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Attorneys for Plaintiff Eric Diaz
on behalf of himself and all others similarly situated

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN BERNARDINO

ERIC DIAZ, on behalf of himself and all
others similarly situated,

Plaintiff,

vs.

THE KROGER CO. an Ohio Corporation,
RALPHS GROCERY COMPANY an Ohio
Corporation, and DOES 1 to 10, inclusive,

Defendants.

) Case No. CIVSB2028561

) **CLASS AND PAGA ACTION**

) **FIRST AMENDED CLASS ACTION AND
PAGA ACTION COMPLAINT FOR
DAMAGES:**

1. FAILURE TO PAY MINIMUM, STRAIGHT
AND OVERTIME COMPENSATION IN
VIOLATION OF LABOR CODE §§ 223,
510, 558, 1194, 1194.2, 1198, 1199;
2. WAITING TIME PENALTIES (CAL. LAB.
CODE §§ 201-203);
3. UNFAIR COMPETITION IN VIOLATION
OF CAL. BUSINESS & PROFESSIONS
CODE 17200, *ET SEQ.*; AND
4. PRIVATE ATTORNEYS GENERAL
ACTION COMPLAINT FOR VIOLATION
OF LABOR CODE § 2698, *ET SEQ.*

DEMAND FOR JURY TRIAL

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

JUL - 8 2021

BY LEANNE M. LANDEROS
LEANNE M. LANDEROS, DEPUTY

FILED BY FAX

1 Plaintiff ERIC DIAZ (“Representative Plaintiff”) alleges as follows:

2 **PARTIES**

3 1. Plaintiff Eric Diaz is an individual who resides in California and was employed by
4 defendants THE KROGER CO. and RALPHS GROCERY COMPANY and DOES 1 to 10
5 (hereafter collectively referred to as “Defendants” or “Kroger”) beginning in 2007 and worked for
6 the Defendants for over a dozen years.

7 2. Representative Plaintiff is informed and believes, and based on such information
8 and belief, alleges that at all times mentioned herein, that both Defendants were and are
9 corporations organized under the laws of the State of Ohio and authorized to do business and doing
10 business throughout the State of California and throughout the County of San Bernardino.

11 3. Representative Plaintiff is unaware of the true names and capacities, whether
12 corporate or individual, or otherwise, of defendants named as DOES 1 through 10, inclusive.
13 Pursuant to California Code of Civil Procedure section 474, Representative Plaintiff will seek leave
14 of court to amend this complaint to state said defendants’ true names and capacities when the same
15 have been ascertained. Representative Plaintiff is informed and believes and based on such
16 information and belief alleges that said fictitiously-named defendants are responsible in some
17 manner for the injuries and damages to Representative Plaintiff and the putative class as further
18 alleged herein.

19 4. This is a Class Action Complaint, pursuant to California Code of Civil Procedure
20 section 382, on behalf of Eric Diaz and all other persons similarly situated who worked for
21 Defendants in a warehouse/distribution center in California as non-exempt hourly employees for:
22 (i) failure to pay minimum, straight and overtime compensation in violation of Labor Code sections
23 223, 510, 558, 1194, 1194.2, 1198 and 1199 as well as IWC Wage Order No. 7/9.; (ii) failure to
24 pay waiting time penalties in violation of Labor Code sections 201-203; (iii) unlawful business
25 practices in violation of Bus. & Prof. Code section 17200 *et seq*; and (iv) violation of the Private
26 Attorneys General Act (“PAGA”) Labor Code section 2698 *et. seq*.

27 5. For at least four (4) years prior to the filing of this action and through to the present,
28 Defendants have had a consistent policy of failing to pay for minimum, straight and overtime hours

1 worked by Defendants' California hourly non-exempt, warehouse/distribution center employees in
2 violation of California law. Defendants failed to pay Representative Plaintiff and the putative class
3 members for all of the time in which they were under Defendants' control. When Representative
4 Plaintiff and the other putative class members clock out at the end of their shifts they are required
5 to walk to a security area and wait in line to undergo a bag and security check before they could
6 leave work. When Representative Plaintiff and the putative class members undergo the security
7 check they are required to hold out their cold temperature PPE suit and shake it to show there is
8 nothing concealed within it for the security guard, they were also required to open up all bags,
9 lunch containers and coats/jackets for the security guards to search as well before s/he could leave
10 work. After finishing the required security check Representative Plaintiff and the putative class
11 members were then allowed to badge out at a metal turnstile and leave for the day. Additionally,
12 employees could be randomly selected for a vehicle inspection before they were allowed to leave
13 the parking area.

14 6. For at least the last four (4) years prior to the filing of this action and through to the
15 present, Defendants have had a consistent policy of failing to pay all of their
16 warehouse/distribution center non-exempt employees for all of this additional time in which they
17 were under the Defendant's control and were not compensated at the correct legal rate of pay.

