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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

JUL 06 2022

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

WILLIAM SJOMELING, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

CUMMINGS INDUSTRIES, INC., a California
Corporation; and DOES 1-50, inclusive.

Defendants.

CASE NO.: **CIV SB 2213873**

**CLASS AND PAGA REPRESENTATIVE
ACTION COMPLAINT:**

- (1) FAILURE TO PAY ALL MINIMUM WAGES;
- (2) FAILURE TO PAY ALL OVERTIME WAGES;
- (3) MEAL PERIOD VIOLATIONS;
- (4) REST PERIOD VIOLATIONS;
- (5) WAGE STATEMENT VIOLATIONS;
- (6) WAITING TIME PENALTIES;
- (7) FAILURE TO REIMBURSE NECESSARY BUSINESS EXPENSES;
- (8) UNFAIR COMPETITION; and
- (9) PENALTIES UNDER THE PRIVATE ATTORNEYS GENERAL ACT

DEMAND FOR JURY TRIAL

1 Plaintiff William Sjomeling (“Plaintiff”) on behalf of himself, and all other similarly situated
2 non-exempt employees, alleges and complains of Defendant Cummings Industries, Inc., and DOES
3 1 to 50 (collectively, “Defendants”) and each of them, as follows:

4 **INTRODUCTION**

5 1. Defendant Cummings Industries, Inc., dba North American Crane Co., is a provider of
6 crane systems, lifting devices, and maintenance and repairs services throughout California. Plaintiff
7 brings this class action against Defendant for alleged violations of the California Labor Code and
8 Business and Professions Code.

9 2. As set forth below, Plaintiff alleges that Defendants failed to pay for all hours worked
10 as a result of Defendants’ unlawful time rounding/ shaving policies and procedures which resulted in
11 a failure to pay for all hours worked. Plaintiff further alleges that Defendants’ meal and rest period
12 policies and practices failed to allow and permit non-exempt employees to take all compliant and
13 timely meal and rest periods or pay premium wages in lieu thereof. As a result, Plaintiff alleges that
14 Defendants failed to provide non-exempt employees with accurate written itemized wage statements
15 and failed to timely pay all final wages upon separation of employment. Finally, Plaintiff alleged that
16 Defendants uniformly failed to reimburse non-exempt employees for all necessary business expenses.
17 Based on these alleged Labor Code violations, Plaintiff now brings this class action and representative
18 action to recover unpaid wages, restitution, penalties, and other related relief on behalf of himself and
19 all others similarly situated non-exempt employees.

20 **JURISDICTION AND VENUE**

21 3. Plaintiff, on behalf of himself and all others similarly situated employees hereby brings
22 this class action for recovery of unpaid wages and penalties under California Labor Code §§ 201-
23 203, 204, 210, 226, 226(a), 226(e), 226.3, 226.7 510, 512, 516, 1194, 1197.1, 1199, 2800-2802, 2699
24 *et seq.*, and applicable Industrial Welfare Commission Wage Orders (“Wage Orders”), in addition to
25 seeking declaratory relief and restitution pursuant to California Business and Professions Code §
26 17200, *et seq.*

27 4. This class action is brought pursuant to California Code of Civil Procedure § 382.

28 5. This Court has jurisdiction over Defendants’ violations of the California Labor Code

and applicable Wage Orders because the amount in controversy exceeds this Court's jurisdictional minimum.

6. Venue is proper in this judicial district pursuant to California Code of Civil Procedure §§ 395(a) and 395.5, Defendants operate a large facility on 2041 E. Locust Court, in the city of Ontario within the County of San Bernardino, and/or otherwise are found within the County of San Bernardino, and Defendants are within the jurisdiction of this Court for purposes of service of process.

PARTIES

7. At all relevant times herein, Plaintiff, who is over the age of 18, was and currently is a California resident residing in the State of California. Defendants employed Plaintiff as a non-exempt employee with the title of “Crane Technician” in Ontario, California in the County of San Bernardino.

8. Plaintiff is informed and believes and thereon alleges that Defendant Cummings Industries, Inc., dba North American Crane Co. is a California corporation authorized to and doing business in Ontario, California, and is and/or was the legal employer of Plaintiff and the Class Members during the applicable statutory periods. Plaintiff was, and is, a victim of Defendants' policies and/or practices complained of herein and has been deprived of the rights guaranteed to him by California Labor Code §§ 201-203, 204, 210, 226, 226(a), 226(e), 226.3, 226.7, 510, 512, 516, 1194, 1197.1, 1199, 2800-2802. and the California Business and Professions Code § 17200 *et seq.*, and applicable Wage Orders.

9. Plaintiff is informed and believes, and based thereon alleges, that during the four years preceding the filing of the Complaint and continuing to the present, Defendants did (and continue to do) business in the State of California, County of San Joaquin.

