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File 1215.001
Via Certified U.S. Mail

December 20, 2023

Ross Stores, Inc.
Attn: Legal Department
5130 Hacienda Drive
Dublin, CA 94568

Ross Stores, Inc.
Attn: C T Corporation System
(Agent for Service of Process)
330 N Brand Blvd.
Glendale, CA 91203

Distribution & Marking Services, Inc.
Attn: Legal Department
2127 Ayrsley Town Blvd., Suite 301
Mecklenburg, Charlotte, NC 28273

Distribution & Marking Services, Inc.
Attn: John C. Allen III
(Agent for Service of Process)
P.O. Box 7112
Mecklenburg, Charlotte, NC 28241

John C. Allen III
2127 Ayrsley Town Blvd., Suite 301
Mecklenburg, Charlotte, NC 28273

Re: *Shelia Roman v. Ross Stores, Inc., et al.*
Employment Matter

Dear Sir or Madam,

Our office provides legal representation for Ms. Shelia Roman ("Roman") regarding Roman's employment with Ross Stores, Inc., Distribution & Marking Services, Inc. and John C. Allen III[1] (collectively, "Employers" or "Ross"). We are writing in a good faith attempt to resolve employment claims Roman, and possibly others similarly situated, have against Ross, without having to resort to litigation. This letter is also being mailed and uploaded to the California Labor & Workforce Development Agency, consistent with *Labor Code* § 2698 et seq. Further, a complaint is being filed with the Department of Fair Employment and Housing. As set forth in greater detail below, Roman, and possibly others similarly situated, have several meritorious claims against Ross related to their employment, including, but not limited to:

[1] See, California Labor Code §558.1 and §1197.1.

1) Wrongful termination and retaliation in violation of public policy (as to Roman only);
2) Discrimination [redacted]
3) Failure to accommodate (as to Roman only);
4) Failure to engage in the interactive process (as to Roman only);
5) Failure to take reasonable steps to prevent discrimination and/or retaliation (as to Roman only);
6) Failure to pay overtime wages;
7) Failure to provide accurate itemized wage statements;
8) Untimely payment of wages;
9) Unlawful withholding of wages;
10) Waiting time penalties;
11) Negligence (as to Roman only);
12) Negligent infliction of emotional distress (as to Roman only); and
13) For unfair business practices.

Roman's claims include relief under *California Business and Professions Code* § 17200 et. seq. and the Private Attorney General Act ("PAGA") as set forth in *Labor Code* §2698 et seq. as to Roman and possibly others. These claims are briefly discussed below.

FACTS

From around January to May 12, 2023, Roman was employed as a staff worker by Ross through Distribution & Marking Services, Inc., a hiring agency. John C. Allen III is named as the Chief Executive Officer of Distribution & Marking Services, Inc.

Through bi-weekly direct deposits, Roman was paid $18/hour, which was her most recent hourly rate. Roman also received non-discretionary bonus from the number of price tags she put on clothes for sale. However, like other employees similarly situated, Roman's overtime rate was not based on Roman's regular rate plus bonus earned, which led to underpaid of overtime for Roman and others. Scheduled for work 3:45 p.m. to 12:15 a.m., Monday to Friday, Roman and other employees similarly situated would be scheduled for a 30-minute lunch break and two 15-minute rest breaks on a workday.

[redacted]

VIOLATIONS IN RELATION TO DISCRIMINATION AND RETALIATION

1. **Wrongful Termination and Retaliation in Violation of Public Policy**

In *Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127 ("*Casella*"), the Court stated, "'[w]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.' [Citations.] In *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172 ("*Tameny*"), the California Supreme Court held that 'at-will employees may recover tort damages from their employers if they can show they were discharged in contravention of fundamental public policy.' [Citation.]" (*Casella*, supra, 157 Cal.App.4th at pp. 1138-1139.) The Courts look to the public policy of the states and federal government to determine if the termination of an employee violates the interests of the general public. In proving wrongful termination, a plaintiff must prove either that the termination violated the California Fair Employment and Housing Act ("FEHA") (*Gov. Code* § 12900, et seq.) or other statute, or that the existence of a "common law" (non-statutory) cause of action as wrongful termination in violation of public policy (see, *Tameny*; also see *Foley v. Interactive Data Corp.*, (1988) 47 Cal.3d 654), and/or wrongful constructive termination in violation of public policy. (See *Turner*) As a matter of public policy, FEHA recognizes the need to protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination, harassment, and retaliation. [*Gov. Code* § 12920] The California state legislature has directed that FEHA be construed liberally so as to accomplish its purposes. [*Gov. Code* § 12993] Moreover, the California Supreme Court has specifically held that one's right to be free from discrimination and harassment in the workplace is "fundamental." (*Brown v. Superior Court*, (1984) 37 Cal.3d 477) FEHA prohibits discrimination against an employee based on disability, among other things, and prohibits retaliation for reporting an on-the-job injury and seeking accommodation due to the injury or disability.

