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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MONTEREY**

TERESA AGUILERA, as an individual and
on behalf of all others similarly situated,

Plaintiff,

vs.

THE SAVE MART COMPANIES, INC.,
a California corporation; SAVE MART
SUPERMARKETS, a California
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 20CV000609

**CLASS, REPRESENTATIVE, AND
INDIVIDUAL ACTION COMPLAINT FOR
DAMAGES FOR:**

- (1) **VIOLATION OF LABOR CODE §§ 510, 558, AND 1194;**
- (2) **VIOLATION OF LABOR CODE § 226(a);**
- (3) **VIOLATION OF BUSINESS AND PROFESSIONS CODE § 17200, ET SEQ.;**
- (4) **VIOLATION OF LABOR CODE § 2698, ET SEQ.;**
- (5) **RACE/NATIONAL ORIGIN DISCRIMINATION IN VIOLATION OF FAIR EMPLOYMENT HOUSING ACT ("FEHA");**
- (6) **VIOLATION OF GOVERNMENT CODE § 12951;**
- (7) **HOSTILE WORK ENVIRONMENT & NATIONAL ORIGIN HARASSMENT IN VIOLATION OF FEHA;**

ELECTRONICALLY FILED BY
Superior Court of California,
County of Monterey
On 2/13/2020 5:24 PM
By: Jacqueline Gilbert, Deputy

- 1 (8) RETALIATION IN VIOLATION OF
2 THE FEHA;
3 (9) CONSTRUCTIVE/WRONGFUL
4 TERMINATION IN VIOLATION OF
5 PUBLIC POLICY;
6 (10) INTENTIONAL INFLICTION OF
7 EMOTIONAL DISTRESS; and
8 (11) NEGLIGENT INFLICTION OF
9 EMOTIONAL DISTRESS

10 Plaintiff Teresa Aguilera (“Plaintiff”) hereby submits this Class and Representative
11 Action Complaint (“Complaint”) against Defendants The Save Mart Companies, Inc., Save Mart
12 Supermarkets, and Does 1 through 50 (collectively, “Defendants”) on behalf of herself and all
13 other similarly situated current and former employees of Defendants for wages and penalties for
14 violations of the California Labor Code, including without limitation, failure to pay overtime
15 wages and failure to provide employees with accurate itemized wage statements as follows:

16 INTRODUCTION

17 1. This class and representative action is within the Court’s jurisdiction under
18 California Labor Code sections 201-203, 226(a), 510, 558, 1194, and 2698, *et seq.*, the California
19 Unfair Competition Law (the “UCL”), Business and Professions Code section 17200 *et seq.*, and
20 the applicable Wage Orders of the California Industrial Welfare Commission (“IWC”), and the
21 California Fair Employment Housing Act (“FEHA”).

22 2. This complaint challenges systemic illegal employment practices resulting in
23 violations of the California Labor Code against individuals who worked for Defendants.

24 3. Plaintiff is informed and believes, and based thereon alleges, that Defendants,
25 jointly and severally, have acted intentionally and with deliberate indifference and conscious
26 disregard to the rights of all employees in receiving overtime wages for all hours worked and
27 receiving accurate wage statements.

28 4. Plaintiff is informed and believes, and based thereon alleges, that Defendants
have engaged in, among other things a system of willful violations of the California Labor Code
and the applicable IWC Wage Orders by creating and maintaining policies, practices, and

1 customs that knowingly deny employees the above stated rights and benefits.

2 5. The policies, practices, and customs of Defendants described above and below
3 have resulted in unjust enrichment of Defendants and an unfair business advantage over
4 businesses that routinely adhere to the strictures of the California Labor Code and the UCL.

5 **JURISDICTION AND VENUE**

6 6. The Court has jurisdiction over the violations of the California Labor Code
7 sections 201-203, 226(a), 510, 558, 1194, and 2698, *et seq.*, the UCL, and the FEHA.

8 7. Venue is proper in Monterey County because Plaintiff works for Defendant in
9 Monterey County.

10 **PARTIES**

11 8. Plaintiff Teresa Aguilera was hired as a non-exempt employee in Defendant's
12 retail grocery store in or about December 17, 2018. Plaintiff was employed by Defendant until
13 January 6, 2020, when she was forced to resign given the harassment she suffered at the hands of
14 Defendant.

15 9. Plaintiff was and is the victim of the policies, practices, and customs of Defendant
16 complained of in this action in ways that have deprived her of the rights guaranteed by California
17 Labor Code sections 201-203, 226(a), 510, 558, 1194, and 2698 *et seq.*, the UCL, and the FEHA.

18 10. Plaintiff is informed and believes, and based thereon alleges, that The Save Mart
19 Companies, Inc. is a California corporation, operating retail grocery stores throughout the State
20 of California.

21 11. Plaintiff is informed and believes, and based thereon alleges, that Save Mart
22 Supermarkets is a California corporation, operating retail grocery stores throughout the State of
23 California.

24 12. Plaintiff is informed and believes, and based thereon alleges, that at all times
25 herein mentioned Does 1 through 50, are and were corporations, business entities, individuals,
26 and partnerships, licensed to do business and actually doing business in the State of California.
27 As such, and based upon all the facts and circumstances incident to Defendants' business,
28 Defendants are subject to the California Labor Code and the UCL.

1 13. Plaintiff does not know the true names or capacities, whether individual, partner
2 or corporate, of the defendants sued herein as Does 1 through 50, inclusive, and for that reason,
3 said defendants are sued under such fictitious names, and Plaintiff prays for leave to amend this
4 complaint when the true names and capacities are known. Plaintiff is informed and believes and
5 based thereon alleges that each of said fictitious defendants was responsible in some way for the
6 matters alleged herein and proximately caused Plaintiff and members of the general public and
7 class to be subject to the illegal employment practices, wrongs and injuries complained of herein.

8 14. At all times herein mentioned, each defendant participated in the doing of the acts
9 hereinafter alleged to have been done by the named Defendant; and furthermore, Defendants,
10 and each of them, were the agents, servants and employees of each of the other defendants, as
11 well as the agents of all Defendants, and at all times herein mentioned, were acting within the
12 course and scope of said agency and employment.