10. Plaintiff does not know the true names or capacities, whether individual, partner, or corporate, of the defendants sued herein as DOES 1 to 50, inclusive, and for that reason, said Defendants are sued under such fictitious names, and Plaintiff will seek leave from this Court to amend this Complaint when such true names and capacities are discovered. Plaintiff is informed, and believes, and thereon alleges, that each of said fictitious defendants, whether individual, partners, or corporate, were responsible in some manner for the acts and omissions alleged herein, and

1 proximately caused Plaintiff and the Classes to be subject to the unlawful employment practices
2 alleged herein.

3 11. Plaintiff is informed, and believes, and thereon alleges, that at all times mentioned
4 herein, Defendants were and are the employers of Plaintiff and all members of the Classes. At all
5 times herein mentioned, each of said Defendants participated in the doing of the acts hereinafter
6 alleged to have been done by the named Defendants; and furthermore, the Defendants, and each of
7 them, were the agents, servants, and employees of each and every one of the other Defendants, as
8 well as the agents of all Defendants, and at all times herein mentioned were acting within the course
9 and scope of said agency and employment. Defendants, and each of them, approved of, condoned,
10 and/or otherwise ratified each and every one of the acts or omissions complained of herein.

11 12. At all times mentioned herein, Defendants, and each of them, were members of and
12 engaged in a joint venture, partnership, and common enterprise, and acting within the course and
13 scope of and in pursuance of said joint venture, partnership, and common enterprise. Further, Plaintiff
14 alleges that all Defendants were joint employers for all purposes of Plaintiff and all members of the
15 Classes.

16 **COMMON FACTUAL ALLEGATIONS**

17 13. Defendants are a provider of crane systems, lifting devices, and maintenance and
18 repairs services throughout California. Plaintiff was employed by Defendants as a non-exempt
19 employee with the title of “Crane Technician” out of its Ontario, California location. Plaintiff began
20 working for Defendants on approximately February 2022, until his separation from employment on
21 or about April 29, 2022. Plaintiff and other non-exempt employees (including, but not limited to
22 technicians, warehouse operators, service administrators, and all other non-exempt positions) were
23 responsible for all aspects of Defendants’ business in California.

24 14. First, at all relevant times, Defendants have had a consistent policy/practice of unfairly
25 rounding/shaving Plaintiff’s and other non-exempt employees’ time entries, resulting in a failure to
26 pay all hours worked. As a result of this practice, Plaintiff and other non-exempt employees are not
27 compensated for all minimum wages and all of the overtime wages in violation of Labor Code §§
28 204, 510, 1194, 1197.1, 1199, and applicable Wage Orders.

1 15. The Court in *See's Candy Shops v. Superior Court* (2012) 210 Cal.App.4th 889, 907,
2 held that rounding time policies can be lawful, "if the rounding policy is fair and neutral on its face
3 and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate
4 the employees properly for all the time they have actually worked,' (29 C.F.R. § 785.48; see DLSE
5 Manual, *supra*, §§ 47.1, 47.2.)"

6 16. Here, Defendants' time rounding policy/practice is not neutral on its face or in its
7 application as Plaintiff and other non-exempt employees are subject to discipline, including
8 termination for being tardy in reporting to work, or returning from a meal or rest period. Moreover,
9 because Defendants are capable of tracking the exact time worked by non-exempt employees to the
10 minute, the policy itself exists not for the convenience or benefit of the non-exempt employees who
11 report to work early and try to report their time on timecards accurately, but for Defendants' benefit.
12 As a result, the policy is not neutral on its face, and over a period of time, Plaintiff and other non-
13 exempt employees were not properly paid for all hours worked in violation of Cal. Labor Code §§
14 204, 510, 1194, 1197.1, 1199, and applicable Wage Orders.

15 17. Labor Code § 1197.1 authorizes employees who are paid less than the minimum fixed
16 by an applicable state or local law, or by an order of the commission a civil penalty, restitution of
17 wages, and liquidate damages as follows: (1) for any initial violation that is intentionally committed,
18 one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee
19 is underpaid....[and] (2) [f]or each subsequent violation for the same specific offense, two hundred
20 fifty dollars (\$250) for each underpaid employee for each pay period for which the employee is
21 underpaid regardless of whether the initial violation is intentionally committed.

22 18. Labor Code § 510 requires an employer to compensate an employee who works more
23 than eight (8) hours in one workday, forty (40) hours in a workweek, and for the first eight (8) hours
24 worked on the seventh consecutive day, no less than one and one-half times (1 1/2) the regular rate of
25 pay. In addition, Labor Code § 510 obligates employers to compensate employees at no less than
26 twice the regular rate of pay when an employee works more than twelve (12) hours in a workday or
27 more than eight (8) hours on the seventh consecutive day of work. Pursuant to Section 3 of the
28 applicable Wage Orders, non-exempt employees shall not be employed more than eight (8) hours in

1 any workday or more than 40 hours in any workweek unless the employee receives one and one-half
2 (1 1/2) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek.

3 19. By their policy of requiring Plaintiff and the other non-exempt employees to work in
4 excess of eight (8) hours in a workday and/or forty (40) hours in a workweek without compensating
5 them at the lawful rate of one-half (1 1/2) their regular rate of pay, Defendants willfully violated the
6 provisions of Labor Code § 510 and the applicable Wage Orders.

