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10 *Attorneys for Plaintiffs Anna Hernandez,*
11 *Lebrado Madrazo*

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 FOR THE COUNTY OF SAN FRANCISCO

CGC-22-598893

14 ANNA HERNANDEZ and LEBRADO
15 MADRAZO, individually and as aggrieved
employees pursuant to the Private Attorneys
16 General Act ("PAGA"), and on behalf of the
State of California and other aggrieved
employees,

17 Plaintiffs.

18 vs.

19 OLD NAVY, LLC, a Delaware Limited
20 Liability Company.

21 Defendant.

Case No.:

REPRESENTATIVE COMPLAINT

Claim for Violations of California Labor
Code and Wage Order 7-2001, Section
14(A); and (B)

ELECTRONICALLY

FILED

Superior Court of California,
County of San Francisco

03/25/2022

Clerk of the Court

BY: LAURA SIMMONS

Deputy Clerk

1 Plaintiffs Anna Hernandez and Lebrado Madrazo as aggrieved employees bring this
2 representative action on behalf of themselves and similarly situated current and former
3 employees of Old Navy LLC and on behalf of the State of California, and allege as follows:
4

5 JURISDICTION AND VENUE

6 1. This is an enforcement action under the Labor Code Private Attorneys General
7 Act of 2004, California Labor Code section 2698 *et seq.* ("PAGA") to recover on behalf of the
8 Plaintiffs, the State of California, and "non-party Aggrieved Employees" who worked for
9 Defendant in California as non-exempt, hourly-paid store employees who suffered violations of
10 7-2001 Wage Order Section 14(A) and/or (B) as set forth in this complaint at any time between
11 one year prior to the filing of the pre-filing written notices to the Labor and Workforce
12 Development Agency ("LWDA") in this case on January 18, 2022 until judgment.

13 2. This Court has jurisdiction over this action pursuant to the California
14 Constitution, Article VI, section 10. The overall amount in controversy exceeds \$25,000.
15 The California Labor Code (including §2699) provides this Court has jurisdiction.

16 3. This Court has jurisdiction over the Defendant because, on information and belief,
17 Defendant has sufficient minimum contacts in California, or otherwise intentionally avail itself
18 of the California market so as to render the exercise of jurisdiction over them by the California
19 courts consistent with traditional notions of fair play and substantial justice. Also, the Plaintiffs
20 and all other aggrieved employees were employed by Defendant in California.

21 4. Venue is proper in this Court because Defendant employs persons in multiple
22 stores located within the County of San Francisco and have violated the seating requirements of
23 the applicable Wage Order in this County giving rise to the civil penalties sought in this action.
24 Cal. Code Civ. P. § 393. Pursuant to CPC § 393, venue is proper for the recovery of a penalty
25 imposed by statute in the county in which the cause, or some part of the cause, arose.

26 5. Venue is also proper because the Defendant's California headquarters is in this
27 County.

28 6. Finally, venue is appropriate in this Court because a judgment was earlier entered

1 against the Defendant on August 12, 2020, for earlier violations of Wage Order § 14. That shows
2 the Defendant was certainly on notice of its unlawful conduct and is, therefore, subject to
3 subsequent penalties pursuant to Labor Code § 2699 (f) (2).

4 **THE PARTIES**

5 7. Plaintiff Anna Hernandez was an employee of Old Navy, LLC. from
6 approximately from 2009 to approximately August 2021. She was employed at an Old Navy
7 retail store located at 1137 State Street, Santa Barbara, CA. She was frequently assigned to work
8 as a cashier at the checkout counters and was also frequently assigned to work at the fitting room
9 stations. Her duties as a cashier involved ringing up purchases, processing returns and exchanges
10 and assisting customers. When assigned to work as a fitting room attendant, she provided
11 customer service and cleared the fitting room areas by recovering merchandise.

12 8. Both jobs that Ms. Hernandez performed could reasonably and feasibly been done
13 while seated. However, the Defendant failed to provide a seat under Section 14(A) and failed to
14 provide her a seat during lulls in the workflow as required under 14(B).

15 9. Ms. Hernandez has assisted counsel by providing information on her work and the
16 seating policies and practices of the Defendant. She has assisted counsel in the preparation and
17 filing of a written notice to the LWDA and the employer on January 18, 2022. The violations of
18 the Wage Order that she suffered are central and common to other aggrieved employees and her
19 experience is typical of that of other aggrieved employees. She will serve as an adequate
20 representative of other current and former employees who were aggrieved by the practices of the
21 Defendant with respect to seating and she has retained counsel who are very experienced in the
22 prosecution of representative actions, and in particular, actions that involve Wage Order § 14.

23 10. Plaintiff Lebrado Madrazo was employed by Old Navy, LLC. from September
24 2015 to January 2020 as a brand operations manager. Since then he has worked as an hourly
25 Brand Associate at the Defendant's retail store located at 4950 Pacific Ave., Stockton, CA. His
26 current duties have included the cashier station at the checkout counter. He has also been
27 assigned to cover in store pick ups and work at the fitting room stations. As a cashier, he rings up
28 customer purchases, processes returns and exchanges, and assists customers. When working at

1 the fitting room he clears the area by recovering store merchandise and providing customer
2 service. The cashier and fitting room duties that Mr. Madrazo has performed could have been
3 performed, at least in part, while seated. But Old Navy failed to provide suitable seating under
4 Section 14(A) and failed to provide suitable seating in lulls of workflow under Section 14(B).

