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

13 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

ELECTRONICALLY

FILED

Superior Court of California,
County of San Francisco

05/04/2022

Clerk of the Court

BY: KAREN VALDES

Deputy Clerk

CGC-22-599478

10 JEFFREY LEE, on behalf of the State of
11 California, as a private attorney general,

12 Plaintiff,

13 vs.

14 PANDA EXPRESS, LLC, a California
15 Limited Liability Company; PANDA
16 EXPRESS, INC., a California
17 Corporation; PANDA EXPRESS (P.R.),
18 INC., a California Corporation; and Does
19 1 through 50, Inclusive,

20 Defendants.

Case No. _____

REPRESENTATIVE ACTION
COMPLAINT FOR:

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

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

6 **INTRODUCTION**

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

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

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

23 **THE PARTIES**

24 4. Defendant Panda Express, LLC is a California limited liability company and at
25 all relevant times mentioned herein conducted and continues to conduct substantial and regular
26 business throughout California.

27 5. Defendant Panda Express, Inc. is a California Corporation and at all relevant times
28

1 mentioned herein conducted and continues to conduct substantial and regular business
2 throughout California.

3 6. Defendant Panda Express (P.R.), Inc. is a California Corporation and at all
4 relevant times mentioned herein conducted and continues to conduct substantial and regular
5 business throughout California.

6 7. PLAINTIFF alleges there has existed a unity of interest and ownership between
7 Panda Express, LLC and/or Panda Express, Inc. and/or Panda Express (P.R.), Inc. such that any
8 individuality and separateness between the entities has ceased and all Defendants are referred
9 to herein as "DEFENDANT."

10 8. DEFENDANT is a fast food restaurant chain.

11 9. PLAINTIFF was employed by DEFENDANT in California from July of 2018 to
12 October of 2021 and was at all times classified by DEFENDANT as a non-exempt employee
13 entitled to the legally required meal and rest periods and payment of minimum and overtime
14 wages due for all time worked.

15 10. PLAINTIFF, and such persons that may be added from time to time who satisfy
16 the requirements and exhaust the administrative procedures under the Private Attorney General
17 Act, brings this Representative Action on behalf of the State of California with respect to
18 himself and all individuals who are or previously were employed by Panda Express, LLC and/or
19 Panda Express, Inc. and/or Panda Express, (P.R.) in California and classified as non-exempt
20 employees ("AGGRIEVED EMPLOYEES") during the time period of February 22, 2021 until
21 a date as determined by the Court (the "PAGA PERIOD").

22 11. PLAINTIFF, on behalf of himself and all AGGRIEVED EMPLOYEES presently
23 or formerly employed by DEFENDANT during the PAGA PERIOD, brings this representative
24 action pursuant to Labor Code § 2699, *et seq.* seeking fixed civil penalties for DEFENDANT's
25 violation of California Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 221, 226(a), 226.7, 227.3,
26 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations, Title
27 8, Section 11040, Subdivision 5(A)-(B), and the applicable Wage Order(s). Based upon the
28 foregoing, PLAINTIFF and all AGGRIEVED EMPLOYEES are aggrieved employees within

1 the meaning of Labor Code § 2699, *et seq.*

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

11 13. The agents, servants and/or employees of the Defendants and each of them acting
12 on behalf of the Defendants acted within the course and scope of his, her or its authority as the
13 agent, servant and/or employee of the Defendants, and personally participated in the conduct
14 alleged herein on behalf of the Defendants with respect to the conduct alleged herein.
15 Consequently, the acts of each Defendant are legally attributable to the other Defendants and
16 all Defendants are jointly and severally liable to PLAINTIFF and the other AGGRIEVED
17 EMPLOYEES, for the loss sustained as a proximate result of the conduct of the Defendants'
18 agents, servants and/or employees.

