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Superior Court of California,
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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY SAN DIEGO**

TREVOR WIPF, an individual, on behalf of
the State of California,

Plaintiff,

v.

ASI HASTINGS, INC., a California
Corporation, and DOES 1-50, Inclusive,

Defendants.

Case No: 37-2020-00043643-CU-OE-CTL

**REPRESENTATIVE ACTION
COMPLAINT FOR:**

1) VIOLATIONS OF THE PRIVATE
ATTORNEY GENERAL ACT
PURSUANT TO LABOR CODE
SECTIONS 2698, et seq.

Plaintiff, TREVOR WIPF (hereinafter "PLAINTIFF" or "PLAINTIFFS"), on behalf of the people of the State of California and as "aggrieved employees" acting as a private attorney general under the Labor Code Private Attorney General Action of 2004, § 2699, *et seq.* ("PAGA") only, alleges on information and belief, except for his own acts and knowledge which are based on personal knowledge, the following:

INTRODUCTION

1
2 1. PLAINTIFF brings this action against ASI HASTINGS, INC. (“DEFENDANT”
3 or “DEFENDANTS”) seeking only to recover PAGA civil penalties for himself, and on behalf of
4 all current and former aggrieved employees that worked for DEFENDANT. At this time, and
5 through this action, PLAINTIFF does **not seek to recover anything other than penalties as**
6 **permitted by California Labor Code § 2699 as interpreted by the by the California Supreme**
7 **Court in ZB, N.A. v. Superior Court (Lawson) 2019 WL 4309684.**

8 2. To the extent that statutory violations are mentioned for wage violations,
9 PLAINTIFF does not seek underlying general and/or special damages for those violations, but
10 simply the civil penalties permitted by California Labor Code § 2699.

11 3. California has enacted the PAGA to permit an individual to bring an action on
12 behalf of herself and on behalf of others for PAGA penalties *only*, which is the precise and sole
13 nature of this action.

14 4. Accordingly, PLAINTIFF seeks to obtain all applicable relief for DEFENDANT’S
15 violations under PAGA and solely for the relief as permitted by PAGA – that is, penalties and any
16 other relief the Court deems proper pursuant to the PAGA. Nothing in this complaint should be
17 construed as attempting to obtain any relief that would not be available in a PAGA-only action.

THE PARTIES

18
19 5. Defendant ASI HASTINGS, INC. is a corporation that at all relevant times
20 mentioned herein conducted and continues to conduct substantial business in the state of
21 California.

22 6. DEFENDANT provides heating and air conditioning services. The Company
23 offers heating, ventilation, and air conditioning equipment and accessories.

24 7. PLAINTIFF was employed by DEFENDANT from March of 2016 to June of 2020
25 as and was at all times classified by DEFENDANT as a non-exempt employee, paid on an hourly
26 basis, and entitled to the legally required meal and rest periods and payment of minimum and
27 overtime wages due for all time worked.

28 8. PLAINTIFF, and such persons that may be added from time to time who satisfy
the requirements and exhaust the administrative₂ procedures under the Private Attorney General

1 Act, bring this Representative Action on behalf of the State of California with respect to
2 themselves and all individuals who are or previously were employed by DEFENDANT and
3 classified as non-exempt employees in California, (the "AGGRIEVED EMPLOYEES") during
4 the time period of September 3, 2019 until a date as determined by the Court (the "PAGA
5 PERIOD").

6 9. PLAINTIFF, on behalf of himself and all AGGRIEVED EMPLOYEES presently
7 or formerly employed by DEFENDANT during the PAGA PERIOD, bring this representative
8 action pursuant to Labor Code § 2699, *et seq.* seeking penalties for DEFENDANT'S violation of
9 California Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 226(a), 226.7, 351, 510, 512,
10 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations, Title 8, Section
11 11040, Subdivision 5(A)-(B), California Code of Regulations, Title 8, Section 1 1070(14) (Failure
12 to Provide Seating), Violation of the applicable Industrial Welfare Commission Wage Order(s).
13 Based upon the foregoing, PLAINTIFF and all AGGRIEVED EMPLOYEES are aggrieved
14 employees within the meaning of Labor Code § 2699, *et seq.*

