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Attorneys for Plaintiff
MAGDA CASTRO

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF KERN

MAGDA CASTRO, an individual, on behalf
of herself, all others similarly situated, and the
State of California,

Plaintiffs,

vs.

ROSS DRESS FOR LESS, INC. and DOES
1-50,

Defendants.

Case No. BCV-21-101490

**COMPLAINT FOR CIVIL PENALTIES
PURSUANT TO PRIVATE ATTORNEYS
GENERAL ACT OF 2004 (LABOR CODE
§§ 2698 ET SEQ.)**

1 Plaintiff Magda Castro (“PLAINTIFF”), on behalf of herself, all current and former
2 hourly employees of Defendant Ross Dress For Less, Inc. (“DEFENDANT” or “Ross”) who
3 worked in Ross’s distribution centers, and on behalf of the State of California, hereby complains
4 and alleges as follows:

5 **INTRODUCTION**

6 1. This is a representative action by PLAINTIFF on behalf of herself, other similarly
7 situated California employees who worked in Ross’s California distribution centers, and the
8 State of California against Defendant Ross Dress For Less, Inc. and Doe Defendants 1-50
9 (collectively, “DEFENDANTS”), pursuant to the California Private Attorneys General Act,
10 Labor Code sections 2698 *et seq.* (“PAGA”) to recover civil penalties [75% payable to the Labor
11 & Workforce Development Agency (“LWDA”) and 25% payable to aggrieved employees] for
12 failure to pay all minimum and overtime wages, failure to provide adequate meal breaks, failure
13 to pay meal break premiums, failure to pay meal and rest break premiums at the regular rate of
14 compensation, failure to pay sick leave at the regular rate of pay, failure to keep accurate records,
15 failure to provide accurate wage statements, and failure to timely pay all wages upon cessation of
16 employment to DEFENDANTS’ employees in Ross’s distribution centers in California.

17 **JURISDICTION AND VENUE**

18 2. This Court has jurisdiction over PLAINTIFF’s claims for penalties pursuant to
19 PAGA.

20 3. Venue is proper in this Judicial district and the County of Kern pursuant to
21 California Code of Civil Procedure § 395.5 because DEFENDANTS employed PLAINTIFF in
22 Ross’s distribution center located in the County of Kern, including in the city of Shafter, and the
23 acts, omissions, and conduct alleged by PLAINTIFF herein occurred in this county.

24 **PARTIES**

25 4. DEFENDANT is a Virginia corporation that operates clothing retail stores and
26 warehouses throughout California, including in Kern County.

27 5. PLAINTIFF worked as an hourly paid employee of DEFENDANTS for over five
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years until her termination in February 2021.

6. PLAINTIFF is informed and believes that DOES 1 through 50 are corporations, individuals, limited liability partnerships, limited liability companies, general partnerships, sole proprietorships or are other business entities or organizations of a nature not currently known to PLAINTIFF.

7. PLAINTIFF is unaware of the true names of Defendant DOES 1 through 50. PLAINTIFF sues said Defendants by said fictitious name, and will amend this complaint when the true names and capacities are ascertained or when such facts pertaining to liability are ascertained, or as permitted by law or by the Court. PLAINTIFF is informed and believes that each of the fictitiously named Defendants is in some manner responsible for the events and allegations set forth in this complaint.

8. PLAINTIFF is informed and believes, and thereon alleges, that at all times herein mentioned each Defendant, including all Defendants sued under fictitious names, was the employee, or representative of each of the remaining Defendants, and in doing the things hereinafter alleged, was at times acting within the course and scope of this employment, and at other times, acting in his or her own individual capacity. In the alternative, each of the individually named Defendants, acted in concert and in furtherance of a fraudulent plan and scheme and each actively participated in the wrongful acts alleged in this complaint.

FACTUAL BACKGROUND

9. At all relevant times, DEFENDANTS employed PLAINTIFF and other similarly employed individuals at Ross's distribution centers subject to Labor Code sections 510, 1194 and 1197.

10. During the one-year period before PLAINTIFF notified DEFENDANTS and the LWDA of her claims, PLAINTIFF and other similarly employed individuals at Ross'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 DEFENDANTS' premises for their meal

1 periods and before returning to work after a meal period. These security screenings were
2 mandatory.