18 7. Representative Plaintiff, on behalf of himself and all class members, bring this
19 action pursuant to California Labor Code sections 201, 202, 203, 218, 218.5, 218.6, 510, 558,
20 1194, 1194.2, 1197, 1998 and 1199 and the IWC Wage Orders, seeking unpaid minimum, straight
21 and overtime wages, penalties, injunctive and other equitable relief, interest, and reasonable
22 attorneys' fees and costs.

23 8. Representative Plaintiff, on behalf of himself and all class members, pursuant to
24 Business and Professions Code sections 17200-17208, also seeks injunctive relief, restitution, and
25 disgorgement of all benefits Defendants enjoyed from their failure to correctly pay minimum,
26 straight and overtime wages for all hours worked, and injuries suffered as a result of the
27 Defendants' failure to timely pay all wages due.

28 ///

1 **VENUE AND JURISDICTION**

2 9. Venue is proper under California Code of Civil Procedure section 395 and under
3 California Government Code section 12965(b), in that Defendants conduct business throughout the
4 state of California including San Bernardino County. Defendants' warehouses support and directly
5 supply a large number of Ralph's supermarkets throughout California and San Bernardino County.

6 10. Representative Plaintiff is informed and believes, and thereupon alleges that his
7 individual claims are under \$75,000.00 and the aggregate claim of the putative class are under the
8 \$5,000,000.00 threshold for federal jurisdiction under the Class Action Fairness Act of 2005.

9 **STATEMENT OF FACTS**

10 11. Representative Plaintiff was hired by Defendants as a warehouse worker in 2007
11 and worked for the Defendants for over 12 years.

12 12. During the entire period of his employment with Defendants, Representative
13 Plaintiff as a dedicated and exemplary employee, and performed his duties as a warehouse worker
14 for Defendants in a diligent and thorough manner.

15 13. During his employment with Defendants, Representative Plaintiff and the other
16 putative class members are required to perform a number of specific and time consuming post-shift
17 activities after clocking out on the Defendants' Biometric timekeeping system. When
18 Representative Plaintiff and the other putative class members clock out at the end of the workday,
19 or for their meal period if s/he decided to leave the premises, they are required to walk to the locker
20 room to doff their cold suit PPE, and then walk the long route to the security desk to wait in line for
21 the mandatory bag check and security screening to ensure that no one stole anything from the
22 Defendants. The security check includes an inspection of their cold suit, bags, jackets/coats and
23 lunch box, after which the Representative Plaintiff and the other putative class members are
24 allowed to badge out at a metal turnstile. Additionally, employees could be randomly selected for
25 a vehicle inspection before they were allowed to leave the parking area. Representative Plaintiff
26 and the putative class members are not paid for any of the time spent submitting to these
27 procedures, and as such are not paid for the time from when s/he clocks out on the Biometric
28 timekeeping system to the time that s/he badges out at the metal turnstile. Nor are they paid for the

1 time they are required to submit to the random but mandatory vehicle inspections.

2 14. The above-mentioned post-shift activities deprive the Representative Plaintiff and
3 the other putative class members of compensable time spent under the control of Defendants and
4 for which they must be paid. The warehouses and distribution centers run by Defendants store
5 food and operate at temperatures from 34 degrees to negative 15 degrees Fahrenheit, and as such
6 Representative Plaintiff and the putative class members must wear “cold suits” as PPE in order to
7 protect them from the cold temperatures. The cold suit PPE Representative Plaintiff and the other
8 putative class members are required to wear is time consuming to doff. Defendants’ policies
9 prohibit any employee from wearing their cold suits through the exit and for the security check
10 before being allowed to leave any facility. As a result, the time spent walking to and from the
11 locker room, waiting in line at the security station for a security check, undergoing a security and
12 bag check, and then badging out of the facility, and submitting to the mandatory vehicle
13 inspections is off-the-clock and is not compensated. These required post-shift activities can take
14 several minutes. During at least the last four (4) years the Representative Plaintiff and the other
15 putative class members have not been compensated for any of this time.

16 15. The time Representative Plaintiff and the other putative class members spend from
17 the time they clock out to the time they badge out of Defendants’ facilities is compensable under
18 California law. Frlekin v. Apple Inc. (2020) 8 Cal.5th 1038, reh'g denied (May 13, 2020). In
19 Frlekin the California Supreme Court held that all time spent under an employer’s control is
20 compensable time, including the time spent undergoing post-shift bag checks and that the ruling in
21 Frlekin applies retroactively. Additionally, the California Supreme Court in Troester v. Starbucks
22 Corp. (2018) 5 Cal.5th 829, as modified on denial of reh'g (Aug. 29, 2018) ruled that the Labor
23 Code and Wage Orders do not allow employers to require employees to routinely work for minutes
24 off the clock without compensation, and that this responsibility to pay wages for all time worked
25 may not be avoided. California law mandates that the time Representative Plaintiff and the other
26 putative class members spend under Defendants’ control, such as when they perform Defendants’
27 exit procedures and undergo Defendants’ security/bag checks, is compensable and a failure to pay
28 wages for that time is in violation of Labor Code and the Wage Orders.

