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12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **IN AND FOR THE COUNTY OF STANISLAUS**

14 CARLOS COUSINEAU, on behalf of the
15 State of California, as a private attorney
16 general,

17 Plaintiff,

18 vs.

19 GALLO GLASS COMPANY, a Corporation;
20 DOES 1 through 50, inclusive,

21 Defendants.

Case No. CV-21-006587

REPRESENTATIVE ACTION
COMPLAINT FOR:

1.Civil Penalties Pursuant to Labor Code §
2699, *et seq.* for violations of Labor Code
§§ 201, 202, 203, 204 *et seq.*, 210, 221,
226(a), 226.7, 227.3, 510, 512,
558(a)(1)(2), 1194, 1197, 1197.1, 1198,
2802, California Code of Regulations,
Title 8, Section 11040, Subdivision 5(A)-
(B)

This case has been assigned to Judge Freeland, John D.
Dept. 23
Department 23 for all purposes including Trial.

1 Plaintiff Carlos Cousineau ("PLAINTIFF") on behalf of the people of the State of
2 California and as an "aggrieved employee" acting as a private attorney general under the Labor
3 Code Private Attorney General Act of 2004, § 2699, *et seq.* ("PAGA") only, alleges on
4 information and belief, except for his own acts and knowledge which are based on personal
5 knowledge, the following:

6 INTRODUCTION

7 1. PLAINTIFF brings this action against Defendant Gallo Glass Company (referred
8 to as "DEFENDANT") seeking only to recover PAGA civil penalties for himself, and on behalf
9 of all current and former aggrieved employees that worked for DEFENDANT. PLAINTIFF
10 does **not seek to recover anything other than penalties as permitted by California Labor**
11 **Code § 2699**. To the extent that statutory violations are mentioned for wage violations,
12 PLAINTIFF does not seek underlying general and/or special damages for those violations, but
13 simply the civil penalties permitted by California Labor Code § 2699.

14 2. California has enacted the PAGA to permit an individual to bring an action on
15 behalf of himself and on behalf of others for PAGA penalties *only*, which is the precise and sole
16 nature of this action.

17 3. Accordingly, PLAINTIFF seeks to obtain all applicable relief for
18 DEFENDANT's violations under PAGA and solely for the relief as permitted by PAGA – that
19 is, penalties and any other relief the Court deems proper pursuant to the PAGA. Nothing in this
20 complaint should be construed as attempting to obtain any relief that would not be available in
21 a PAGA-only action.

22 THE PARTIES

23 4. Defendant Gallo Glass Company ("DEFENDANT") is a corporation that at all
24 relevant times mentioned herein conducted and continues to conduct substantial business in the
25 state of California.

26 5. DEFENDANT, established in 1958, is a glass manufacturer that operates a glass
27 plant in California.
28

1 6. PLAINTIFF was employed by DEFENDANT in California from 2006 to May of
2 2021 and was at all times classified by DEFENDANT as a non-exempt employee, paid on an
3 hourly basis, and entitled to the legally required meal and rest periods and payment of minimum
4 and overtime wages due for all time worked.

5 7. 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 himself and all individuals who are or previously were employed by DEFENDANT in
9 California and who were classified as non-exempt employees ("AGGRIEVED EMPLOYEES")
10 during the time period of September 23, 2020 until a date as determined by the Court (the
11 "PAGA PERIOD").

12 8. PLAINTIFF, on behalf of himself and all AGGRIEVED EMPLOYEES presently
13 or formerly employed by DEFENDANT during the PAGA PERIOD, brings this representative
14 action pursuant to Labor Code § 2699, *et seq.* seeking fixed civil penalties for DEFENDANT's
15 violation of California Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 221, 226(a), 226.7, 227.3,
16 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations, Title
17 8, Section 11040, Subdivision 5(A)-(B), and the applicable Wage Order(s). Based upon the
18 foregoing, PLAINTIFF and all AGGRIEVED EMPLOYEES are aggrieved employees within
19 the meaning of Labor Code § 2699, *et seq.*

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

10. The agents, servants and/or employees of the Defendants and each of them acting on behalf of the Defendants acted within the course and scope of his, her or its authority as the agent, servant and/or employee of the Defendants, and personally participated in the conduct alleged herein on behalf of the Defendants with respect to the conduct alleged herein. 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 EMPLOYEES, for the loss sustained as a proximate result of the conduct of the Defendants' agents, servants and/or employees.