3 11. Because PLAINTIFF regularly worked 8-hour shifts, DEFENDANTS owe
4 PLAINTIFF and other similarly employed individuals at Ross's distribution centers who also
5 worked 8-hour shifts compensation at their overtime rate for the off-the-clock work performed
6 when the time spent in a mandatory security screening caused their total work time to exceed 8
7 hours.

8 12. In addition, to the extent DEFENDANTS' policies regarding mandatory security
9 screenings prevented PLAINTIFF and other similarly employed individuals from leaving the
10 premises of Ross's distribution centers in order to receive a full 30 minutes of break time for a
11 meal period on shifts over 5 hours (as alleged below), the time during which PLAINTIFF and
12 other similarly employed individuals were restricted to DEFENDANTS' premises would also be
13 compensable. Because PLAINTIFF and other similarly employed individuals at Ross's
14 distribution centers were required to clock out for that time, DEFENDANTS did not pay them
15 for that time. As a result, DEFENDANTS owe PLAINTIFF and other similarly employed
16 individuals at Ross's distribution centers minimum wages and/or overtime wages (if any one of
17 those 30 minutes caused their total work time to exceed 8 hours for that day or 40 hours for that
18 week) for those meal periods.

19 13. Labor Code section 512 generally provides, in relevant part, "an employer may
20 not employ an employee for a work period of more than five hours per day without providing the
21 employee with a meal period of not less than 30 minutes..." *see also* Section 11 of the
22 applicable Wage Orders, including Wage Order 7. Employees are, therefore, entitled to one
23 additional hour of pay at the employee's regular rate of pay for every day that a meal period was
24 not provided or is provided late. *See id.*; Lab. Code § 226.7(c). The Division of Labor Standards
25 Enforcement ("DLSE") has advised with regard to meal periods, "an employer has an affirmative
26 obligation to ensure that workers are actually relieved of all duty, not performing any work, and
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1 ... free to leave the employer's premises." Dept. of Industrial Relations, DLSE Opn. Letter No.
2 2002.01.28 (Jan. 28, 2002) p. 1.

3 14. As alleged above, DEFENDANTS required PLAINTIFF and other similarly
4 employed individuals at Ross's distribution centers to undergo security screenings when leaving
5 their premises and when returning to their premises, but were not compensated for that time.
6 Because DEFENDANTS did not provide additional time for these employees to undergo the
7 security screening when leaving the distribution centers for their meal periods, PLAINTIFF and
8 similarly employed individuals at Ross's distribution centers would receive less than 30 minutes
9 of break time for their meal period when they left DEFENDANTS' premises for their meal
10 period. Accordingly, PLAINTIFF and similarly employed individuals at Ross's distribution
11 centers had to remain on premises for their meal periods in order to get the full 30 minutes of
12 break time to which they are entitled under California law. In both situations, DEFENDANTS
13 failed to pay PLAINTIFF and similarly employed individuals at Ross's distribution centers the
14 additional hour of pay as a premium for these violations.

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

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

3 17. At all relevant times, PLAINTIFF and similarly employed individuals at Ross's
4 distribution centers were entitled to "paid sick days" pursuant to the California Healthy
5 Workplaces, Healthy Families Act of 2014 and California Labor Code sections 245 *et seq.*

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

14 19. During the one-year period before PLAINTIFF notified DEFENDANTS and the
15 LWDA of her claims, PLAINTIFF and similarly employed individuals at Ross's distribution
16 centers accrued and took paid sick leave. However, DEFENDANTS failed to include such non-
17 discretionary remuneration, including shift differentials, when determining the "regular rate of
18 pay" for PLAINTIFF and similarly employed individuals at Ross's distribution centers for
19 purposes of sick time pay when PLAINTIFF and similarly employed individuals at Ross's
20 distribution centers were paid sick time pay and other non-discretionary compensation (such as
21 shift differentials and attendance or Blue Chip bonuses and the like) in the same relevant period.
22 Instead, DEFENDANTS only paid PLAINTIFF and similarly employed individuals at Ross's
23 distribution centers paid sick leave at their base hourly rate, rather than at their "regular rate of
24 pay."