1 16. A result of the Defendants' above-mentioned policies is that Defendants have failed
2 to pay all minimum, straight, and overtime wages to Representative Plaintiff and the other putative
3 class members as they were not paid for all compensable time spent under their employers' control.

4 **CLASS ACTION ALLEGATIONS**

5 17. Representative Plaintiff brings this action on behalf of himself and all others
6 similarly situated as a class action pursuant to Section 382 of the Code of Civil Procedure.

7 18. Representative Plaintiff seeks to represent a Class composed of and defined as
8 follows:

9 19. **Off-The-Clock Class.** All persons who are employed or have been employed by
10 Defendants in California in a warehouse/distribution center in a non-exempt position within four
11 (4) years of the filing of the Complaint who were denied wages for the time spent complying with
12 the Defendants' mandatory post-shift security screening measures.

13 20. Representative Plaintiff also seeks to represent a Class composed of and defined as
14 follows:

15 21. **Waiting Time Penalties Sub-Class.** All persons who are employed or have been
16 employed by Defendants in California in a warehouse/distribution center in a non-exempt position
17 within three (3) years of the filing of the Complaint who did not receive all wages owed to them at
18 the time of termination for the time spent complying with the Defendant's mandatory post-shift
19 security screening measures.

20 **A. Numerosity**

21 22. The potential members of the Class as defined are so numerous that joinder of all
22 the members of the Class is impracticable. While the precise number of class members has not
23 been determined at this time, Representative Plaintiff is informed and believes that Defendants
24 currently employ, and during the relevant time periods employed, hundreds of non-exempt
25 warehouse/distribution center employees in the State of California.

26 23. Upon information and belief, Representative Plaintiff alleges that the Defendants'
27 employment records will provide information as to the number and location of all members of the
28 Class. Joinder of all members of the proposed Class is not practicable.

1 **B. Commonality**

2 24. There are questions of law and fact common to the Class that predominate over any
3 questions affecting only individual Class members. These common questions of law and fact
4 include, without limitation:

- 5 a. Whether Defendants paid their non-exempt warehouse/distribution center
6 employees for all of the time that they were under their control at the end of
7 their shifts;
- 8 b. Whether Defendants violated Labor Code Sections 201-203 by failing to pay
9 all wages due and owing at the time of termination of employment of the
10 putative class members;
- 11 c. Whether members of the Class are entitled to injunctive and/or declaratory
12 relief.

13 **C. Typicality**

14 25. The claims of the Representative Plaintiff are typical of the claims of the Class.
15 Representative Plaintiff and all members of the Class sustained injuries and damages arising out of
16 and caused by Defendants' common course of conduct in violation of laws and regulations that
17 have the force and effect of law and statutes as alleged therein.

18 **D. Adequacy of Representation**

19 26. The Representative Plaintiff will fairly and adequately represent and protect the
20 interests of the members of the Class. Counsel who represent Representative Plaintiff are
21 competent and experienced.

22 **E. Superiority of Class Action**

23 27. A class action is superior to other available means for the fair and efficient
24 adjudication of this controversy. Individual joinder of all class members is not practicable, and
25 questions of law and fact common to the Class predominate over any questions affecting only
26 individual members of the Class. Each member of each Class has been damaged and is entitled to
27 recovery by reason of Defendants' illegal policy and/or practice of failing to legally compensate
28 class members as alleged above.

1 **FIRST CAUSE OF ACTION**

2 **(FAILURE TO PAY MINIMUM, STRAIGHT AND OVERTIME COMPENSATION IN**
3 **VIOLATION OF LABOR CODE §§ 223, 510, 558, 1194, 1194.2, 1198, 1199, IWC WAGE**

4 **ORDER NO. 7/9)**

5 **(By Representative Plaintiff Against Defendants The Kroger Co., Ralphs Grocery**
6 **Company, and Does 1 through 10, inclusive)**

7 28. Representative Plaintiff hereby re-alleges and incorporates all preceding paragraphs
8 as though fully set forth herein.