7 20. As set forth above, Defendants failed to compensate Plaintiff and other non-exempt
8 employees for all hours worked, including all minimum and overtime wages, by failing to properly
9 record non-exempt employees' hours worked by unevenly rounding/shaving non-exempt employees'
10 time entries. Accordingly, to the extent permitted by law, Plaintiff and other non-exempt employees
11 are entitled to recover civil penalties for violations of §§ 204, 510, 1194, 1199, and pursuant to Labor
12 Code § 1197.1.

13 21. Furthermore, at all relevant times, Plaintiff and other non-exempt employees were
14 denied compliant and timely 30-minute off-duty meal periods as mandated by California law. Despite
15 Defendants' alleged meal period policy, due to the work demand and operational requirements,
16 Plaintiff and other non-exempt employees were unable to take timely and uninterrupted 30-minute
17 first meal periods before the end of the fifth hour of work. Similarly, when Plaintiff and other non-
18 exempt employees worked in excess of 10.0 hours in a shift, they were not always allowed and
19 permitted to take a mandated second meal period before the end of the tenth hour of work in violation
20 of the Labor Code and applicable Wage Orders.

21 22. Additionally, for each missed or non-compliant meal period, Defendants failed to
22 maintain a mechanism by which non-exempt employees were paid meal period premiums at the
23 "regular rate of pay" pursuant to *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 5th 858 and Labor
24 Code § 226.7.

25 23. Accordingly, due to Defendants' uniform meal period policies/practices, Plaintiff and
26 other non-exempt employees were also regularly denied legally compliant meal periods in violation
27 of Labor Code 226.7, 510, 516, and applicable IWC Wage Orders.

1 24. Moreover, at all relevant times, despite Defendants’ alleged rest period policy, Plaintiff
2 and other non-exempt employees were also not provided with all 10-minute rest periods for every
3 four hours worked, or major fraction thereof due to Defendants’ uniform operational requirements
4 and work demands. As a result, Plaintiff and other non-exempt employees were and are routinely
5 unable to take a net 10-minute duty free rest periods for every major fraction of four hours worked.
6 This includes a second rest period for shifts in excess of six hours, and a third rest period for shifts in
7 excess of 10 hours in a workday.

8 25. By not relieving all non-exempt employees of all duties during rest periods, Defendants
9 failed to provide legally compliant rest periods. See *Augustus v. ABM Security Services, Inc.* (2016)
10 2 Cal. 5th 257, 269 [concluding that “during rest periods employers must relieve employees of all
11 duties and relinquish control over how employees spend their time.”]. In *Augustus*, the California
12 Supreme Court expressly rejected the employers’ assertion that it could provide an on-duty rest period
13 to employees who worked as security guards and further explained “that employers [must] relinquish
14 any control over how employees spend their break time and relieve their employees of all duties.” *Id.*
15 at 273.

16 26. Each time Plaintiff and other non-exempt employees were unable to take a compliant
17 rest period, Defendants failed and continue to fail to adequately pay rest period premium payments
18 at the “regular rate of pay” as required by Labor Code § 226.7.

19 27. Accordingly, due to Defendants’ uniform rest period policies/practices and work
20 demands/operational requirements, Plaintiff and other non-exempt employees were regularly denied
21 legally compliant rest breaks in violation of Labor Code §§ 226.7, 512, and applicable Wage Orders.

22 28. As a result of Defendants’ failure to pay Plaintiff and other non-exempt employees for
23 all hours they were subject to the control of Defendants, including all minimum and overtime wages,
24 and Defendants’ failure to pay for meal and rest period premiums at the “regular rate of pay”,
25 Defendants issued wage statements which failed to accurately identify the gross wages earned, the
26 total hours worked, the net wages earned, and the correct corresponding number of hours worked at
27 each hourly rate, in violation of Labor Code § 226(a)(1, 2, 5, and 9).

29. Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the required in subdivision (a) of Section 226.”

30. As such, the wage statements Defendants issued to Plaintiff and other non-exempt employees are in violation of Labor Code § 226(a). Consequently, because Defendants failed to comply with Labor Code § 226(a), Plaintiff and other non-exempt employees would be entitled to recover penalties under Labor Code §§ 226(e)

31. Moreover, as a result of Defendants' failure to pay all minimum and overtime wages, and meal and rest period premiums at the "regular rate of pay", Defendants also failed and continue to fail to pay non-exempt employees all wages owed at their time of separation from employment in violation of Labor Code §§ 201-203. Thus, non-exempt employees would be entitled to recover penalties under Labor Code §§ 201-203.

