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VIA PAGA ONLINE FILING

Secretary Julie Su
Labor & Workforce Development Agency
PAGA ADMINISTRATOR
1515 Clay Street, Ste. 801
Oakland, California 94612

**VIA U.S. CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Ross Dress For Less, Inc.
c/o CT Corporation System
Agent for Service of Process
818 Seventh Street, Ste. 930
Los Angeles, California 90017

Re: **AMENDED** Notice pursuant to Labor Code Section 2699.3(a)(1)
Labor Code Private Attorney General Act ("PAGA")

Employer: Ross Dress For Less, Inc.

Employee: Magda Castro, on behalf of herself and on behalf of all current and former hourly employees of Ross Dress For Less, Inc., who worked in its distribution centers

Dear Secretary Su:

Pursuant to the Private Attorney General Act of 2004, California Labor Code § 2698 *et seq.* ("PAGA"), representative employee, Magda Castro ("Plaintiff"), on behalf of herself and all other similarly situated California employees who worked in Ross's California distribution centers, amends her April 23, 2021 letter to give notice of additional violations of the California Labor Code that her former employer, Ross Dress For Less, Inc. ("Defendant" or "Ross") committed throughout Plaintiff's employment and within the one year prior to the mailing of this letter.

General Facts

Defendant Ross Dress For Less, Inc. is a clothing retailer that employs workers throughout California, including in Kern County. Plaintiff Magda Castro is a former employee of Ross. She worked for Ross at its distribution center in Shafter, California, for over five years until her termination in February 2021.

During her employment at Ross, Plaintiff and similarly employed individuals at Defendant's distribution centers throughout California regularly were subjected to the following violations of California law for which they are entitled to PAGA penalties.

Unpaid Minimum and Overtime Wages

At all relevant times, Defendant employed Plaintiff and other similarly employed individuals at its distribution centers subject to Labor Code Sections 510, 1194 and 1197.

Under Labor Code Section 1197 and the applicable IWC Wage Orders, including Wage Order 7, Plaintiff and other similarly employed individuals at Defendant's distribution centers were entitled to receive minimum wages for all hours worked. Under Labor Code Sections 510 and 1194 and the applicable IWC Wage Orders, including Wage Order 7, Plaintiff and other similarly employed individuals at Defendant's distribution centers were entitled to receive overtime wages for all hours worked in excess of 8 hours in a day or 40 hours in a week.

Defendant failed to pay all wages for all hours worked in violation of Labor Code Sections 510, 1194, 1197 and Wage Order 7. Defendant knew, or should have known, that Plaintiff and other similarly employed individuals at its distribution centers were not receiving compensation, let alone minimum wages, for work that was necessarily performed off the clock. During the one year period preceding the submission of this notice letter, Plaintiff and other similarly employed individuals at Defendant's distribution centers were required to undergo off-the-clock security checks before and after their scheduled shift. Employees were also required to clock out before going through a security screening at the end of their shifts and when they left Defendant's premises for their meal periods and before returning to work after a meal period. These security screenings were mandatory.

Because Plaintiff regularly worked 8-hour shifts, Defendant owes Plaintiff and other similarly employed individuals at its distribution centers who also worked 8-hour shifts compensation at their overtime rate for the off-the-clock work performed when the time spent in a mandatory security screening caused their total work time to exceed 8 hours.

In addition, to the extent Defendant's policies regarding mandatory security screenings prevented Plaintiff and other similarly employed individuals from leaving the premises of Defendant's distribution centers in order to receive a full 30 minutes of break time for a meal period on shifts over 5 hours (as alleged below), the time during which Plaintiff and the other similarly employed individuals were restricted to Defendant's premises would also be compensable. Because Plaintiff and

other similarly employed individuals at Defendant's distribution centers were required to clock out for that time, Defendant did not pay them for that time. As a result, Defendant owes Plaintiff and other similarly employed individuals at its distribution centers minimum wages or overtime wages (if those 30 minutes caused their total work time to exceed 8 hours for that day or 40 hours for that week) for those meal periods.

