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Attorneys for Plaintiff and the Class

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

JOSHUA GIBBS, as an individual and on behalf
of all others similarly situated, and as a private
attorney general,

Plaintiff,

vs.

SWIFT TRANSPORTATION CO. OF
ARIZONA, LLC., a Delaware limited liability
company; and DOES 1 through 50, inclusive,

Defendants.

Case No. 37-2024-00015349-CU-OE-CTL

**FIRST AMENDED CLASS AND
REPRESENTATIVE ACTION COMPLAINT**

- (1) Unpaid Sick Pay Wages**
(Lab. Code §§ 201-204, 233, 246);
- (2) Inaccurate Itemized Wage Statements**
(Lab. Code § 226(a));
- (3) Unfair or Unlawful Business Practices**
(Bus. & Prof. Code §§ 17200 et seq.); and
- (4) Violations of the California Labor Code**
(Lab. Code §§ 2698 et seq.)

DEMAND OVER \$25,000.00

1 On behalf of himself and other similarly situated current and former employees of Defendants,
2 Plaintiff, Joshua Gibbs, submits this First Amended Class and Representative Action Complaint (the
3 “Complaint”) against Defendant, Swift Transportation Co. of Arizona, LLC, and Does 1 through 50
4 (collectively, “Defendants”).

5 INTRODUCTION

6 1. This class and representative action challenges systemic employment practices resulting
7 in violations of the California Labor Code against individuals who worked for Defendants. Plaintiff is
8 informed and believes that Defendants have jointly and severally acted intentionally and with deliberate
9 indifference and conscious disregard to the rights of employees by failing to pay all sick pay wages,
10 failing to timely pay all wages during employment or upon termination of employment, and failing to
11 provide complete and accurate itemized wage statements. The Complaint seeks damages, penalties, and
12 other relief pursuant to, among other provisions, Labor Code sections 201-204, 210, 218, 218.5, 218.6,
13 226, 226.3, 233, 246, and 2698 et seq., and the Unfair Competition Law, codified at Business and
14 Professions Code sections 17200 et seq. (the “UCL”).¹

15 2. Defendants fail to pay sick pay wages at the regular rate of pay. As discussed above,
16 Plaintiff and other non-exempt employees earn non-base hourly wages or other non-hourly, non-
17 discretionary remuneration, including for example production pay and performance pay. Defendants fail
18 to consider such wages when paying sick pay wages. Rather than pay sick pay wages at the regular rate
19 of pay, Defendants underpay sick pay wages to Plaintiff and other non-exempt employees at their base
20 rates of pay.

21 3. Because Plaintiff and other non-exempt employees are underpaid sick pay wages,
22 Defendants routinely fail to timely pay Plaintiff and other non-exempt employees all wages during
23 employment or upon separation of employment. Moreover, Defendants also routinely fail to furnish
24 wage statements that accurately show and itemize all applicable hourly rates in effect during the pay
25 period, gross wages earned, and net wages earned.

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¹ Except as otherwise noted, all “Section” references are to the Labor Code.

4. Plaintiff is informed and believes that Defendants have engaged in, among other things, a system of willful violations of the Labor Code by creating and maintaining policies, practices, and customs that knowingly deny its employees the above stated rights and benefits.

5. The policies, practices, and customs of Defendants result in unjust enrichment of Defendants and an unfair business advantage over businesses that comply with the Labor Code.

JURISDICTION AND VENUE

6. The Complaint seeks relief exceeding \$25,000.00. The Court has jurisdiction of Defendants' violations of Sections 201-204, 226, 233, and 246, and the UCL.

7. Venue is proper in the County of San Diego, where Plaintiff performed work for Defendants.

PARTIES

8. In September of 2022, Plaintiff began working for Defendants and worked in California for Defendants for 30 or more days within a year. Until his employment ended in July of 2023, Plaintiff was paid on an hourly basis as a non-exempt employee and earned non-base hourly wages or other non-hourly, non-discretionary remuneration, including for example production pay and performance pay. Throughout his employment, Plaintiff accrued and actually used sick leave. When sick leave was used in workweeks that Plaintiff earned non-base hourly wages or other non-hourly, non-discretionary remuneration in addition to his base hourly wages, sick pay wages were paid at Plaintiff's base rate of pay rather than his regular rate of pay. Plaintiff was not timely paid all due wages during employment or upon separation of employment and also was not provided with accurate itemized wage statements. Plaintiff thus is a victim of the policies, practices, and customs of Defendants complained of in this action in ways that have deprived his of the rights guaranteed by the Labor Code and the UCL.

