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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

MARK GUTIERREZ, on behalf of the State
of California, as a private attorney general,

Plaintiff,

vs.

SMART & FINAL STORES LLC, a California
Limited Liability Company; and DOES 1
through 50, inclusive,

Defendants.

Case No. 22STCV33312

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, 218,
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 Mark Gutierrez (“PLAINTIFF”), on behalf of the people of the State of
2 California and as an “aggrieved employee” acting as a private attorney general under the Labor
3 Code Private Attorney General Act of 2004, § 2699, *et seq.* (“PAGA”) only, alleges on
4 information and belief, except for his own acts and knowledge which are based on personal
5 knowledge, the following:

6 **INTRODUCTION**

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

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

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

22 **THE PARTIES**

23 4. Defendant Smart & Final Stores LLC (“DEFENDANT”) is a limited liability
24 company that at all relevant times mentioned herein conducted and continues to conduct
25 substantial business in the state of California.

26 5. DEFENDANT is a chain of warehouse-style food and supply stores based in
27 Commerce, California, which developed through a series of mergers and expansions. The oldest
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1 of the combined companies, Hellman-Haas Grocery, was founded in 1871 in Los Angeles

2 6. PLAINTIFF was employed by DEFENDANT in California from December of
3 2019 to March 28, 2022 and was at all times classified by DEFENDANT as a non-exempt
4 employee, paid on an hourly basis, and entitled to the legally required meal and rest periods and
5 payment of minimum and overtime wages due for all time worked.

6 7. PLAINTIFF, and such persons that may be added from time to time who satisfy
7 the requirements and exhaust the administrative procedures under the Private Attorney General
8 Act, brings this Representative Action on behalf of the State of California with respect to
9 himself and all individuals who are or previously were employed by DEFENDANT in California,
10 including any employees staffed with DEFENDANT by a third party, and classified as non-
11 exempt employees ("AGGRIEVED EMPLOYEES") during the time period of July 20, 2021
12 until a date as determined by the Court (the "PAGA PERIOD").

13 8. PLAINTIFF, on behalf of himself and all AGGRIEVED EMPLOYEES
14 presently or formerly employed by DEFENDANT during the PAGA PERIOD, brings this
15 representative action pursuant to Labor Code § 2699, *et seq.* seeking fixed civil penalties for
16 DEFENDANT's violation of California Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 218,
17 221, 226(a), 226.7, 227.3, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802,
18 California Code of Regulations, Title 8, Section 11040, Subdivision 5(A)-(B), and the
19 applicable Wage Order(s). Based upon the foregoing, PLAINTIFF and all AGGRIEVED
20 EMPLOYEES are aggrieved employees within the meaning of Labor Code § 2699, *et seq.*

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

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

11 THE CONDUCT

12
13 11. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT
14 was required to pay PLAINTIFF and the AGGRIEVED EMPLOYEES for all their time
15 worked, meaning the time during which an employee is subject to the control of an
16 employer, including all the time the employee is suffered or permitted to work.
17 DEFENDANT requires PLAINTIFF and the AGGRIEVED EMPLOYEES to work without
18 paying them for all the time they are under DEFENDANT's control. Among other things,
19 DEFENDANT requires PLAINTIFF to work while clocked out during what is supposed to
20 be PLAINTIFF's off-duty meal break. PLAINTIFF was from time to time interrupted by
21 work assignments while clocked out for what should have been PLAINTIFF's off-duty meal
22 break. DEFENDANT, as a matter of established company policy and procedure,
23 administers a uniform practice of rounding the actual time worked and recorded by
24 PLAINTIFF and the AGGRIEVED EMPLOYEES, always to the benefit of DEFENDANT,
25 so that during the course of their employment, PLAINTIFF and the AGGRIEVED
26 EMPLOYEES are paid less than they would have been paid had they been paid for actual
27 recorded time rather than "rounded" time. Additionally, DEFENDANT engages in the
28 practice of requiring PLAINTIFF and the AGGRIEVED EMPLOYEES to perform work off

1 the clock in that DEFENDANT, as a condition of employment, required these employees to
2 submit to mandatory temperature checks and symptom questionnaires for COVID-19
3 screening prior to clocking into DEFENDANT's timekeeping system for the workday. As a
4 result, PLAINTIFF and the AGGRIEVED EMPLOYEES forfeit minimum wage, overtime
5 wage compensation, and off-duty meal breaks by working without their time being correctly
6 recorded and without compensation at the applicable rates. DEFENDANT's policy and
7 practice not to pay PLAINTIFF and the AGGRIEVED EMPLOYEES for all time worked, is
8 evidenced by DEFENDANT's business records.