5 11. Mr. Madrazo will adequately represent other current and former hourly
6 employees. He has assisted counsel by providing information as to Old Navy's operating
7 procedures and policies and practices with respect to seats. Mr. Madrazo has assisted counsel in
8 understanding the Defendant's operations and central practices. He has also assisted counsel in
9 preparing and filing the pre-litigation notice to the LWDA and the employer which was filed on
10 January 18, 2022. Mr. Madrazo's claims of the Defendant's statewide failure to provide suitable
11 seating is shared with all other aggrieved employees and his experiences in suffering violations
12 of Section 14 are typical of those of other aggrieved employees.

13 12. Defendant OLD NAVY, LLC, was and is a Delaware limited liability company
14 doing business in California, and at all times hereinafter mentioned, an employer whose
15 employees are engaged throughout this County and the State of California.

16 13. Plaintiffs and other current and former California employees of Defendant are
17 "aggrieved employees" as defined by Labor Code section 2699(c) in that they are all Defendant's
18 current or former California employees who experienced violations of 7-2001 Wage Order,
19 Section 14(A) and 14(B).

20 14. Plaintiffs have complied with the administrative prefiling requirements of Labor
21 Code §2966.3. Copies of these LWDA prefiling letters to the LWDA and Defendants are
22 attached as **Exhibits 1 and 2**.

23 15. As of the filing date of this Complaint, over 65 days have passed since Plaintiffs
24 sent their notices described above to the LWDA, and the LWDA has not responded that it
25 intends to investigate Plaintiffs' claims and Defendant has not cured the violations.

26 16. Pursuant to PAGA, and in particular, California Labor Code sections 2699(a),
27 2699.3(a), 2699.3(c), and 2699.5, Plaintiffs, acting in the public interest as a private attorney
28 generals, seek assessment and collection of subsequent civil penalties for themselves, all other

1 non-party Aggrieved Employees, and the State of California against for violations of California
2 Labor Code section 1198.

3
4 **FIRST CAUSE OF ACTION**
5 **FAILURE TO PROVIDE SUITABLE SEATING**
6 **VIOLATION OF LABOR CODE SECTION 1198 AND CALIFORNIA CODE OF**
7 **REGULATIONS, TITLE 8, SECTION 11070(14)(A)**

8 17. Plaintiffs incorporate by reference and re-allege as if fully stated herein each and
9 every allegation set forth above.

10 18. California Labor Code §§ 2698, *et seq.* ("PAGA") permits Plaintiffs to recover
11 civil penalties for the violation(s) of the Labor Code sections enumerated in Labor Code section
12 2699.5. Section 2699.5 enumerates Labor Code section 1198, among others. Defendants'
13 conduct, as alleged herein, violates section 1198 of the California Labor Code, by failing to
14 provide suitable seating to Plaintiffs and other non-party Aggrieved Employees as set forth
15 below.

16 19. At all relevant times herein, California Labor Code section 1198 makes it illegal
17 to employ an employee under conditions of labor that are prohibited by the applicable wage
18 order. California Labor Code section 1198 requires that ". . . the standard conditions of labor
19 fixed by the commission shall be the . . . standard conditions of labor for employees. The
20 employment of any employee . . . under conditions of labor prohibited by the order is unlawful."

21 20. California Code of Regulations, Title 8, section 11070(14)(A) provides that "[a]ll
22 working employees shall be provided with suitable seats when the nature of the work reasonably
23 permits the use of seats."

24 21. During the relevant time period, Defendant violated California Labor Code
25 section 1198 and California Code of Regulations, Title 8, section 11070(14)(A), because
26 Plaintiffs and other non-party Aggrieved Employees were not allowed to sit, even when the
27 nature of their work would have reasonably permitted the use of seats, nor were they provided
28 with suitable seats.

22. Defendant's failure to provide suitable seating to Plaintiffs and other non-party Aggrieved Employees violated and continues to violate California Labor Code section 1198 and IWC Wage Order 7-2001, Section 14(A).

SECOND CAUSE OF ACTION

FAILURE TO PROVIDE SUITABLE SEATING

VIOLATION OF LABOR CODE SECTION 1198 AND CALIFORNIA CODE OF

REGULATIONS, TITLE 8, SECTION 11070(14)(B)

23. Plaintiffs incorporate by reference and re-allege as if fully stated herein each and every allegation set forth above.

24. California Labor Code §§ 2698, *et seq.* (“PAGA”) permits Plaintiffs to recover civil penalties for the violation(s) of the Labor Code sections enumerated in Labor Code section 2699.5. Section 2699.5 enumerates Labor Code section 1198, among others. Defendants’ conduct, as alleged herein, violates section 1198 of the California Labor Code, by failing to provide suitable seating to Plaintiffs and other non-party Aggrieved Employees as set forth below.

25. At all relevant times herein, California Labor Code section 1198 makes it illegal to employ an employee under conditions of labor that are prohibited by the applicable wage order. California Labor Code section 1198 requires that “. . . the standard conditions of labor fixed by the commission shall be the . . . standard conditions of labor for employees. The employment of any employee . . . under conditions of labor prohibited by the order is unlawful.”

26. California Code of Regulations, Title 8, section 11070(14)(B) provides that “[w]hen employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.”

27. During the relevant time period, Defendants violated California Labor Code section 1198 and California Code of Regulations, Title 8, section 11070(14)(B), because

1 Plaintiffs and other non-party Aggrieved Employees were not allowed to sit, even during lulls in
2 their work duties, nor were they provided with suitable seats in reasonable proximity to their
3 work areas.