13 15. Plaintiff is informed and believes, and based thereon alleges, that at all times
14 material hereto, each of the Defendants named herein was the agent, employee, alter ego and/or
15 joint venturer of, or working in concert with each of the other co-Defendants and was acting
16 within the course and scope of such agency, employment, joint venture, or concerted activity. To
17 the extent said acts, conduct, and omissions were perpetrated by certain Defendants, each of the
18 remaining Defendants confirmed and ratified said acts, conduct, and omissions of the acting
19 Defendants.

20 16. At all times herein mentioned, Defendants, and each of them, were members of,
21 and engaged in, a joint venture, partnership and common enterprise, and acting within the course
22 and scope of, and in pursuance of, said joint venture, partnership and common enterprise.

23 17. At all times herein mentioned, the acts and omissions of various Defendants, and
24 each of them, concurred and contributed to the various acts and omissions of each and all of the
25 other Defendants in proximately causing the injuries and damages as herein alleged. At all times
26 herein mentioned, Defendants, and each of them, ratified each and every act or omission
27 complained of herein. At all times herein mentioned, Defendants, and each of them, aided and
28 abetted the acts and omissions of each and all of the other Defendants in proximately causing the

1 damages as herein alleged.

2 **CLASS ACTION ALLEGATIONS**

3 18. **Definition:** The named individual Plaintiff seeks class certification, pursuant to
4 California Code of Civil Procedure section 382. Plaintiff proposes the following class ("Class"):

5 a. All current and former non-exempt employees of Defendants in the State
6 of California who earned overtime wages and non-discretionary remuneration
7 during the same workweek, and whose regular hourly wage rates were not 30% or
8 more of the applicable California minimum wage, at any time from February 13,
9 2016, through the present (the "Class").

10 19. **Numerosity and Ascertainability:** The members of the Class are so numerous
11 that joinder of all members would be impractical, if not impossible. The identity of the members
12 of the Class is readily ascertainable by review of Defendants' records, including payroll records.
13 Plaintiff is informed and believes, and based thereon alleges, that Defendants: (a) failed to
14 correctly calculate the regular rate of pay for purposes of paying overtime wages by not
15 including all non-discretionary remuneration in the regular rate in violation of Labor Code
16 sections 510, 558, and 1194; (b) failed to pay all wages owed upon separation of employment;
17 (c) failed to provide proper payroll records in violation of Labor Code section 226(a); and (d)
18 engaged in unfair business practices in violation of the Labor Code and the UCL.

19 20. **Adequacy of Representation:** The named Plaintiff is fully prepared to take all
20 necessary steps to represent fairly and adequately the interests of the Class defined above.
21 Plaintiff's attorneys are ready, willing, and able to fully and adequately represent the Class and
22 the individual Plaintiff. Plaintiff's attorneys have prosecuted and settled wage-and-hour class
23 actions in the past and currently have a number of wage-and-hour class actions pending in
24 California state and federal courts.

25 21. Defendants uniformly administered a corporate policy, practice of: (a) failing to
26 correctly calculate the regular rate of pay for purposes of paying overtime wages by not
27 including all non-discretionary remuneration in the regular rate in violation of Labor Code
28 sections 510, 558, and 1194; (b) failing to pay all wages owed upon separation of employment;

1 (c) failing to provide proper payroll records in violation of Labor Code section 226(a); and (d)
2 engaging in unfair business practices in violation of the Labor Code and the UCL.

3 22. Plaintiff is informed and believes, and based thereon alleges, that Defendants had
4 a consistent and uniform policy, practice and procedure of willfully failing to comply with Labor
5 Code sections 201-203, 226(a), 510, 558, 1194, and the UCL.

6 23. **Common Question of Law and Fact:** There are predominant common questions
7 of law and fact and a community of interest amongst Plaintiff and the claims of the Class
8 concerning Defendants' policy and practice of: (a) failing to correctly calculate the regular rate
9 of pay for purposes of paying overtime wages by not including all non-discretionary
10 remuneration in the regular rate in violation of Labor Code sections 510, 558, and 1194, for
11 those employees whose regular hourly earnings were not more than 30% greater than
12 California's applicable minimum wage; (b) failing to pay all wages owed upon separation of
13 employment; (c) failing to provide proper payroll records in violation of Labor Code section
14 226(a); and (d) engaging in unfair business practices in violation of the Labor Code and the
15 UCL.

16 24. **Typicality:** The claims of Plaintiff are typical of the claims of all members of the
17 Class in that Plaintiff has suffered the harms alleged in this Complaint in a similar and typical
18 manner as the Class Members. As with all other non-exempt employees in the State of
19 California, Plaintiff worked overtime hours. Defendants, however, paid overtime wages based on
20 the incorrect regular rate of pay in violation of Labor Code sections 510, 558, and 1194.
21 Specifically, during Plaintiff's employment with Defendants, Plaintiff worked more than 8 hours
22 in one day and/or more than 40 hours in one week and also earned non-discretionary
23 remuneration, including premium wages, during the same pay period. Plaintiff's overtime rate of
24 pay of did not incorporate all non-discretionary remuneration for purposes of calculating the
25 regular rate of pay and earning overtime wages. Plaintiff and the Class did not earn greater than
26 30% or more of the applicable California state minimum wage during the time period
27 encompassed by this action. As such, Defendants should have included all non-discretionary
28 remuneration into the regular rate of pay for purposes of paying overtime wages. Defendants

1 failed to do so. Thus, when Plaintiff and Class Members worked overtime and earned non-
2 discretionary pay in the same workweek, the employees were paid overtime based on a lower
3 regular rate of pay that did not take into account additional items of non-discretionary
4 remuneration. Plaintiff alleges that such miscalculation of overtime wages was intentionally done
5 by Defendants, and that Defendants did not have any good faith belief, in law or fact, as to such
6 improper calculation of overtime wages. As a result of the intentional miscalculation and
7 underpayment of overtime wages, the wage statements provided to Plaintiff also intentionally did
8 not accurately identify the correct rates of pay, and the gross and net wages earned during the
9 pay period, in violation of Labor Code section 226(a). Additionally, based on the above
10 miscalculation, employees who separated from employment were not paid all wages owed.
11 Therefore, Plaintiff is a member of the Class and has suffered the alleged violations of California
12 Labor Code sections 201-203, 226(a), 510, 558, 1194, and the UCL.

