUAL ALLEGATIONS**

5 9. Plaintiff has been employed by Defendants as a non-exempt “truck driver” since
6 approximately December 2019. Defendants are in the trucking business and contract with third
7 parties to provide yard management and logistics services consisting of transporting trailers and
8 cargo to and from production centers and distribution centers.

9 10. Plaintiff and other similarly situated employees’ job duties consist of picking up
10 cargo trailers and transporting them to assigned locations, and picking up empty trailers and
11 taking them back to be loaded. Each specific assignment is communicated to the employees by a
12 dispatcher who sends a text message to the employee’s personal cellular phone telling them which
13 trailer to pick up. Once the employee picks up the assigned trailer, the employee must send a
14 picture of the bill of lading to the dispatcher, again with their personal cellular phone. The
15 dispatcher then tells the employee where to take the trailer. Once the employee has transported
16 the trailer to the drop site, the employee picks up an empty trailer and sends the trailer number to
17 the dispatcher, who in turn tells the employee where to take the empty trailer. While the
18 dispatchers are provided with company cellular phones, the employees are required to use their
19 personal cellular phones for all of these communications, and there is no way to complete the job
20 without using a cellular phone. Because the assignments are all local, an employee can complete
21 approximately 20 different assignments during each shift.

22 11. Additionally, Plaintiff and other similarly situated employees are required to
23 download an ADP application on their personal cellular phones which is used for timekeeping
24 and is also how employees receive their paystubs.

25 12. Despite the inherent necessity of having a cellular phone to complete the job
26 duties, Defendants have never reimbursed Plaintiff or other similarly situated employees for any
27 portion of their cellular phone bill, in direct violation of *Cochran v. Schwan’s Home Service, Inc.*,
28 228 Cal. App. 4th 1137 (2014), and Labor Code § 2802.

1 13. Additionally, during the COVID-19 pandemic, Defendants have required Plaintiff
2 and other similarly situated employees to purchase their own Personal Protective Equipment
3 (PPE) and sanitizing sprays and wipes. Despite disciplining employees for failing to obtain
4 required PPE and sanitizing sprays and wipes, Defendants do not provide any reimbursement for
5 such required supplies in violation of Labor Code § 2802.

6 **CLASS ACTION ALLEGATIONS**

7 14. **Class Definitions:** Plaintiff brings this action on behalf of himself and the
8 following Class pursuant to Section 382 of the Code of Civil Procedure:

9 a. The Reimbursement Class (the “Class”) consists of all of Defendants’
10 current and former employees in California who have held a position that required the use
11 of a cellular phone for work related purposes, and/or have been required to purchase PPE,
12 sanitizing wipes or sanitizing sprays, during the four years immediately preceding the
13 filing of this action to the present.

14 15. **Numerosity/Ascertainability:** The members of the Class are so numerous that
15 joinder of all members would be unfeasible and not practicable. The membership of the Class is
16 unknown to Plaintiff at this time; however, it is estimated that the Class numbers greater than one
17 hundred (100) individuals. The identity of such membership is readily ascertainable via inspection
18 of Defendants’ employment records.

19 16. **Common Questions of Law and Fact Predominate/Well Defined Community**
20 **of Interest:** There are common questions of law and fact as to Plaintiff and all other similarly
21 situated employees, which predominate over questions affecting only individual members
22 including, without limitation to:

23 i. Whether it was necessary for Class members to use their personal cellular
24 phone to perform their job duties;

25 ii. Whether Defendants’ policies and practices (or lack thereof) for
26 reimbursing members of the Class violated California law;

27 17. **Predominance of Common Questions:** Common questions of law and fact
28 predominate over questions that affect only individual members of the Class. The common

1 questions of law set forth above are numerous and substantial and stem from Defendants' policies
2 and/or practices applicable to each individual class member, such as Defendants' uniform
3 reimbursement policies/practices. As such, the common questions predominate over individual
4 questions concerning each individual class member's showing as to his or her eligibility for
5 recovery or as to the amount of his or her damages.

6 18. **Typicality:** Plaintiff's claims are typical of the claims of the Class because
7 Plaintiff was employed by Defendants in California during the applicable statute of limitations
8 period. As alleged herein, Plaintiff, like the members of the Class, was required to use his
9 personal cellular phone to complete his job duties, without reimbursement, and was similarly
10 required to purchase COVID-19 related PPE and sanitizing products without reimbursement.

11 19. **Adequacy of Representation:** Plaintiff is fully prepared to take all necessary
12 steps to represent fairly and adequately the interests of the members of the Class. Moreover,
13 Plaintiff's attorneys are ready, willing, and able to fully and adequately represent the members of
14 the Class and Plaintiff. Plaintiff's attorneys have prosecuted and defended numerous wage and
15 hour class actions in state and federal courts in the past, and are committed to vigorously
16 prosecuting this action on behalf of the members of the Class.