4 28. Defendants' failure to provide suitable seating to Plaintiffs and other non-party
5 Aggrieved Employees violated and continues to violate California Labor Code section 1198 and
6 IWC Wage Order 7-2001, Section 14((B)).

7 8 **SUBSEQUENT PENALTIES**

9 29. In 2017, the Defendant was sued in this Court for violating Wage Order § 14.
10 *Alvarado v. Old Navy, LLC*, CGC 17-562773. In November of 2019 the parties reached a
11 settlement by which Old Navy, LLC would pay \$6,148,174.00 for alleged violations of Wage
12 Order § 14(A) and (B). Judgment was entered accordingly by Judge Y.S. Cheng on August 12,
13 2020.

14 30. Because this prior suit placed the Defendant that its policies and practices were
15 violative of § 14, Plaintiffs Hernandez and Madrazo may recover subsequent penalties of \$200
16 per pay period per employee pursuant to Labor Code § 2699 (f) (2).

17 18 **REPRESENTATIVE ACTION**

19 31. A representative action is not only provided for in the Labor Code, it is also the
20 superior alternative. At the present time individual actions under PAGA are not allowed and
21 Wage Order § 14 does not allow an individual employee to seek enforcement of Section 14.

22 32. A representative action is also appropriate because the Defendant has
23 common seating policies that are statewide. Its actual practices are also uniform throughout the
24 State with respect to not providing suitable seats. Its uniform policies and practices therefore
25 create a uniquely common issue that may be determined and resolved by the Court through a
26 representative action.

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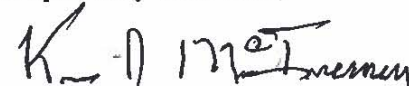
PRAYER FOR RELIEF

Plaintiffs, on behalf of the State of California and all other non-party Aggrieved Employees, pray for relief and judgment against Defendants, jointly and severally, as follows:

For civil penalties and attorneys' fees in excess of twenty-five thousand dollars (\$25,000) to the State of California and aggrieved employees.

Dated: March 25, 2022

Respectfully submitted,



Kevin J. McInerney
Attorney for Plaintiffs Anna Hernandez,
Lebrado Madrazo

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EXHIBIT 1



1875 Century Park East, Suite 1000
Los Angeles, California 90067
310.556.4811 Main | 310.943.0396 Fax

JEZZETTE RON
310.712.8142 Direct
Jezzette.Ron@capstonelawyers.com

January 18, 2022

VIA ONLINE SUBMISSION

California Labor & Workforce Development Agency
ATTN: PAGA Administrator
(<https://dir.tfaforms.net/308>)

Subject: *Anna Hernandez v. Old Navy, LLC, et al.*

Dear PAGA Administrator:

This office represents Anna Hernandez in connection with her claims under the California Labor Code, and this letter is sent in compliance with the notice requirements of the California Labor Code Private Attorneys General Act, California Labor Code section 2699.3. Until August 2021, Ms. Hernandez was an employee of OLD NAVY, LLC and/or THE GAP, INC. For the purpose of this letter, Ms. Hernandez collectively refers to these entities as "OLD NAVY."

The employers may be contacted directly at the addresses below:

OLD NAVY, LLC
2 FOLSOM STREET
SAN FRANCISCO, CA 94105

THE GAP, INC.
2 FOLSOM STREET
SAN FRANCISCO, CA 94105

Ms. Hernandez intends to seek civil penalties, attorney's fees, costs, and other available relief for violations of the California Labor Code, which are recoverable under sections 2698, *et seq.*, the Labor Code Private Attorneys General Act of 2004 ("PAGA"). Ms. Hernandez seeks relief on behalf of herself, the State of California, and other persons who are or were employed by OLD NAVY in California as a non-exempt, hourly paid employee in an OLD NAVY store location, including retail and outlet or factory stores ("aggrieved employees").

OLD NAVY's Store Types and Workstations

OLD NAVY is an apparel retailer headquartered in San Francisco, California. OLD NAVY sells clothing and accessories "for the whole family"¹ under its brand name, and is one of the largest apparel brands in the world, operating both standard retail and outlet (or factory) stores, which sell discounted merchandise. OLD NAVY operates at least 1,220 store locations in the United States,

¹ Old Navy | Gap Inc., "About" page, available at: <https://www.gapinc.com/en-us/about/old-navy> (last visited December 9, 2021).

including approximately 118 locations in California, of which a majority are retail stores and approximately seven (7) are outlet stores.

Specifically, OLD NAVY's stores, which are each around 15,000 square feet, employ approximately 50-100 associates. While OLD NAVY's California retail and outlet store locations may vary slightly by size and merchandise offered, both store types share generally similar cash wrap counter and workstation designs and configurations. OLD NAVY stores have an "open and easy to navigate"² layout between core clothing sections and are "intentionally designed like grocery stores, with flowing aisles, shopping carts, and small impulse items near the checkout counters," according to Kevin Lonergan, the late former director of stores of The Gap, Inc. OLD NAVY stores maintain a uniform cash wrap or checkout counter for five (5) or more cashier stations near the front entrance. These OLD NAVY cash wrap counters are generally 20 feet in length and 4 feet in width, and are waist or hip-height. These dimensions allow space for the presence and use of a seat or stool by Ms. Hernandez and other aggrieved employees during the performance of their work duties. OLD NAVY stores utilize a mix of cash wrap counters, including traditional front-end cashier stations, self-checkout stations, and/or in-store pickup stations. Some OLD NAVY stores have more cashier stations, some have less. Some have more self-checkout stations or in-store pickup stations, some have less. But regardless of the number of cash wraps and checkout station types in a particular store, the layout and design of the various cash wrap counters are similar across all OLD NAVY California stores. Similarly, all OLD NAVY stores have fitting rooms and fitting-room attendant workstations that have the same or a similar design. The design and configuration of OLD NAVY's workstations do not vary by store; rather, OLD NAVY uses the same design and configuration in virtually all of its California stores, regardless of the location.