THE CONDUCT

11. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT is required to pay PLAINTIFF and other AGGRIEVED EMPLOYEES for all their time worked, meaning the time during which an employee is subject to the control of an employer, including all the time the employee is suffered or permitted to work. DEFENDANT required PLAINTIFF and other AGGRIEVED EMPLOYEES to work from time to time while they were clocked out for what was supposed to be their off duty meal break. DEFENDANT required PLAINTIFF and other AGGRIEVED EMPLOYEES to work off the clock without paying them for all the time they performed duties while on their meal break, specifically by failing to provide enough labor hours to accomplish all the job tasks that DEFENDANT expected PLAINTIFF and other AGGRIEVED EMPLOYEES to complete on a daily and/or weekly basis. PLAINTIFF and other AGGRIEVED EMPLOYEES also worked off the clock with respect to time spent undergoing mandatory drug testing or any other testing and/or examination required as a condition of employment. Further, during the PAGA PERIOD, DEFENDANT required PLAINTIFF and other AGGRIEVED EMPLOYEES to wait in line and submit to mandatory temperature checks for COVID-19 screening and also complete a COVID-19 questionnaire regarding whether these employees had any symptoms prior to clocking into DEFENDANT's timekeeping system for the workday. Finally, PLAINTIFF and other AGGRIEVED EMPLOYEES from time to time were not paid wages for all time worked, including overtime

1 wages, such that in the aggregate employees were underpaid wages as a result of
2 DEFENDANT's pattern and practice of unevenly rounding time worked by its employees. As
3 a result, PLAINTIFF and other AGGRIEVED EMPLOYEES forfeited minimum wage and
4 overtime compensation by from time to time working without their time being accurately
5 recorded and without compensation at the applicable minimum wage and overtime rates.
6 DEFENDANT's policy and practice not to pay PLAINTIFF and other AGGRIEVED
7 EMPLOYEES for all time worked is evidenced by DEFENDANT's business records.

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

18 13. During the PAGA PERIOD, PLAINTIFF and other AGGRIEVED EMPLOYEES
19 were also required from time to time to work in excess of four (4) hours without being provided
20 ten (10) minute rest periods. Further, these employees were denied their first rest periods of at
21 least ten (10) minutes for some shifts worked of at least two (2) to four (4) hours from time to
22 time, a first and second rest period of at least ten (10) minutes for some shifts worked of
23 between six (6) and eight (8) hours from time to time, and a first, second and third rest period
24 of at least ten (10) minutes for some shifts worked of ten (10) hours or more from time to time.
25 PLAINTIFF and other AGGRIEVED EMPLOYEES were also not provided with one hour
26 wages in lieu thereof. As a result of their rigorous work schedules, PLAINTIFF and other
27 AGGRIEVED EMPLOYEES were from time to time denied their proper rest periods by
28 DEFENDANT and DEFENDANT's managers. Additionally, the applicable California Wage

1 Order requires employers to provide employees with off-duty rest periods, which the California
2 Supreme Court defined as time during which an employee is relieved from all work related
3 duties and free from employer control. In so doing, the Court held that the requirement under
4 California law that employers authorize and permit all employees to take rest period means that
5 employers must relieve employees of all duties and relinquish control over how employees
6 spend their time which includes control over the locations where employees may take their rest
7 period. Employers cannot impose controls that prohibit an employee from taking a brief walk -
8 five minutes out, five minutes back. Here, DEFENDANT's policy restricted PLAINTIFF and
9 other AGGRIEVED EMPLOYEES from unconstrained walks and was unlawful based on
10 Defendant's rule which stated PLAINTIFF and other AGGRIEVED EMPLOYEES could not
11 leave the work premises during their rest period.

12 14. State law provides that employees must be paid overtime and meal and rest break
13 premium pay at one-and-one-half times their "regular rate of pay." PLAINTIFF and other
14 AGGRIEVED EMPLOYEES were compensated at an hourly rate plus incentive pay that was
15 tied to specific elements of an employee's performance.