13 25. The California Labor Code upon which Plaintiff bases these claims are broadly
14 remedial in nature. These laws and labor standards serve an important public interest in
15 establishing minimum working conditions and standards in California. These laws and labor
16 standards protect the average working employee from exploitation by employers who may seek
17 to take advantage of superior economic and bargaining power in setting onerous terms and
18 conditions of employment.

19 26. The nature of this action and the format of laws available to Plaintiff and
20 members of the Class identified herein make the class action format a particularly efficient and
21 appropriate procedure to redress the wrongs alleged herein. If each employee were required to
22 file an individual lawsuit, the corporate defendants would necessarily gain an unconscionable
23 advantage since it would be able to exploit and overwhelm the limited resources of each
24 individual plaintiff with their vastly superior financial and legal resources. Requiring each Class
25 Member to pursue an individual remedy would also discourage the assertion of lawful claims by
26 employees who would be disinclined to file an action against their former and/or current
27 employer for real and justifiable fear of retaliation and permanent damage to their careers at
28 subsequent employment.

1 27. The prosecution of separate actions by the individual class members, even if
2 possible, would create a substantial risk of (a) inconsistent or varying adjudications with respect
3 to individual Class members against the Defendants and which would establish potentially
4 incompatible standards of conduct for the Defendants, and/or (b) adjudications with respect to
5 individual Class members which would, as a practical matter, be dispositive of the interest of the
6 other Class members not parties to the adjudications or which would substantially impair or
7 impede the ability of the Class members to protect their interests. Further, the claims of the
8 individual members of the Class are not sufficiently large to warrant vigorous individual
9 prosecution considering all of the concomitant costs and expenses.

10 28. Such a pattern, practice and uniform administration of corporate policy regarding
11 illegal employee compensation described herein is unlawful and creates an entitlement to
12 recovery by Plaintiff and the Class identified herein, in a civil action, for overtime wages,
13 inaccurate wage statements, unreimbursed business expenses, applicable penalties, reasonable
14 attorneys' fees, and costs of suit according to the mandate of California Labor Code sections
15 201-203, 226(a), 510, 558, and 1194, the UCL, and Code of Civil Procedure section 1021.5.

16 29. Proof of a common business practice or factual pattern, which the named Plaintiff
17 experienced and is representative of, will establish the right of each of the members of the
18 Plaintiff Class to recovery on the causes of action alleged herein.

19 30. The Class is commonly entitled to a specific fund with respect to the
20 compensation illegally and unfairly retained by Defendants. The Class is commonly entitled to
21 restitution of those funds being improperly withheld by Defendants. This action is brought for
22 the benefit of the entire class and will result in the creation of a common fund.

23 **FACTS COMMON TO ALL ALLEGATIONS**

24 31. Ms. Aguilera is of Mexican ancestry.

25 32. On December 17, 2018 and February 2019, Pamela, a co-worker, last name
26 unknown, said to Ms. Aguilera: "I hope our president gets all Mexicans out of the country they
27 don't belong here. Mexicans are coming and draining our system, getting everything free."

28 33. On February 15, 2019, Karen Avilla, Deli Manager, told Ms. Aguilera not to

1 speak Spanish because “we are Americans.” It was necessary for Ms. Aguilera speak Spanish to
2 the Spanish speaking customers.

3 34. On February 15, 2019, Ms. Aguilera went to Victor Ayala, Assistant Manager, to
4 complain about Pamela harassing her. Mr. Ayala told her Pamela wasn’t harassing. That
5 harassing would be if Pam called her a lesbian. Victor would not allow Ms. Aguilera to change
6 her shift to accommodate going back to school

7 35. In March of 2019, Emily Castaneda, Bakery Manager, called Ms. Aguilera “dog”,
8 “gremlin”, “abortion”, “crazy”, “chueca” and constantly told Ms. Aguilera she did not listen.

9 36. From July 26, 2019 until October 20, 2019. Ms. Castaneda would not provide
10 necessary supplies to Ms. Aguilera.

11 37. On July 26, 2019, Victor Ayala, Assistant Manager told employees that Ms.
12 Aguilera just wants store money and not to talk to her. He ostracized her.

13 38. On or around December 1, 2019, Patricia Acosta told Veronica Banda, Manager,
14 that Ms. Banda needed to get rid of Teresa Aguilera which then led to Ms. Banda changing Ms.
15 Aguilera’s work schedule. Ms. Aguilera’s new hours were less desirable. Ms. Banda commented
16 that she wanted to replace Ms. Aguilera, stating “...if you know anybody that wants to work I
17 will hire them”. This conversation took place in front of multiple employees.

18 39. Ultimately, Ms. Aguilar was wrongfully and constructively discharged from her
19 employment. The conditions were so intolerable that Ms. Aguilera had no choice but to resign
20 her employment on January 6, 2020 due to the discrimination she suffered at the hands of
21 Defendant on the basis of her national origin and race.

22 **FIRST CAUSE OF ACTION**

23 **VIOLATION OF LABOR CODE §§ 510, 558, AND 1194**

24 **(BY PLAINTIFF AND THE CLASS AGAINST ALL DEFENDANTS)**

25 40. Plaintiff re-alleges and incorporates by reference all paragraphs above, as though
26 fully set forth herein.

27 41. This cause of action is brought pursuant to Labor Code sections 510, 558 and
28 1194, which require employers to pay employees overtime at a rate of one and one-half the

1 employee's regular rate of pay for any work in excess of eight hours in a workday or forty hours
2 in a workweek.

3 42. Defendants, as a matter of policy and practice, failed to pay Plaintiff and the Class
4 overtime pay at the correct, higher regular rate of pay in violation of Labor Code sections 510,
5 558, and 1194. Specifically, Defendants did not factor in non-discretionary compensation,
6 including but not limited to premium wages, into the regular rate when calculating overtime pay.
7 Plaintiff and the Class did not earn at least 30% greater than the applicable California minimum
8 wage during the workweeks where Plaintiff and the Class earned overtime and non-discretionary
9 remuneration. As a result of such policy and practice, Defendants regularly failed to compensate
10 Plaintiff and the Class proper overtime pay.