The nature of the work performed at a number of workstations in OLD NAVY's stores would reasonably permit the use of a seat. Specifically, the OLD NAVY workstations where the nature of the work performed would reasonably permit the use of a seat include, but are not limited to, OLD NAVY's cash wrap counters, customer service desks and/or courtesy desks, fitting rooms, in-store pickups, returns and exchanges, and store entrances and/or exits.

Ms. Hernandez's Employment at OLD NAVY

OLD NAVY employed Ms. Hernandez as a non-exempt, hourly paid brand associate from approximately November 2009 to August 2021. Ms. Hernandez worked at OLD NAVY's retail store in Santa Barbara, California, located at 1137 State Street, Santa Barbara, California 93101 (Store #5416). She typically worked six (6) hours or more a day, and one (1) to two (2) days per week. As a brand associate, Ms. Hernandez was assigned to a cashier station at the cash wrap counter 15% of her time, was sometimes assigned to cover in-store pickup stations, and was assigned to work at the fitting room stations approximately two (2) days per week for four (4) hours. Her primary job duties as a brand associate when assigned to a cashier station included, without limitation, clearing the sales area, folding clothing, processing returns and exchanges, assisting customers, and ringing up purchases in the cash wrap counter area. Also, her primary job duties when assigned to a fitting room attendant workstation included, without limitation, folding clothes, recovering store merchandise, clearing fitting rooms, and providing customer service.

² "Old Navy's New Store Format Is The Gap's Unsung Hero," Forbes.com, available at <https://www.forbes.com/sites/barbarathau/2018/10/08/why-old-navys-growth-format-is-inspired-by-wine-country-greenmarkets-and-has-a-hopscotch-court/?sh=5088c0cf1a63> (last visited December 9, 2021).

Many of the tasks that Ms. Hernandez performed at her assigned cashier station and fitting room workstation could have been performed from a seated position. However, during her employment, OLD NAVY did not provide Ms. Hernandez with a suitable seat to use while performing her cashier or fitting room attendant duties.

Because OLD NAVY did not provide Ms. Hernandez with suitable seating while performing cashier tasks at her cash wrap counter station or fitting room attendant tasks at the fitting room workstation, the majority of which could reasonably have been performed from a seated position, OLD NAVY committed the following Labor Code violations against Ms. Hernandez, the facts and theories of which follow, making her an “aggrieved employee” pursuant to California Labor Code section 2699(c)³.

Violation of California Labor Code § 1198 and California Code of Regulations Title 8, Section 11070 Subdivision 14(A) – Failure to Provide Suitable Seating

California Labor Code section 1198 makes it illegal to employ an employee under conditions of labor that are prohibited by the applicable wage order. California Labor Code section 1198 requires that “. . . the standard conditions of labor fixed by the commission shall be the . . . standard conditions of labor for employees. The employment of any employee . . . under conditions of labor prohibited by the order is unlawful.” California Code of Regulations, Title 8, section 11070(14)(A) provides that “[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.”

“The ‘nature of the work’ refers to an employee’s tasks performed at a given location for which a right to a suitable seat is claimed, rather than a ‘holistic’ consideration of the entire range of an employee’s duties anywhere on the jobsite during a complete shift. If the tasks being performed at a given location reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing, a seat is called for.” *Kilby v. CVS Pharmacy, Inc.*, 368 P.3d 554, 558 (Cal. 2016). “Whether the nature of the work reasonably permits sitting is a question to be determined objectively based on the totality of the circumstances. An employer’s business judgment and the physical layout of the workplace are relevant but not dispositive factors. The inquiry focuses on the nature of the work, not an individual employee’s characteristics.” *Id.* The burden of proof to show suitable seating is not available is on the employer. *Id.* at 568. In other words, the employer must show that compliance is “infeasible because no suitable seating exists.” *See id.*

There was, and continues to be, space at various workstations in OLD NAVY’s store types that could accommodate seats (with reasonable or no modification), which cashiers and customer service employees could use while performing various location-specific tasks. These OLD NAVY workstations include, but are not limited to, cash wrap counters, customer service desks and/or courtesy desks, fitting rooms, in-store pickups, returns and exchanges, store entrances and/or exits,

³ These facts, theories, and claims are based on Ms. Hernandez’s experience and counsel’s review of those records currently available relating to Ms. Hernandez’s employment. Discovery conducted in litigation of wage and hour claims such as these often reveals additional claims that the aggrieved employee was not initially aware of (because the aggrieved employee was not aware of the law’s requirements, the employer misinformed its employee of the law’s requirements, or because the employer effectively hid the violations). Thus, Ms. Hernandez reserves the right to supplement this letter with additional facts, theories, and claims if she becomes aware of them subsequent to the submission of this letter.

and/or other workstations. OLD NAVY could have provided Ms. Hernandez and other aggrieved employees with seats at these workstations, but instead denied and continues to deny aggrieved employees seats altogether or denies them suitable seats.

During her employment, Ms. Hernandez worked at the cash wrap counter and fitting room station. Her cashiering and fitting room attendant tasks included, without limitation, operating the cash register, scanning items, folding apparel, and bagging items—all of which could have been performed from a seated position without negatively affecting the quality or efficiency of her performance. Although her tasks could have been performed from a seated position, Ms. Hernandez was required to stand when working at the cash wrap counter and fitting room station.