9 29. Defendants had a consistent policy of failing to pay minimum, straight and overtime
10 wages to their hourly non-exempt warehouse/distribution center employees in violation of
11 California state wage and hour laws by requiring employees to work off-the-clock without payment
12 by not paying for all of the time that these employees spent under Defendants' control.
13 Defendants' pay practices failed to compensate Representative Plaintiff and the putative class
14 members for the time period from when they clocked out at the end of their shift to the time they
15 badged out at the metal turnstiles at the facility's exit. This time includes but is not limited to, time
16 spent doffing their cold suit, time spent waiting in line to undergo a security check, and time spent
17 undergoing a bag, vehicle and/or person security checks.

18 30. In Frlekin v. Apple Inc. (2020) 8 Cal.5th 1038, reh'g denied (May 13, 2020) the
19 California Supreme Court decided that time spent undergoing bag checks is compensable as is any
20 time an employee spends under the employer's control. When Representative Plaintiff and the
21 putative class clocked out, they were still under Defendants' control when they had to doff their
22 cold suit, walk to another area to wait in line for a security check, undergo a mandatory bag and
23 security check, and then badge out. During these times, the Representative Plaintiff and the other
24 putative class members were not free to use their time as they wished, and were subject to the
25 Defendants' policies, rules, and directions. Regardless of how long these activities took, all time
26 spent under the employer's control, such as being subject to their rules and restrictions, is
27 compensable under California law. Troester v. Starbucks Corp. (2018) 5 Cal.5th 829, as modified
28 on denial of reh'g (Aug. 29, 2018) Representative Plaintiff and the other putative class members

1 were not permitted to leave Defendants' facilities without performing these post-shift activities and
2 could be written up or terminated if they did not comply with them.

3 31. As a result of the unlawful acts of Defendants, Representative Plaintiff and the
4 putative class members have been deprived of their full minimum, straight and/or overtime wages
5 in amounts to be determined at trial, and are entitled to the recovery of such amounts, plus interest
6 and penalties thereon, attorneys' fees, and costs, pursuant to Labor Code sections 218.5, 223, 510,
7 558, 1194, 1194.2, 1198 and 1199 and the IWC Wage Orders.

8 **SECOND CAUSE OF ACTION**

9 **(FAILURE TO PAY WAITING TIME PENALTIES IN VIOLATION OF**

10 **LABOR CODE §§ 201-203)**

11 **(By Representative Plaintiff Against Defendants The Kroger Co., Ralphs Grocery Company,**
12 **and Does 1 through 10, inclusive)**

13 32. Representative Plaintiff hereby re-alleges and incorporates all preceding paragraphs
14 as though fully set forth herein.

15 33. California Labor Code section 201 requires an employer who discharges an
16 employee to pay all compensation due and owing to that employee immediately upon discharge.

17 34. California Labor Code section 203 provides that if an employer willfully fails to pay
18 compensation promptly upon separation from employment, as required by either Sections 201 or
19 202, then the employer is liable for waiting time penalties in the form of continued compensation
20 for up to 30 workdays.

21 35. Defendants willfully failed and refused to timely pay all wages to Representative
22 Plaintiff and the putative class members whose employment terminated. As a result, Defendants
23 are liable to Representative Plaintiff and the putative class members for waiting time penalties,
24 together with costs, under Labor Code section 203.

25 36. As a result of Defendants' unlawful conduct, Representative Plaintiff and the
26 putative class members have suffered damages in an amount, subject to proof, to the extent they
27 were not paid all wages due each pay period. The precise amount of unpaid wages is not presently
28 known to Representative Plaintiff but can be determined directly from Defendants' records or

1 indirectly based on information from Defendants' records.

2 **THIRD CAUSE OF ACTION**

3 **(UNLAWFUL BUSINESS PRACTICES IN VIOLATION OF BUS. & PROF. CODE**

4 **§ 17200, *ET SEQ.*)**

5 **(By Representative Plaintiff Against Defendants The Kroger Co., Ralphs Grocery Company,**
6 **and Does 1 through 10, inclusive)**

7 37. Representative Plaintiff hereby re-alleges and incorporates all preceding paragraphs
8 as though fully set forth herein.

9 38. Defendants' failure to correctly pay minimum, legal and agreed upon wages as
10 alleged herein constitutes unlawful activity prohibited by Business and Professions Code section
11 17200, *et seq.*, including but not limited to Sections 17200, 17202, and 17203.

12 39. The actions of Defendants in failing to pay Representative Plaintiff and the putative
13 class members in a lawful manner as alleged herein constitute false, unfair, fraudulent and/or
14 deceptive business practices, within the meaning of Business and Professions Code section 17200,
15 *et seq.*

16 40. As a result of their unlawful acts, Defendants have reaped and continue to reap
17 unfair benefits at the expense of Representative Plaintiff and the putative class members.
18 Defendants should be enjoined from this activity and made to disgorge these ill-gotten gains and
19 restore to Representative Plaintiff and putative class members the wrongfully withheld wages
20 pursuant to Business and Professions Code section 17203. Representative Plaintiff is informed and
21 believes, and thereon alleges that Defendants are unjustly enriched through their failure to pay for
22 all time Representative Plaintiff and the putative class spent under the Defendants' control.