32. Finally, at all relevant times, Defendants required Plaintiff and other non-exempt employees to incur necessary business expenses, including but not limited to, costs associated with driving their personal vehicles and using their personal cell phones for work related purposes, but did not reimburse non-exempt employees for these necessary expenses. (See *Cochran v. Schwan's Home Service, Inc.*, (2014) 228 Cal.App.4th 1137, 1144 [“[i]f an employee is required to make work-related calls on a personal cell phone, then he or she is incurring an expense for the purposes of section 2802...To show liability under section 2802, an employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed”].) Defendants’ uniform failure to reimburse Plaintiff and other non-exempt employees for their on-going business expenses incurred in their discharge of their duties continues through the present day. Indeed, any reimbursement is absent from Plaintiff’s wage statements during his employment.

CLASS ACTION ALLEGATIONS

33. Plaintiff brings this action on behalf of himself and the following Classes pursuant to § 382 of the Code of Civil Procedure:

1 All non-exempt employees who work or worked for Defendants in
2 California, during the four years immediately preceding the filing of the
Complaint through the date of trial. ("Class");

3 All non-exempt employees who worked for Defendants in California and
4 who worked overtime hours during at least one shift, during the four years
5 immediately preceding the filing of the Complaint through the date of trial.
("Overtime Subclass");

6 All employees who work or worked for Defendants in California, during
7 the one year immediately preceding the filing of the Complaint through the
8 date of trial. ("Wage Statement Subclass")

9 All employees who work or worked for Defendants in California, and who
10 left their employ during the three years immediately preceding the filing of
the Complaint through the date of trial. ("Waiting Time Penalty Subclass")

11 (collectively "the Classes")

12 34. **Numerosity/Ascertainability:** The members of the Classes are so numerous that
13 joinder of all members would be unfeasible and not practicable. The membership of the Classes is
14 unknown to Plaintiff at this time; however, it is estimated that the Classes consist of at least one
15 hundred (100) individuals. The identity of such membership is readily ascertainable via inspection of
16 Defendants' employment and payroll records.

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

21 1. Whether Defendants' timekeeping policies/practices resulted in a failure to pay for all
22 hours worked to the members of the Class;

23 2. Whether Defendants provided legally compliant meal and rest periods or proper
24 compensation at the "regular rate of pay" in lieu thereof to members of the Class;

25 3. Whether Defendants furnished legally compliant wage statements to members of the
26 Wage Statement Subclass pursuant to Labor Code § 226(a); and

27 4. Whether the timing and amount of payment of final wages to members of the Waiting
28 Time Penalty Subclass at the time of separation from employment were unlawful; and

1 5. Whether Defendants reimbursed all necessary business expenses to members of the
2 Class in violation of Labor Code § 2800 et seq.

3 36. **Predominance of Common Questions:** Common questions of law and fact
4 predominate over questions that affect only individual members of the Classes. The common
5 questions of law set forth above are numerous and substantial and stem from Defendants' policies
6 and/or practices applicable to each individual class member, such as Defendants' failure to pay for
7 all hours worked due to their rounding/time shaving policies and practices, Defendants' failure to
8 provide all compliant meal and rest periods or adequate compensation at the "regular rate of pay" in
9 lieu thereof, Defendants' resulting failure to provide accurate itemized wage statements, Defendants'
10 failure to reimburse necessary business expenses, and to pay for all wages due upon separation of
11 employment. As such, the common questions predominate over individual questions concerning each
12 individual class member's showing as to his or her eligibility for recovery or as to the amount of his
13 or her damages.

14 37. **Typicality:** The claims of Plaintiff are typical of the claims of the Classes because
15 Plaintiff was employed by Defendants as a non-exempt employee in California during the statute(s)
16 of limitation applicable to each cause of action pled in the Complaint in this action. As alleged herein,
17 Plaintiff, like the members of the Classes was deprived of minimum and overtime wages, was
18 deprived of meal and rest period premium wages, was subject to Defendants' uniform meal and rest
19 period policies/practices, was not provided accurate itemized wage statements, was not reimbursed
20 necessary business expenses, and was not timely paid all wages owed upon separation of
21 employment.

22 38. **Adequacy of Representation:** Plaintiff is fully prepared to take all necessary steps to
23 represent fairly and adequately the interests of the members of the Classes. Moreover, Plaintiff's
24 attorneys are ready, willing and able to fully and adequately represent the members of the Classes.
25 Plaintiff's attorneys have prosecuted and are actively litigating several wage-and-hour class actions
26 in state and federal courts and are committed to vigorously prosecuting this action on behalf of the
27 members of the Classes.

39. **Superiority:** The California Labor Code is broadly remedial in nature and serves an important public interest in establishing minimum working conditions and standards in California. These laws and labor standards protect the average working employee from exploitation by employers who have the responsibility to follow the laws and who may seek to take advantage of superior economic and bargaining power in setting onerous terms and conditions of employment. The nature of this action and the format of laws available to Plaintiff and members of the Classes make the class action format a particularly efficient and appropriate procedure to redress the violations alleged herein. If each employee were required to file an individual lawsuit, Defendants would necessarily gain an unconscionable advantage since they would be able to exploit and overwhelm the limited resources of each individual plaintiff with their vastly superior financial and legal resources.