15 10. The true names and capacities, whether individual, corporate, subsidiary,
16 partnership, associate or otherwise of defendants DOES 1 through 50, inclusive, are presently
17 unknown to PLAINTIFF who therefore sues these Defendants by such fictitious names pursuant
18 to Cal. Civ. Proc. Code § 474. PLAINTIFF will seek leave to amend this Complaint to allege the
19 true names and capacities of Does 1 through 50, inclusive, when they are ascertained. PLAINTIFF
20 is informed and believes, and based upon that information and belief alleges, that the Defendants
21 named in this Complaint, including DOES 1 through 50, inclusive, are responsible in some
22 manner for one or more of the events and happenings that proximately caused the injuries and
23 damages hereinafter alleged.

24 11. The agents, servants and/or employees of the Defendants and each of them acting
25 on behalf of the Defendants acted within the course and scope of his, her or its authority as the
26 agent, servant and/or employee of the Defendants, and personally participated in the conduct
27 alleged herein on behalf of the Defendants with respect to the conduct alleged herein.
28 Consequently, the acts of each Defendant are legally attributable to the other Defendants and all
Defendants are jointly and severally liable to PLAINTIFF and the other AGGRIEVED

1 EMPLOYEES, for the loss sustained as a proximate result of the conduct of the Defendants'
2 agents, servants and/or employees

3 **THE CONDUCT**

4 12. During the PAGA PERIOD, DEFENDANT failed to accurately record and pay
5 PLAINTIFF and other AGGRIEVED EMPLOYEES for the actual amount of time these employees
6 work. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT is required to
7 pay PLAINTIFF and other AGGRIEVED EMPLOYEES for all time worked, meaning the time
8 during which an employee was subject to the control of an employer, including all the time the
9 employee was permitted or suffered to permit this work. DEFENDANT required PLAINTIFF and
10 AGGRIEVED EMPLOYEES to work off the clock without paying them for all the time they were
11 under DEFENDANT's control.

12 13. Under California law, every employer shall pay to each employee, on the established
13 payday for the period involved, not less than the applicable minimum wage for all hours worked in
14 the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.
15 Hours worked is defined in the applicable Wage Order as "the time during which an employee is
16 subject to the control of an employer, and includes all the time the employee is suffered or permitted
17 to work, whether or not required to do so. PLAINTIFF and AGGRIEVED EMPLOYEES were from
18 time to time paid a piece rate during the PAGA Period. Here, PLAINTIFF and AGGRIEVED
19 EMPLOYEES were entitled to separate hourly compensation for time spent performing all non-
20 installation related tasks directed by DEFENDANT during their work shifts, and are entitled to one
21 hour of pay for their rest periods.

22 14. In addition, State and federal law provides that employees must be paid overtime at
23 one-and-one-half times their "regular rate of pay." PLAINTIFF and other AGGRIEVED
24 EMPLOYEES are compensated at an hourly rate plus incentive pay that is tied to specific elements
25 of an employee's performance.

26 15. The second component of PLAINTIFF's and other C AGGRIEVED EMPLOYEES'
27 compensation was DEFENDANT's non-discretionary incentive program that paid PLAINTIFF and
28 other AGGRIEVED EMPLOYEES incentive wages based on their performance for DEFENDANT.
The non-discretionary incentive program provided all employees paid on an hourly basis with

1 incentive compensation when the employees met the various performance goals set by
2 DEFENDANT. However, when calculating the regular rate of pay in order to pay overtime to
3 PLAINTIFF and other AGGRIEVED EMPLOYEES, DEFENDANT failed to include the incentive
4 compensation as part of the employees' "regular rate of pay" for purposes of calculating overtime
5 pay. Management and supervisors described the incentive program to potential and new employees
6 as part of the compensation package. As a matter of law, the incentive compensation received by
7 PLAINTIFF and other AGGRIEVED EMPLOYEES must be included in the "regular rate of pay."
8 The failure to do so has resulted in an underpayment of overtime compensation to PLAINTIFF and
9 other AGGRIEVED EMPLOYEES by DEFENDANT.