Other aggrieved employees similarly spent a substantial portion of their day at the cash wrap counter and/or fitting room workstations. The nature of the work of an employee performing cashier and/or customer service duties can reasonably be accomplished from a seated position. Ms. Hernandez and other aggrieved employees could have handled transactions, provided customer service, and performed other similar tasks at these work areas at any of OLD NAVY's stores while seated without interfering with their ability to perform their job duties. OLD NAVY's failure to provide suitable seats to Ms. Hernandez and other aggrieved employees at or near their workstations has occurred, and continues to occur, systematically and on a company-wide basis at all of its stores.

OLD NAVY's failure to provide suitable seating to Ms. Hernandez and other aggrieved employees when the nature of their work reasonably permits seats violates California Labor Code section 1198 and Industrial Welfare Commission ("IWC") Wage Order No. 7-2001, subdivision 14(A). Ms. Hernandez and other aggrieved employees are therefore entitled to recover civil penalties in the amount of one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Violation of California Labor Code § 1198 and California Code of Regulations Title 8, Section 11070 Subdivision 14(B) – Failure to Provide Suitable Seating

California Labor Code section 1198 makes it illegal to employ an employee under conditions of labor that are prohibited by the applicable wage order. California Labor Code section 1198 requires that "... the standard conditions of labor fixed by the commission shall be the ... standard conditions of labor for employees. The employment of any employee ... under conditions of labor prohibited by the order is unlawful." California Code of Regulations, Title 8, section 11070(14)(B) provides that "[w]hen employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties."

The IWC states that section 14(B) applies during "lulls in operation" when an employee, while still on the job, is not then actively engaged in any duties. *Kilby v. CVS Pharmacy, Inc.*, 368 P.3d 554, 565 (Cal. 2016), citing IWC, 1976 Wage Orders, Summary of Basic Provisions, Seats. When taken together, an employee is entitled to a seat under section 14(A) if his or her actual tasks at a discrete location make seated work feasible, while working there. *Id.* However, if other job tasks take the employee to a different location where he or she must perform tasks requiring standing, the employee would be entitled to a seat under section 14(B) during "lulls in operation." *Id.*

There was, and continues to be, space near employees' work areas (with reasonable or no modification to work areas) in OLD NAVY's stores that could accommodate seats that Ms. Hernandez and other aggrieved employees could have used during lulls in operations. OLD NAVY could have provided Ms. Hernandez and other aggrieved employees with an adequate number of suitable seats in its work areas, but instead denied employees seating and forced Ms. Hernandez and other aggrieved employees to stand throughout the day.

OLD NAVY did not provide Ms. Hernandez and other aggrieved employees with an adequate number of seats or stools in reasonable proximity to their work areas to allow them to use seats when it would not interfere with the performance of their duties for times when they were not engaged in active duties that require standing. For example, during their employment, Ms. Hernandez and/or other aggrieved employees experienced lulls in their work at various times during a typical shift, especially when the store was not busy. During these lulls, when Ms. Hernandez and/or other aggrieved employees were not actively checking out customers, folding clothes, and/or providing customer service, they could have taken a moment to sit and rest. But, because OLD NAVY did not and continues to not furnish suitable seats in reasonable proximity to Ms. Hernandez's and/or other aggrieved employees' work areas, they have not been permitted to sit during lulls in OLD NAVY's operations.

OLD NAVY's failure to provide suitable seating in reasonable proximity to Ms. Hernandez's and/or other aggrieved employees' work areas violates California Labor Code section 1198 and IWC Wage Order No. 7-2001, subdivision 14(B), for which Ms. Hernandez and other aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Thank you for your attention to this matter.

Best Regards,

A handwritten signature in black ink, appearing to read "J. Ron" or "Jezzette Ron".

Jezzette Ron

Copy: OLD NAVY, LLC (via U.S. Certified Mail); THE GAP, INC. (via U.S. Certified Mail)

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 SAN FRANCISCO, CA 94105

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Capstone
 LAW APC
 1875 Century Park East, Suite 1000
 Los Angeles, California 90067

OLD NAVY, LLC
 2 FOLSOM STREET
 SAN FRANCISCO, CA 94105

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1. Article Addressed to: OLD NAVY, LLC 2 FOLSOM STREET SAN FRANCISCO, CA 94105 Barcode: 9590 9402 7269 1284 8873 23	3. Service Type ☐ Adult Signature ☐ Priority Mail Express[®] ☐ Adult Signature Restricted Delivery ☐ Registered Mail[™] ☒ Certified Mail[®] ☐ Registered Mail Restricted Delivery ☐ Certified Mail Restricted Delivery ☐ Signature Confirmation[™] ☐ Collect on Delivery ☐ Signature Confirmation Restricted Delivery ☐ Insured Mail ☐ Signature Confirmation Restricted Delivery ☐ Insured Mail Restricted Delivery (over \$500)
2. Article Number (Transfer from service label) 7021 1970 0002 1277 0929	Domestic Return Receipt