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

13 13. The second component of PLAINTIFF's and the AGGRIEVED
14 EMPLOYEES' compensation is DEFENDANT's non-discretionary incentive program that
15 paid PLAINTIFF and the AGGRIEVED EMPLOYEES incentive wages based on their
16 performance for DEFENDANT. The non-discretionary incentive program provided all
17 employees paid on an hourly basis with incentive compensation when the employees met the
18 various performance goals set by DEFENDANT. However, when calculating the regular
19 rate of pay in order to pay overtime and meal and rest break premiums to PLAINTIFF and
20 the AGGRIEVED EMPLOYEES, DEFENDANT failed to include the incentive
21 compensation as part of the employees' "regular rate of pay" for purposes of calculating
22 overtime pay and meal and rest break premium pay. Management and supervisors described
23 the incentive program to potential and new employees as part of the compensation package.
24 As a matter of law, the incentive compensation received by PLAINTIFF and the
25 AGGRIEVED EMPLOYEES must be included in the "regular rate of pay." The failure to
26 do so has resulted in a underpayment of overtime compensation and meal and rest break
27 premiums to PLAINTIFF and the AGGRIEVED EMPLOYEES by DEFENDANT.
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1 14. As a result of their rigorous work schedules, PLAINTIFF and the
2 AGGRIEVED EMPLOYEES were from time to time unable to take thirty (30) minute off
3 duty meal breaks and were not fully relieved of duty for their meal periods. PLAINTIFF
4 and the AGGRIEVED EMPLOYEES were required from time to time to perform work as
5 ordered by DEFENDANT for more than five (5) hours during some shifts without receiving
6 a meal break. Further, DEFENDANT from time to time failed to provide PLAINTIFF and
7 the AGGRIEVED EMPLOYEES with a second off-duty meal period for some workdays in
8 which these employees were required by DEFENDANT to work ten (10) hours of work.
9 DEFENDANT also engaged in the practice of rounding the meal period times to avoid
10 paying penalties to PLAINTIFF and the AGGRIEVED EMPLOYEES. PLAINTIFF and the
11 AGGRIEVED EMPLOYEES therefore forfeit meal breaks without additional compensation
12 and in accordance with DEFENDANT's corporate policy and practice.

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

1 an employee from taking a brief walk - five minutes out, five minutes back. Here,
2 DEFENDANT's policy restricted PLAINTIFF and the AGGRIEVED EMPLOYEES from
3 unconstrained walks and is unlawful based on DEFENDANT's rule which states
4 PLAINTIFF and the AGGRIEVED EMPLOYEES cannot leave the work premises during
5 their rest period.

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

21 17. From time to time, DEFENDANT also failed to provide PLAINTIFF and the
22 AGGRIEVED EMPLOYEES with complete and accurate wage statements which failed to
23 show, among other things, the correct gross and net wages earned. Cal. Lab. Code § 226
24 provides that every employer shall furnish each of his or her employees with an accurate
25 itemized wage statement in writing showing, among other things, gross wages earned and all
26 applicable hourly rates in effect during the pay period and the corresponding amount of time
27 worked at each hourly rate. PLAINTIFF and the AGGRIEVED EMPLOYEES were paid on
28 an hourly basis. As such, the wage statements should reflect all applicable hourly rates

1 during the pay period and the total hours worked, and the applicable pay period in which the
2 wages were earned pursuant to California Labor Code Section 226(a). The wage statements
3 DEFENDANT provided to PLAINTIFF and the AGGRIEVED EMPLOYEES failed to
4 identify such information. More specifically, the wage statements failed to identify the
5 accurate total hours worked each pay period. When the hours shown on the wage statements
6 were added up, they did not equal the actual total hours worked during the pay period in
7 violation of Cal. Lab. Code 226(a)(2). Aside, from the violations listed above in this
8 paragraph, DEFENDANT failed to issue to PLAINTIFF an itemized wage statement that
9 lists all the requirements under California Labor Code 226 *et seq.* As a result, DEFENDANT
10 from time to time provided PLAINTIFF and the AGGRIEVED EMPLOYEES with wage
11 statements which violated Cal. Lab. Code § 226.

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

16 [I]n addition to, and entirely independent and apart from, any other penalty provided
17 in this article, every person who fails to pay the wages of each employee as provided
18 in Sections. . . 204. . . shall be subject to a civil penalty as follows: (1) For any initial
19 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.

20 19. DEFENDANT from time to time failed to pay PLAINTIFF and the
21 AGGRIEVED EMPLOYEES within seven (7) days of the close of the payroll period in
22 accordance with Cal. Lab. Code § 204(d), including but not limited to for the “Hourly”
23 regular wage payments.

24 20. DEFENDANT underpaid sick pay wages to PLAINTIFF and the
25 AGGRIEVED EMPLOYEES by failing to pay such wages at the regular rate of pay in
26 violation of Cal. Lab. Code Section 246. Specifically, PLAINTIFF and other non-exempt
27 employees earn non-discretionary remuneration. Rather than pay sick pay at the regular rate
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1 of pay, DEFENDANT underpaid sick pay to PLAINTIFF and the AGGRIEVED
2 EMPLOYEES at their base rates of pay.

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

7 22. DEFENDANT violated Cal. Lab. Code Section 246 by failing to pay sick pay
8 at the regular rate of pay. PLAINTIFF and the AGGRIEVED EMPLOYEES routinely
9 earned non-discretionary incentive wages which increased their regular rate of pay.
10 However, when sick pay was paid, it was paid at the base rate of pay for PLAINTIFF and
11 the AGGRIEVED EMPLOYEES, as opposed to the correct, higher regular rate of pay, as
12 required under Cal. Lab. Code Section 246.