16 15. The second component of PLAINTIFF's and other AGGRIEVED EMPLOYEES'
17 compensation was DEFENDANT's non-discretionary incentive program that paid PLAINTIFF
18 and other AGGRIEVED EMPLOYEES incentive wages based on their performance for
19 DEFENDANT. The non-discretionary incentive program provided all employees paid on an
20 hourly basis with incentive compensation when the employees met the various performance
21 goals set by DEFENDANT. However, when calculating the regular rate of pay in order to pay
22 overtime and premiums for meal and rest break violations to PLAINTIFF and other
23 AGGRIEVED EMPLOYEES, DEFENDANT failed to include the incentive compensation as
24 part of the employees' "regular rate of pay" for purposes of calculating overtime pay and
25 premium pay for meal and rest break violations. Management and supervisors described the
26 incentive program to potential and new employees as part of the compensation package. As a
27 matter of law, the incentive compensation received by PLAINTIFF and other AGGRIEVED
28 EMPLOYEES must be included in the "regular rate of pay." The failure to do so has resulted

1 in an underpayment of overtime compensation and meal and rest break premium pay to
2 PLAINTIFF and other AGGRIEVED EMPLOYEES by DEFENDANT.

3 16. DEFENDANT also failed to provide PLAINTIFF and other AGGRIEVED
4 EMPLOYEES with complete and accurate wage statements which failed to show, among other
5 things, the correct gross and net wages earned. Cal. Lab. Code § 226 provides that every
6 employer shall furnish each of his or her employees with an accurate itemized wage statement
7 in writing showing, among other things, gross wages earned and all applicable hourly rates in
8 effect during the pay period and the corresponding amount of time worked at each hourly rate.
9 PLAINTIFF and other AGGRIEVED EMPLOYEES were from time to time paid on an hourly
10 basis. As such, the wage statements should reflect all applicable hourly rates during the pay
11 period and the total hours worked, and the applicable pay period in which the wages were
12 earned pursuant to California Labor Code Section 226(a)(2). The wage statements
13 DEFENDANT provided to PLAINTIFF and other AGGRIEVED EMPLOYEES failed to
14 identify such information. More specifically, the wage statements failed to identify the accurate
15 total hours worked each pay period. When the hours shown on the wage statements were added
16 up, they did not equal the actual total hours worked during the pay period in violation of Cal.
17 Lab. Code 226 (a)(2). Additionally, DEFENDANT violated Section 226(a)(9) by failing to
18 identify the correct rates of pay and number of hours worked, including for the “Retro Pay” and
19 “Shift Dif Prm” items of pay, which were wage payments. Aside, from the violations listed
20 above, DEFENDANT failed to issue to PLAINTIFF an itemized wage statement that lists all
21 the requirements under California Labor Code 226 *et seq.* As a result, DEFENDANT from time
22 to time provided PLAINTIFF and other AGGRIEVED EMPLOYEES with wage statements
23 which violated Cal. Lab. Code § 226.

24 17. Cal. Lab. Code § 204 provides that “[a]ll wages. . . earned by any person in any
25 employment are due and payable twice during each calendar month, on days designated in
26 advance by the employer as the regular paydays.” Further, Cal. Lab. Code § 204(d) expressly
27 requires employers to pay employees all wages owed within seven (7) days of the close of the
28 payroll period. DEFENDANT from time to time failed to pay PLAINTIFF and other

1 AGGRIEVED EMPLOYEES all wages owed to them within seven (7) days of the close of the
2 payroll period, including but not limited to for the “Retro Pay” regular wage payment.

3 18. Pursuant to Cal. Lab. Code Section 221, “It shall be unlawful for any employer
4 to collect or receive from an employee any part of wages theretofore paid by said employer to
5 said employee.” DEFENDANT failed to pay all compensation due to PLAINTIFF and other
6 AGGRIEVED EMPLOYEES, made unlawful deductions from compensation payable to
7 PLAINTIFF and other AGGRIEVED EMPLOYEES, failed to disclose all aspects of the
8 deductions from compensation payable to PLAINTIFF and other AGGRIEVED EMPLOYEES,
9 and thereby failed to pay these employees all wages due at each applicable pay period and upon
10 termination.

11 19. DEFENDANT underpaid sick pay wages to PLAINTIFF and other AGGRIEVED
12 EMPLOYEES by failing to pay such wages at the regular rate of pay in violation of Cal. Lab.
13 Code Section 246. Specifically, PLAINTIFF and other non-exempt employees earn non-
14 discretionary remuneration. Rather than pay sick pay at the regular rate of pay, DEFENDANT
15 underpaid sick pay to PLAINTIFF and other AGGRIEVED EMPLOYEES at their base rates
16 of pay.