11 43. Plaintiff is informed and believes and based thereon alleges that Defendants
12 willfully failed to pay Plaintiff and the Class overtime wages due and owing to them. Plaintiff is
13 informed and believes and based thereon alleges that Defendants' willful and intentional failure
14 to provide overtime wages due and owing to Class Members resulted in continued payment of
15 wages up to thirty (30) days from the time the wages are due. Therefore, all members of the
16 Class who have separated from employment are entitled to compensation as per Labor Code
17 section 203.

18 44. Such a pattern, practice, and uniform administration of corporate policy regarding
19 illegal employee compensation as described herein is unlawful and creates an entitlement to
20 recovery by Plaintiff and the Class in a civil action, for the unpaid balance of the full amount of
21 damages owed, including interest thereon, penalties, attorneys' fees, and costs of suit according
22 to the mandate of California Labor Code sections 201-203, 510, 558, and 1194.

23 **SECOND CAUSE OF ACTION**

24 **VIOLATION OF LABOR CODE § 226(a)**

25 **(BY PLAINTIFF AND THE CLASS AGAINST ALL DEFENDANTS)**

26 45. Plaintiff re-alleges and incorporates by reference all the paragraphs above, as
27 though fully set forth herein.

28 46. Defendants, as a matter of policy and practice, intentionally failed to provide

accurate records to Plaintiff and the Class, in violation of Labor Code section 226(a).

47. Plaintiff and the Class were paid hourly. As such, the wage statements should have reflected the accurate hourly rates of pay, as well as the gross and net wages earned. As a result of the intentional miscalculation and underpayment of overtime wages, the wage statements provided to Plaintiff and the Class intentionally did not accurately identify the correct rates of pay, and the gross and net wages earned during the pay period in violation of Labor Code section 226(a). The issuance of inaccurate wage statements caused actual injury to Plaintiff and the Class Members as they were not able to accurately calculate their wages.

48. Such a pattern, practice and uniform administration of corporate policy as described herein is unlawful and creates an entitlement to recovery by Plaintiff and the Class, in a civil action, for all damages or penalties pursuant to Labor Code section 226, including interest thereon, attorneys' fees, and costs of suit according to the mandate of California Labor Code section 226.

THIRD CAUSE OF ACTION

VIOLATION OF THE UCL, BUSINESS AND PROFESSIONS CODE § 17200 *ET SEQ.*

(BY PLAINTIFF AND THE CLASS AGAINST ALL DEFENDANTS)

49. Plaintiff re-alleges and incorporates by reference all paragraphs above, as though fully set forth herein.

50. Defendants engaged and continues to engage in unfair and unlawful business practices in California by practicing, employing, and utilizing the employment practices outlined above, inclusive, to wit, by failing to correctly calculate the regular rate of pay by not including all non-discretionary remuneration in the regular rate for Plaintiff and the Class, who earned less than 30% more than the applicable California minimum wage, in violation of Labor Code sections 510, 558, and 1194.

51. Defendants' utilization of such unfair and unlawful business practices constitutes unfair, unlawful competition and provides an unfair advantage over Defendants' competitors.

52. Plaintiff seeks, on behalf of himself and other similarly situated members of the Class, full restitution of monies, as necessary and according to proof, to restore any and all

monies withheld, acquired and/or converted by Defendants by means of the unfair practices complained of herein.

53. Plaintiff is informed and believes, and on that basis alleges, that at all times herein mentioned Defendants have engaged in unlawful, deceptive, and unfair business practices, as proscribed by California Business and Professions Code section 17200 *et seq.*, including those set forth herein above thereby depriving Plaintiff and other members of the Class the minimum working condition standards and conditions due to them under the California laws as specifically described therein.

FOURTH CAUSE OF ACTION

VIOLATION OF LABOR CODE § 2698, *ET SEQ.*

(BY PLAINTIFF AND AGGRIEVED EMPLOYEES AGAINST ALL DEFENDANTS)

54. Plaintiff re-alleges and incorporates by reference the paragraphs above, as though fully set forth herein.

55. Plaintiff brings this cause of action as a proxy for the State of California and in this capacity, seeks penalties on behalf of all Aggrieved Employees from January 3, 2019, through the present, for Defendants' violations of Labor Code sections 201-203, 226(a), 510, 558, and 1194, as identified above for: (a) failure to pay overtime wages at the correct regular rate of pay by failing to include all non-discretionary remuneration into the calculation of the regular rate, including without limitation premium wages, in violation of Labor Code sections 510, 558, and 1194, for those employees who earned less than 30% greater than the applicable California minimum wage at the relevant time; (b) failure to provide accurate itemized wage statements in violation of Labor Code section 226(a); and (c) failure to pay all wages owed upon separation of employment within the time requirements set forth by Labor Code sections 201-203.

56. On or about January 3, 2020, Plaintiff sent written notice to the California Labor and Workforce Development Agency ("LWDA") of Defendants' violations of Labor Code sections 201-203, 226(a), 510, 558, and 1194, pursuant to Labor Code section 2698, *et seq.*, the Private Attorneys General Act (the "PAGA"). Plaintiff also sent written notice of said Labor

1 Code violations to Defendant via certified mail pursuant to Labor Code section 2699.3. As of the
2 date of the filing of this Complaint, the LWDA has not provided written notice regarding
3 whether it intends to investigate the Labor Code violations set forth in Plaintiff's written notice
4 and thus allowing Plaintiff to proceed under the PAGA against Defendants for said violations as
5 provided for in Plaintiff's written notice.

6 57. As such, pursuant to Labor Code section 2699(a), Plaintiff and the Aggrieved
7 Employees may seek recovery of any and all applicable civil penalties on behalf of the State of
8 California or Defendants' violations of Labor Code sections 201-203, 226(a), 510, 558, and
9 1194.

10 **FIFTH CAUSE OF ACTION**

11 **VIOLATION OF FAIR EMPLOYMENT AND HOUSING ACT, GOVERNMENT CODE**
12 **SECTION 12900 ET SEQ.—RACE/NATIONAL ORIGIN DISCRIMINATION**
13 **(BY PLAINTIFF AGAINST DEFENDANTS)**

14 58. Plaintiff realleges and incorporates by reference all allegations contained in the
15 above paragraphs.