10 16. As a result of their rigorous work schedules, PLAINTIFF and other AGGRIEVED
11 EMPLOYEES were also from time to time unable to take off duty meal breaks and were not fully
12 relieved of duty for meal periods. PLAINTIFF and other AGGRIEVED EMPLOYEES were from
13 time to time required to perform work as ordered by DEFENDANT for more than five (5) hours
14 during a shift without receiving an off-duty meal break. Further, DEFENDANT failed to provide
15 PLAINTIFF and AGGRIEVED EMPLOYEES with a second off-duty meal period from time to
16 time in which these employees are required by DEFENDANT to work ten (10) hours of work from
17 time to time. PLAINTIFF and the other AGGRIEVED EMPLOYEES therefore forfeit meal breaks
18 without additional compensation and in accordance with DEFENDANT's corporate policy and
19 practice.

20 17. In addition, because of DEFENDANT's piece rate pay plan described herein,
21 DEFENDANT failed to compensate PLAINTIFF and AGGRIEVED EMPLOYEES for their rest
22 periods as required by the applicable Wage Order and Labor Code. DEFENDANT did not have a
23 policy or practice which paid for off-duty rest periods to PLAINTIFF and the other AGGRIEVED
24 EMPLOYEES. During the PAGA PERIOD, PLAINTIFF and other CALIFORNIA CLASS
25 Members were also from time to time required to work in excess of four (4) hours without being
26 provided ten (10) minute rest periods. Further, these employees are denied their first rest periods of
27 at least ten (10) minutes for some shifts worked of at least two (2) to four (4) hours, a first and
28 second rest period of at least ten (10) minutes for some shifts worked of between six (6) and eight
(8) hours, and a first, second and third rest period of at least ten (10) minutes for some shifts worked
of ten (10) hours or more from time to time. PLAINTIFF and other AGGRIEVED EMPLOYEES

1 are also not provided with one hour wages in lieu thereof. As a result of their rigorous work
2 schedules, PLAINTIFF and other AGGRIEVED EMPLOYEES are periodically denied their proper
3 rest periods by DEFENDANT and DEFENDANT's managers.

4 18. DEFENDANT intentionally and knowingly failed to reimburse and indemnify
5 PLAINTIFF and the other AGGRIEVED EMPLOYEES for required business expenses incurred
6 by the PLAINTIFF and other AGGRIEVED EMPLOYEES in direct consequence of discharging
7 their duties on behalf of DEFENDANT. Under California Labor Code Section 2802, employers are
8 required to indemnify employees for all expenses incurred in the course and scope of their
9 employment. Cal. Lab. Code § 2802 expressly states that "an employer shall indemnify his or her
10 employee for all necessary expenditures or losses incurred by the employee in direct consequence
11 of the discharge of his or her duties, or of his or her obedience to the directions of the employer,
12 even though unlawful, unless the employee, at the time of obeying the directions, believed them to
be unlawful."

13 19. In the course of their employment PLAINTIFF and other AGGRIEVED
14 EMPLOYEES as a business expense, were required by DEFENDANT to use their own personal
15 cellular phones as a result of and in furtherance of their job duties as employees for DEFENDANT
16 but were not reimbursed or indemnified by DEFENDANT for the cost associated with the use of
17 their personal tools for DEFENDANT's benefit. As a result, in the course of their employment with
18 DEFENDANT, PLAINTIFF and other AGGRIEVED EMPLOYEES incurred unreimbursed
19 business expenses which included, but were not limited to, costs related to the use of their personal
20 tools all on behalf of and for the benefit of DEFENDANT.