40. Moreover, requiring each member of the Classes to pursue an individual remedy would also discourage the assertion of lawful claims by employees who would be disinclined to file an action against their former and/or current employer for real and justifiable fear of retaliation and permanent damages to their careers at subsequent employment. Further, the prosecution of separate actions by the individual class members, even if possible, would create a substantial risk of inconsistent or varying verdicts or adjudications with respect to the individual class members against Defendants herein; and which would establish potentially incompatible standards of conduct for Defendants; and/or legal determinations with respect to individual class members which would, as a practical matter, be dispositive of the interest of the other class members not parties to adjudications or which would substantially impair or impede the ability of the class members to protect their interests. Further, the claims of the individual members of the class are not sufficiently large to warrant vigorous individual prosecution considering all of the concomitant costs and expenses attending thereto. As such, the Classes identified in Paragraph 33 are maintainable as Classes under § 382 of the Code of Civil Procedure.

FIRST CAUSE OF ACTION

MINIMUM WAGE VIOLATIONS

(AGAINST ALL DEFENDANTS)

41. Plaintiff re-alleges and incorporates by reference all previous paragraphs.

1 42. Section 4 of the applicable Wage Orders and California Labor Code §§ 1197 and
2 1182.12 establish the right of employees to be paid minimum wages for all hours worked, in amounts
3 set by state law. Labor Code §§ 1194(a) and 1194.2(a) provide that an employee who has not been
4 paid the legal minimum wage as required by Labor Code § 1197 may recover the unpaid balance
5 together with attorneys' fees and costs of suit, as well as liquidated damages in an amount equal to
6 the unpaid wages and interest accrued thereon.

7 43. At all relevant times herein, Defendants failed to conform their pay practices to the
8 requirements of the law. This unlawful conduct includes but is not limited to Defendants'
9 rounding/time shaving policy/practice, which resulted in these individuals not being paid for all hours
10 actually worked. Accordingly, Plaintiff and members of the Classes were not compensated for all
11 hours worked including, but not limited to, all hours they were subject to the control of Defendants
12 and/or suffered or permitted to work under the California Labor Code and applicable Wage Orders.

13 44. Labor Code § 1198 makes unlawful the employment of an employee under conditions
14 that the IWC prohibits. California Labor Code §§ 1194(a) and 1194.2(a) provide that an employer
15 who has failed to pay its employees the legal minimum wage is liable to pay those employees the
16 unpaid balance of the unpaid wages as well as liquidated damages in an amount equal to the wages
17 due and interest thereon.

18 45. As a direct and proximate result of Defendants' unlawful conduct as alleged herein,
19 Plaintiff and the Classes have sustained economic damages, including but not limited to unpaid wages
20 and lost interest, in an amount to be established at trial, and they are entitled to recover economic and
21 statutory damages and penalties and other appropriate relief as a result of Defendants' violations of
22 the California Labor Code and applicable Wage Orders.

23 46. Defendants' practice and uniform administration of corporate policy regarding illegal
24 employee compensation is unlawful and creates an entitlement to recovery by Plaintiff and members
25 of the Classes in a civil action for the unpaid amount of minimum wages, liquidated damages,
26 including interest thereon, statutory penalties, attorney's fees, and costs of suit according to Labor
27 Code §§ 204, 558, 1194 *et seq.*, 1197, 1198, and Code of Civil Procedure § 1021.5.

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1 **SECOND CAUSE OF ACTION**

2 **FAILURE TO PAY ALL OVERTIME WAGES**

3 **(AGAINST ALL DEFENDANTS)**

4 47. Plaintiff re-alleges and incorporates by reference all previous paragraphs.

5 48. This cause of action is brought pursuant to Labor Code §§ 204, 210, 510, 558, 1194,
6 and 1198, which provide that non-exempt employees are entitled to overtime wages for all overtime
7 hours worked and provide a private right of action for the failure to pay all overtime compensation
8 for overtime work performed.

9 49. At all times relevant herein, Defendants were required to properly pay Plaintiff and
10 members of the Overtime Subclass for all overtime hours worked pursuant to California Labor Code
11 § 1194 and the applicable Wage Orders.

12 50. Section 3 of the applicable Wage Order requires an employer to pay an employee “one
13 and one-half (1 1/2) times the employee’s regular rate of pay” for work in excess of 8 hours per
14 workday and/or in excess of 40 hours of work in the workweek. The same section also requires an
15 employer to pay an employee double the employee’s regular rate of pay for work in excess of twelve
16 hours each workday and/or for work in excess of 8 hours on the seventh consecutive day of work in
17 the workweek. Defendants caused Plaintiff to work overtime and hours but did not compensate
18 Plaintiff or members of the Overtime Subclass at one and one-half times their regular rate of pay for
19 such hours.

20 51. Defendants failed to conform their pay practices to the requirements of the law. This
21 unlawful conduct includes but is not limited to Defendants’ rounding/time shaving policy/practice,
22 which resulted in Plaintiff and the Overtime Subclass not being paid all overtime wages owed.