9. Plaintiff is informed and believes that Swift Transportation Co. of Arizona, LLC was and is a Delaware limited liability company. Plaintiff is informed and believes that at all times herein mentioned named defendants and Does 1 through 50, were and are corporations, business entities, individuals, or partnerships that are and were licensed to do business and actually doing business in the State of California. Based upon all the facts and circumstances incident to Defendants' business, Defendants are subject to Sections 201-204, 226, 233, and 246, and the UCL.

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

11. At all times mentioned herein, each of said Defendants participated in the doing of the acts alleged herein. Defendants, and each of them, were the agents, servants, or employees of each of the other Defendants, as well as the agents of all Defendants, and were acting within the course and scope of said agency and employment.

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

13. Plaintiff is informed and believes that at all times material hereto each of the Defendants (i) aided and abetted the acts and omissions of each of the other Defendants in proximately causing the alleged harms, or (ii) were members of, engaged in, and acting within the course and scope of, and in pursuance of, a joint venture, partnership, or common enterprise.

CLASS ACTION ALLEGATIONS

14. **Definition:** Pursuant to Code of Civil Procedure section 382, Plaintiff seeks class certification of the following classes: (i) all current and former non-exempt employees of Defendants in the State of California who have been paid sick pay wages in a workweek since April 2, 2020, in which they also earned non-base hourly wages or other non-hourly, non-discretionary remuneration (the “Sick Pay Class”), and (ii) all current and former non-exempt employees of Defendants in the State of California who have been paid sick pay wages in a workweek since April 2, 2023, in which they also earned non-base hourly wages or other non-hourly, non-discretionary remuneration (the “Wage

Statement Class”). The Sick Pay Class and Wage Statement Class are collectively referred to as the “Class.”

15. **Numerosity and Ascertainability:** The members of the Class are so numerous that joinder of all members would be impractical, if not impossible. The identities of the members of the Class are readily ascertainable by review of Defendants’ records, including payroll records. Plaintiff is informed and believes that Defendants violated Sections 201-204, 226, 233, and 246, and the UCL against Plaintiff and the Class by failing to pay all sick pay wages, failing to timely pay all wages during employment or upon termination of employment, and failing to provide complete and accurate itemized wage statements.

16. **Adequacy of Representation:** 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 fully and adequately able to represent Plaintiff and the Class. Plaintiff’s attorneys have prosecuted and settled wage-and-hour class actions in the past and continue to litigate numerous wage-and-hour class actions currently pending in California state and federal courts.

17. **Common Question of Law and Fact:** There are predominant common questions of law and fact and a community of interest amongst the claims of Plaintiff and of the Class. Plaintiff is informed and believes that Defendants uniformly administer a corporate policy and practice of routinely failing to pay all sick pay wages due, to timely pay all wages during employment or upon separation of employment, or to provide complete and accurate itemized wage statements.

18. **Typicality:** The claims of Plaintiff are typical of the claims of all members of the Class in that Plaintiff suffered the alleged harms in a similar and typical manner as other members of the Class suffered. As with other members of the Class, Plaintiff was paid on an hourly basis as a non-exempt employee and earned non-base hourly wages or other non-hourly, non-discretionary remuneration, including for example production pay and performance pay. Throughout his employment, Plaintiff accrued and actually used sick leave. When sick leave was used in workweeks that Plaintiff earned non-base hourly wages or other non-hourly, non-discretionary remuneration in addition to his base hourly wages, sick pay wages were paid at Plaintiff’s base rate of pay rather than his regular rate of pay. Plaintiff was not timely paid all due wages during employment or upon separation of employment and

1 also was not provided with accurate itemized wage statements. Plaintiff thus is a member of the Class
2 and has suffered the alleged violations of the Labor Code.

3 19. The Labor Code is broadly remedial in nature. Its laws serve an important public interest
4 in establishing minimum working conditions and requirements in California. These labor standards
5 protect employees from onerous terms and conditions of employment or exploitation by employers who
6 have superior economic and bargaining power.

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

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

24 22. Defendants' pattern, practice, and uniform administration of corporate policy in violation
25 of the Labor Code is unlawful. Proof of a common business practice or factual pattern will establish the
26 rights of Plaintiff and the Class under Sections 201-204, 210, 218, 218.5, 218.6, 226, 233, and 246,
27 applicable IWC Wage Orders, the UCL, and Code of Civil Procedure section 1021.5 to recover
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1 damages and restitution, including unpaid wages and interest thereon, applicable penalties, reasonable
2 attorneys' fees, and costs of suit.

