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Superior Court of California,

County of Monterey

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By: Rowena Esquerra, Deputy

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **IN AND FOR THE COUNTY OF MONTEREY**

10 ADRIAN HERNANDEZ, on behalf of the
11 State of California, as a private attorney
12 general,

13 Plaintiff,

14 vs.

15 SANTA FE MERCADOS, INC., a
16 California Corporation; and Does 1
17 through 50, Inclusive,

18 Defendants.

Case No. 21CV000223

REPRESENTATIVE ACTION
COMPLAINT FOR:

1. Civil Penalties Pursuant to Labor Code
§ 2699, *et seq.* for violations of Labor
Code §§ 201, 202, 203, 204 *et seq.*, 210,
226(a), 226.7, 351, 510, 512, 558(a)(1)(2),
1194, 1197, 1197.1, 1198, 2802,
California Code of Regulations, Title 8,
Section 11040, Subdivision 5(A)-(B)

1 Plaintiff Adrian Hernandez (“PLAINTIFF”), an individual, on behalf of himself and all
2 other similarly situated current and former employees, alleges on information and belief, except
3 for his own acts and knowledge which are based on personal knowledge, the following:

4 INTRODUCTION

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

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

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

20 THE PARTIES

21 4. Defendant Santa Fe Mercados, Inc. (“DEFENDANT”) is a California Corporation
22 and at all relevant times mentioned herein conducted and continues to conduct substantial and
23 regular business throughout California.

24 5. DEFENDANT retails a range of canned foods and dry goods.

25 6. PLAINTIFF was employed by DEFENDANT in California from March of 2019
26 to July of 2020 and was at all times classified by DEFENDANT as a non-exempt employee,
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1 paid on an hourly basis, and entitled to the legally required meal and rest periods and payment
2 of minimum and overtime wages due for all time worked.

3 7. PLAINTIFF, and such persons that may be added from time to time who satisfy
4 the requirements and exhaust the administrative procedures under the Private Attorney General
5 Act, brings this Representative Action on behalf of the State of California with respect to
6 himself and all individuals who are or previously were employed by DEFENDANT in
7 California and classified as non-exempt employees ("AGGRIEVED EMPLOYEES") during
8 the time period of August 20, 2019 until a date as determined by the Court (the "PAGA
9 PERIOD").

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

18 9. The true names and capacities, whether individual, corporate, subsidiary,
19 partnership, associate or otherwise of defendants DOES 1 through 50, inclusive, are presently
20 unknown to PLAINTIFF who therefore sues these Defendants by such fictitious names pursuant
21 to Cal. Civ. Proc. Code § 474. PLAINTIFF will seek leave to amend this Complaint to allege
22 the true names and capacities of Does 1 through 50, inclusive, when they are ascertained.
23 PLAINTIFF is informed and believes, and based upon that information and belief alleges, that
24 the Defendants named in this Complaint, including DOES 1 through 50, inclusive, are
25 responsible in some manner for one or more of the events and happenings that proximately
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27 ¹Plaintiff specifically excludes and/or does not allege any claims under California Labor
28 Code §558(a)(3).

1 caused the injuries and damages hereinafter alleged.

2 10. The agents, servants and/or employees of the Defendants and each of them acting
3 on behalf of the Defendants acted within the course and scope of his, her or its authority as the
4 agent, servant and/or employee of the Defendants, and personally participated in the conduct
5 alleged herein on behalf of the Defendants with respect to the conduct alleged herein.
6 Consequently, the acts of each Defendant are legally attributable to the other Defendants and
7 all Defendants are jointly and severally liable to PLAINTIFF and the other AGGRIEVED
8 EMPLOYEES, for the loss sustained as a proximate result of the conduct of the Defendants'
9 agents, servants and/or employees.

11 THE CONDUCT

12 11. During the PAGA PERIOD, DEFENDANT failed to accurately record and pay
13 PLAINTIFF and other AGGRIEVED EMPLOYEES for the actual amount of time these
14 employees work. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT
15 is required to pay PLAINTIFF and other AGGRIEVED EMPLOYEES for all time worked,
16 meaning the time during which an employee was subject to the control of an employer,
17 including all the time the employee was permitted or suffered to permit this work.
18 DEFENDANT required PLAINTIFF and AGGRIEVED EMPLOYEES to work off the clock
19 without paying them for all the time they were under DEFENDANT's control. Further,
20 PLAINTIFF and other AGGRIEVED EMPLOYEES from time to time were not paid wages for
21 all time worked, including overtime wages, such that in the aggregate employees were
22 underpaid wages as a result of DEFENDANT's pattern and practice of unevenly rounding time
23 worked by its employees.