23 41. Representative Plaintiff is informed and believes, and thereon alleges, that he and
24 the putative class members are prejudiced by Defendants' unfair practices.

25 42. As a direct and proximate result of the unfair business practices of Defendants,
26 Representative Plaintiff is entitled to equitable and injunctive relief, including full restitution
27 and/or disgorgement of all wages, which have been unlawfully withheld from Representative
28 Plaintiff and the putative class members, as a result of the business acts and practices described

1 therein and enjoin Defendants to cease and desist from engaging in the practices described therein.

2 43. The illegal conduct alleged herein is believed to be continuing, and there is no
3 indication that Defendants will not continue such activity into the future. Representative Plaintiff
4 alleges that if Defendants are not enjoined from the conduct set forth in this complaint, they will
5 continue to fail to pay the correct wages, will continue to require employees to not be compensated
6 for all the time in which they spend under the employer's control, and will continue to fail to
7 provide appropriate compensation as described herein to their employees.

8 **FOURTH CAUSE OF ACTION**

9 **(VIOLATION OF LABOR CODE § 2698, *ET SEQ.*)**

10 **(By Representative Plaintiff Against Defendants The Kroger Co., Ralphs Grocery Company,**
11 **and Does 1 through 10, inclusive)**

12 44. Representative Plaintiff hereby re-alleges and incorporates all preceding paragraphs
13 as though fully set forth herein.

14 45. California Labor Code section 2698 *et. seq.* provides employees with a private right
15 of action to remedy an employer's failure to comply with Labor Code sections designated in Labor
16 Code section 2699.5. Labor Code sections 201, 202, 203, 223, 226(a), 510, 558, 1194, 1194.2,
17 1198 and 1199, and the IWC Wage Orders all of which Defendants have violated as alleged above
18 and as stated in **Exhibit "A,"** Plaintiff's Notice to the Labor Workforce Development Agency
19 which is incorporated by reference. Penalties for violations under Labor Code section 2699(f)(2)
20 are one hundred dollars (\$100.00) for each aggrieved employee per pay period for the initial
21 violation, and two hundred dollars (\$200.00) per subsequent violation for each aggrieved employee
22 per pay period, when the Labor Code has not provided otherwise.

23 46. Representative Plaintiff has exhausted the administrative prerequisites to file a claim
24 under Labor Code section 2698 *et seq.* by sending notices by certified mail and via electronic
25 submission to the California Labor Workforce and Development Agency on December 18, 2020
26 along with copies to Defendants. (Attached hereto as **Exhibit "A."**) It has been over 65 days since
27 each mailing/submission and Representative Plaintiffs have not received confirmation from the
28 LWDA that it will not investigate the complaint within the time limits set forth in Labor Code

1 section 2699.3(a)(2).

2 47. As the administrative process has been exhausted under Labor Code section 2699.3,
3 Representative Plaintiff seeks to recover, on behalf of himself and others similarly situated, civil
4 penalties to be distributed according to statute.

5 48. As provided for in Labor Code section 2699.3(d), Representative Plaintiff is entitled
6 to recover civil penalties, on behalf of himself and others similarly situated, for the one-year period
7 beginning with the Section 2699 demand letter, the necessary precursor to this claim.

8 49. Labor Code section 2699(g)(1) provides for attorneys' fees and costs to the
9 prevailing employees for disputes under the Labor Code. Representative Plaintiff thus seeks to
10 recover attorneys' fees and costs expended in recovering these penalties on behalf of themselves
11 and others similarly situated.

12 50. As a result of Defendants' unlawful conduct, Representative Plaintiff and putative
13 Class Members have suffered damages in an amount, subject to proof, as they were not paid all
14 wages due. The precise amount of unpaid wages is not presently known to Representative Plaintiff
15 but can be determined directly from Defendants' records.

16 51. As a result of these violations, Representative Plaintiff and the members of the Class
17 have been damaged in an amount according to proof at the time of trial, but still in excess of the
18 minimum jurisdiction of this Court.