16 59. The actions alleged above caused plaintiff to be discriminated based on
17 race/national origin in violation of the Fair Employment and Housing Act. Defendant had actual
18 knowledge of the intolerable conditions caused by the acts of discrimination alleged above, but
19 failed to take any steps to end those conditions.

20 60. Defendant's discriminatory actions against plaintiff, as alleged above, constituted
21 unlawful discrimination in employment on account of race, in violation Government Code
22 Sections 12940(a).

23 61. As a proximate result of defendant's race/national origin discrimination against
24 Plaintiff, as alleged above, Plaintiff has been harmed in that plaintiff has suffered humiliation,
25 mental anguish, and emotional and physical distress. As a result of such age discrimination and
26 consequent harm, Plaintiffs has suffered damages in an amount according to proof.

27 62. On information and belief, the above-recited actions of Defendant were done with
28 malice, fraud, or oppression, and in reckless disregard of the Plaintiffs' rights under the Fair

1 Employment and Housing Act.

2 63. Within one year of the dates of discrimination herein alleged against Plaintiff by
3 Defendant, Plaintiff filed a charge of discrimination with the California Department of Fair
4 Employment and Housing (DFEH). A copy of this charge is appended here, marked “**Exhibit**
5 **1,**” and is incorporated by this reference as though fully set forth.

6 64. Within one year of the dates of discrimination herein alleged against Plaintiffs by
7 Defendant, the DFEH issued to Plaintiff a notice of right to bring a civil action based on the
8 charge that is “**Exhibit 1**” to this complaint. A copy of this notice of right of action is appended
9 hereto, marked “Exhibit 1,” and is incorporated by this reference as though fully set forth.

10 65. As a proximate result of Defendants’ discrimination against Plaintiff, she has been
11 forced to hire attorneys to prosecute the claims alleged herein, and has incurred and is expected
12 to continue to incur attorneys’ fees. Pursuant to California Government Code Section 12965(b),
13 Plaintiff request the award of attorneys’ fees against Defendants.

14 **SIXTH CAUSE OF ACTION**

15 **VIOLATION OF GOVERNMENT CODE § 12951**

16 **(BY PLAINTIFF AGAINST DEFENDANTS)**

17 66. Plaintiff realleges and incorporates by reference all the allegations contained in
18 the above paragraphs, as though fully set forth here.

19 67. As discussed above, on February 15, 2019, Karen Avilla, Deli Manager, told Ms.
20 Aguilera not to speak Spanish because “we are Americans.” It was necessary for Ms. Aguilera
21 speak Spanish to the Spanish speaking customers. This is a violation of Government Code §
22 12951.

23 68. On information and belief, no business necessity justified the language restriction.
24 In fact, Plaintiff needed to speak Spanish to communicate with Spanish speaking customers.

25 69. As a proximate result of Defendants’ failure to comply with the law, Plaintiff
26 suffered and continues to suffer compensatory damages, including without limitation, lost wages,
27 loss of future earnings and earning capacity, loss of bonuses, emotional distress, mental anguish,
28 embarrassment, humiliation, loss of future advancement, and damage to their reputation in the

business community. Plaintiff claims such amounts as damages, together with prejudgment interest accruing from the date of the filing of this action pursuant to California Civil Code Sections 3281 and/or 3288, and/or any other provision of law providing for prejudgment interest.

70. As a proximate result of Defendants' failure to comply with the law, Plaintiff has been forced to hire attorneys to prosecute the claims alleged herein, and has incurred and is expected to continue to incur attorneys' fees. Pursuant to California Government Code Section 12965(b), Plaintiff request the award of attorneys' fees against Defendants.

71. Defendants committed the acts alleged herein maliciously, fraudulently, and oppressively, callously, in bad faith, with the wrongful intent of injuring Plaintiff, and in conscious disregard of Plaintiff's rights and safety. As such, Plaintiff is entitled to an award of punitive damages in an amount according to proof.

SEVENTH CAUSE OF ACTION

VIOLATION OF FAIR EMPLOYMENT AND HOUSING ACT, GOVERNMENT CODE

§ 12900 ET SEQ.—HOSTILE WORK ENVIRONMENT NATIONAL ORIGIN

HARASSMENT

(BY PLAINTIFF AGAINST DEFENDANTS)

72. Plaintiff realleges and incorporates by reference all the allegations contained in the above paragraphs, as though fully set forth here.

73. Defendant's harassing actions against Plaintiff, as alleged above, constituted unlawful discrimination in employment on account of national origin, in violation Government Code Sections 12940(a) and (j).

74. As a proximate result of Defendants' failure to comply with the law, Plaintiff suffered and continues to suffer compensatory damages, including without limitation, lost wages, loss of future earnings and earning capacity, loss of bonuses, emotional distress, mental anguish, embarrassment, humiliation, loss of future advancement, and damage to their reputation in the business community. Plaintiff claims such amounts as damages, together with prejudgment interest accruing from the date of the filing of this action pursuant to California Civil Code Sections 3281 and/or 3288, and/or any other provision of law providing for prejudgment interest.

1 75. As a proximate result of Defendants' failure to comply with the law, Plaintiff has
2 been forced to hire attorneys to prosecute the claims alleged herein, and has incurred and is
3 expected to continue to incur attorneys' fees. Pursuant to California Government Code Section
4 12965(b), Plaintiff request the award of attorneys' fees against Defendants.

5 76. Defendants committed the acts alleged herein maliciously, fraudulently, and
6 oppressively, callously, in bad faith, with the wrongful intent of injuring Plaintiff, and in
7 conscious disregard of Plaintiff's rights and safety. As such, Plaintiff is entitled to an award of
8 punitive damages in an amount according to proof.

9 **EIGHTH CAUSE OF ACTION**
10 **RETALIATION IN VIOLATION OF THE FEHA**
11 **(BY PLAINTIFF AGAINST DEFENDANTS)**

12 77. Plaintiff re-alleges and incorporates by reference all paragraphs above, as though
13 fully set forth herein.

14 78. California Government Code section 12940(h) prohibits employers from
15 retaliating against employees who have opposed any practices forbidden under the FEHA.

16 79. Defendant is liable under section 12940(h) for retaliating against Plaintiff because
17 Plaintiff complained about conduct forbidden under the FEHA, including being unlawfully
18 subjected to discrimination and harassment based on Plaintiff's race and/or national origin.