As Defendant failed to pay all minimum wages properly, Defendant is liable for penalties of \$100 per pay period for the first violation within the statutory period, and \$200 per pay period for each additional violation.

As Defendant failed to pay all overtime wages properly, Defendant is liable for penalties of \$100 per pay period for the first violation within the statutory period, and \$200 per pay period for each additional violation.

Meal and Rest Period Violations

Failing to provide meal periods in compliance with California Labor Code § 226.7 and the IWC wage orders, including Wage Order 7: California law entitles employees to the following meal periods: "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee." Labor Code § 512. This means that "the statute requires a first meal period no later than the start of an employee's sixth hour of work." *Brinker v. Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1041 (2012). The DLSE has advised with regard to meal periods, "an employer has an affirmative obligation to ensure that workers are actually relieved of all duty, not performing any work, and ... free to leave the employer's premises." Dept. of Industrial Relations, DLSE Opn. Letter No. 2002.01.28 (Jan. 28, 2002) p. 1.

As alleged above, Defendant required Plaintiff and other similarly employed individuals at its distribution centers to undergo security screenings when leaving its premises and when returning to its premises, but were not compensated for that time. Because Defendant did not provide additional time for these employees to undergo the security screening when leaving the distribution centers for their meal periods, Plaintiff and similarly employed individuals at Defendant's distribution centers would receive less than 30 minutes of break time for their meal period if they left Defendant's premises. Accordingly, Plaintiff and similarly employed individuals at Defendant's distribution centers had to remain on premises for their meal periods in order to get the full 30 minutes of break time to which they are entitled under California law. As such, whenever Plaintiff and similarly employed individuals at Defendant's distribution centers left the premises for their meal periods, Defendant violated Labor Code § 226.7 and Wage Order 7 by not providing them with a full 30 minute meal period. Defendant also violated Labor Code § 226.7 and Wage Order 7 on those shifts when Plaintiff and similarly employed individuals remained inside the distribution center in order to get their full 30 minutes of break time because they were then restricted to Defendant's premises in violation of California law. In

both situations, Defendant failed to pay Plaintiff and similarly employed individuals at Defendant's distribution centers the additional hour of pay as a premium for these violations.

Meal and Rest Period Premiums Rate Calculation: Wage Order 7-2001(11) provides: "If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's **regular rate of compensation** for each workday that the meal period is not provided." Wage Order 7-2001(11)(B), (12)(B) (same re rest periods) (emphasis added); *see also* Labor Code § 226.7(c) ("If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, ..., the employer shall pay the employee one additional hour of pay at the employee's **regular rate of compensation** for each work day that the meal or rest period is not provided." (Emphasis added)).

Defendant paid Plaintiff and similarly employed individuals at Defendant's distribution centers one hour of pay at the employee's **base hourly rate** when compensating those employees for violations of the meal and rest period requirements, including in periods when the employee earned a shift differential or other form of non-discretionary compensation such as an attendance bonus or a Blue Chip bonus (as referenced on the employee's wage statements), which are required to be factored into an employee's regular rate of compensation.

As Defendant failed to pay meal and rest period premiums as required by California law when such violations occurred, Defendant is liable for penalties of \$100 per pay period for the first violation within the statutory period (respectively per meal period violations and rest break violations), and \$200 per pay period for each additional violation, respectively.

Violation of Paid Sick Leave Law

During their employment with Defendant, Plaintiff and similarly employed individuals at Defendant's distribution centers were entitled to "paid sick days" pursuant to the California Healthy Workplaces, Healthy Families Act of 2014, California Labor Code sections 245, et seq. Pursuant to Labor Code § 245.5(b), all employers in California are required to provide paid sick leave to their employees, unless the employee is exempt from coverage, which Plaintiff was not. Employees who work in California for 30 or more days within a year from the commencement of employment are entitled to paid sick leave on the 90th day of employment. Labor Code § 246.