19 **PRAYER FOR RELIEF**

20 THEREFORE, Representative Plaintiff prays for judgment against Defendants The Kroger
21 Co., Ralphs Grocery Company, and Does 1 through 10, and each of them, as follows:

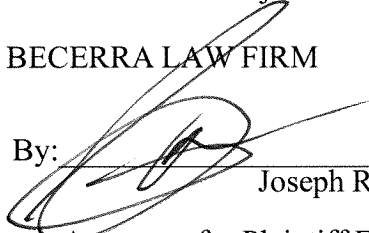
- 22 1. For compensatory damages in a sum according to proof;
23 2. For wages pursuant to the California Labor Code;
24 3. For damages and/or penalties, an award of costs and reasonable attorney's fees
25 pursuant to the California Labor Code and Business and Professions Code § 17200
26 et seq.;
27 4. For penalties pursuant to the California Labor Code;

28 ///

5. For liquidated damages pursuant to Labor Code section 1194.2 for the failure to pay minimum wages;
6. That Defendants be found to have engaged in unfair competition in violation of California Business and Professions Code section 17200, *et seq.*;
7. That Defendants be ordered and enjoined to make restitution to Representative Plaintiff due to their unfair competition, pursuant to California Business and Professions Code sections 17203 and 17204;
8. That Defendants further be enjoined to cease and desist from unfair competition in violation of California Business and Professions Code section 17200, *et seq.*;
9. For prejudgment interest pursuant to California Civil Code section 3287 and/or section 3288;
10. For attorneys' fees, interests and costs of suit pursuant to Labor Code sections 218.5, 1194(a), Code of Civil Procedure section 1021.5; and Business and Professions Code § 17200 *et seq.*
11. For such other and further relief as the Court deems just and proper.

Dated: July 7, 2021

BECERRA LAW FIRM

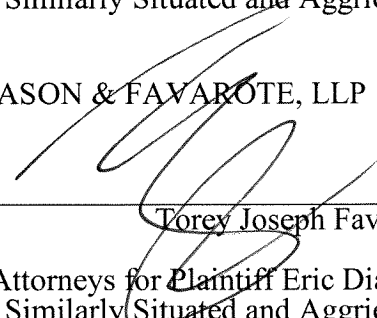
By: 

Joseph R. Becerra

Attorneys for Plaintiff Eric Diaz and All Others
Similarly Situated and Aggrieved Employees

Dated: July 7, 2021

GLEASON & FAVAROTE, LLP

By: 

Torey Joseph Favarote

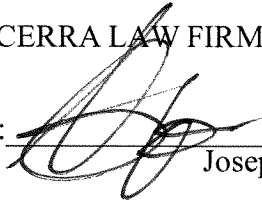
Attorneys for Plaintiff Eric Diaz and All Others
Similarly Situated and Aggrieved Employees

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial on all causes of action and claims with respect to which she and all members of the proposed class have a right to a jury trial.

Dated: July 7, 2021

BECERRA LAW FIRM

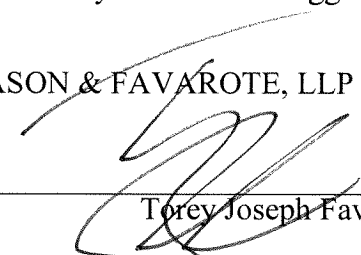
By: 

Joseph R. Becerra

Attorneys for Plaintiff Eric Diaz and All Others
Similarly Situated and Aggrieved Employees

Dated: July 7, 2021

GLEASON & FAVAROTE, LLP

By: 

Torey Joseph Favarote

Attorneys for Plaintiff Eric Diaz and All Others
Similarly Situated and Aggrieved Employees

EXHIBIT A



BECERRA
L A W F I R M
EMPLOYMENT LAW ADVOCATES

DIRECT DIAL: (213) 542-8501
DIRECT FACSIMILE: (213) 542-5556
JBECERRA@JRBECERRALAW.COM

December 18, 2020

**SENT VIA ELECTRONIC
SUBMISSION**

DEPARTMENT OF INDUSTRIAL
RELATIONS
Accounting Unit
455 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102

SENT VIA CERTIFIED MAIL

RALPH'S GROCERY COMPANY
c/o CSC – Lawyers Incorporating Service
(C1592199)
Agent for Service of process
2710 Gateway Oaks Dr., Suite 150N
Sacramento, CA 95833

SENT VIA CERTIFIED MAIL

THE KROGER CO.
c/o CSC – Lawyers Incorporating Service
(C1592199)
Agent for Service of process
2710 Gateway Oaks Dr., Suite 150N
Sacramento, CA 95833

Re: Eric Diaz v. The Kroger Co. and Ralph's Grocery Company
California Labor Code section 2698, *et seq.* violations

To Whom It May Concern:

I am writing on behalf of aggrieved employee Eric Diaz ("Diaz"). This notice is being made to the Labor & Workforce Development Agency pursuant to the requirement of Labor Code section 2698 *et al.* that Diaz, and other Aggrieved Employees, who were employed by The Kroger Co. and Ralph's Grocery Company (collectively "Kroger"), classified as non-exempt hourly employees and worked at Kroger warehouses and distribution centers throughout California were: 1) not paid for mandatory post-shift activities performed at the direction or, and under the control of Kroger in violation of Labor Code §§ 223, 510, 558, 1194, 1194.2, 1198 and 1199 as well as the IWC Wage Orders, 2) not paid all wages at the time of termination in

violation of Labor Code §§ 201-203; and 3) were issued inaccurate wage statements in violation of Labor Code § 226(a).