23 52. The foregoing policies and practices are unlawful and create entitlement to recovery
24 by Plaintiff and the members of the Overtime Subclass in a civil action for the unpaid amount of
25 overtime wages, including interest thereon, statutory penalties, attorney’s fees, and costs of suit
26 according to Labor Code §§ 204, 210, 510, 1194, and 1198, the applicable Wage Orders, and Code
27 of Civil Procedure § 1021.5.

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1 **THIRD CAUSE OF ACTION**

2 **MEAL PERIOD VIOLATIONS**

3 **(AGAINST ALL DEFENDANTS)**

4 53. Plaintiff re-alleges and incorporates by reference all previous paragraphs.

5 54. Plaintiff is informed and believes, and based thereon alleges, that Defendants failed in
6 their affirmative obligation to provide all of their hourly non-exempt employees, including Plaintiff
7 and members of the Class, with all required meal periods in accordance with the mandates of the
8 California Labor Code and applicable Wage Orders, for the reasons set forth in the Common
9 Allegations section of this Complaint.

10 55. Despite Defendants' violations, Defendants have not paid an additional hour of pay at
11 the "regular rate of pay" to Plaintiff and members of the Class at their respective regular rates of pay
12 for each violation, in accordance with California Labor Code § 226.7.

13 56. As a result, Defendants are responsible for paying premium compensation for meal
14 period violations, including interest thereon, statutory penalties, and costs of suit pursuant to the
15 applicable Wage Orders, Labor Code §§ 226.7, 512, and Civil Code §§ 3287(b) and 3289.

16 **FOURTH CAUSE OF ACTION**

17 **REST PERIOD VIOLATIONS**

18 **(AGAINST ALL DEFENDANTS)**

19 57. Plaintiff re-alleges and incorporates by reference all previous paragraphs.

20 58. Section 12 of the applicable Wage Orders and Labor Code §§ 226.7 and 516 establish
21 the right of non-exempt employees to be provided with a rest period of at least ten (10) minutes for
22 each four (4) hour period worked, or major fraction thereof.

23 59. Due to their unlawful rest period policy/practices and operational requirements/work
24 demands, Defendants did not authorize and permit Plaintiff and members of the Class to take all rest
25 periods to which they were legally entitled.

26 60. Despite Defendants' violations, Defendants have not paid an additional hour of pay at
27 the "regular rate of pay" to Plaintiff and members of the Class at their respective regular rates of pay
28 for each violation, in accordance with California Labor Code § 226.7.

61. The foregoing violations create an entitlement to recovery by Plaintiff and members of the Class in a civil action for the unpaid amount of rest period premiums owing, including interest thereon, statutory penalties, and costs of suit pursuant to the applicable Wage Orders, Labor Code §§ 226.7 and 516, and Civil Code §§ 3287(b) and 3289.

FIFTH CAUSE OF ACTION

FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS

(AGAINST ALL DEFENDANTS)

62. Plaintiff re-alleges and incorporates by reference all previous paragraphs.

63. Labor Code 226(a) states in pertinent part the following:

“(a) An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee’s wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.”

64. As set forth above, during the Class Period, Defendants issued and continue to issue wage statements to its employees including Plaintiff and members of the Wage Statement Subclass, which are inadequate under Labor Code Section 226(a).

65. As a result of Defendants failure to pay Plaintiff and the Wage Statement Subclass for all regular and overtime wages, and missed meal and rest period premiums at the appropriate legal rate, Defendants failed to include required information on Plaintiff and the Wage Statement Subclass' wage statements, including, but not limited to, the gross wages earned, the net wages earned in violation of Labor Code section 226(a)(1,2,5, and 9).

66. Defendants' failure to comply with section 226(a) of the Labor Code was knowing and intentional.

67. As a result of Defendants' issuance of inaccurate itemized wage statements to Plaintiff and members of the Wage Statement Subclass in violation of section 226(a) of the California Labor Code, Plaintiff and members of the Wage Statement Subclass are each entitled to recover an initial penalty of \$50, and subsequent penalties of \$100, up to an amount not exceeding an aggregate penalty of \$4,000 per Plaintiff and per every member of the Wage Statement Subclass from Defendants pursuant to section 226(e) of the Labor Code, costs and reasonable attorneys' fees.

SIXTH CAUSE OF ACTION

WAITING TIME PENALTIES

(AGAINST ALL DEFENDANTS)

68. Plaintiff re-alleges and incorporates by reference all previous paragraphs.

69. The actionable period for this cause of action is three years prior to the filing of this Complaint through the present, and on-going until the violation is corrected or the class is certified.

70. Labor Code §§ 201 and 202 require Defendants to pay all compensation due and owing to Plaintiff and the Waiting Time Subclass during the actionable period for this cause of action at or around the time that their employment is or was terminated or ended.

71. Labor Code § 203 provides that if an employer willfully fails to pay compensation promptly upon discharge or resignation, as required by Labor Code sections 201 and 202, then the employer is liable for penalties in the form of continued compensation up to thirty (30) workdays.