24 12. Specifically, during the PAGA PERIOD, DEFENDANT engaged in the practice
25 of requiring PLAINTIFF and AGGRIEVED EMPLOYEES to perform work off the clock
26 during what should have been these employees' off-duty meal periods. Additionally,
27 DEFENDANT engaged in the practice of requiring PLAINTIFF and AGGRIEVED
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1 EMPLOYEES to perform work off the clock in that DEFENDANT, as a condition of
2 employment, required these employees to wait in line and submit to mandatory temperature
3 checks for COVID-19 screening prior to clocking into DEFENDANT's timekeeping system for
4 the workday. As a result, PLAINTIFF and other AGGRIEVED EMPLOYEES forfeited
5 minimum wage, overtime wage compensation, and off-duty meal breaks by working without
6 their time being correctly recorded and without compensation at the applicable rates.
7 DEFENDANT's policy and practice not to pay PLAINTIFF and other AGGRIEVED
8 EMPLOYEES for all time worked, is evidenced by DEFENDANT's business records.

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

13 14. The second component of PLAINTIFF's and other AGGRIEVED EMPLOYEES'
14 compensation was DEFENDANT's non-discretionary incentive program that paid PLAINTIFF
15 and other AGGRIEVED EMPLOYEES incentive wages based on their performance for
16 DEFENDANT. The non-discretionary incentive program provided all employees paid on an
17 hourly basis with incentive compensation when the employees met the various performance
18 goals set by DEFENDANT. However, when calculating the regular rate of pay in order to pay
19 overtime to PLAINTIFF and other AGGRIEVED EMPLOYEES, DEFENDANT failed to
20 include the incentive compensation as part of the employees' "regular rate of pay" for purposes
21 of calculating overtime pay. Management and supervisors described the incentive program to
22 potential and new employees as part of the compensation package. As a matter of law, the
23 incentive compensation received by PLAINTIFF and other AGGRIEVED EMPLOYEES must
24 be included in the "regular rate of pay." The failure to do so has resulted in an underpayment
25 of overtime compensation to PLAINTIFF and other AGGRIEVED EMPLOYEES by
26 DEFENDANT. Further, DEFENDANT underpaid sick pay wages to PLAINTIFF and other
27 AGGRIEVED EMPLOYEES by failing to pay such wages at the regular rate of
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1 pay. Specifically, PLAINTIFF and other non-exempt employees regularly earn non-
2 discretionary remuneration, including but not limited to, incentives, shift differential pay, and
3 bonuses. Rather than pay sick pay at the regular rate of pay, DEFENDANT underpaid sick pay
4 to PLAINTIFF and other AGGRIEVED EMPLOYEES at their base rates of pay.

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

15 16. During the PAGA PERIOD, PLAINTIFF and other AGGRIEVED EMPLOYEES
16 were also from time to time required to work in excess of four (4) hours without being provided
17 ten (10) minute rest periods. Further, these employees are denied their first rest periods of at
18 least ten (10) minutes for some shifts worked of at least two (2) to four (4) hours, a first and
19 second rest period of at least ten (10) minutes for some shifts worked of between six (6) and
20 eight (8) hours, and a first, second and third rest period of at least ten (10) minutes for some
21 shifts worked of ten (10) hours or more from time to time. PLAINTIFF and other
22 AGGRIEVED EMPLOYEES are also not provided with one hour wages in lieu thereof. As
23 a result of their rigorous work schedules, PLAINTIFF and other AGGRIEVED EMPLOYEES
24 are periodically denied their proper rest periods by DEFENDANT and DEFENDANT's
25 managers. Additionally, the applicable California Wage Order requires employers to provide
26 employees with off-duty rest periods, which the California Supreme Court defined as time
27 during which an employee is relieved from all work related duties and free from employer
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1 control. In so doing, the Court held that the requirement under California law that employers
2 authorize and permit all employees to take rest period means that employers must relieve
3 employees of all duties and relinquish control over how employees spend their time which
4 includes control over the locations where employees may take their rest period. Employers
5 cannot impose controls that prohibit an employee from taking a brief walk - five minutes out,
6 five minutes back. Here, DEFENDANT's policy restricts PLAINTIFF and other AGGRIEVED
7 EMPLOYEES from unconstrained walks.