19 80. As alleged above, Defendant retaliated against Plaintiff by, among other acts: (a)
20 fostering a racially hostile workplace; (b) ultimately allowing the workplace to get to such a
21 harassing and uncomfortable level that Plaintiff was constructively terminated from her position.

22 81. As a proximate result of Defendant's retaliation against Plaintiff, Plaintiff has
23 suffered and continues to suffer compensatory damages, including without limitation, lost wages,
24 loss of future earnings and earning capacity, loss of bonuses, emotional distress, mental anguish,
25 embarrassment, humiliation, loss of future advancement, and damage to his reputation in the
26 business community. Plaintiff claims such amounts as damages, together with prejudgment
27 interest accruing from the date of the filing of this action pursuant to California Civil Code
28 sections 3281 and/or 3288, and/or any other provision of law providing for prejudgment interest.

1 82. As a proximate result of Defendant's retaliation against Plaintiff, Plaintiff has
2 been forced to hire attorneys to prosecute the claims alleged herein, and has incurred and is
3 expected to continue to incur attorneys' fees. Pursuant to California Government Code section
4 12965(b), Plaintiff requests the award of attorneys' fees against Defendant.

5 83. Defendant committed the acts alleged herein maliciously, fraudulently, and
6 oppressively, callously, in bad faith, with the wrongful intent of injuring Plaintiff, and in
7 conscious disregard of Plaintiff's rights and safety.

8 **NINTH CAUSE OF ACTION**

9 **CONSTRUCTIVE/WRONGFUL TERMINATION IN VIOLATION OF PUBLIC**
10 **POLICY**

11 **(BY PLAINTIFF AGAINST DEFENDANTS)**

12 84. Plaintiff realleges and incorporates by reference all the allegations contained in
13 the above paragraphs, as though fully set forth here.

14 85. At all times mentioned herein, the public policy of the State of California, as
15 codified, expressed and mandated in the FEHA, prohibits employers from harassing,
16 discriminating and retaliating against employees because of their protected characteristics,
17 including race, national origin, and/or engaging in protected activities. As alleged above,
18 Plaintiff was subjected to repeated acts of harassment, discrimination, and retaliation based on
19 her national origin and/or race. As also alleged above, Plaintiff repeatedly complained about this
20 unlawful treatment to Defendants to no avail. Plaintiff is informed and believes and based
21 thereon alleges that Defendants did not even begin an investigation into her complaints until after
22 this lawsuit was filed. On or about January 6, 2020, Plaintiff submitted her resignation to
23 Defendants, given Defendants' repeated refusal to investigate and address the numerous acts of
24 unlawful discrimination, retaliation, and harassment to which Plaintiff was subjected. In other
25 words, Plaintiff was subjected to a hostile work environment which was intolerable, causing
26 Plaintiff to resign. Such a constructive termination violates the public policy of the State of
27 California, as codified, expressed and mandated in the FEHA, which prohibits employers from
28 harassing, discriminating and retaliating against employees because of their protected

1 characteristics and/or engaging in protected activities.

2 86. As a proximate result of Defendant's wrongful constructive termination of
3 Plaintiff, she has suffered and continues to suffer compensatory damages, including without
4 limitation, severe emotional distress, lost wages, benefits, and compensation, and loss of future
5 earnings and earning capacity in the amount of at least \$25,000.00, according to proof at the time
6 of trial, which is in excess of the jurisdictional minimum for this lawsuit to qualify as an
7 unlimited civil action. Plaintiff claims such amounts as damages, together with prejudgment
8 interest accruing from the date of the filing of this action pursuant to California Civil Code
9 Sections 3281 and/or 3288, and/or any other provision of law providing for prejudgment interest.

10 87. Defendants committed the acts alleged herein maliciously, fraudulently, and
11 oppressively, callously, in bad faith, with the wrongful intent of injuring Plaintiff, and in
12 conscious disregard of Plaintiff's rights and safety. Defendants callously disregarded Plaintiff's
13 rights and willfully and intentionally failed to adequately investigate Plaintiff's complaints.
14 Further, these actions were carried out by Defendants without regard to their legality or effect on
15 Plaintiff's welfare. As such, Plaintiff is entitled to an award of punitive damages in an amount
16 according to proof.

17 **TENTH CAUSE OF ACTION**

18 **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

19 **(BY PLAINTIFF AGAINST DEFENDANTS)**

20 88. Plaintiff realleges and incorporates by reference all the allegations contained in
21 the above paragraphs, as though fully set forth here.

22 89. When the Defendants, and the each of them, committed the acts described above,
23 they did so deliberately and intentionally to cause Plaintiff to suffer humiliation, mental anguish,
24 and emotional distress. The outrageousness of the above-described conduct is amplified due to
25 upper management's abuse of their positions with actual and apparent authority over Plaintiff,
26 such as is commonly found in employment relationships. The Defendants, and each of them,
27 were aware that their unlawful acts would cause Plaintiff to suffer extreme emotional distress
28 and other consequential damages.

1 90. The above-said acts of the Defendants, and each of them, constituted intentional
2 infliction of emotional distress against Plaintiff and such conduct of the Defendants was a
3 substantial or determining factor in causing damage and injury to Plaintiff.

4 91. As a result of Defendants' intentional infliction of emotional distress, Plaintiff has
5 suffered and continue to suffer substantial loss and damages including, lost wages, future
6 advancement, bonuses, benefits, embarrassment, humiliation, and mental anguish in an amount
7 to be determined at trial.

8 92. The Defendants, and each of them, committed said intentional infliction of
9 emotional distress alleged herein against Plaintiff, maliciously, fraudulently, and oppressively
10 with the wrongful intent of injuring Plaintiff for an improper and evil motive which constitutes a
11 malicious and conscious disregard of Plaintiff's rights. Plaintiff is thereby entitled to punitive
12 damages from the Defendants in an amount to be determined at trial.

13 **ELEVENTH CAUSE OF ACTION**

14 **NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS**

15 **(BY PLAINTIFF AGAINST DEFENDANTS)**

16 93. Plaintiff re-alleges and incorporates by reference all paragraphs above, as though
17 fully set forth herein.