Labor Code section 246(l) requires that employers pay sick time pay to non-exempt employees at the employee's "regular rate of pay." Employers may either calculate "paid sick days" for non-exempt employees in California at the regular rate of pay for the workweek in which the employee uses paid sick time or by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment. Labor Code § 246(l)(1-2). The "regular rate of pay" includes all remuneration for employment paid to the employee and includes, but is not limited to, shift differentials and non-discretionary incentive bonuses.

During the one year period preceding the submission of this notice letter, Plaintiff and similarly employed individuals at Defendant's distribution centers accrued and took paid sick leave. However, Defendant failed to include such non-discretionary remuneration, including shift differentials, when determining the "regular rate of pay" for Plaintiff and similarly employed individuals at Defendant's distribution centers for purposes of sick time pay when Plaintiff and similarly employed individuals at Defendant's distribution centers were paid sick time pay and other non-discretionary compensation (such as shift differentials and attendance or Blue Chip bonuses and the like) in the same relevant period. Instead, Defendant only paid Plaintiff and similarly employed individuals at Defendant's distribution centers paid sick leave at their base hourly rate, rather than at their "regular rate of pay."

As Defendant failed to pay Plaintiff and similarly employed individuals at Defendant's distribution centers the correct amount of paid sick leave properly, Defendant is liable for penalties of \$100 per pay period for the first violation within the statutory period, and \$200 per pay period for each additional violation.

Failure to Keep Accurate Records

At all relevant times, Defendant employed Plaintiff and other similarly employed individuals subject to Industrial Welfare Commission ("IWC") Wage Orders, including Wage Order 7. Section 7 of Wage Order 7 provides in relevant part:

Every employer shall keep accurate information with respect to each employee including the following ... (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded.

Defendant maintains time records that show only when an employee clocked in and out using the Defendant's time clock system. However, Defendant's timekeeping system fails to capture the additional time worked alleged above. The time records fail to show the amount of time Plaintiff and similarly employed individuals at Defendant's distribution centers spent undergoing security screenings at the beginning and end of their shifts and when they left and returned to the premises for their meal periods. Accordingly, Defendant failed to keep accurate records of employees' meal periods and start and end of shift times, thereby violating section 7 of Wage Order 7.

As Defendant failed to keep accurate time records, Defendant is liable for penalties of \$100 per pay period for the first violation within the statutory period, and \$200 per pay period for each additional violation.

Inaccurate Wage Statements

Plaintiff and similarly employed Californians received wage statements that did not list all wages earned, including the minimum and overtime wages, the correct amount of meal and rest break period premium wages discussed above, as required by Labor Code Section 226. As the above infractions explain, Plaintiff and similarly employed persons were entitled to premium wages that were not paid and, therefore, are entitled to penalty payments pursuant to Labor Code Section 226. *Azpeitia v. Tesoro Ref. & Mktg. Co. LLC*, No. 17-CV-00123-JST, 2017 WL 3115168, at *8 (N.D. Cal. July 21, 2017) (“the payments required by section 226.7 should be considered wages, and that the Plaintiffs may therefore bring a derivative claim under section 226.”).

Moreover, Plaintiff and other similarly employed persons were entitled to minimum and overtime wages for off-the-clock work in the form of security checks. Defendant’s employees were deprived of such wages and received wage statements that did not state all hours worked. Such an omission gives rise to an inference of injury under Labor Code Section 226 (*Maldonado v. Epsilon Plastics, Inc.*, (2018) 22 Cal.App.5th 1308, 1337) and entitles Plaintiff and other similarly employed individuals to penalty payments pursuant to Labor Code Section 226. Accordingly, Defendant is liable for penalties of \$100 per pay period for the first wage statement violation within the statutory period, and \$200 per pay period for each additional violation.