13 23. As a pattern and practice, DEFENDANT regularly failed to pay PLAINTIFF
14 and the AGGRIEVED EMPLOYEES their correct wages and accordingly owe waiting time
15 penalties pursuant to Cal. Lab. Code Section 203. Further, PLAINTIFF is informed and
16 believes and based thereon alleges that such failure to pay sick pay at regular rate was
17 willful, such that PLAINTIFF and the AGGRIEVED EMPLOYEES whose employment has
18 separated are entitled to waiting time penalties pursuant to Cal. Lab. Code Sections 201-203.

19 24. Pursuant to Cal. Lab. Code Section 221, "It shall be unlawful for any employer
20 to collect or receive from an employee any part of wages theretofore paid by said employer
21 to said employee." DEFENDANT failed to pay all compensation due to PLAINTIFF and
22 the AGGRIEVED EMPLOYEES, made unlawful deductions from compensation payable to
23 PLAINTIFF and the AGGRIEVED EMPLOYEES, failed to disclose all aspects of the
24 deductions from compensation payable to PLAINTIFF and the AGGRIEVED
25 EMPLOYEES, and thereby failed to pay these employees all wages due at each applicable
26 pay period and upon termination.

27 25. DEFENDANT intentionally and knowingly failed to reimburse and indemnify
28 PLAINTIFF and the AGGRIEVED EMPLOYEES for required business expenses incurred

1 by the PLAINTIFF and the AGGRIEVED EMPLOYEES in direct consequence of
2 discharging their duties on behalf of DEFENDANT. Under California Labor Code Section
3 2802, employers are required to indemnify employees for all expenses incurred in the course
4 and scope of their employment. Cal. Lab. Code § 2802 expressly states that "an employer
5 shall indemnify his or her employee for all necessary expenditures or losses incurred by the
6 employee in direct consequence of the discharge of his or her duties, or of his or her
7 obedience to the directions of the employer, even though unlawful, unless the employee, at
8 the time of obeying the directions, believed them to be unlawful."

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

20 27. All of the conduct and violations alleged herein occurred during the PAGA
21 PERIOD. To the extent that any of the conduct and violations alleged herein did not affect
22 PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those violations
23 that affected the AGGRIEVED EMPLOYEES pursuant to *Carrington v. Starbucks Corp.*
24 2018 AJDAR 12157 (Certified for Publication 12/19/18).

25 **JURISDICTION AND VENUE**

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

29. Venue is proper in this Court pursuant to California Code of Civil Procedure, Sections 395.5 and 393, because DEFENDANT operates in locations across California, employs AGGRIEVED EMPLOYEES across California, including in this County, and committed the wrongful conduct herein alleged in this County against AGGRIEVED EMPLOYEES.

FIRST CAUSE OF ACTION

For Violation of the Private Attorneys General Act

[Cal. Lab. Code §§ 2698, *et seq.*]

(By PLAINTIFF and Against All Defendants)

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

31. 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.

32. 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, including any employees staffed with DEFENDANT by a third party, and classified as non-exempt employees (“AGGRIEVED EMPLOYEES”) during the time period of July 20, 2021 until a date as determined by the Court (the "PAGA PERIOD").

33. On July 20, 2022, 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 the Complaint has expired. As a result, pursuant to Section 2699.3, PLAINTIFF may now commence a representative civil action under PAGA pursuant to Section 2699 as the proxy of the State of California with respect to all AGGRIEVED EMPLOYEES as herein defined.

34. The policies, acts and practices heretofore described were and are an unlawful business act or practice because DEFENDANT (a) failed to provide PLAINTIFF and the AGGRIEVED EMPLOYEES accurate itemized wage statements, (b) failed to properly record and provide legally required meal and rest periods, (c) failed to pay minimum wages, (d) failed to pay overtime wages and sick pay wages, (e) failed to reimburse employees for required expenses and (f) failed to provide wages when due, all in violation of the applicable Labor Code sections listed in Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 218, 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), and thereby gives rise to civil penalties as a result of such conduct.¹ PLAINTIFF hereby seeks recovery of only civil penalties as prescribed by the Labor Code Private Attorney General Act of 2004 as the representative of the State of California for the illegal conduct perpetrated on PLAINTIFF and the AGGRIEVED EMPLOYEES.

PRAYER FOR RELIEF

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

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

A) Recovery of civil penalties as prescribed by the Labor Code Private

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

1 Attorneys General Act of 2004; and,

2 B) An award of attorneys' fees and cost of suit, as allowable under the
3 law, including, but not limited to, pursuant to Labor Code §2699.

4 Dated: October 12, 2022 BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW
5 LLP

6
7 By: /s/ Nicholas De Blouw
8 Norman B. Blumenthal
9 Kyle R. Nordrehaug
10 Nicholas J. De Blouw

11 *Attorneys for Plaintiff*
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