18 94. When the Defendants, and the each of them, committed the acts described above,
19 they knew, or should have known, that their failure to exercise due care in the performance of
20 their role as employer, manager, supervisor would cause Plaintiff to suffer emotional distress.
21 The Defendants knew or should have known that their conduct under the alleged circumstances
22 would cause Plaintiff severe emotional distress.

23 95. The above-said wrongful and discriminatory acts of the Defendants, and each of
24 them, constituted negligent infliction of emotional distress against Plaintiff and such conduct of
25 the Defendants was a substantial or determining factor in causing damage and injury to Plaintiff.

26 96. As a result of Defendants' negligent infliction of emotional distress, Plaintiff has
27 suffered and continue to suffer substantial loss and damages including, loss of salary, future
28 advancement, bonuses, commissions, benefits, embarrassment, humiliation, and mental anguish

1 in an amount to be determined at trial.

2 97. The Defendants, and each of them, committed said negligent infliction of
3 emotional distress alleged herein against Plaintiff, maliciously, fraudulently, and oppressively
4 with the wrongful intent of injuring Plaintiff for an improper and evil motive which constitutes a
5 malicious and conscious disregard of Plaintiff's rights. Plaintiff is thereby entitled to punitive
6 damages from the Defendants in an amount to be determined at trial.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff prays for judgment for himself and all others on whose behalf
9 this suit is brought against Defendants, jointly and severally, as follows:

- 10 1. For an order certifying the proposed Classes;
- 11 2. For an order appointing Plaintiff as the representative of the Classes as described
12 herein;
- 13 3. For an order appointing Counsel for Plaintiff as class counsel;
- 14 4. Upon the First Cause of Action, for damages and/or penalties pursuant to statute
15 as set forth in Labor Code sections 201-203, 510, 558, and 1194, and for
16 attorneys' fees and costs;
- 17 5. Upon the Second Cause of Action, for damages and/or penalties pursuant to
18 California Labor Code section 226, and for attorneys' fees and costs;
- 19 6. Upon the Third Cause of Action, for restitution to Plaintiff and other similarly
20 affected members of the general public of all funds unlawfully acquired by
21 Defendants by means of any acts or practices declared by this Court to be in
22 violation of California Business and Professions Code section 17200 et seq., and
23 for attorneys' fees and costs;
- 24 7. Upon the Fourth Cause of Action, for civil penalties pursuant to Labor Code
25 section 2698, et seq. and for attorneys' fees and costs;
- 26 8. Upon the Fifth Cause of Action, attorneys' fees pursuant to California
27 Government Code Section 12965(b), costs, punitive damages in a sum appropriate
28 to punish Defendants and set an example for others, and prejudgment interest at

the prevailing legal rate;

9. Upon the Sixth Cause of Action, attorneys' fees pursuant to California Government Code Section 12965(b), costs, punitive damages in a sum appropriate to punish Defendants and set an example for others, and prejudgment interest at the prevailing legal rate;
10. Upon the Seventh Cause of Action, attorneys' fees pursuant to California Government Code Section 12965(b), costs, punitive damages in a sum appropriate to punish Defendants and set an example for others, and prejudgment interest at the prevailing legal rate;
11. Upon the Eighth Cause of Action, attorneys' fees pursuant to California Government Code Section 12965(b), costs, punitive damages in a sum appropriate to punish Defendants and set an example for others, and prejudgment interest at the prevailing legal rate;
12. Upon the Ninth Cause of Action, attorneys' fees pursuant to California Government Code Section 12965(b), costs, punitive damages in a sum appropriate to punish Defendants and set an example for others, and prejudgment interest at the prevailing legal rate;
13. Upon the Tenth Cause of Action, prejudgment interest at the prevailing legal rate, costs, and punitive damages in a sum appropriate to punish Defendants and set an example for others, and prejudgment interest at the prevailing legal rate;
14. Upon the Eleventh Cause of Action, prejudgment interest at the prevailing legal rate, costs, and punitive damages in a sum appropriate to punish Defendants and set an example for others, and prejudgment interest at the prevailing legal rate;
15. On all causes of action for attorneys' fees and costs as provided by California Labor Code sections 218.5, 226, 510, 558, and 1194, and Code of Civil Procedure section 1021.5; and

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1 16. For such other and further relief the Court may deem just and proper.
2

3 DATED: February 13, 2020

DIVERSITY LAW GROUP, P.C.

4
5 By: _____

Larry W. Lee

Howard L. Magee

Max W. Gavron

Attorneys for Plaintiff, the Class, and Aggrieved
Employees
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EXHIBIT 1



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

KEVIN KISH, DIRECTOR

2218 Kausen Drive, Suite 100 | Elk Grove | CA | 95758
(800) 884-1684 (Voice) | (800) 700-2320 (TTY) | California's Relay Service at 711
<http://www.dfeh.ca.gov> | Email: contact.center@dfeh.ca.gov

January 18, 2020

William Marder
501 San Benito Street, Suite 200
Hollister, California 95023

RE: **Notice to Complainant's Attorney**
DFEH Matter Number: 202001-08942919
Right to Sue: Aguilera / The Save Mart Companies, Inc./Save Mart Supermarkets

Dear William Marder:

Attached is a copy of your complaint of discrimination filed with the Department of Fair Employment and Housing (DFEH) pursuant to the California Fair Employment and Housing Act, Government Code section 12900 et seq. Also attached is a copy of your Notice of Case Closure and Right to Sue.

Pursuant to Government Code section 12962, DFEH will not serve these documents on the employer. You must serve the complaint separately, to all named respondents. Please refer to the attached Notice of Case Closure and Right to Sue for information regarding filing a private lawsuit in the State of California. A courtesy "Notice of Filing of Discrimination Complaint" is attached for your convenience.

Be advised that the DFEH does not review or edit the complaint form to ensure that it meets procedural or statutory requirements.