3 23. This action is brought for the benefit of the Class, which is commonly entitled to a
4 specific fund with respect to the compensation illegally and unfairly retained by Defendants. The Class
5 is commonly entitled to restitution of those funds being improperly withheld by Defendant.

6 **FIRST CAUSE OF ACTION**

7 **Unpaid Sick Pay Wages (Lab. Code §§ 201-204, 233, 246)**

8 **(By Plaintiff and the Sick Pay Class Against All Defendants)**

9 24. The preceding paragraphs are re-alleged and incorporated by this reference.

10 25. Section 233 provides that an employer must permit an employee to use accrued sick leave
11 in accordance with Section 246.5 at the employee's then current rate of entitlement. Section 246
12 provides that an employee is entitled to sick pay wages for use of accrued sick leave pursuant to Section
13 246.5. Specifically, once accrued sick leave is used as paid sick time, an employee has a vested right to
14 sick pay wages, which an employer must calculate and compensate based on one of two calculations: (i)
15 "Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of
16 pay for the workweek in which the employee uses paid sick time, whether or not the employee actually
17 works overtime in that workweek," or (ii) "Paid sick time for nonexempt employees shall be calculated
18 by dividing the employee's total wages, not including overtime premium pay, by the employee's total
19 hours worked in the full pay periods of the prior 90 days of employment." Under Sections 204, 218, and
20 233, employees may sue to recover underpaid sick pay wages as damages.

21 26. As a matter of policy and practice, Defendants pay sick pay wages to Plaintiff and the
22 Sick Pay Class at the incorrect rate of pay. Plaintiff and the Sick Pay Class regularly use accrued sick
23 leave in workweeks in which they also earn non-base hourly wages or other non-hourly, non-
24 discretionary remuneration, including for example production pay and performance pay. As a matter of
25 policy and practice, Defendants pay sick pay wages to Plaintiff and the Sick Pay Class at the base hourly
26 rate of pay, as opposed to the regular rate of pay, which would consider all non-base hourly wages or
27 other non-hourly, non-discretionary remuneration in addition to base hourly wages, or the rate resulting
28 from dividing the employee's total wages, not including overtime premium pay, by the employee's total

1 hours worked in the full pay periods of the prior 90 days of employment. As a result, Defendants
2 underpay sick pay wages to Plaintiff and the Sick Pay Class.

3 27. Section 204 provides that wages generally are due and payable twice during each
4 calendar month and are to be paid no later than the payday for the next regular payroll period. Consistent
5 with Section 204, Section 246 specifically requires that, upon use of accrued sick leave, vested sick pay
6 wages are due and to be paid no later than the payday for the next regular payroll period after accrued
7 sick leave is used as paid sick time. Similarly, Section 201 provides that if an employer discharges an
8 employee, wages earned and unpaid at the time of discharge are due and payable immediately. Section
9 202 provides that an employee is entitled to receive all unpaid wages no later than 72 hours after an
10 employee quits his or her employment, unless the employee has given 72-hour notice of his or her
11 intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. The
12 Labor Code penalizes untimely payments. For example, Section 203 provides that if an employer
13 willfully fails to pay wages owed in accordance with Sections 201 and 202, then the wages of the
14 employee shall continue as a penalty from the due date, and at the same rate until paid, but the wages
15 shall not continue for more than thirty (30) days. Likewise, Section 210 provides penalties for violations
16 of Section 204 and untimely payments during employment. Under Sections 203, 210, and 218,
17 employees may sue to recover applicable penalties.

18 28. As alleged herein and as a matter of policy and practice, Defendants routinely underpay
19 sick pay wages and thus do not timely pay Plaintiff and the Sick Pay Class all owing and underpaid sick
20 pay wages. As a result, Defendants violate Sections 201-204, 210, 233, and 246, among other Labor
21 Code provisions. Plaintiff is informed and believe that Defendants were advised by skilled lawyers and
22 knew, or should have known, of the mandates of the Labor Code as it relates to Plaintiff's allegations,
23 especially since the California Supreme Court has explained that "[c]ourts have recognized that 'wages'
24 also include those benefits to which an employee is entitled as a part of his or her compensation,
25 including money, room, board, clothing, vacation pay, and sick pay." *Murphy v. Kenneth Cole Prods.,*
26 *Inc.*, 40 Cal. 4th 1094, 1103 (2007) (emphasis added). Because Defendants willfully fail to timely pay
27 Plaintiff and the Sick Pay Class all sick pay wages due, Defendants are subject to applicable penalties.