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

18 18. In the course of their employment PLAINTIFF and other AGGRIEVED
19 EMPLOYEES as a business expense, were required by DEFENDANT to use their own personal
20 cellular phones as a result of and in furtherance of their job duties as employees for
21 DEFENDANT but were not reimbursed or indemnified by DEFENDANT for the cost
22 associated with the use of their personal cellular phones for DEFENDANT's benefit.
23 Specifically, PLAINTIFF and other AGGRIEVED EMPLOYEES were required by
24 DEFENDANT to use their personal cellular phones to for work related issues. As a result, in
25 the course of their employment with DEFENDANT, PLAINTIFF and other AGGRIEVED
26 EMPLOYEES incurred unreimbursed business expenses which included, but were not limited
27 to, costs related to the use of their personal cellular phones all on behalf of and for the benefit
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1 of DEFENDANT.

2 19. Cal. Lab. Code § 226 provides that every employer shall furnish each of his or her
3 employees with an accurate itemized wage statement in writing showing, among other things,
4 gross wages earned and all applicable hourly rates in effect during the pay period and the
5 corresponding amount of time worked at each hourly rate. From time to time, DEFENDANT
6 violated Cal. Lab. Code § 226 by failing to provide wage statements that identified the correct
7 gross and net wages earned. Aside from the violations listed above, DEFENDANT failed to
8 issue to PLAINTIFF an itemized wage statement that lists all the requirements under California
9 Labor Code 226 *et seq.* As a result, from time to time DEFENDANT provided PLAINTIFF and
10 the other AGGRIEVED EMPLOYEES with wage statements which violated Cal. Lab. Code
11 § 226.

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

17
18 **JURISDICTION AND VENUE**

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

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

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FIRST CAUSE OF ACTION

For Violation of the Private Attorneys General Act

[Cal. Lab. Code §§ 2698, *et seq.*]

(By PLAINTIFF and Against All Defendants)

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

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

25. PLAINTIFF, and such persons that may be added from time to time who satisfy the requirements and exhaust the administrative procedures under the Private Attorney General Act, brings this Representative Action on behalf of the State of California with respect to himself and all individuals who are or previously were employed by DEFENDANT in California and classified as non-exempt employees ("AGGRIEVED EMPLOYEES") during the time period of August 20, 2019 until a date as determined by the Court (the "PAGA PERIOD").

26. On August 20, 2020, PLAINTIFF gave written notice by electronic mail to the Labor and Workforce Development Agency (the "Agency") and by certified mail to the employer of the specific provisions of this code alleged to have been violated as required by Labor Code § 2699.3. The statutory waiting period for PLAINTIFF to add these allegations to

1 the Complaint has expired. As a result, pursuant to Section 2699.3, PLAINTIFF may now
 2 commence a representative civil action under PAGA pursuant to Section 2699 as the proxy of
 3 the State of California with respect to all AGGRIEVED EMPLOYEES as herein defined.

4 27. The policies, acts and practices heretofore described were and are an unlawful
 5 business act or practice because DEFENDANT (a) failed to provide PLAINTIFF and the other
 6 AGGRIEVED EMPLOYEES accurate itemized wage statements, (b) failed to properly record
 7 and provide legally required meal and rest periods, (c) failed to pay overtime wages, (d) failed
 8 to pay minimum wages, (e) failed to reimburse for required expenses, and (f) failed to provide
 9 wages when due, all in violation of the applicable Labor Code sections listed in Labor Code
 10 §§201, 202, 203, 204 *et seq.*, 210, 226(a), 226.7, 351, 510, 512, 558(a)(1)(2), 1194, 1197,
 11 1197.1, 1198, 2802, California Code of Regulations, Title 8, Section 11040, Subdivision 5(A)-
 12 (B), and the applicable Industrial Wage Order(s), and thereby gives rise to civil penalties as a
 13 result of such conduct.² PLAINTIFF hereby seeks recovery of only civil penalties as prescribed
 14 by the Labor Code Private Attorney General Act of 2004 as the representative of the State of
 15 California for the illegal conduct perpetrated on PLAINTIFF and the other AGGRIEVED
 16 EMPLOYEES.

17 **PRAYER FOR RELIEF**

18
 19 WHEREFORE, PLAINTIFF prays for judgment against each Defendant, jointly and
 20 severally, as follows:

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

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

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

27 ²Plaintiff specifically excludes and/or does not allege any claims under California Labor
 28 Code §558(a)(3).

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

2 Dated: January 26, 2021 **BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP**

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5 By: /s/ Norman Blumenthal

6 Norman B. Blumenthal

7 Attorneys for Plaintiff