Diaz, and each of the Aggrieved Employees described above, suffered from one or more of the following Labor Code violations by their current or former employer Kroger.

Diaz's employment with Kroger began in or around 2007 where he worked for over the next 12 years. Diaz and other Aggrieved Employees' employment with Kroger was governed by the California Wage Orders, and California Labor Code §§ 201-203, 223, 226, 510, 558, 1194, 1194.2, 1198 and 1199.

Diaz worked for Kroger as a warehouse worker in one of Kroger's distribution centers in Southern California. Warehouse workers at Kroger, including Diaz, regularly work more than 8 hours in a day and/or 40 hours in a work week. Warehouse workers who work for Kroger are required to perform a series of specific time-consuming activities at the direction of Kroger, after clocking out at the end of their shifts and after they clock out for meal periods if they decide to leave the facility. Diaz and the other Aggrieved Employees are required to, after clocking out on Kroger's Biometric timekeeping system, walk to the locker room to doff their PPE (usually a cold suit), and then walk the long route to the security desk to wait in line for the mandatory bag check and security screening to ensure that no one stole anything from Kroger. The security checks includes inspection of their cold suit, bags, jackets/coats and lunch box, after which Diaz and the other Aggrieved Employees are allowed to badge out at a metal turnstile. Additionally, Diaz and the other Aggrieved Employees were subject to random vehicle inspections, in which Kroger's security guards would randomly stop employees after exiting in order to search their vehicle preventing the employee from leaving until the search was complete. Diaz and the other Aggrieved Employees are not paid for any of the time spent submitting to these procedures, and as such are not paid for the time from when s/he clocks out on the Biometric timekeeping system to the time that s/he badges out at the metal turnstile. During the time spent undergoing these activities Diaz and the other Aggrieved Employees were under the control of Kroger and as such that time was compensable, but Diaz and the other Aggrieved Employees were unlawfully not paid for that time. Frlekin v. Apple Inc. (2020) 8 Cal.5th 1038, reh'g denied (May 13, 2020)

Diaz is informed and believes that it is Kroger's uniform practice and procedure to pay only for the time Diaz and the other Aggrieved Employees spend clocked in and to not pay for any of the above-described post-shift activities performed at Kroger's direction. While performing the activities discussed above, Diaz and the other Aggrieved Employees were under Kroger's control, were subject to Kroger's workplace rules and policies, and were instructed by Kroger to perform the activities. Diaz and the other Aggrieved Employees could be written up if they failed to perform any of the above tasks. Furthermore, Diaz and the other Aggrieved Employees are not permitted to leave the facility without complying with Kroger's security

screening procedures. Diaz is informed and believes that Kroger knows or should know that the above discussed post-clock out activities are compensable under California law and intentionally refuses to pay Diaz and the other Aggrieved Employees for the time spent under its control. By refusing to pay Diaz and the other Aggrieved Employees for this time, Kroger is willfully failing to pay a minimum wage, straight time wages, and overtime wages for all hours worked.

The specified wage order and regulations provide that Diaz and the other Aggrieved Employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1 1/2) times his regular rate of pay, and shall not be employed more than twelve (12) hours in any workday or more than eight (8) hours on the seventh (7th) consecutive workday in any workweek unless the employee receives double his regular rate pay. Diaz and the other Aggrieved Employees often worked more than eight (8) hours in a workday and if the time spent undergoing the aforementioned post-clock out activities was accounted for Diaz and the other Aggrieved Employees would, in most instances, be entitled to overtime pay and in many instances double time pay. Kroger willfully and intentionally refused, and continues to refuse, to pay Diaz and the other Aggrieved Employees for all the straight time, overtime and double time they are entitled to under California law.

The California Supreme Court has repeatedly made it clear that all time employees spend under an employer's control is compensable. Frlekin v. Apple Inc. (2020) 8 Cal.5th 1038, reh'g denied (May 13, 2020); Troester v. Starbucks Corp. (2018) 5 Cal.5th 829, as modified on denial of reh'g (Aug. 29, 2018). In Troester the California Supreme Court ruled that the Labor Code and Wage Orders do not allow employers to require employees to routinely work for minutes off the clock without compensation. Troester 5 Cal.5th 829 at 848. Troester dealt with Starbucks's post shift closing activities, which many times took less than a minute, ruling that even small amounts of time worked off the clock are compensable. In Frlekin the California Supreme Court reiterated the position that all time spent under an employer's control is compensable. Specifically, the Court ruled that "[t]ime employees spent on employer's premises waiting for, and undergoing, mandatory exit searches of bags, packages, or personal employer-based technology devices, such as smart-phones, voluntarily brought to work purely for personal convenience was employer-controlled activity, and therefore it was compensable as 'hours worked'" Frlekin 8 Cal.5th 1038 at 1047. Here Kroger subjects Diaz and the other Aggrieved Employees to a much more restrictive exit search than at issue in Frlekin and a much more time-consuming exit process than at issue in Troester. The law is clear that Kroger's refusal to pay for all of the time Diaz and the other Aggrieved Employees spend under its control is in violation of California law.

