

92

RECEIVED FOR SCANNING
VENTURA SUPERIOR COURT

DEC 29 2017

1 David C. Berns, Esq. (State Bar #160966)
2 Matthew S. Erickson, Esq. (State Bar #289319)
3 LAW OFFICES OF DAVID C. BERNES
4 A Professional Corporation
5 P.O. Box 6146
6 Woodland Hills, California 91365
7 Telephone: (818) 961-9000
8 Facsimile: (888) 313-6888

6 Attorneys for Plaintiff
7 David Upward

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF VENTURA

11 David Upward,

12 Plaintiff,

13 vs.

14 WALL SYSTEMS, INC.; and DOES 1 to 25,
15 inclusive,

16 Defendants.

Case No.:

[UNLIMITED CIVIL]

COMPLAINT FOR DAMAGES

1. Unlawful Deductions from Wages in Violation of California Labor Code §§ 221, 2802, I.W.C. Wage Orders;
2. Failure to Provide Accurate Wage Statements in Violation of California Labor Code §§ 226 et seq.;
3. Failure to Pay Wages at Time of Termination of Employment in Violation of California Labor Code §§ 201 et seq.;
4. Conversion and Theft of Labor;
5. Unlawful and/or Unfair Business Practices in Violation of Cal. Business and Prof. Code §§ 17200 et seq.

DEMAND FOR JURY TRIAL

1 Plaintiff, DAVID UPWARD ("Plaintiff" or "Mr. Upward"), by and through his attorneys
2 of record, Law Offices of David C. Berns, APC, hereby demands a jury trial and complains and
3 alleges based on information and belief for causes of action against Defendants Wall Systems, Inc.
4 ("Wall Systems"); and DOES 1 to 25, inclusive, (referred to collectively herein as "Defendants"),
5 and each of them, as follows:

6
7 **JURISDICTION**

8 1. This Court is the proper court, and this action is properly filed in Ventura County,
9 because Defendants' obligations and liability arise therein, because Defendants maintain offices
10 and transact business within Ventura County, and because the work that is the subject of this
11 action was performed by Plaintiff in Ventura County, among other counties in California.

12 **THE PARTIES**

13 2. Plaintiff David Upward ("Plaintiff" or "Mr. Upward"), at all times herein mentioned,
14 was and is an adult male living in the County of Los Angeles, in the State of California.

15 3. At all material times, Mr. Upward was an employee of Wall Systems, Inc., a California
16 corporation which upon information and belief, is doing business under the laws of the state of
17 California at 11975 Discovery Ct., Moorpark, CA 93021.

18 4. Wall Systems operates within the county and is therefore subject to the jurisdiction of
19 this court.

20 5. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as Does
21 1 to 25, inclusive and therefore sues these Defendants by such fictitious names and capacities.
22 Plaintiff is informed and believes, and on that basis alleges, that each fictitiously named defendant
23 is responsible in some manner for the occurrences alleged herein, and that Plaintiff's injuries as
24 alleged herein were proximately caused by the conduct of said Doe Defendants. Plaintiff will seek
25 leave of Court to amend this Complaint to allege such true names and capacities should such
26 information become known to Plaintiff. Each reference in this complaint to "Defendant",
27 "Defendants", or a specifically named Defendant shall include reference to all Defendants
28 including fictitiously named defendants.

1 6. Whenever and wherever reference is made in this Complaint to any act or failure to act
2 by a Defendant or co-Defendant, such allegations and references shall also be deemed to mean the
3 acts and/or failures to act by each Defendant acting individually, jointly and severally.

4 **FACTS COMMON TO ALL CAUSES OF ACTION**

5 7. In or around 1993, Plaintiff began working for Defendants as a drywaller.

6 8. In or around January 1993, Defendants told Plaintiff that he needed to join the
7 Carpenters Union and so Plaintiff joined the Carpenters Local #2361 ("Carpenters Union").

8 9. Plaintiff is informed and believes, and thereupon alleges that from approximately
9 January 1993 to the end of his employment, union dues were deducted from Plaintiff's paycheck
10 on a weekly basis.

11 10. On or around December 30, 2016, Plaintiff retired as a drywaller and inquired about
12 the benefits he might receive from the Carpenters Union that he had been paying into for some
13 twenty-four years.