72. Defendants willfully failed to pay the Waiting Time Subclass for all hours worked, including all minimum and overtime wages, and their meal and rest period premiums at the “regular rate of pay”, prior to or upon termination or separation from employment with Defendants as required by Labor Code §§ 201 and 202.

73. As a result, Defendants are liable to the Waiting Time Subclass for waiting time penalties amounting to thirty (30) days wages for Plaintiff and the Waiting Time Subclass pursuant to Labor Code § 203. *See, e.g.,* DLSE Manual, 4.3.4 (Failure to pay any sort of wages due upon termination entitles an employee to recover waiting time penalties).

1 **SEVENTH CAUSE OF ACTION**

2 **FAILURE TO REIMBURSE NECESSARY BUSINESS EXPENSES**

3 **(AGAINST ALL DEFENDANTS)**

4 74. Plaintiff re-alleges and incorporates by reference all previous paragraphs.

5 75. Labor Code 2802(a) states in pertinent part the following:

6 “(a) An employer shall indemnify his or her employee for all necessary
7 expenditures or losses incurred by the employee in direct consequence
8 of the discharge of his or her duties, or of his or her obedience to the
9 directions of the employer, even though unlawful, unless the employee,
at the time of obeying the directions, believed them to be unlawful.”

10 76. As set forth above, Plaintiff and members of the Class must be compensated for all
11 necessary business expenditures, including, but not limited to, costs associated with driving their
12 personal vehicles and using their personal cell phones for work related purposes, and other business
13 expenses and charges necessarily incurred in their discharge of their duties. (See *Cochran v. Schwan’s*
14 *Home Service, Inc.* (2014) 228 Cal.App.4th 1137 (“We hold that when employees must use their
15 personal cell phones for work-related calls, Labor Code section 2802 requires the employer to
16 reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited
17 minutes, the reimbursement owed is a reasonable percentage of their cell phone bills.”); *Aguilar v.*
18 *Zep, Inc.*, 2014 WL 4245988 *17 (N.D. Cal. 2014) (granting Plaintiff’s motion for partial summary
19 judgment on Plaintiff’s cell phone reimbursement claim); *Ritchie v. Blue Shield of California*, 2014
20 WL 6982943, at *21 (N.D. Cal. 2014) (certifying class of cell phone reimbursement claim and
21 adopting the logic of *Cochran*).

22 77. At all relevant times, by failing to reimburse Plaintiff and the Class for all necessary
23 business expenditures, Defendants have failed to comply with Labor Code Section 2802 and the
24 applicable Wage Orders.

25 **EIGHTH CAUSE OF ACTION**

26 **UNFAIR COMPETITION**

27 **(AGAINST ALL DEFENDANTS)**

28 78. Plaintiff re-alleges and incorporates by reference all previous paragraphs.

79. Defendants have engaged and continue to engage in unfair and/or unlawful business practices in California in violation of California Business and Professions Code § 17200 *et seq.*, by failing to pay for all hours worked including minimum and overtime wages, by failing to provide all legally required meal and rest periods or pay premium payments at the regular rate of pay in lieu thereof, by failing to provide accurate wage statements, failing to reimburse necessary business expenses, and by failing to pay all earned wages at the time of separation from employment.

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

81. Because Plaintiff is a victim of Defendants' unfair and/or unlawful conduct alleged herein, Plaintiff for himself and on behalf of the members of the Classes, seeks full restitution of monies, as necessary and according to proof, to restore any and all monies withheld, acquired and/or converted by Defendants pursuant to Business and Professions Code §§ 17203 and 17208.

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

83. Plaintiff was compelled to retain the services of counsel to file this court action to protect his interests and those of the Classes, to obtain restitution and injunctive relief on behalf of Defendants' current hourly non-exempt employees and to enforce important rights affecting the public interest. Plaintiff has thereby incurred the financial burden of attorneys' fees and costs, which he is entitled to recover under Code of Civil Procedure § 1021.5.

NINTH CAUSE OF ACTION

PRIVATE ATTORNEYS GENERAL ACT

(AGAINST ALL DEFENDANTS)

84. Plaintiff incorporates the preceding paragraphs of the Class and Representative Action Complaint as if fully alleged herein.

1 85. Defendants have committed several Labor Code violations against Plaintiff and other
2 similarly aggrieved employees. Plaintiff, an “aggrieved employee” within the meaning of Labor
3 Code § 2698 *et seq.*, acting on behalf of himself and other similarly aggrieved employees, brings
4 this representative action against Defendants to recover the civil penalties due to Plaintiff, other
5 similarly aggrieved employees, and the State of California according to proof pursuant to Labor
6 Code § 2699 (a) and (f) including, but not limited to (1) \$100 for each initial violation and (2) \$200
7 for each subsequent violation per employee per pay period for those violations of the Labor Code
8 for which no civil penalty is specifically provided based on the following Labor Code violations:

9 a. Failing to pay Plaintiff and other similarly aggrieved employees for all hours worked,
10 including all minimum and overtime wages in violation of Labor Code §§ 204, 510, 1194, 1197,
11 1198, and 1182.12;