25 20. At all relevant times, DEFENDANTS employed PLAINTIFF and other similarly
26 employed individuals subject to Industrial Welfare Commission ("IWC") Wage Orders,
27 including Wage Order 7. Section 7 of the Wage Order 7 provides in relevant part:

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

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

12 22. PLAINTIFF and similarly employed Californians received wage statements that
13 did not list all wages earned, including the minimum and overtime wages, the correct amount of
14 meal and rest break period premium wages discussed above, as required by Labor Code section
15 226. As the above infractions explain, PLAINTIFF and similarly employed persons were entitled
16 to premium wages that were not paid and, therefore, are entitled to penalty payments pursuant to
17 Labor Code section 226. *Azpeitia v. Tesoro Ref. & Mktg. Co. LLC*, No. 17-CV-00123-JST, 2017
18 WL 3115168, at *8 (N.D. Cal. July 21, 2017) ("the payments required by section 226.7 should
19 be considered wages, and that the Plaintiffs may therefore bring a derivative claim under section
20 226.").

21 23. Moreover, PLAINTIFF and other similarly employed persons were entitled to
22 minimum and overtime wages for off-the-clock work in the form of security checks.
23 DEFENDANTS' employees were deprived of such wages and received wage statements that did
24 not state all hours worked. Such an omission gives rise to an inference of injury under Labor
25 Code Section 226 (*Maldonado v. Epsilon Plastics, Inc.*, (2018) 22 Cal.App.5th 1308, 1337) and
26 entitles PLAINTIFF and other similarly employed individuals to penalty payments pursuant to
27 Labor Code section 226.

24. PLAINTIFF (and other similarly employed individuals at Ross’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 all of the minimum, overtime, premium and sick pay 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); *Murphy v. Kenneth Cole Prods.*, 40 Cal.4th 1094, 1103 (2007) (sick pay is a form of wages). Therefore, DEFENDANTS have violated and continue to violate Labor Code sections 201 and 202, because they have not paid the aforementioned wage premiums/pay and owe penalties pursuant to PAGA for each pay period in which they failed to pay PLAINTIFF and other former employees their final wages.

COMPLIANCE WITH NOTIFICATION REQUIREMENTS

25. On April 23, 2021, PLAINTIFF, through her counsel, submitted online a letter to the California Labor and Workforce Development Agency (“LWDA”) informing it that DEFENDANTS failed to pay minimum and overtime wages; failed to provide adequate meal, failed to pay meal premiums, failed to pay meal and rest break premiums at the correct regular rate of compensation, failed to pay sick leave pay at the regular rate of pay, failure to keep accurate records, failed to provide accurate wage statements; and failed to timely pay all wages upon separation of employment, in violation of California law (the “PAGA Letter”). Attached hereto as **Exhibit A** is a true and correct copy of the April 23, 2021 PAGA Letter which was

1 also sent via certified mail to defendant Ross Dress For Less Inc., at the offices of its Agent for
2 Service of Process.

3 26. To date, more than 65 days after the April 23, 2021 PAGA Letter was
4 submitted, the LWDA has not responded.

5 27. The PAGA Letter outlined PLAINTIFF's claims for violations of the California
6 Labor Code and the applicable wage orders on behalf of herself, the State of California and
7 other aggrieved employees.

8 28. Accordingly, PLAINTIFF exhausted administrative remedies as required by
9 Labor Code § 2699.3.

10 **FIRST CAUSE OF ACTION**

11 **CIVIL PENALTIES UNDER PAGA**

12 **(By PLAINTIFF and Aggrieved Employees against DEFENDANTS)**

13 29. PLAINTIFF incorporates all of the foregoing paragraphs of this complaint as if
14 fully alleged herein.

15 30. Under the Private Attorneys General Act, Labor Code §§ 2698-99 ("PAGA"),
16 private parties may recover civil penalties for violations of the California Labor Code, including
17 sections 510, 512, 1194, 1197, 201, 202, 203, 226, 226.7, 245, 246 and the Industrial Welfare
18 Commission's ("IWC") Wage Orders, including IWC Wage Order 7. PAGA penalties are in
19 addition to any other relief available under the Labor Code.

20 31. As set forth above, DEFENDANTS violated the California Labor Code by
21 consistently failing to employ PLAINTIFF and similarly employed individuals in compliance
22 with California law.

23 32. At all times relevant to this action, PLAINTIFF and similarly employed
24 individuals were employees of DEFENDANTS entitled to the benefits of the IWC Wage Orders,
25 including Wage Order 7.