14 11. Upon contacting the Carpenters Union, Plaintiff was informed that he was last paid as
15 an active member in May 1996.

16 12. From May 1996 to the end of Plaintiff's employment, unlawful deductions were made
17 from Plaintiff's paycheck under the belief that he was contributing to the Carpenters Union.
18 Plaintiff alleges that Defendant converted said funds for its own benefit.

19 **FIRST CAUSE OF ACTION**

20 **UNLAWFUL DEDUCTIONS FROM WAGES**

21 **IN VIOLATION OF CALIFORNIA LABOR CODE §§ 221, 2802, IWC WAGE ORDERS**

22 ***(Against All Defendants)***

23 13. Plaintiff incorporates by reference each and every one of the allegations of the
24 foregoing Complaint as though set forth fully herein.

25 14. Defendants, and each of them, deducted union dues from Plaintiff's wages and
26 withheld Plaintiff's wages. Defendants never notified Plaintiff that after May 1996, he was no
27 longer paying into the Carpenters Union. Plaintiff did not learn that the wages were improperly
28

1 deducted until sometime in 2017. Defendants did this on an unknown number of occasions which
2 Plaintiff will identify in the course of discovery.

3 15. In doing the conduct complained of herein, Defendants violated Cal. Labor Code §§
4 221-223 and 401 through 410 and other applicable provisions of Cal. Labor Code and other
5 applicable laws and regulations. At no time did Defendants have a written agreement with Plaintiff
6 confirming the understanding with regard to the proposed deductions and consenting thereto. At
7 no time did Defendants ever take out a bond for Plaintiff as its employee pursuant to Cal. Labor

8 16. The aforementioned wage deductions to offset Defendants' business losses and
9 expenses discussed herein violated California law pursuant to, among other authority. *Kerr's*
10 *Catering Service v. Department of Industrial Relations*, (1962) 57 Cal.2d 319 and
11 *Prachasaisoradej v. Ralphs Grocery Co., Inc.*, (2007) 42 Cal.4th 217.

12 17. At no time was Plaintiff engaged in dishonesty, willful acts, or gross negligence in
13 relation to the instances in which the Defendants deducted "union dues" from Plaintiff's pay.

14 18. Plaintiff has been deprived of his rightfully earned wages and compensation as a direct
15 and proximate result of Defendants' failure and refusal to pay said compensation. Plaintiff is
16 entitled to recover such amounts, plus interest thereon.

17 19. Based on Defendants' conduct as alleged herein, Defendants are liable for statutory and
18 civil penalties pursuant to the Cal. Labor Code and other applicable laws and regulations. Plaintiff
19 is presently unaware of the precise amount of these expenses and fees and prays for an amount
20 according to proof at the time of trial.

21 SECOND CAUSE OF ACTION

22 FAILURE TO PROVIDE ACCURATE WAGE STATEMENTS 23 IN VIOLATION OF CALIFORNIA LABOR CODE §§ 226 et seq.

24 *(Against All Defendants)*

25 20. Plaintiff incorporates by reference each and every allegation contained in this
26 complaint as though fully set forth herein.

27 21. Defendants, and each of them, were, at all times relevant to this Complaint, obligated
28 under California Labor Code §§ 226 et seq. and California Industrial Welfare Commission Order

1 7-2001, to keep an accurate record of Plaintiff's payroll and wage details and history.

2 22. Pursuant to California Law, Defendants, and each of them, were further required to
3 provide Plaintiff with itemized payroll statements on a no less than a biweekly basis (*see* Cal
4 Labor Code § 204, *et seq.*) which must include, among other things and without limitation, all
5 wages earned by Plaintiff, the total hours worked by Plaintiff, all of the deductions made from
6 Plaintiff's compensation, gross wages and net wages earned by Plaintiff, the inclusive dates of the
7 period for which Plaintiff was paid and the last four digits of Plaintiff's social security number or
8 in the alternative, an employee ID.