17 20. **Superiority:** The California Labor Code is broadly remedial in nature and serves
18 an important public interest in establishing minimum working conditions and standards in
19 California. These laws and labor standards protect the average working employee from
20 exploitation by employers who have the responsibility to follow the laws, and who may seek to
21 take advantage of superior economic and bargaining power in setting onerous terms and
22 conditions of employment. The nature of this action and the format of laws available to Plaintiff
23 and members of the Class make the class action format a particularly efficient and appropriate
24 procedure to redress the violations alleged herein. If each employee was required to file an
25 individual lawsuit, Defendants would necessarily gain an unconscionable advantage since they
26 would be able to exploit and overwhelm the limited resources of each individual plaintiff with
27 their vastly superior financial and legal resources. Moreover, requiring each member of the
28 Class(es) to pursue an individual remedy would also discourage the assertion of lawful claims by

1 employees who would be disinclined to file an action against their former and/or current employer
2 for real and justifiable fear of retaliation and permanent damages to their careers at subsequent
3 employment. Further, the prosecution of separate actions by the individual class members, even
4 if possible, would create a substantial risk of inconsistent or varying verdicts or adjudications
5 with respect to the individual class members against Defendants herein; and which would
6 establish potentially incompatible standards of conduct for Defendants; and/or legal
7 determinations with respect to individual class members which would, as a practical matter, be
8 dispositive of the interest of the other class members not parties to adjudications or which would
9 substantially impair or impede the ability of the class members to protect their interests. Further,
10 the claims of the individual members of the Class are not sufficiently large to warrant vigorous
11 individual prosecution considering all of the concomitant costs and expenses attending thereto.
12 As such, the Class identified in Paragraph 11 is maintainable under Section 382 of the Code of
13 Civil Procedure.

14 **FIRST CAUSE OF ACTION**

15 **FAILURE TO REIMBURSE BUSINESS EXPENSES**

16 **(AGAINST ALL DEFENDANTS)**

17 21. Plaintiff re-alleges and incorporates by reference all prior paragraphs as though
18 fully set forth herein.

19 22. It was necessary for Plaintiff and members of the Class to use their personal
20 cellular phones and COVID-19 related PPE and sanitizing products to perform their job duties.
21 Although Plaintiff and members of the Class incurred these expenses in the direct discharge of
22 their job duties, Defendants did not reimburse these employees for such necessary work
23 expenditures during the four years preceding the filing of the Complaint.

24 23. At all relevant times herein, Defendants were subject to Labor Code § 2802, which
25 states that “an employer shall indemnify his or her employees for all necessary expenditures or
26 losses incurred by the employee in direct consequence of the discharge of his or her duties, or of
27 his or obedience to the directions of the employer.”

28 24. At all relevant times herein, Defendants were subject to Labor Code § 2804, which

states that “any contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof, is null and void, and this article shall not deprive any employee or his personal representative of any right or remedy to which he is entitled under the laws of this State.

25. As a proximate result of Defendants’ policies and/or practices in violation of Labor Code §§ 2802 and 2804, and Wage Order 9, § 9, Plaintiff and members of the Reimbursement Class were damaged in sums, which will be shown according to proof.

26. Plaintiff and members of the Class are entitled to attorneys’ fees and costs of suit pursuant to Labor Code § 2802(c) for bringing this action.

27. Pursuant to Labor Code § 2802(b), any action brought for the reimbursement of necessary expenditures carries interest at the same rate as judgments in civil actions. Thus, Plaintiff and members of the Class are entitled to interest, which shall accrue from the date on which they incurred the initial necessary expenditure.

SECOND CAUSE OF ACTION

UNFAIR COMPETITION

(AGAINST ALL DEFENDANTS)

28. Plaintiff re-alleges and incorporates by reference all prior paragraphs as though fully set forth herein.

29. Defendants have engaged and continue to engage in unfair and/or unlawful business practices in California in violation of California Business and Professions Code § 17200 et seq., by failing to reimburse Plaintiff and members of the Reimbursement Class for the costs of necessary business expenses.

30. Defendants’ utilization of these unfair and/or unlawful business practices deprived Plaintiff and continues to deprive members of the Class of compensation to which they are legally entitled, constitutes unfair and/or unlawful competition, and provides an unfair advantage over Defendants’ competitors who have been and/or are currently employing workers and attempting to do so in honest compliance with applicable wage and hour laws.

31. Because Plaintiff is a victim of Defendants’ unfair and/or unlawful conduct alleged

1 herein, Plaintiff for himself and on behalf of the members of the Class, seeks full restitution of
2 monies, as necessary and according to proof, to restore any and all monies withheld, acquired
3 and/or converted by the Defendants pursuant to Business and Professions Code §§ 17203 and
4 17208.

5 32. The acts complained of herein occurred within the last four years immediately
6 preceding the filing of the Complaint in this action.