1 FAILURE TO PAY MINIMUM AND OVERTIME WAGES

2 33. At all times relevant hereto, California Labor Code §§ 510, 1194(a) and 1197 and
3 the applicable wage orders, including Wage Order 7, have required DEFENDANTS to pay their
4 employees the applicable minimum wage for all hours worked and overtime wages for all hours
5 worked over 8 hours in a day and over 40 hours in a week.

6 34. PLAINTIFF and the other similarly employed individuals were not paid by
7 DEFENDANTS, during the relevant period, the applicable minimum and overtime wages for all
8 hours worked because DEFENDANTS required PLAINTIFF and others to undergo off-the-clock
9 security checks before and after their scheduled shifts for which DEFENDANTS did not pay
10 them, as alleged above.

11 35. By failing to pay PLAINTIFF and other similarly employed individuals who
12 underwent the off-the-clock mandatory security screenings, DEFENDANTS willfully breached
13 their obligations under Labor Code §§ 510, 1194(a) and 1197 and Section 4 of the applicable
14 wage orders, including Wage Order 7.

15 MEAL AND REST BREAK VIOLATIONS

16 36. At all relevant times, PLAINTIFF and other similarly employed individuals were
17 employees of DEFENDANTS covered by the meal and rest period provisions of Labor Code
18 sections 226.7 and 512, and the applicable wage orders, including Wage Order 7.

19 37. Pursuant to Labor Code sections 226.7 and 512, and the applicable wage orders,
20 PLAINTIFF and other similarly employed individuals were entitled to a meal period of at least
21 30 minutes for each workday they worked more than 5 hours in any workday, and one additional
22 hour of pay for every day that a timely meal period was not provided. Further, the DLSE has
23 advised with regard to meal periods, “an employer has an affirmative obligation to ensure that
24 workers are actually relieved of all duty, not performing any work, and ... free to leave the
25 employer’s premises.” Dept. of Industrial Relations, DLSE Opn. Letter No. 2002.01.28 (Jan. 28,
26 2002) p. 1.

27 38. As alleged above, DEFENDANTS required PLAINTIFF and other similarly
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1 employed individuals at Ross's distribution centers to undergo security screenings when leaving
2 its premises and when returning to its premises, but were not compensated for that time. As such,
3 whenever PLAINTIFF and similarly employed individuals at Ross's distribution centers left the
4 premises for their meal, DEFENDANTS violated Labor Code §§ 226.7, 512 and Wage Order 7
5 by not providing them with a full 30-minute meal period. DEFENDANTS also violated Labor
6 Code §§ 226.7, 512 and Wage Order 7 on those shifts when PLAINTIFF and similarly employed
7 individuals remained inside the distribution center in order to get their full 30 minutes of meal
8 period time because they were then restricted to DEFENDANTS' premises in violation of
9 California law.

10 39. DEFENDANTS failed to provide PLAINTIFF and similarly employed
11 individuals the additional hour of pay required by Labor Code Section 226.7 and the applicable
12 wage orders for the meal and rest period violations alleged herein. PLAINTIFF is informed and
13 believes and thereon alleges that at all relevant times within the relevant period, DEFENDANTS
14 maintained and continue to maintain a policy or practice of not paying additional pay to
15 employees for meal and/or rest period violations *and at the correct regular rate of compensation*
16 to factor in all forms of incentive pay, including shift differentials or other forms of non-
17 discretionary compensation, including but not limited to, an attendance bonus or a "Blue Chip"
18 bonus, as alleged above.

19 FAILURE TO PAY SICK LEAVE AT THE REGULAR RATE OF PAY

20 40. At all relevant times, PLAINTIFF and similarly employed individuals at Ross's
21 distribution centers were entitled to "paid sick days" pursuant to the California Healthy
22 Workplaces, Healthy Families Act of 2014 and California Labor Code sections 245 *et seq.*

23 41. Labor Code section 246(l) requires that employers pay sick time pay to non-
24 exempt employees at the employee's "regular rate of pay." Employers may either calculate "paid
25 sick days" for non-exempt employees in California at the regular rate of pay for the workweek in
26 which the employee uses paid sick time or by dividing the employee's total wages, not including
27 overtime premium pay, by the employee's total hours worked in the full pay periods of the prior
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90 days of employment. Lab. 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, such as those paid to PLAINTIFF.