29. Such a pattern, practice, and uniform administration of corporate policy is unlawful and entitles Plaintiff and the Sick Pay Class to recover underpaid sick pay wages, including interest thereon, applicable penalties, attorneys' fees, and costs of suit.

SECOND CAUSE OF ACTION

Inaccurate Itemized Wage Statements (Lab. Code § 226(a))

(By Plaintiff and the Wage Statement Class Against All Defendants)

30. The preceding paragraphs are re-alleged and incorporated by this reference.

31. Section 226(a) requires an employer to furnish to its employees itemized wage statements that show accurate information, including without limitation, all applicable hourly rates in effect during the pay period, gross wages earned, and net wages earned.

32. Defendants fail to provide accurate itemized wage statements to Plaintiff and the Wage Statement Class. Because of the above violations and as a matter of policy and practice, Defendants fail to furnish Plaintiff and the Wage Statement Class with wage statements that accurately show the applicable hourly rates in effect during the pay period, gross wages earned, and net wages earned.

33. Such a pattern, practice, and uniform administration of corporate policy is unlawful and entitles Plaintiff and the Wage Statement Class to recover applicable penalties, attorneys' fees, and costs of suit.

THIRD CAUSE OF ACTION

Unfair or Unlawful Business Practices (Bus. & Prof. Code §§ 17200 et seq.)

(By Plaintiff and the Sick Pay Class Against All Defendants)

34. The preceding paragraphs are re-alleged and incorporated by this reference.

35. Plaintiff is informed and believes that at Defendants have engaged and continue to engage in unfair and unlawful business practices in California by utilizing the employment policies and practices alleged herein, including the underpayment of sick pay wages.

36. Defendants' utilization of such unfair and unlawful business practices constitutes unfair and unlawful competition and provides an unfair advantage over Defendants' competitors, as proscribed by the UCL. Defendants have deprived Plaintiff and the Sick Pay Class of the minimum working conditions and standards due to them under the Labor Code and applicable IWC Wage Orders.

37. Such a pattern, practice, and uniform administration of corporate policy is unlawful and entitles Plaintiff and the Sick Pay Class to full restitution of all monies withheld, acquired, or converted by means of the unfair practices complained of herein, including interest thereon, attorneys' fees, and costs of suit.

FOURTH CAUSE OF ACTION

Violations of California Labor Code (Lab. Code §§ 2698 et seq.)

(By Plaintiff as a Proxy for the State Against All Defendants)

38. The preceding paragraphs are re-alleged and incorporated by this reference.

39. Pursuant to the Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698 et seq. (“PAGA”), Plaintiff brings this cause of action as a proxy for the State of California. In this capacity, Plaintiff would seek penalties for Defendants’ violations of Sections 201-204, 226, 233, and 246 committed since April 2, 2023, against all aggrieved employees. As stated herein, Defendants fail to (i) pay all sick pay wages, (ii) timely pay all wages during employment or upon termination of employment, and (iii) provide complete and accurate itemized wage statements. Under Section 2699(c), Plaintiff is an “aggrieved employee,” as one or more of the alleged violations was committed against Plaintiff as an employee of Defendants.

40. On or about April 2, 2024, Plaintiff sent written notice to the Labor & Workforce Development Agency (“LWDA”) of specific facts and theories for Defendants’ above violations. Plaintiff simultaneously sent written notice to Defendants via certified mail. As of the date of the filing of this Complaint, the LWDA has neither responded nor indicated that it intends to investigate the allegations in the written notice.

41. As such, pursuant to Section 2699(a), (f), and (g), Plaintiff seeks recovery of all applicable penalties pursuant to Section 2699(a), (f), and (g) for Defendants' violations against all aggrieved employees for the period described above.

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;
3. For an order appointing Counsel for Plaintiff as Class Counsel;
4. Upon the First Cause of Action for damages, including unpaid wages and interest thereon, penalties, and attorneys' fees and costs;
5. Upon the Second Cause of Action for penalties, actual damages, and attorneys' fees and costs;
6. Upon the Third Cause of Action for restitution of all funds unlawfully acquired by Defendants by any acts or practices declared to be in violation of the UCL, including interest thereon, and for attorneys' fees and costs;
7. Upon the Fourth Cause of Action for penalties pursuant to Section 2699(a), (f), and (g), and for attorneys' fees and costs;
8. Upon each cause of action for attorneys' fees and costs as provided by the Labor Code, UCL, and Code of Civil Procedure section 1021.5; and
9. For such other and further relief that the Court may deem just and proper.

DATED: May 31, 2024

DIVERSITY LAW GROUP, P.C.

By: 

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