7 33. Plaintiff was compelled to retain the services of counsel to file this court action to
8 protect his interests and those of the Class, to obtain restitution, to secure injunctive relief on
9 behalf of Defendants' current employees, and to enforce important rights affecting the public
10 interest. Plaintiff thereby incurred the financial burden of attorneys' fees and costs, which he is
11 entitled to recover under Code of Civil Procedure § 1021.5.

12 **THIRD CAUSE OF ACTION**
13 **PRIVATE ATTORNEYS GENERAL ACT**
14 **(AGAINST ALL DEFENDANTS)**

15 34. Plaintiff re-alleges and incorporates by reference all prior paragraphs as though
16 fully set forth herein.

17 35. Defendants have committed several Labor Code violations against Plaintiff,
18 members of the Class, and other aggrieved employees. Plaintiff, as an "aggrieved employee"
19 within the meaning of Labor Code § 2698 *et seq.*, acting on behalf of himself and other aggrieved
20 employees, brings this representative action against Defendants to recover the civil penalties due
21 to Plaintiff, the members of the Class, other aggrieved employees, and the State of California
22 according to proof pursuant to Labor Code §§ 558 and 2699 (a) and (f) including, but not limited
23 to: (1) \$50.00 for each initial violation and \$100.00 for each subsequent violation pursuant to
24 Labor Code § 558 per employee per pay period; and/or (2) \$100.00 for each initial violation and
25 \$200.00 for each subsequent violation per employee per pay period for those violations of the
26 Labor Code for which no civil penalty is specifically provided, based on the following Labor
27 Code violations:
28

a. Failing to reimburse Plaintiff and other aggrieved employees for all necessary business expenditures incurred in violation of Labor Code §§ 2802 and 2804.

36. On or around January 27, 2021, Plaintiff notified Defendants via certified mail, and notified the California Labor and Workforce Development Agency (“LWDA”) via its website, of Defendants’ violations of the California Labor Code and Plaintiff’s intent to bring a claim for civil penalties under California Labor Code § 2698 *et seq.* with respect to the violations of the California Labor Code identified in Paragraph 35 (a). Now that sixty-five days have passed from Plaintiff notifying Defendants and the LWDA of these violations, and the LWDA has not provided notice that it intends to investigate the violations, Plaintiff has exhausted his administrative requirements for bringing a claim under the Private Attorneys General Act with respect to these violations.

37. Based on the foregoing, Plaintiff seeks to represent himself and all Aggrieved Employees, as defined by Labor Code § 2699(c), which includes all current and former non-exempt employees who worked for Defendants in California between January 27, 2020 and the present.

38. Plaintiff was compelled to retain the services of counsel to file this court action to protect his interests and the interests of other aggrieved employees, and to assess and collect the civil penalties owed by Defendants. Plaintiff has thereby incurred attorneys’ fees and costs, which he is entitled to recover under California Labor Code § 2699.

PRAYER

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

1. For an order certifying the proposed Class;
2. For an order appointing Plaintiff as representative of the Class;
3. For an order appointing counsel for Plaintiff as counsel for the Class;
4. Upon the First Cause of Action, for compensatory, consequential, general and special damages according to proof pursuant to Labor Code §§ 2802 and 2804;
5. Upon the Second Cause of Action, for restitution to Plaintiff and members of the

1 Class of all money and/or property unlawfully acquired by Defendants by means of any acts or
2 practices declared by this Court to be in violation of Business and Professions Code § 17200 et
3 seq., and an injunction requiring Defendants to conform their reimbursement practices to the laws
4 of California;

5 6. Upon the Third Cause of Action, for civil penalties due to Plaintiff, other aggrieved
6 employees, and the State of California according to proof pursuant to Labor Code §§ 558 and
7 2699(a) and (f) including, but not limited to: (1) \$50.00 for each initial violation and \$100.00 for
8 each subsequent violation pursuant to Labor Code § 558 per employee per pay period; and/or (2)
9 \$100.00 for each initial violation and \$200.00 for each subsequent violation per employee per pay
10 period for those violations of the Labor Code for which no civil penalty is specifically provided.

11 7. Prejudgment interest on all due and unpaid wages pursuant to California Labor Code
12 § 2802(b) and Civil Code §§ 3287 and 3289;

13 8. On all causes of action, for attorneys' fees and costs as provided by Labor Code §
14 2802(c) and 2698 *et seq.*, and Code of Civil Procedure § 1021.5;

15 9. For such other and further relief the Court may deem just and proper.

16
17 Dated: April 5, 2021

Respectfully submitted,
HAINES LAW GROUP, APC

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19 By:


Fletcher W. Schmidt
Attorney for Plaintiff

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22 **DEMAND FOR JURY TRIAL**

23 Plaintiff hereby demands a jury trial with respect to all issues triable by jury.

24
25 Dated: April 5, 2021

Respectfully submitted,
HAINES LAW GROUP, APC

26
27 By:


Fletcher W. Schmidt
Attorney for Plaintiff