17 20. Cal. Lab. Code Section 246(1)(2) requires that paid sick time for non-exempt
18 employees be calculated by dividing the employee’s total wages, not including overtime
19 premium pay, by the employee’s total hours worked in the full pay periods of the prior 90 days
20 of employment.

21 21. DEFENDANT violated Cal. Lab. Code Section 246 by failing to pay sick pay at
22 the regular rate of pay. PLAINTIFF and other AGGRIEVED EMPLOYEES routinely earned
23 non-discretionary incentive wages which increased their regular rate of pay. However, when
24 sick pay was paid, it was paid at the base rate of pay for PLAINTIFF and other AGGRIEVED
25 EMPLOYEES, as opposed to the correct, higher regular rate of pay, as required under Cal. Lab.
26 Code Section 246.

27 22. As a pattern and practice, DEFENDANT regularly failed to pay PLAINTIFF and
28 other AGGRIEVED EMPLOYEES their correct wages and accordingly owe waiting time

1 penalties pursuant to Cal. Lab. Code Section 203. Further, PLAINTIFF is informed and believes
2 and based thereon alleges that such failure to pay sick pay at regular rate was willful, such that
3 PLAINTIFF and other AGGRIEVED EMPLOYEES whose employment has separated are
4 entitled to waiting time penalties pursuant to Cal. Lab. Code Sections 201-203.

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

15 24. In the course of their employment PLAINTIFF and other AGGRIEVED
16 EMPLOYEES as a business expense, were required by DEFENDANT to use their own personal
17 cellular phones as a result of and in furtherance of their job duties as employees for
18 DEFENDANT but were not reimbursed or indemnified by DEFENDANT for the cost
19 associated with the use of their personal cellular phones for DEFENDANT's benefit.
20 Specifically, PLAINTIFF and other AGGRIEVED EMPLOYEES were required by
21 DEFENDANT to use their personal cellular phones to respond to managers while off the clock
22 (which also results in minimum wage and overtime violations). As a result, in the course of
23 their employment with DEFENDANT, PLAINTIFF and other AGGRIEVED EMPLOYEES
24 incurred unreimbursed business expenses which included, but were not limited to, costs related
25 to the use of their personal cellular phones all on behalf of and for the benefit of DEFENDANT.

26 25. In violation of the applicable sections of the California Labor Code and the
27 requirements of the Industrial Welfare Commission ("IWC") Wage Order, DEFENDANT as
28 a matter of company policy, practice and procedure, intentionally and knowingly failed to

1 compensate PLAINTIFF and other AGGRIEVED EMPLOYEES for missed meal and rest
2 periods. This policy and practice of DEFENDANT is intended to purposefully avoid the
3 payment for all time worked as required by California law which allows DEFENDANT to
4 illegally profit and gain an unfair advantage over competitors who complied with the law. To
5 the extent equitable tolling operates to toll claims by the AGGRIEVED EMPLOYEES against
6 DEFENDANT, the PAGA PERIOD should be adjusted accordingly.

7 26. By reason of this conduct applicable to PLAINTIFF and all AGGRIEVED
8 EMPLOYEES, DEFENDANT engaged in a company-wide policy and procedure which fails
9 to accurately calculate and record all missed meal and rest periods and failed to pay all
10 minimum and overtime wages due to PLAINTIFF and other AGGRIEVED EMPLOYEES. The
11 proper recording of these employees' missed meal and rest breaks is the DEFENDANT's
12 burden. As a result of DEFENDANT's intentional disregard of the obligation to meet this
13 burden, DEFENDANT fails to properly calculate and/or pay all required compensation for work
14 performed by the AGGRIEVED EMPLOYEES and violated the California Labor Code and
15 regulations promulgated thereunder as herein alleged.

16 27. All of the conduct and violations alleged herein occurred during the PAGA
17 PERIOD. To the extent that any of the conduct and violations alleged herein did not affect
18 PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those violations that
19 affected other AGGRIEVED EMPLOYEES pursuant to *Carrington v. Starbucks Corp.* 2018
20 AJDAR 12157 (Certified for Publication 12/19/18).