21 20. Cal. Lab. Code § 226 provides that every employer shall furnish each of his or her
22 employees with an accurate itemized wage statement in writing showing, among other things, gross
23 wages earned and all applicable hourly rates in effect during the pay period and the corresponding
24 amount of time worked at each hourly rate. From time to time, DEFENDANT violated Cal. Lab.
25 Code § 226 by failing to provide wage statements that identified the correct gross and net wages
26 earned. Aside from the violations listed above, DEFENDANT failed to issue to PLAINTIFF an
27 itemized wage statement that lists all the requirements under California Labor Code 226 *et seq.* As
28 a result, from time to time DEFENDANT provided PLAINTIFF and the other members of the
CALIFORNIA CLASS with wage statements which violated Cal. Lab. Code § 226.

21. Specifically as to PLAINTIFF, he was required to work off the clock during what should have been his off duty meal periods. PLAINTIFF was also from time to time unable to take off duty meal and rest breaks and was not fully relieved of duty for his meal periods. PLAINTIFF was required to perform work as ordered by DEFENDANT for more than five (5) hours during a shift without receiving an off-duty meal break. Further, DEFENDANT failed to provide PLAINTIFF with a second off-duty meal period from time to time in which he was required by DEFENDANT to work ten (10) hours of work. PLAINTIFF therefore forfeited meal and rest breaks without additional compensation and in accordance with DEFENDANT's corporate policy and practice. The amount in controversy for PLAINTIFF individually does not exceed the sum or value of \$75,000.

JURISDICTION AND VENUE

22. This Court has jurisdiction over this Action pursuant to California Code of Civil Procedure, Section 410.10.

23. Venue is proper in this Court pursuant to California Code of Civil Procedure, Sections 395 and 395.5, because DEFENDANT (i) currently maintains and at all relevant times maintained offices and facilities in this County and/or conduct substantial business in this County, and (ii) committed the wrongful conduct herein alleged in this County against PLAINTIFF and the AGGRIEVED EMPLOYEES.

FIRST CAUSE OF ACTION

VIOLATION OF THE PRIVATE ATTORNEYS GENERAL ACT

(Cal. Lab. Code §§ 2698 et seq.)

(Alleged by PLAINTIFF against all Defendants)

24. PLAINTIFF realleges and incorporates by this reference, as though fully set forth herein, the prior paragraphs of this Complaint.

25. PAGA is a mechanism by which the State of California itself can enforce state labor laws through the employee suing under the PAGA who does so as the proxy or agent of the state's labor law enforcement agencies. An action to recover civil penalties under PAGA is fundamentally a law enforcement action designed to protect the public and not to benefit private parties. The purpose of the PAGA is not to recover damages or restitution, but to create a means

1 of "deputizing" citizens as private attorneys general to enforce the Labor Code. In enacting
2 PAGA, the California Legislature specified that "it was ... in the public interest to allow aggrieved
3 employees, acting as private attorneys general to recover civil penalties for Labor Code violations
4 ..." (Stats. 2003, ch. 906, § 1). Accordingly, PAGA claims cannot be subject to arbitration.

5 26. PLAINTIFF, and such persons that may be added from time to time who satisfy
6 the requirements and exhaust the administrative procedures under the Private Attorney General
7 Act, brings this Representative Action on behalf of the State of California with respect to
8 themselves and all individuals who are or previously were employed by DEFENDANT and
9 classified as non-exempt employees in California during the time period of September 3, 2019
10 until the present (the "AGGRIEVED EMPLOYEES").

11 27. On September 3, 2020, PLAINTIFF gave written notice by certified mail to the
12 Labor and Workforce Development Agency (the "Agency") and the employer of the specific
13 provisions of this code alleged to have been violated as required by Labor Code § 2699.3. See
14 Exhibit #1, attached hereto and incorporated by this reference herein. The statutory waiting
15 period for PLAINTIFF to make these allegations in the Complaint has expired. As a result,
16 pursuant to Section 2699.3, PLAINTIFF may now commence a representative civil action under
17 PAGA pursuant to Section 2699 as the proxy of the State of California with respect to all
18 AGGRIEVED EMPLOYEES as herein defined.