19 THE CONDUCT

20
21 14. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT was
22 required to pay PLAINTIFF and the AGGRIEVED EMPLOYEES for all their time worked,
23 meaning the time during which an employee is subject to the control of an employer, including
24 all the time the employee is suffered or permitted to work. DEFENDANT requires PLAINTIFF
25 and the AGGRIEVED EMPLOYEES to work without paying them for all the time they are
26 under DEFENDANT's control. Among other things, DEFENDANT requires PLAINTIFF to
27 work while clocked out during what is supposed to be PLAINTIFF's off-duty meal break.
28 PLAINTIFF is from time to time interrupted by work assignments while clocked out for what

1 should be PLAINTIFF's off-duty meal break. PLAINTIFF and the AGGRIEVED
2 EMPLOYEES also worked off the clock with respect to time spent undergoing mandatory drug
3 testing or any other testing and/or examination required as a condition of employment.
4 DEFENDANT, as a matter of established company policy and procedure, administers a uniform
5 practice of rounding the actual time worked and recorded by PLAINTIFF and the AGGRIEVED
6 EMPLOYEES, always to the benefit of DEFENDANT, so that during the course of their
7 employment, PLAINTIFF and the AGGRIEVED EMPLOYEES are paid less than they would
8 have been paid had they been paid for actual recorded time rather than "rounded" time. As a
9 result, PLAINTIFF and the other AGGRIEVED EMPLOYEES forfeit minimum wage,
10 overtime wage compensation, and off-duty meal breaks by working without their time being
11 correctly recorded and without compensation at the applicable rates. DEFENDANT's policy
12 and practice not to pay PLAINTIFF and the other AGGRIEVED EMPLOYEES for all time
13 worked, is evidenced by DEFENDANT's business records.

14 15. State law provides that employees must be paid overtime and meal and rest break
15 premiums at one-and-one-half times their "regular rate of pay." PLAINTIFF and the
16 AGGRIEVED EMPLOYEES are compensated at an hourly rate plus incentive pay that is tied
17 to specific elements of an employee's performance.

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

1 compensation received by PLAINTIFF and the AGGRIEVED EMPLOYEES must be included
2 in the “regular rate of pay.” The failure to do so has resulted in a underpayment of overtime
3 compensation and meal and rest break premiums to PLAINTIFF and the AGGRIEVED
4 EMPLOYEES by DEFENDANT.

5 17. As a result of their rigorous work schedules, PLAINTIFF and the other
6 AGGRIEVED EMPLOYEES were from time to time unable to take thirty (30) minute off duty
7 meal breaks and were not fully relieved of duty for their meal periods. PLAINTIFF and the
8 other AGGRIEVED EMPLOYEES were required from time to time to perform work as ordered
9 by DEFENDANT for more than five (5) hours during some shifts without receiving a meal
10 break. Further, DEFENDANT from time to time failed to provide PLAINTIFF and the
11 AGGRIEVED EMPLOYEES with a second off-duty meal period for some workdays in which
12 these employees were required by DEFENDANT to work ten (10) hours of work.
13 DEFENDANT also engaged in the practice of rounding the meal period times to avoid paying
14 penalties to PLAINTIFF and the other AGGRIEVED EMPLOYEES. PLAINTIFF and the
15 other AGGRIEVED EMPLOYEES therefore forfeit meal breaks without additional
16 compensation and in accordance with DEFENDANT’s corporate policy and practice.

17 18. During the PAGA PERIOD, PLAINTIFF and the other AGGRIEVED
18 EMPLOYEES were also required from time to time to work in excess of four (4) hours without
19 being provided ten (10) minute rest periods. Further, these employees were denied their first
20 rest periods of at least ten (10) minutes for some shifts worked of at least two (2) to four (4)
21 hours from time to time, a first and second rest period of at least ten (10) minutes for some shifts
22 worked of between six (6) and eight (8) hours from time to time, and a first, second and third
23 rest period of at least ten (10) minutes for some shifts worked of ten (10) hours or more from
24 time to time. PLAINTIFF and the other AGGRIEVED EMPLOYEES were also not provided
25 with one hour wages in lieu thereof. Additionally, the applicable California Wage Order
26 requires employers to provide employees with off-duty rest periods, which the California
27 Supreme Court defined as time during which an employee is relieved from all work related
28 duties and free from employer control. In so doing, the Court held that the requirement under

1 California law that employers authorize and permit all employees to take rest period means that
2 employers must relieve employees of all duties and relinquish control over how employees
3 spend their time which includes control over the locations where employees may take their rest
4 period. Employers cannot impose controls that prohibit an employee from taking a brief walk -
5 five minutes out, five minutes back. Here, DEFENDANT's policy restricted PLAINTIFF and
6 the other AGGRIEVED EMPLOYEES from unconstrained walks and is unlawful based on
7 DEFENDANT's rule which states PLAINTIFF and the AGGRIEVED EMPLOYEES cannot
8 leave the work premises during their rest period.