Because Diaz and the other Aggrieved Employees were not paid all proper straight time, overtime and/or double time pursuant to California law Kroger failed to remit all wages earned

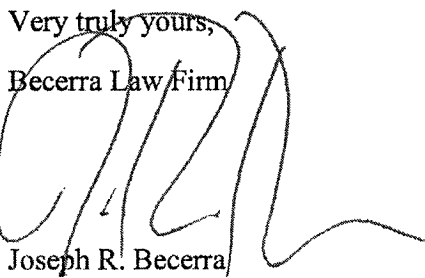
by many of the Aggrieved Employees at the time of termination. At the time of termination, Kroger failed to pay certain Aggrieved Employees who no longer worked for Kroger all wages owed pursuant to California Labor Code §§ 201-203, because they were not paid all wages, including overtime, that they earned for the reasons described above. Thus, they are also entitled to up to 30 days of wages pursuant to California Labor Code sections 201, 202 and 203.

Labor Code section 226 requires an employer to furnish its employees with an accurate itemized wage statement in writing showing, among other things, gross wages earned, net wages earned, all applicable hourly rates in effect during each respective pay period and the corresponding number of hours worked at each hourly rate by each respective individual. As a pattern and practice, in violation of Labor Code section 226(a), Kroger did not furnish accurate itemized wage statements to Diaz and the other Aggrieved Employees because these wage statements failed to provide an accurate number of hours worked at each applicable rate, failed to provide an accurate amount of total hours worked, failed to provide an accurate amount of net wages. These violations stem from Kroger's willful failure to pay for all time spent under its control as described above, and as such Kroger has provided inaccurate wage statements in connection with its failure to pay all minimum, straight, and overtime wages.

Very truly yours,

Becerra Law Firm

Joseph R. Becerra



PROOF OF SERVICE

I, Thomas Steinhart, declare:

I am and was at the time of the service mentioned in this declaration, employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is Gleason & Favarote, LLP, 4014 Long Beach Blvd., Suite 300, Long Beach, CA 90807.

On July 8, 2021, I served a copy(ies) of the following document(s):

FIRST AMENDED CLASS ACTION AND PAGA ACTION COMPLAINT FOR DAMAGES

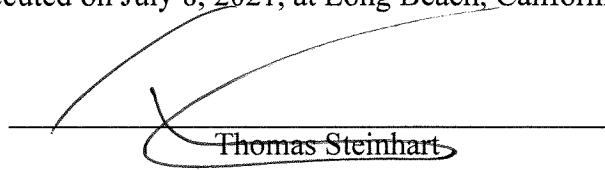
on the parties to this action by placing them in a sealed envelope(s) addressed as follows:

Attorney	Party(ies) Served	Method of Service
Tritia M. Murata Wendy J. Ray MORRISON & FOERSTER LLP 707 Wilshire Boulevard Los Angeles, CA 90017-3543 Tel: 213-892-5200 Fax: 213-892-5454 TMurata@mofo.com WRay@mofo.com	Attorneys for Defendants THE KROGER CO. and RALPHS GROCERY COMPANY	First Class Mail and Email
Karen J. Kubin MORRISON & FOERSTER LLP 425 Market Street San Francisco, CA 94105-2482 Tel: 415-268-7000 Fax: 415-268-7522 KKubin@mofo.com	Attorneys for Defendants THE KROGER CO. and RALPHS GROCERY COMPANY	First Class Mail and Email

☒ [BY MAIL] I placed the sealed envelope(s) for collection and mailing by following the ordinary business practice of Gleason & Favarote, LLP, Long Beach, California. I am readily familiar with Gleason & Favarote, LLP's practice for collecting and processing of correspondence for mailing with the United States Postal Service, said practice being that, in the ordinary course of business, correspondence with postage fully prepaid is deposited with the United States Postal Service the same day as it is placed for collection.

☒ [BY ELECTRONIC TRANSMISSION] I caused said document to be sent by electronic transmission to the e-mail address indicated for the party(ies) listed above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct, and that this declaration was executed on July 8, 2021, at Long Beach, California.


Thomas Steinhart