19 28. The policies, acts and practices heretofore described were and are an unlawful
20 business act or practice because Defendant (a) failed to provide PLAINTIFF and other
21 AGGRIEVED EMPLOYEES legally required meal and rest breaks, (b) failed to separately
22 compensate employees for rest breaks, (c) failed to pay employees for all time worked, (d) failed
23 to pay employees overtime at the correct rate, (e) failed to provide accurate itemized wage
24 statements, (f) failed to reimburse employees for business expenses, and (g) failed to timely pay
25 wages, all in violation of the applicable Labor Code sections listed in Labor Code §2699.5,
26 including but not limited to Labor Code §§ 2201, 202, 203, 204 *et seq.*, 210, 226(a), 226.7, 351,
27 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations, Title 8,
28 Section 11040, Subdivision 5(A)-(B), California Code of Regulations, Title 8, Section 1 1070(14)
(Failure to Provide Seating), Violation of the applicable Industrial Welfare Commission Wage

1 Order(s), and thereby gives rise to statutory penalties as a result of such conduct. PLAINTIFFS
2 hereby seek recovery of civil penalties as prescribed by the Labor Code Private Attorney General
3 Act of 2004 as the representative of the State of California for the illegal conduct perpetrated on
4 PLAINTIFF and the other AGGRIEVED EMPLOYEES.

5 29. Some or all of the conduct and violations alleged herein occurred during the PAGA
6 PERIOD. To the extent that any of the conduct and violations alleged herein did not affect
7 PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those violations that
8 affected other AGGRIEVED EMPLOYEES. (Carrington v. Starbucks Corp. (2018) 30
9 Cal.App.5th 504, 519; See also Huff v. Securitas Security Services USA, Inc. (2018) 23 Cal. App.
10 5th 745, 751 [“PAGA allows an “aggrieved employee”—a person affected by at least one Labor
11 Code violation committed by an employer—to pursue penalties for all the Labor Code violations
12 committed by that employer.”], Emphasis added, reh'g denied (June 13, 2018).)

13
14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiffs pray for a judgment against each Defendants, jointly and
16 severally, as follows:

- 17 1. On behalf of the State of California and with respect to all AGGRIEVED
18 EMPLOYEES:
- 19 a. Recovery of civil penalties as prescribed by the Labor Code Private Attorneys
20 General Act of 2004; and
 - 21 b. An award of penalties, attorneys' fees and costs of suit, as allowable under the law.

22 DATED: November 25, 2020

23
24 **ZAKAY LAW GROUP, APLC**

25
26 By: 

27 Shari G. Zakay
28 Attorney for Plaintiff

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DEMAND FOR A JURY TRIAL

PLAINTIFF demands a jury trial on issues triable to a jury.

DATED: November 25, 2020

ZAKAY LAW GROUP, APLC

By: 
Shari O. Zakay
Attorney for Plaintiff

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EXHIBIT 1

BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP

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WRITERS E-MAIL:

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WRITERS EXT:

1004

September 3, 2020
CA2185

VIA ONLINE FILING TO LWDA AND CERTIFIED MAIL TO DEFENDANT

Labor and Workforce Development Agency
Online Filing

A.S.I. Hastings, Inc.
Certified Mail #70192970000014863432
Philip T. Justo
4870 Viewridge Avenue, Suite 200
San Diego, CA 92123

Re: Notice Of Violations Of California Labor Code Sections §§ 201, 202, 203, 204 *et seq.*, 210, 226(a), 226.7, 351, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations, Title 8, Section 11040, Subdivision 5(A)-(B), California Code of Regulations, Title 8, Section 11070(14) (Failure to Provide Seating), Violation of Applicable Industrial Welfare Commission Wage Order(s), and Pursuant To California Labor Code Section 2699.5.