9 19. During the PAGA PERIOD, DEFENDANT failed to accurately record and pay
10 PLAINTIFF and the AGGRIEVED EMPLOYEES for the actual amount of time these
11 employees worked. Pursuant to the Industrial Welfare Commission Wage Orders,
12 DEFENDANT was required to pay PLAINTIFF and the AGGRIEVED EMPLOYEES for all
13 time worked, meaning the time during which an employee was subject to the control of an
14 employer, including all the time the employee was permitted or suffered to permit this work.
15 DEFENDANT required these employees to work off the clock without paying them for all the
16 time they were under DEFENDANT's control. As such, DEFENDANT knew or should have
17 known that PLAINTIFF and the AGGRIEVED EMPLOYEES were under compensated for all
18 time worked. As a result, PLAINTIFF and the AGGRIEVED EMPLOYEES forfeited time
19 worked by working without their time being accurately recorded and without compensation at
20 the applicable minimum wage and overtime wage rates. To the extent that the time worked off
21 the clock does not qualify for overtime premium payment, DEFENDANT fails to pay minimum
22 wages for the time worked off-the-clock in violation of Cal. Lab. Code §§ 1194, 1197, and
23 1197.1.

24 20. From time to time, DEFENDANT also failed to provide PLAINTIFF and the
25 AGGRIEVED EMPLOYEES with complete and accurate wage statements which failed to
26 show, among other things, the correct gross and net wages earned. Cal. Lab. Code § 226
27 provides that every employer shall furnish each of his or her employees with an accurate
28 itemized wage statement in writing showing, among other things, gross wages earned and all

1 applicable hourly rates in effect during the pay period and the corresponding amount of time
2 worked at each hourly rate. Aside, from the violations listed above in this paragraph,
3 DEFENDANT failed to issue to PLAINTIFF an itemized wage statement that lists all the
4 requirements under California Labor Code 226 *et seq.* As a result, DEFENDANT from time to
5 time provided PLAINTIFF and the other AGGRIEVED EMPLOYEES with wage statements
6 which violated Cal. Lab. Code § 226.

7 21. Cal. Lab. Code § 204(d) provides, the requirements of this section shall be
8 deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the
9 wages are paid not more than seven (7) calendar days following the close of the payroll period.
10 Cal. Lab. Code § 210 provides:

11 [I]n addition to, and entirely independent and apart from, any other penalty provided in
12 this article, every person who fails to pay the wages of each employee as provided in
13 Sections. . . 204. . . shall be subject to a civil penalty as follows: (1) For any initial
14 violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For each
subsequent violation, or any willful or intentional violation, two hundred dollars (\$200)
for each failure to pay each employee, plus 25 percent of the amount unlawfully
withheld.

15 22. DEFENDANT from time to time failed to pay PLAINTIFF and the AGGRIEVED
16 EMPLOYEES within seven (7) days of the close of the payroll period in accordance with Cal.
17 Lab. Code § 204(d).

18 23. DEFENDANT underpaid sick pay wages to PLAINTIFF and the other
19 AGGRIEVED EMPLOYEES by failing to pay such wages at the regular rate of pay in violation
20 of Cal. Lab. Code Section 246. Specifically, PLAINTIFF and other non-exempt employees earn
21 non-discretionary remuneration. Rather than pay sick pay at the regular rate of pay,
22 DEFENDANT underpaid sick pay to PLAINTIFF and the other AGGRIEVED EMPLOYEES
23 at their base rates of pay.

24 24. Cal. Lab. Code Section 246(1)(2) requires that paid sick time for nonexempt
25 employees be calculated by dividing the employee's total wages, not including overtime
26 premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days
27 of employment.