21 **JURISDICTION AND VENUE**

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

24 29. Venue is proper in this Court pursuant to California Code of Civil Procedure,
25 Sections 395 and 395.5, because PLAINTIFF worked in this County for DEFENDANT, resides
26 in this County, and DEFENDANT (i) currently maintains and at all relevant times maintained
27 offices and facilities in this County and/or conducts substantial business in this County, and (ii)
28

1 committed the wrongful conduct herein alleged in this County against PLAINTIFF and other
2 AGGRIEVED EMPLOYEES.

3 **FIRST CAUSE OF ACTION**

4 **For Violation of the Private Attorneys General Act**

5 **[Cal. Lab. Code §§ 2698, *et seq.*]**

6 **(By PLAINTIFF and Against All Defendants)**

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

9 31. PAGA is a mechanism by which the State of California itself can enforce state
10 labor laws through the employee suing under the PAGA who do so as the proxy or agent of
11 the state's labor law enforcement agencies. An action to recover civil penalties under
12 PAGA is fundamentally a law enforcement action designed to protect the public and not to
13 benefit private parties. The purpose of the PAGA is not to recover damages or restitution,
14 but to create a means of "deputizing" citizens as private attorneys general to enforce the
15 Labor Code. In enacting PAGA, the California Legislature specified that "it was ... in the
16 public interest to allow aggrieved employees, acting as private attorneys general to recover
17 civil penalties for Labor Code violations ..." Stats. 2003, ch. 906, § 1. Accordingly, PAGA
18 claims cannot be subject to arbitration.

19 32. PLAINTIFF, and such persons that may be added from time to time who
20 satisfy the requirements and exhaust the administrative procedures under the Private
21 Attorney General Act, brings this Representative Action on behalf of the State of California
22 with respect to himself and all individuals who are or previously were employed by
23 DEFENDANT in California and who were classified as non-exempt employees
24 ("AGGRIEVED EMPLOYEES") during the time period of September 23, 2020 until a date
25 as determined by the Court (the "PAGA AGGRIEVED EMPLOYEES").

26 33. On September 23, 2021, PLAINTIFF gave written notice by electronic mail to
27 the Labor and Workforce Development Agency (the "Agency") and by certified mail to the
28 employer of the specific provisions of this code alleged to have been violated as required by

1 Labor Code § 2699.3. The statutory waiting period for PLAINTIFF to add these allegations
2 to the Complaint has expired. As a result, pursuant to Section 2699.3, PLAINTIFF may now
3 commence a representative civil action under PAGA pursuant to Section 2699 as the proxy
4 of the State of California with respect to all AGGRIEVED EMPLOYEES as herein defined.

5 34. The policies, acts and practices heretofore described were and are an unlawful
6 business act or practice because DEFENDANT (a) failed to provide PLAINTIFF and the
7 other AGGRIEVED EMPLOYEES accurate itemized wage statements, (b) failed to properly
8 record and provide legally required meal and rest periods, (c) failed to pay minimum wages,
9 (d) failed to pay overtime and sick pay wages, (e) failed to reimburse employees for required
10 expenses, and (f) failed to provide wages when due, all in violation of the applicable Labor
11 Code sections listed in Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 221, 226(a), 226.7,
12 227.3, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of
13 Regulations, Title 8, Section 11040, Subdivision 5(A)-(B), and the applicable Wage
14 Order(s), and thereby gives rise to civil penalties as a result of such conduct.¹ PLAINTIFF
15 hereby seeks recovery of only civil penalties as prescribed by the Labor Code Private
16 Attorney General Act of 2004 as the representative of the State of California for the illegal
17 conduct perpetrated on PLAINTIFF and the other AGGRIEVED EMPLOYEES.

18
19 **PRAYER FOR RELIEF**

20 WHEREFORE, PLAINTIFF prays for judgment against each Defendant, jointly and
21 severally, as follows:

22 1. On behalf of the State of California and with respect to all AGGRIEVED
23 EMPLOYEES:

24 A) Recovery of civil penalties as prescribed by the Labor Code Private
25 Attorneys General Act of 2004; and,

26 B) An award of attorneys' fees and cost of suit, as allowable under the

27 ¹Plaintiff specifically excludes and/or does not allege any claims under California Labor
28 Code §558(a)(3).

1 law, including, but not limited to, pursuant to Labor Code §2699.

2 Dated: December 8, 2021 BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW
3 LLP

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5 By: /s/ Norman Blumenthal
6 Norman B. Blumenthal
7 Attorneys for Plaintiff
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