12 b. Failing to provide Plaintiff and other similarly aggrieved employees with all of their
13 statutorily mandated meal periods or compensation in lieu thereof at the “regular rate of pay” in
14 violation of Labor Code §§ 204, 510, 558, 1194 and 1198;

15 c. Failing to authorize and permit Plaintiff and other similarly aggrieved employees
16 with all of their statutorily mandated rest periods or compensation in lieu thereof at the “regular rate
17 of pay” in violation of Labor Code §§ 226.7, and 516;

18 d. Failing to furnish Plaintiff and other similarly situated employees with complete,
19 accurate, itemized wage statements in violations of Labor Code § 226;

20 e. Failing to timely compensate Plaintiff and similarly aggrieved employees with all
21 earnings at their separation of employment in violation of Labor Code §§ 201-203;

22 f. Failing to reimburse Plaintiff and similarly aggrieved employees for business
23 expenses and charges necessarily incurred in their discharge of their duties in violation of Labor Code
24 § 2802.

25 86. On May 10, 2022, Plaintiff notified Defendant Cummings Industry, Inc.
26 (“Defendant”), and the California Labor and Workforce Development Agency (“LWDA”) via email
27 of Defendant’s violations of the California Labor Code § 2698 *et seq.*, with respect to violations of
28 the California Labor Code identified in Paragraph 85 (a)-(f) and as alleged in the Common Factual

1 Allegations Section. Now that than sixty-five (65) days have passed since that date, Plaintiff has fully
2 satisfied the administrative prerequisites to bring suit under the PAGA. Plaintiff now seeks to recover
3 all applicable and available PAGA remedies pursuant to Labor Code § 2699, as well as attorneys'
4 fees, costs, and/or other damages as permitted by PAGA through a representative action pursuant to
5 the PAGA and the California Supreme Court in *Arias v. Superior Court* (2009) 46 Cal. 4th 969.
6 Plaintiff is not required to, nor does he, seek class certification of the PAGA claims under Code of
7 Civil Procedure § 382.

8 87. Plaintiff was compelled to retain the services of counsel to file this court action to
9 protect his interests and the interests of similarly aggrieved employees, and to assess and collect the
10 civil penalties owed by Defendants. Plaintiff has hereby incurred attorneys' fees and costs, which he
11 is entitled to receive under California Labor Code § 2699.

12 **PRAYER FOR RELIEF**

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

- 15 1. For an order certifying the proposed Classes;
- 16 2. For an order appointing Plaintiff as representative of the Classes;
- 17 3. For an order appointing Counsel for Plaintiff as Counsel for the Classes;
- 18 4. Upon the First Cause of Action, for compensatory, consequential, general and
19 special damages according to proof pursuant to Labor Code §§ 204, 210, 510, and 1194;
- 20 5. Upon the Second Cause of Action, for compensatory, consequential, general and
21 special damages according to proof pursuant to Labor Code §§ 204, 210, 510, 1194, and 1198;
- 22 6. Upon the Third Cause of Action, for compensatory, consequential, general and
23 special damages according to proof pursuant to Labor Code §§ 226.7 and 512;
- 24 7. Upon the Fourth Cause of Action, for compensatory, consequential, general and
25 special damages according to proof pursuant to Labor Code §§ 226.7 and 516;
- 26 8. Upon the Fifth Cause of Action, penalties pursuant to Labor Code § 226(a), and
27 reasonable costs and attorneys' fees;

1 9. Upon the Sixth Cause of Action, for statutory waiting time penalties pursuant to
2 Labor Code §§ 201-203;

3 10. Upon the Seventh Causes of Action, for unreimbursed expenses and reasonable costs
4 and attorneys' fees pursuant to Labor Code § 2802;

5 11. Upon the Eighth Cause of Action, for restitution to Plaintiff and members of the
6 Classes of all money and/or property unlawfully acquired by Defendants by means of any acts or
7 practices declared by this Court to be in violation of Business and Professions Code § 17200 *et seq.*;

8 12. Upon the Ninth Cause of Action, for civil penalties due to Plaintiff, other similarly
9 aggrieved employees, and the State of California according to proof pursuant to Labor Code § 2699
10 (a) and (f), including, but not limited to (1) \$100.00 for each initial violation and (2) \$200 for each
11 subsequent violation per employee per pay period for those violations of the Labor Code for which
12 no civil penalty is specifically provided;

13 13. Prejudgment interest on all due and unpaid wages pursuant to California Labor Code
14 § 218.6 and Civil Code §§ 3287 and 3289;

15 14. On all causes of action, for attorneys' fees and costs as provided by Labor Code §§
16 218.5, 226, 1194, and Code of Civil Procedure § 1021.5; and

17 15. For such other relief that the Court may deem just and proper.

18 Dated: July 6, 2022

FALAKSSA LAW, P.C.
BOKHOUR LAW GROUP, P.C.

19
20
21 By: _____

Joshua Falakassa, Esq.
Mehrdad Bokhour, Esq.
Attorneys for Plaintiff and the Putative Classes