Unpaid Final Wages

Plaintiff (and other similarly employed individuals at Defendant’s distribution centers) have ceased their employment at Ross. Upon the cessation of that employment relationship (and as prescribed by statute), Plaintiff (and the others whose employment has ended) did not receive all wages owed. Namely, said former employees (including Plaintiff) did not receive the minimum, overtime and premium wages to which they were entitled. *Brewer v. Gen. Nutrition Corp.*, No. 11-CV-3587 YGR, 2015 WL 5072039, at *19 (N.D. Cal. Aug. 27, 2015) (denying defendant’s motion for summary judgment because “the premium payments due under section 226.7 are to be considered “wages” for purposes of sections 203 and 226.”); *Castillo v. Bank of Am. Nat’l Ass’n*, No. SACV170580DOCKESX, 2018 WL 1409314, at *6 (C.D. Cal. Feb. 1, 2018) (“This Court agrees with the majority of courts that meal and rest premiums are wages for the purposes of waiting time penalties.”); *Karl v. Zimmer Biomet Holdings, Inc.*, No. C 18-04176 WHA, 2018 WL 5809428, at *10–11 (N.D. Cal. Nov. 6, 2018).

Plaintiff and those similarly situated, upon termination, did not receive all owed wages on the date of termination, or within 72 hours if they resigned. Therefore, Defendant has violated and continue to violate Labor Code Sections 201 and 202, because they have not paid the aforementioned wage premiums and are owed penalties pursuant to PAGA for each pay period in which Defendant failed to pay Plaintiff and other former employees their final wages.

Unlawful PAGA Waiver

When Defendant hired Plaintiff Magda Castro (formerly known as Magda Cabrera), Plaintiff was required to sign a Dispute Resolution Agreement (“Agreement”) as a condition of her employment. The Agreement contained a purported waiver of Plaintiff’s right to bring any claim related to her employment on a representative basis, which necessarily includes any claim brought under the Private Attorneys General Act of 2004, Labor Code Section 2698 *et. seq.* Such a provision is unenforceable as a matter of settled California law.

Section 4 of the Dispute Resolution Agreement provides:

4. The arbitration, including all discovery, motions, and other procedures, will be conducted in accordance with the Federal Rules of Civil Procedure (“FRCP”), except as otherwise provided in this Agreement. A copy of the FRCP can be obtained or viewed here for free: <http://www.us.court.gov/uscourts/rules/civil-procedure.pdf>. All Covered Disputes¹ must be arbitrated in an individual capacity and each party waives all its rights to pursue any Covered Dispute in arbitration or in court as a class, collective, *representative* or consolidated basis, collectively referred to as a “Class Action” for the purposes of this Agreement. In addition, neither party can join any Class Action or participate as a member of a Class Action instituted by someone else in court or in arbitration in order to pursue any Covered Dispute.

(Emphasis added.) Similarly situated aggrieved employees were required to sign the same or similar Agreements.

Labor Code section 432.5 provides: “No employer, or agent, manager, superintendent, or officer thereof, shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer, or agent, manager, superintendent, or officer thereof to be prohibited by law.”

¹ A “Covered Dispute,” is any dispute “...arising out of or related to your employment with Ross or its termination” and is further defined in the Alternative Dispute Resolution Agreement as including “any and all disputes both between you and Ross and between you and any other Ross Associate, agent, or employee of Ross, arising out of or related to your employment with or separation of employment from Ross regardless of who initiates the claim. Covered Disputes include, but are not limited to, disputes related to the use of trade secrets, unfair competition, compensation, termination, retaliation, whistleblower claims, workers’ compensation retaliation claims, harassment, discrimination, and claims based on the Civil Rights Act of 1964, the American with Disabilities Act, the Age Discrimination in Employment Act, Family Medical Leave Act, the Employee Retirement Income Security Act, Fair Labor Standards Act and all similar state statutes and all related common law claims. Covered Disputes does not include claims for workers’ compensation benefits, state disability benefits and unemployment insurance benefits or any other claims not subject to arbitration as a matter of controlling law.”