PS Form 3811, July 2020 PSN 7530-02-000-9053



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☒ Return Receipt (hardcopy) \$
☐ Return Receipt (electronic) \$
☐ Certified Mail Restricted Delivery \$
☐ Adult Signature Required \$
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1. Article Addressed to: THE GAP, INC. 2 FOLSOM STREET SAN FRANCISCO		B. Received by (Printed Name)	C. Date of Delivery
2. Article Number (Transfer from service label) 7021 0950 0001 0025 2499		D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☐ No	
3. Service Type ☐ Adult Signature ☐ Adult Signature Restricted Delivery ☒ Certified Mail [®] ☐ Certified Mail Restricted Delivery ☐ Collect on Delivery ☐ Collect on Delivery Restricted Delivery ☐ Insured Mail ☐ Insured Mail Restricted Delivery (over \$500)		☐ Priority Mail Express [®] ☐ Registered Mail [™] ☐ Registered Mail Restricted Delivery ☐ Signature Confirmation [™] ☐ Signature Confirmation Restricted Delivery	

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☐ Return Receipt (electronic)	\$0.00
☐ Certified Mail Restricted Delivery	\$0.00
☐ Adult Signature Required	\$0.00
☐ Adult Signature Restricted Delivery	\$0.00
Postage	\$1.36
Total Postage and Fees	\$8.16

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 2 FOLSOM STREET
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 SAN FRANCISCO, CA 94105

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

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Extra Services & Fees (check box, add fee as appropriate)	\$3.05
☒ Return Receipt (hardcopy)	\$0.00
☐ Return Receipt (electronic)	\$0.00
☐ Certified Mail Restricted Delivery	\$0.00
☐ Adult Signature Required	\$0.00
☐ Adult Signature Restricted Delivery	\$0.00
Postage	\$1.36
Total Postage and Fees	\$8.16

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EXHIBIT 2



1875 Century Park East, Suite 1000
Los Angeles, California 90067
310.556.4811 Main | 310.943.0396 Fax

JEZZETTE RON
310.712.8142 Direct
Jezzette.Ron@capstonelawyers.com

January 18, 2022

VIA ONLINE SUBMISSION

California Labor & Workforce Development Agency
ATTN: PAGA Administrator
(<https://dir.tfaforms.net/308>)

Subject: *Lebrado Madrazo v. Old Navy, LLC, et al.*

Dear PAGA Administrator:

This office represents Lebrado Madrazo in connection with his claims under the California Labor Code, and this letter is sent in compliance with the notice requirements of the California Labor Code Private Attorneys General Act, California Labor Code section 2699.3. As of January 2022, Mr. Madrazo is a current employee of OLD NAVY, LLC and/or THE GAP, INC. For the purpose of this letter, Mr. Madrazo collectively refers to these entities as "OLD NAVY."

The employers may be contacted directly at the addresses below:

OLD NAVY, LLC
2 FOLSOM STREET
SAN FRANCISCO, CA 94105

THE GAP, INC.
2 FOLSOM STREET
SAN FRANCISCO, CA 94105

Mr. Madrazo intends to seek civil penalties, attorney's fees, costs, and other available relief for violations of the California Labor Code, which are recoverable under sections 2698, *et seq.*, the Labor Code Private Attorneys General Act of 2004 ("PAGA"). Mr. Madrazo seeks relief on behalf of himself, the State of California, and other persons who are or were employed by OLD NAVY in California as a non-exempt, hourly paid employee in an OLD NAVY store location, including retail and outlet or factory stores ("aggrieved employees").

OLD NAVY's Store Types and Workstations

OLD NAVY is an apparel retailer headquartered in San Francisco, California. OLD NAVY sells clothing and accessories "for the whole family"¹ under its brand name, and is one of the largest apparel brands in the world, operating both standard retail and outlet (or factory) stores, which sell discounted merchandise. OLD NAVY operates at least 1,220 store locations in the United States,

¹ Old Navy | Gap Inc., "About" page, available at: <https://www.gapinc.com/en-us/about/old-navy> (last visited December 9, 2021).

including approximately 118 locations in California, of which a majority are retail stores and approximately seven (7) are outlet stores.

Specifically, OLD NAVY's stores, which are each around 15,000 square feet, employ approximately 50-100 associates. While OLD NAVY's California retail and outlet store locations may vary slightly by size and merchandise offered, both store types share generally similar cash wrap counter and workstation designs and configurations. OLD NAVY stores have an "open and easy to navigate"² layout between core clothing sections and are "intentionally designed like grocery stores, with flowing aisles, shopping carts, and small impulse items near the checkout counters," according to Kevin Lonergan, the late former director of stores of The Gap, Inc. OLD NAVY stores maintain a uniform cash wrap or checkout counter for five (5) or more cashier stations near the front entrance. These OLD NAVY cash wrap counters are generally 20 feet in length and 4 feet in width, and are waist or hip-height. These dimensions allow space for the presence and use of a seat or stool by Mr. Madrazo and other aggrieved employees during the performance of their work duties. OLD NAVY stores utilize a mix of cash wrap counters, including traditional front-end cashier stations, self-checkout stations, and/or in-store pickup stations. Some OLD NAVY stores have more cashier stations, some have less. Some have more self-checkout stations or in-store pickup stations, some have less. But regardless of the number of cash wraps and checkout station types in a particular store, the layout and design of the various cash wrap counters are similar across all OLD NAVY California stores. Similarly, all OLD NAVY stores have fitting rooms and fitting-room attendant workstations that have the same or a similar design. The design and configuration of OLD NAVY's workstations do not vary by store; rather, OLD NAVY uses the same design and configuration in virtually all of its California stores, regardless of the location.

The nature of the work performed at a number of workstations in OLD NAVY's stores would reasonably permit the use of a seat. Specifically, the OLD NAVY workstations where the nature of the work performed would reasonably permit the use of a seat include, but are not limited to, OLD NAVY's cash wrap counters, customer service desks and/or courtesy desks, fitting rooms, in-store pickups, returns and exchanges, and store entrances and/or exits.