Sincerely,

Department of Fair Employment and Housing



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

KEVIN KISH, DIRECTOR

2218 Kausen Drive, Suite 100 | Elk Grove | CA | 95758
(800) 884-1684 (Voice) | (800) 700-2320 (TTY) | California's Relay Service at 711
<http://www.dfeh.ca.gov> | Email: contact.center@dfef.ca.gov

January 18, 2020

RE: **Notice of Filing of Discrimination Complaint**

DFEH Matter Number: 202001-08942919

Right to Sue: Aguilera / The Save Mart Companies, Inc./Save Mart Supermarkets

To All Respondent(s):

Enclosed is a copy of a complaint of discrimination that has been filed with the Department of Fair Employment and Housing (DFEH) in accordance with Government Code section 12960. This constitutes service of the complaint pursuant to Government Code section 12962. The complainant has requested an authorization to file a lawsuit. This case is not being investigated by DFEH and is being closed immediately. A copy of the Notice of Case Closure and Right to Sue is enclosed for your records.

Please refer to the attached complaint for a list of all respondent(s) and their contact information.

No response to DFEH is requested or required.

Sincerely,

Department of Fair Employment and Housing



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

KEVIN KISH, DIRECTOR

2218 Kausen Drive, Suite 100 | Elk Grove | CA | 95758
(800) 884-1684 (Voice) | (800) 700-2320 (TTY) | California's Relay Service at 711
<http://www.dfeh.ca.gov> | Email: contact.center@dfeh.ca.gov

January 18, 2020

Teresa Aguilera
501 San Benito Street, Suite 200
Hollister, California 95023

RE: **Notice of Case Closure and Right to Sue**
DFEH Matter Number: 202001-08942919
Right to Sue: Aguilera / The Save Mart Companies, Inc./Save Mart Supermarkets

Dear Teresa Aguilera,

This letter informs you that the above-referenced complaint was filed with the Department of Fair Employment and Housing (DFEH) has been closed effective January 18, 2020 because an immediate Right to Sue notice was requested. DFEH will take no further action on the complaint.

This letter is also your Right to Sue notice. According to Government Code section 12965, subdivision (b), a civil action may be brought under the provisions of the Fair Employment and Housing Act against the person, employer, labor organization or employment agency named in the above-referenced complaint. The civil action must be filed within one year from the date of this letter.

To obtain a federal Right to Sue notice, you must contact the U.S. Equal Employment Opportunity Commission (EEOC) to file a complaint within 30 days of receipt of this DFEH Notice of Case Closure or within 300 days of the alleged discriminatory act, whichever is earlier.

Sincerely,

Department of Fair Employment and Housing

1 **COMPLAINT OF EMPLOYMENT DISCRIMINATION**
2 **BEFORE THE STATE OF CALIFORNIA**
3 **DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING**
4 **Under the California Fair Employment and Housing Act**
5 **(Gov. Code, § 12900 et seq.)**

6 **In the Matter of the Complaint of**

7 Teresa Aguilera

DFEH No. 202001-08942919

8 Complainant,

9 vs.

10 The Save Mart Companies, Inc./Save Mart
11 Supermarkets
12 1800 Standiford Ave.
13 Modesto, California 95350

14 Respondents

15 1. Respondent **The Save Mart Companies, Inc./Save Mart Supermarkets** is an
16 **employer** subject to suit under the California Fair Employment and Housing Act
17 (FEHA) (Gov. Code, § 12900 et seq.).

18 2. Complainant **Teresa Aguilera**, resides in the City of **Hollister** State of **California**.

19 3. Complainant alleges that on or about **January 6, 2020**, respondent took the
20 following adverse actions:

21 **Complainant was harassed** because of complainant's race, ancestry, national
22 origin (includes language restrictions).

23 **Complainant was discriminated against** because of complainant's race, ancestry,
24 national origin (includes language restrictions) and as a result of the discrimination
25 was forced to quit, reprimanded, denied any employment benefit or privilege, denied
26 work opportunities or assignments.

27 **Complainant experienced retaliation** because complainant reported or resisted
28 any form of discrimination or harassment and as a result was forced to quit,
reprimanded, denied any employment benefit or privilege.

1 **Additional Complaint Details:** Ms. Aguilera began employment with Save Mart
2 Supermarkets on December 17, 2018. Ms. Aguilera's job title was deli worker. Ms.
3 Aguilera worked in Marina, CA, Store Number 724. Ms. Aguilera resigned her
employment on January 6, 2020.

4 On December 17, 2018 and February 2019, Pamela, a co-worker, last name
5 unknown, said to Ms. Aguilera: "I hope our president gets all Mexicans out of the
6 country they don't belong here. Mexicans are coming and draining our system,
getting everything free."

7 On February 15, 2019, Karen Avilla, Deli Manager, told Ms. Aguilera not to speak
8 Spanish because "we are Americans." It was necessary for Ms. Aguilera speak
Spanish to the Spanish speaking customers.

9 On February 15, 2019, Ms. Aguilera went to Victor Ayala, Assistant Manager, to
10 complain about Pamela harassing her. Mr. Ayala told her Pamela wasn't harassing.
11 That harassing would be if Pam called her a lesbian. Victor would not allow Ms.
Aguilera to change her shift to accommodate going back to school

12 In March of 2019, Emily Castaneda, Bakery Manager, called Ms. Aguilera "dog",
13 "gremlin", "abortion", "crazy", "chueca" and constantly told Ms. Aguilera she did not
listen.

14 From July 26, 2019 until October 20, 2019. Ms. Castaneda would not provide
15 necessary supplies to Ms. Aguilera.

16 On July 26, 2019, Victor Ayala, Assistant Manager told employees that Ms. Aguilera
17 just wants store money and not to talk to her. He ostracized her.

18 On or around December 1, 2019, Patricia Acosta told Veronica Banda, Manager,
19 that Ms. Banda needed to get rid of Teresa Aguilera which then led to Ms. Banda
20 changing Ms. Aguilera's work schedule. Ms. Aguilera's new hours were less
desirable. Ms. Banda commented that she wanted to replace Ms. Aguilera, stating
21 "...if you know anybody that wants to work I will hire them". This conversation took
place in front of multiple employees.

22 The conditions were so intolerable that Ms. Aguilera resigned her employment on
23 January 6, 2020.

1 VERIFICATION

2 I, **William Marder**, am the **Attorney** in the above-entitled complaint. I have read the
3 foregoing complaint and know the contents thereof. The matters alleged are based
4 on information and belief, which I believe to be true.

5 On January 18, 2020, I declare under penalty of perjury under the laws of the State of
6 California that the foregoing is true and correct.

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San Jose, CA