Dear Sir/Madam:

“Aggrieved Employees” refers to all individuals who are or previously were employed by Defendant A.S.I. Hastings, Inc. in California and classified as non-exempt employees during the time period of September 3, 2019 until a date as determined by the Court. Our offices represent Plaintiff Trevor Wipf (“Plaintiff”), and other Aggrieved Employees in a lawsuit against Defendant A.S.I. Hastings, Inc. (“Defendant”). Plaintiff was employed by Defendant in California as a HVAC Installer from March of 2016 to June of 2020 as a non-exempt employee entitled to the legally required meal and rest breaks and payment for all time worked under Defendant’s control. Defendant, however, unlawfully failed to record and pay Plaintiff and other Aggrieved Employees for, including but not limited to, all of their time worked, including minimum and overtime wages, for all of their missed meal and rest breaks, and for all of their time spent working off the clock. Moreover, when Defendant required Plaintiff and Aggrieved Employees to report for work, but “furnished less than half said employee’s usual or scheduled day’s work,” Defendant violated Cal. Code Regs., tit. 8 § 11040, subd. 5(A) by failing to pay Plaintiff and Aggrieved Employees for at least two (2) hours’ worth of work at their regular rate of pay. In addition, when Defendant required Plaintiff and Aggrieved Employees to respond to and engage in additional work, this resulted in a second reporting for work in a single workday, and Defendant failed to pay these employees reporting time pay as required by Cal. Code Regs., tit. 8, § 11040, subd. 5(B). Further, Defendant failed to advise Plaintiff and the other

Aggrieved Employees of their right to take separately and hourly paid duty-free ten (10) minute rest periods. *See Vaquero v. Stoneledge Furniture, LLC*, 9 Cal. App. 5th 98, 110 (2017). Additionally, pursuant to Labor Code § 204 *et seq.*, Defendant failed to timely provide Plaintiff and other Aggrieved Employees with their wages. Plaintiff further contends that Defendant failed to provide accurate wage statements to him, and other Aggrieved Employees, in violation of California Labor Code section 226(a). Additionally, Plaintiff contends that Defendant failed to comply with Industrial Wage Order 7(A)(3) in that Defendant failed to keep time records showing when Plaintiff began and ended each shift and meal period. Plaintiff and other Aggrieved Employees perform tasks that reasonably permit sitting, and a seat would not interfere with their performance of any of their tasks that may require them to stand. Defendant fails to provide Plaintiff and other Aggrieved Employees with suitable seats. Said conduct, in addition to the foregoing, as well as the conduct alleged in the incorporated Complaint, violates Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 226(a), 226.7, 351, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations, Title 8, Section 11040, Subdivision 5(A)-(B), California Code of Regulations, Title 8, Section 11070(14) (Failure to Provide Seating), Violation of the applicable Industrial Welfare Commission Wage Order(s), and is therefore actionable under California Labor Code section 2699.3.

A true and correct copy of the Complaint by Plaintiff against Defendant, which (i) identifies the alleged violations, (ii) details the facts and theories which support the alleged violations, (iii) details the specific work performed by Plaintiff, (iii) sets forth the people/entities, dates, classifications, violations, events, and actions which are at issue to the extent known to Plaintiff, and (iv) sets forth the illegal practices used by Defendant, is attached hereto. This information provides notice to the Labor and Workforce Development Agency of the facts and theories supporting the alleged violations for the agency's reference. Plaintiff therefore incorporates the allegations of the attached Complaint into this letter as if fully set forth herein. If the agency needs any further information, please do not hesitate to ask.

This notice is provided to enable Plaintiff to proceed with the Complaint against Defendant as authorized by California Labor Code section 2699, *et seq.* The filing fee of \$75 is being mailed to the Department of Industrial Relations Accounting unit with an identification of the Plaintiff, the Defendant and the notice. The lawsuit consists of other Aggrieved Employees. As counsel, our intention is to vigorously prosecute the claims as alleged in the Complaint, and to procure civil penalties as provided by the Private Attorney General Statue of 2004 on behalf of Plaintiff and all Aggrieved Employees.

Your earliest response to this notice is appreciated. If you have any questions of concerns, please do not hesitate to contact me at the above number and address.

Respectfully,

/s/ Nicholas J. De Blouw

Nicholas J. De Blouw, Esq.