Mr. Madrazo's Employment at OLD NAVY

OLD NAVY has employed Mr. Madrazo as a non-exempt, hourly paid brand operations manager from approximately September 2015 to January 2020, and as a non-exempt, hourly paid brand associate as of August 2020. Mr. Madrazo is a current employee of OLD NAVY. Mr. Madrazo works at OLD NAVY's retail store in Stockton, California, located at 4950 Pacific Avenue, Stockton, California 95207 (Store #5626). He typically works six (6) hours or more a day, and one (1) day a week. As a brand associate, Mr. Madrazo is assigned to a cashier station at the cash wrap counter 10-20% of his time, is sometimes assigned to cover in-store pickup stations, and is assigned to work at the fitting room stations approximately one (1) day per week for one (1) hour. His primary job duties as a brand associate when assigned to a cashier station include, without limitation, clearing the sales area, folding clothing, processing returns and exchanges, assisting customers, and ringing up purchases in the cash wrap counter area. Also, his primary job duties when assigned to a fitting room attendant workstation include, without limitation, folding clothes, recovering store merchandise, clearing fitting rooms, and providing customer service.

² "Old Navy's New Store Format Is The Gap's Unsung Hero," Forbes.com, available at <https://www.forbes.com/sites/barbarathau/2018/10/08/why-old-navys-growth-format-is-inspired-by-wine-country-greenmarkets-and-has-a-hopscotch-court/?sh=5088c0cfla63> (last visited December 9, 2021).

Many of the tasks that Mr. Madrazo performs at his assigned cashier station and fitting room workstation can be performed from a seated position. However, during his employment, OLD NAVY has not provided Mr. Madrazo with a suitable seat to use while performing his cashier or fitting room attendant duties.

Because OLD NAVY has not provided Mr. Madrazo with suitable seating while performing cashier tasks at his cash wrap counter station or fitting room attendant tasks at the fitting room workstation, the majority of which could reasonably have been performed from a seated position, OLD NAVY has committed the following Labor Code violations against Mr. Madrazo, the facts and theories of which follow, making him an “aggrieved employee” pursuant to California Labor Code section 2699(c)³.

Violation of California Labor Code § 1198 and California Code of Regulations Title 8, Section 11070 Subdivision 14(A) – Failure to Provide Suitable Seating

California Labor Code section 1198 makes it illegal to employ an employee under conditions of labor that are prohibited by the applicable wage order. California Labor Code section 1198 requires that “. . . the standard conditions of labor fixed by the commission shall be the . . . standard conditions of labor for employees. The employment of any employee . . . under conditions of labor prohibited by the order is unlawful.” California Code of Regulations, Title 8, section 11070(14)(A) provides that “[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.”

“The ‘nature of the work’ refers to an employee’s tasks performed at a given location for which a right to a suitable seat is claimed, rather than a ‘holistic’ consideration of the entire range of an employee’s duties anywhere on the jobsite during a complete shift. If the tasks being performed at a given location reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing, a seat is called for.” *Kilby v. CVS Pharmacy, Inc.*, 368 P.3d 554, 558 (Cal. 2016). “Whether the nature of the work reasonably permits sitting is a question to be determined objectively based on the totality of the circumstances. An employer’s business judgment and the physical layout of the workplace are relevant but not dispositive factors. The inquiry focuses on the nature of the work, not an individual employee’s characteristics.” *Id.* The burden of proof to show suitable seating is not available is on the employer. *Id.* at 568. In other words, the employer must show that compliance is “infeasible because no suitable seating exists.” *See id.*

There was, and continues to be, space at various workstations in OLD NAVY’s store types that could accommodate seats (with reasonable or no modification), which cashiers and customer service employees could use while performing various location-specific tasks. These OLD NAVY workstations include, but are not limited to, cash wrap counters, customer service desks and/or courtesy desks, fitting rooms, in-store pickups, returns and exchanges, store entrances and/or exits,

³ These facts, theories, and claims are based on Mr. Madrazo’s experience and counsel’s review of those records currently available relating to Mr. Madrazo’s employment. Discovery conducted in litigation of wage and hour claims such as these often reveals additional claims that the aggrieved employee was not initially aware of (because the aggrieved employee was not aware of the law’s requirements, the employer misinformed its employee of the law’s requirements, or because the employer effectively hid the violations). Thus, Mr. Madrazo reserves the right to supplement this letter with additional facts, theories, and claims if he becomes aware of them subsequent to the submission of this letter.

and/or other workstations. OLD NAVY could have provided Mr. Madrazo and other aggrieved employees with seats at these workstations, but instead denied and continues to deny aggrieved employees seats altogether or denies them suitable seats.

During his employment, Mr. Madrazo has worked at the cash wrap counter and fitting room station. His cashiering and fitting room attendant tasks include, without limitation, operating the cash register, scanning items, folding apparel, and bagging items—all of which could have been performed from a seated position without negatively affecting the quality or efficiency of his performance. Although his tasks could be performed from a seated position, Mr. Madrazo has been required to stand when working at the cash wrap counter and fitting room station.

Other aggrieved employees similarly have spent a substantial portion of their day at the cash wrap counter and/or fitting room workstations. The nature of the work of an employee performing cashier and/or customer service duties can reasonably be accomplished from a seated position. Mr. Madrazo and other aggrieved employees could have handled transactions, provided customer service, and performed other similar tasks at these work areas at any of OLD NAVY's stores while seated without interfering with their ability to perform their job duties. OLD NAVY's failure to provide suitable seats to Mr. Madrazo and other aggrieved employees at or near their workstations has occurred, and continues to occur, systematically and on a company-wide basis at all of its stores.