It is well settled that agreements purporting to waive an employee's right to a trial of PAGA claims is contrary to California law and unenforceable. *See Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 384 ("We conclude that where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law."); *Juarez v. Wash Depot Holdings, Inc.* (2018) 24 Cal. App. 5th 1197, 1202–03 ("court properly concluded that the PAGA waiver set forth in the handbook is unenforceable as against public policy"); *Lawson v. ZB, N.A.* (2017) 18 Cal. App. 5th 705, 725, as modified (Dec. 21, 2017) (same).

Moreover, the California Supreme Court has ruled that a court cannot compel arbitration of an aggrieved employee's individual PAGA claim because there is no such thing as an individual PAGA claim. *Kim v. Reins Int'l California, Inc.* (2020) 9 Cal. 5th 73, 86-87 ("There is no individual component to a PAGA action because 'every PAGA action ... is a representative action on behalf of the state.'").

Defendant knows that its Dispute Resolution Agreement contains an unlawful PAGA waiver as *Iskanian* has been the law since 2014 and courts have directly addressed this issue with Defendant in Defendant's attempt to enforce its agreement against other employees. *See, e.g., Hernandez v. Ross Stores, Inc.* (2016) 7 Cal. App. 5th 171, 177 ("the contract signed by Hernandez included an arbitration clause. It required that all disputes 'arising out of or relating to the employment relationship' including violations of the 'Fair Labor Standards Act' must be resolved only through arbitration. It further provided 'there will be no right or authority for any dispute to be brought, heard or arbitrated as a class action, private attorney general, or in a representative capacity on behalf of any person.' Such waiver is unenforceable, as stated in *Iskanian*.").

By continuing to require its employees to sign mandatory arbitration agreements that Defendant knows contains an unlawful PAGA waiver, Defendant has violated and continues to violate Labor Code section 432.5. In doing so, Defendant deters its employees from pursuing PAGA claims that they otherwise are entitled to pursue in court.

California Labor Code § 2699(f)(2) provides for civil penalties of one hundred dollars (\$100) per pay period for Plaintiff and each aggrieved employee of Defendant in California who was required to sign a mandatory arbitration agreement containing the same illegal term in violation of California Labor Code § 432.5 that Plaintiff and others were required to sign upon becoming employed by Defendant—that is, the term requiring the employee to waive his or her right to bring a representative action under PAGA.

As a result, Defendant is liable for civil penalties as provided for by California law. Consequently, Plaintiff and all other aggrieved employees of Defendant who signed the same or similar Agreements are entitled to recover all penalties permitted under California law, including Labor Code § 2698 *et seq.*

Civil Penalties

As a result of the foregoing, Defendant is liable for civil penalties as provided for by California law. Consequently, Plaintiff and all other aggrieved employees of Defendant are entitled to recover all penalties permitted by the Labor Code and penalties provided for under California law, including but not limited to Labor Code § 2698 *et seq.*

Conclusion

Defendant violated and continues to violate its obligation to keep accurate time records, pay all minimum and overtime wages, make available legally compliant meal and rest breaks as well as pay break premiums at the correct regular rate of pay, pay all paid sick leave at the correct regular rate of pay, issue legally compliant wage statements and pay all final wages. Defendant also violated and continues to violate Labor Code section 432.5 by requiring its employees to sign dispute resolution agreements that contain unlawful PAGA waivers. Plaintiff requests the agency to investigate the above allegations and provide notice of the investigation and findings pursuant to PAGA.

Alternatively, Plaintiff requests that the agency inform her if it does not intend to investigate these violations so that she may file a lawsuit with respect to the allegations discussed in this letter. Thank you for your immediate attention to this matter. If you have any questions, please do not hesitate to contact me at (310) 982-2984.

Sincerely,
MOSS BOLLINGER, LLP



Jeremy F. Bollinger