28 25. DEFENDANT violated Cal. Lab. Code Section 246 by failing to pay sick pay at

1 the regular rate of pay. PLAINTIFF and the AGGRIEVED EMPLOYEES routinely earned non-
2 discretionary incentive wages which increased their regular rate of pay. However, when sick pay
3 was paid, it was paid at the base rate of pay for PLAINTIFF and the AGGRIEVED
4 EMPLOYEES, as opposed to the correct, higher regular rate of pay, as required under Cal. Lab.
5 Code Section 246.

6 26. As a pattern and practice, DEFENDANT regularly failed to pay PLAINTIFF and
7 the AGGRIEVED EMPLOYEES their correct wages and accordingly owe waiting time
8 penalties pursuant to Cal. Lab. Code Section 203. Further, PLAINTIFF is informed and believes
9 and based thereon alleges that such failure to pay sick pay at regular rate was willful, such that
10 PLAINTIFF and the AGGRIEVED EMPLOYEES whose employment has separated are
11 entitled to waiting time penalties pursuant to Cal. Lab. Code Sections 201-203.

12 27. Pursuant to Cal. Lab. Code Section 221, "It shall be unlawful for any employer
13 to collect or receive from an employee any part of wages theretofore paid by said employer to
14 said employee." DEFENDANT failed to pay all compensation due to PLAINTIFF and the
15 AGGRIEVED EMPLOYEES, made unlawful deductions from compensation payable to
16 PLAINTIFF and the AGGRIEVED EMPLOYEES, failed to disclose all aspects of the
17 deductions from compensation payable to PLAINTIFF and the AGGRIEVED EMPLOYEES,
18 and thereby failed to pay these employees all wages due at each applicable pay period and upon
19 termination.

20 28. DEFENDANT intentionally and knowingly failed to reimburse and indemnify
21 PLAINTIFF and the other AGGRIEVED EMPLOYEES for required business expenses
22 incurred by the PLAINTIFF and the AGGRIEVED EMPLOYEES in direct consequence of
23 discharging their duties on behalf of DEFENDANT. Under California Labor Code Section
24 2802, employers are required to indemnify employees for all expenses incurred in the course
25 and scope of their employment. Cal. Lab. Code § 2802 expressly states that "an employer shall
26 indemnify his or her employee for all necessary expenditures or losses incurred by the employee
27 in direct consequence of the discharge of his or her duties, or of his or her obedience to the
28 directions of the employer, even though unlawful, unless the employee, at the time of obeying

1 the directions, believed them to be unlawful."

2 29. In the course of their employment PLAINTIFF and the AGGRIEVED
3 EMPLOYEES as a business expense, were required by DEFENDANT to use their own personal
4 cellular phones as a result of and in furtherance of their job duties as employees for
5 DEFENDANT but are not reimbursed or indemnified by DEFENDANT for the cost associated
6 with the use of their personal cellular phones and personal home offices for DEFENDANT's
7 benefit. Specifically, PLAINTIFF and the AGGRIEVED EMPLOYEES were required by
8 DEFENDANT to use their personal cellular phones and personal home offices. As a result, in
9 the course of their employment with DEFENDANT, PLAINTIFF and the AGGRIEVED
10 EMPLOYEES incurred unreimbursed business expenses which included, but were not limited
11 to, costs related to the use of their personal cellular phones all on behalf of and for the benefit
12 of DEFENDANT.

13 30. All of the conduct and violations alleged herein occurred during the PAGA
14 PERIOD. To the extent that any of the conduct and violations alleged herein did not affect
15 PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those violations that
16 affected other AGGRIEVED EMPLOYEES pursuant to *Carrington v. Starbucks Corp.* 2018.

17 **JURISDICTION AND VENUE**

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

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

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

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

18 **PRAYER FOR RELIEF**

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

1 law, including, but not limited to, pursuant to Labor Code §2699.
2

3 Dated: May 4, 2022 BLUMENTHAL NORDREHAUG BHOWMIK
4 DE BLOUW LLP

5 By: /s/ Nicholas De Blouw
6 Nicholas J. De Blouw
7 Attorneys for Plaintiff
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