OLD NAVY's failure to provide suitable seating to Mr. Madrazo and other aggrieved employees when the nature of their work reasonably permits seats violates California Labor Code section 1198 and Industrial Welfare Commission ("IWC") Wage Order No. 7-2001, subdivision 14(A). Mr. Madrazo and other aggrieved employees are therefore entitled to recover civil penalties in the amount of one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Violation of California Labor Code § 1198 and California Code of Regulations Title 8, Section 11070 Subdivision 14(B) – Failure to Provide Suitable Seating

California Labor Code section 1198 makes it illegal to employ an employee under conditions of labor that are prohibited by the applicable wage order. California Labor Code section 1198 requires that "... the standard conditions of labor fixed by the commission shall be the ... standard conditions of labor for employees. The employment of any employee ... under conditions of labor prohibited by the order is unlawful." California Code of Regulations, Title 8, section 11070(14)(B) provides that "[w]hen employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties."

The IWC states that section 14(B) applies during "lulls in operation" when an employee, while still on the job, is not then actively engaged in any duties. *Kilby v. CVS Pharmacy, Inc.*, 368 P.3d 554, 565 (Cal. 2016), citing IWC, 1976 Wage Orders, Summary of Basic Provisions, Seats. When taken together, an employee is entitled to a seat under section 14(A) if his or her actual tasks at a discrete location make seated work feasible, while working there. *Id.* However, if other job tasks take the employee to a different location where he or she must perform tasks requiring standing, the employee would be entitled to a seat under section 14(B) during "lulls in operation." *Id.*

There was, and continues to be, space near employees' work areas (with reasonable or no modification to work areas) in OLD NAVY's stores that could accommodate seats that Mr. Madrazo and other aggrieved employees could use during lulls in operations. OLD NAVY could provide Mr. Madrazo and other aggrieved employees with an adequate number of suitable seats in its work areas, but instead denies employees seating and forces Mr. Madrazo and other aggrieved employees to stand throughout the day.

OLD NAVY has not provided Mr. Madrazo and other aggrieved employees with an adequate number of seats or stools in reasonable proximity to their work areas to allow them to use seats when it would not interfere with the performance of their duties for times when they were not engaged in active duties that require standing. For example, as a brand associate, Mr. Madrazo has experienced lulls in his work at various times during a typical shift, especially when the store is not busy. Oftentimes, Mr. Madrazo's location experiences slower customer traffic near the opening of business, toward the beginning of his morning shifts, and around 2 or 3 p.m., closer to the middle of his afternoon shifts. Typically, there are fewer customers in the store during the first few hours the store is open and in the middle of the day after the lunch hour. During these lulls, when Mr. Madrazo is not actively checking out customers or providing customer service, Mr. Madrazo could have taken a moment to sit and rest his legs, back, and feet. But, because OLD NAVY did not and continues to not furnish suitable seats in reasonable proximity to Mr. Madrazo's and other aggrieved employees' work areas, Mr. Madrazo and other aggrieved employees have not been permitted to sit during lulls in OLD NAVY's operations.

OLD NAVY's failure to provide suitable seating in reasonable proximity to Mr. Madrazo's and other aggrieved employees' work areas violates California Labor Code section 1198 and IWC Wage Order No. 7-2001, subdivision 14(B), for which Mr. Madrazo and other aggrieved employees are entitled to recover to recover civil penalties in the amount of one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Thank you for your attention to this matter.

Best Regards,

A handwritten signature in black ink, appearing to read "J. Ron" or "Jezzette Ron". The signature is stylized with a large, looped initial "J" and a cursive "Ron".

Jezzette Ron

Copy: OLD NAVY, LLC (via U.S. Certified Mail); THE GAP, INC. (via U.S. Certified Mail)

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 LAW APC
 1875 Century Park East, Suite 1000
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1. Article Addressed to: <u>OLD NAVY, LLC</u> <u>2 FOLSOM STREET</u> <u>SAN FRANCISCO, CA 94105</u>	D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☐ No		
2. Article Number (Transfer from service label) 7021 0950 0001 0025 2468	3. Service Type <table border="0"> <tr> <td> ☐ Adult Signature ☐ Adult Signature Restricted Delivery ☒ Certified Mail® ☐ Certified Mail Restricted Delivery ☐ Collect on Delivery ☐ Collect on Delivery Restricted Delivery ☐ Insured Mail ☐ Insured Mail Restricted Delivery (over \$500) </td> <td> ☐ Priority Mail Express® ☐ Registered Mail™ ☐ Registered Mail Restricted Delivery ☐ Signature Confirmation™ ☐ Signature Confirmation Restricted Delivery </td> </tr> </table>	☐ Adult Signature ☐ Adult Signature Restricted Delivery ☒ Certified Mail® ☐ Certified Mail Restricted Delivery ☐ Collect on Delivery ☐ Collect on Delivery Restricted Delivery ☐ Insured Mail ☐ Insured Mail Restricted Delivery (over \$500)	☐ Priority Mail Express® ☐ Registered Mail™ ☐ Registered Mail Restricted Delivery ☐ Signature Confirmation™ ☐ Signature Confirmation Restricted Delivery
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LAW APC

1875 Century Park East, Suite 1000
Los Angeles, California 90067

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SAN FRANCISCO, CA 94105

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☐ Agent

☐ Addressee

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☐ Adult Signature Restricted Delivery	\$	\$0.00
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☐ Agent☐ Addressee

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2. Article Number (Transfer from service label)

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