9 23. On information and belief, Defendants, and each of them, have failed to keep precise
10 and complete payroll records for Plaintiff, have failed to properly itemize the wages earned by
11 Plaintiff, Plaintiff's gross and net wages, the total number of hours worked by Plaintiff with each
12 payment of wages to Plaintiff, as required by California law. Namely, Defendants unlawfully
13 deducted amounts from Plaintiff's wages in order to pay into the Carpenters Union. Plaintiff
14 learned that Defendants had not paid into the Carpenters Union since May 1996 but had been
15 deducting amounts from his wages as "union dues."

16 24. Plaintiff is informed and believes and thereon alleges that at all times relevant to this
17 Complaint, Defendants maintained a policy and practice of not providing accurate payroll
18 statements and records.

19 25. As a result of Defendants' conduct, Plaintiff has suffered injury in that, among other
20 things, the lack of accurate wage statements hindered Plaintiff from determining the correct
21 amount of wages owed to him. As a result of the improper deductions from wages as reflected on
22 his wage statements, and Plaintiff is thereby injured by the Defendants' failure to report the total
23 amount of wages earned during each pay period on each paycheck stub. As a result of Defendants'
24 conduct, Plaintiff has suffered injury in that his legal right to receive accurate wage statements was
25 violated.

26 26. Pursuant to California Labor Code § 226 *et seq.*, Plaintiff is entitled to a penalty of
27 \$100.00 for the first violation and \$50.00 per pay period for each subsequent violation of this
28 section, according to proof up to a maximum of \$4,000.00.

1 27. As a direct and proximate cause of the acts alleged above, Plaintiff has had to hire the
2 services of an attorney. Plaintiff has incurred and continues to incur legal expenses and
3 attorneys' fees, and is entitled to an award of attorneys' fees and costs pursuant to California
4 Labor Code § 226. Plaintiff is presently unaware of the precise amount of these expenses and fees
5 and prays for an amount according to proof at the time of trial.

6 **THIRD CAUSE OF ACTION**

7 **FAILURE TO PAY WAGES AT TIME OF TERMINATION OF EMPLOYMENT**
8 **IN VIOLATION OF CALIFORNIA LABOR CODE §§ 201, et seq.**

9 *(Against All Defendants)*

10 28. Plaintiff incorporates by reference each and every allegation contained in this
11 complaint as though fully set forth herein.

12 29. Plaintiff last worked for Defendants on or around December 30, 2016.

13 30. At the time of Plaintiff's termination of employment with Defendants, Defendants
14 knowingly and willfully failed to pay Plaintiff all of the wages Plaintiff had earned, as alleged
15 herein and above.

16 31. Pursuant to California Labor Code §§ 201 through 204, Plaintiff is entitled by law to
17 receive all of Plaintiff's earned and unpaid wages at the time of Plaintiff's termination of
18 employment with Defendants.

19 32. Defendants, and each of them, knowingly, intentionally, and willfully failed to pay
20 Plaintiff all of Plaintiff's earned and unpaid wages at the time of Plaintiff's employment
21 relationship terminated with Defendants.

22 33. Pursuant to California Labor Code § 203, Plaintiff is entitled to waiting time penalties,
23 calculated based on thirty (30) days of Plaintiff's proper and correct average daily rate, or
24 according to proof at trial, whichever is greater.

25 34. As a direct and proximate cause of the acts alleged above, Plaintiff has had to hire the
26 services of an attorney. Plaintiff has incurred and continues to incur legal expenses and attorneys'
27 fees, and is entitled to an award of attorneys' fees and costs pursuant to California Labor Code §
28 226. Plaintiff is presently unaware of the precise amount of these expenses and fees and prays for

1 an amount according to proof at the time of trial.

2 **FOURTH CAUSE OF ACTION**
3 **CONVERSION AND THEFT OF LABOR**
4 ***(Against All Defendants)***

5 35. Plaintiff incorporates by reference each and every allegation contained in this
6 complaint as though fully set forth herein.

7 36. It is well-settled that employees in California have a vested property right to their
8 wages and the right vests as the work is performed. As conversion is the wrongful dominion of
9 another's property and as conversion includes intangible property rights (where the amount is
10 certain or incapable of being made certain) conversion is appropriate to recover unlawfully
11 withheld wages.¹

12 37. Pursuant to statute, including but not limited to California Labor Code sections 216,
13 225, and 226.6 and Penal Code sections 484 and 532, it is a criminal violation of the law to fail to
14 pay wages on the next payday after they are earned.