42. DEFENDANTS failed to include such non-discretionary remuneration, including shift differentials, when determining the “regular rate of pay” for PLAINTIFF and similarly employed individuals at Ross’s distribution centers for purposes of sick time pay when PLAINTIFF and similarly employed individuals at Ross’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, as required by Labor Code § 246.

FAILURE TO KEEP ACCURATE RECORDS

43. At all relevant times, DEFENDANTS employed PLAINTIFF and other similarly employed individuals subject to 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 shifts intervals and total daily hours worked shall also be recorded.

44. As alleged above, DEFENDANTS’ time records fail to show the amount of time PLAINTIFF and similarly employed individuals at Ross’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, DEFENDANTS failed to keep accurate records of employees’ meal periods and start and end of shift times, thereby violating section 7 of Wage Order 7.

FAILURE TO FURNISH ACCURATE ITEMIZED WAGE STATEMENTS

45. At all relevant times, DEFENDANTS were required to provide PLAINTIFF and similarly employed individuals with accurate itemized wage statements. Lab. Code § 226.

46. As alleged above, by failing to list all hours worked (on account of off-the-clock work such as mandatory security screenings) and by failing to list all wages earned, including

1 minimum and overtime wages, and the correct amount of meal and rest break period premium
2 wages discussed above, in wage statements provided to PLAINTIFF and similarly employed
3 individuals, DEFENDANTS violated Labor Code section 226.

4 FAILURE TO TIMELY PAY ALL WAGES UPON CESSATION OF EMPLOYMENT

5 47. Pursuant to Labor Code section 201, PLAINTIFF and other similarly employed
6 individuals were entitled upon cessation of employment with DEFENDANTS to timely payment
7 of all wages earned and unpaid prior to termination and/or discharge, including layoff.
8 Employees who were discharged were entitled to payment of all wages earned and unpaid prior
9 to discharge immediately upon termination. Pursuant to section 202, employees who voluntarily
10 terminated their employment with DEFENDANTS were entitled to timely payment of all wages
11 earned and unpaid within 72 hours of giving notice of their resignation.

12 48. As alleged above, DEFENDANTS failed to timely pay PLAINTIFF and other
13 similarly employed persons all wages earned and unpaid prior to termination in accordance with
14 Labor Code sections 201 and 202. PLAINTIFF is informed and believes and thereon alleges that
15 at all relevant times within the applicable limitations period, DEFENDANTS maintained and
16 continue to maintain a policy or practice of not paying terminated or quitting employees all their
17 final wages earned and due under Labor Code sections 201 and 202.

18 49. DEFENDANTS' failure to pay PLAINTIFF and other similarly employed
19 individuals all wages earned prior to termination in accordance with Labor Code sections 201
20 and 202 was willful. DEFENDANTS had the ability to pay all wages earned by employees prior
21 to termination in accordance with Labor Code sections 201 and 202, but intentionally adopted
22 policies or practices incompatible with the requirements of Labor Code sections 201 and 202.

23 50. Pursuant to Labor Code section 203, PLAINTIFF and other similarly employed
24 persons were entitled to continuation of their wages, from the day their earned and unpaid wages
25 were due upon termination until paid, up to a maximum of 30 days. DEFENDANTS did not
26 comply with their obligations under section 203.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, PLAINTIFF, on behalf of herself and all other current and former
3 employees of DEFENDANTS' who worked at Ross's distribution centers in California, and the
4 State of California, prays for relief and judgment against DEFENDANTS as follows:

- 5 1. Civil penalties under Labor Code section 2699 (75% payable to the LWDA and
6 25% payable to aggrieved employees);
7 2. Costs;
8 3. Reasonable attorney's fees; and
9 4. Such other and further relief as this Court may deem just and proper.
10

11 Dated: June 29, 2021

MOSS BOLLINGER LLP

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13 By: 
14 Jeremy F. Bollinger
Attorneys for Plaintiff MAGDA CASTRO
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EXHIBIT A

to

Complaint



Moss Bollinger
LLP

JEREMY F. BOLLINGER
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April 23, 2021

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: 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, gives notice that her former employer, Ross Dress For Less, Inc. ("Defendant" or "Ross") violated the California Labor Code 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.

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. 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