15 38. At the time Defendants refused to pay the wages due to Plaintiff who had an immediate
16 right to possess the withheld wages. Defendants willfully and without legal justification, interfered
17 with Plaintiff's right to own and possess Plaintiff's wages. The exact amount of those wages is
18 capable of being made certain from a review of either information of Plaintiff or from the records
19 of Defendants.

20 39. In refusing to pay wages to Plaintiff, Defendants unlawfully and intentionally took and
21 converted the property of Plaintiff for their own use. At the time the conversion took place,
22 Plaintiff was entitled to the immediate possession of the amounts of wages payable. This
23 conversion was oppressive, malicious and fraudulent. This conversion was concealed by
24 Defendants from Plaintiff.

25 40. This amount of wages converted by the Defendants from Plaintiff is easily
26
27

28 ¹ "It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. Money

1 ascertainable through Defendant's records that California employers are required by law to keep.

2 41. Plaintiff has been injured by this conversion and is entitled to all monies converted by
3 Defendants with interest thereon pursuant to Civil Code section 3336, any and all profits whether
4 direct or indirect, the Defendants acquired by their conversion.

5 42. Plaintiff is informed and believes and thereon alleges that the Defendants, and each of
6 them, by engaging in the aforementioned acts and/or in authorizing and/or ratifying such acts,
7 engaged in willful, malicious, intentional, oppressive and despicable conduct, and acted with
8 willful and conscious disregard of Plaintiff's rights, welfare and safety, thereby justifying the
9 award of punitive and exemplary damages in an amount to be determined at trial.

10 **FIFTH AUSE OF ACTION**

11 **UNLAWFUL AND/OR UNFAIR BUSINESS PRACTICES**

12 **IN VIOLATION OF BUSINESS AND PROFESSIONS CODE §§ 17200 *et seq.***

13 ***(Against All Defendants)***

14 43. Plaintiff incorporates by reference each and every allegation contained in this
15 complaint as though fully set forth herein.

16 44. Defendants' conduct, as alleged above, constitutes unlawful, unfair and fraudulent
17 activity prohibited by Business and Professions Code §§ 17200 *et seq.*

18 45. As a result of their improper acts, Defendants and Does 1 to 25, and each of them, have
19 reaped and continue to reap unfair benefits and illegal profits at Plaintiff's expense and on behalf
20 of the general public.

21 46. Defendants and Does 1 to 25, and each of them, should be made to restore to Plaintiff
22 these gains pursuant to California Business and Professions Code § 17203.

23 47. Defendants and Does 1 to 25, and each of them, should also be subjected to penalties
24 pursuant to California Business and Professions Code § 17202 *et seq.*

25 ///

26

27

28

can be the subject of an action for conversion if a specific sum capable of identification is involved." (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 451-452).

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as
3 follows:

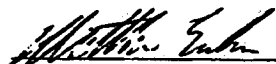
- 4 1. For special damages in an amount according to proof at trial;
5 2. For all general in an amount according to proof at trial;
6 3. For liquidated damages for failure to comply with various aforepleaded provisions the
7 California Labor Code.
8 4. For punitive, treble, liquidated and other damages where available by law.
9 5. For penalties pursuant to California Labor Code.
10 6. For attorneys' fees and costs as set forth above where such fees and costs are available
11 by law to Plaintiff.
12 7. For Defendants to be enjoined from the unlawful activities described herein in violation
13 of California Labor Code §§ 200 *et seq.* California Business and Professions Code §§ 17200 *et*
14 *seq.*
15 8. For prejudgment and post-judgment interest as available by law;
16 9. For such other and further relief as this Court may deem just and proper.

17 **DEMAND FOR JURY TRIAL**

18 Plaintiff hereby demands a trial by jury.
19

20 Dated: December 29, 2017

LAW OFFICES OF DAVID C. BERNIS
A Professional Corporation

21 
22 DAVID C. BERNIS, ESQ.
23 MATTHEW S. ERICKSON, ESQ.
24 Attorneys for Plaintiff
25 David Upward
26
27
28