[redacted]

2. <u>Discrimination</u>

FEHA prohibits harassment and discrimination in employment because of mental and physical disability, medical condition, denial of medical and family care leave. (*Government Code* §§12940, 12945, 12945.2) Under FEHA, physical disabilities, mental disabilities, and mental conditions are defined broadly and include both actual disabilities and conditions, and situations where an employer perceives that an employee has a disability or condition. (*Government Code* §12926.1(b)) A physical disability is "[a]ny physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (a) affects one or more of neurological, immunological, musculoskeletal, special sense organs, respiratory, speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine, and limits a major life activity; (b) If it makes achievement of a major life activity difficult then it is a limit on a major life activity. "Major life activity" is broadly construed and includes physical, mental, and social activities as well as working. As such, employers may not consider an employee's disability, for example, in making employment decisions.

[redacted]

Ross's conducts described above were done with malice, fraud, and oppression and with conscious disregard for Roman's rights and with the intent, design, and purpose to cause harm. Roman, therefore, would be entitled to punitive or exemplary damages in addition to the regularly prescribed damages.

3. **<u>Failure to Accommodate</u>**

Under FEHA, it is unlawful for an employer to fail to make a "reasonable accommodation for the known physical or mental disability of an applicant or employee." *Cal. Gov. Code* § 12940(m). In labor cases, stress has been found to be a recognized disability (see, e.g. *Baker v. Workmen's Compensation Appeals Board*, 18 Cal.App.3d 852, Cal. Ct. App. 1971; and *Albertson's Inc. v. Workers' Compensation Appeals Board*, 131 Cal.App.3d 308, Cal. Ct. App. 1982).

[redacted]

4. **<u>Failure to Engage in the Interactive Process</u>**

It is unlawful for an employer to fail to engage in a "timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." *Cal. Gov. Code* § 12940(n). In fact, upon learning of the employee's disability, the employer must engage in a good faith interactive process with the employee (see, e.g. *Jensen v. Wells Fargo Bank*, 84 Cal. App. 4th 245, Cal. Ct. App., 2000). This requirement is an ongoing one. Similarly, the employer has an ongoing duty to engage the employee when the employee returns from a disability leave.

[redacted]

[redacted]

5. Failure to Take Reasonable Steps to Prevent Discrimination and/or Retaliation

It is an unlawful employment practice in California for an employer to fail to take all reasonable steps necessary to prevent discrimination from occurring. [*Gov. Code* §12940(k)] This is considered a statutory tort action. (*Trujillo v. North Co. Transit Dist.* (1988) 63 CA 4th 280, 286, 73 CR2d 596, 600.) For such violations an employer shall be liable for such legal or equitable relief as may be appropriate including without limitation (a) back pay [*Gov. Code* §12970(a)(1); see also *42 USC* §2000e-5; *Gov. Code* §12965]; (b) reinstatement [*Gov. Code.* §12970(a)(1)]; (c) front pay [*Gov. Code* §12970(a)(3); see also *Peralta Comm. College Dist. v. Fair Employment & Housing Comm'n.* (1990) 52 C3d 40, 52, 276 CR 114, 121]; (d) Injunctive relief [*Gov. Code* §12970(a)]; (e) Compensatory damages for pain and suffering [*Gov. Code* §12970(a)(3)]; (f) Administrative fine [*Gov. Code* §12970(c)]; (g) Reasonable attorney fees and court costs [*Gov. Code* §12987(a)(3)]; and (h) Punitive damages.

[redacted]

VIOLATIONS IN RELATION TO WAGE AND HOUR

6. Failure to Pay Minimum Wages, Regular Wages, and Overtime Wages

Under *Labor Code* § 510, an employee must be paid overtime after working eight (8) hours in a day and forty (40) hours in a week, and on the first eight (8) hours of the seventh consecutive day worked in a week. Overtime must be paid at one-and-a-half times the regular rate of pay. The overtime rate becomes two times the regular rate of pay for hours over twelve in a day, or over eight hours on the seventh consecutive day worked. The "regular rate of pay" is comprised of more than just the employee's hourly rate of pay, it includes many kinds of monetary remuneration an employee earns for his labor, including commissions, spiffs, and bonuses. (29 *U.S.C.* 207(e)).

A nondiscretionary bonus is included in determining the regular rate of pay for computing overtime when the bonus is compensation for hours worked, production or proficiency, or as an incentive to remain employed by the same employer. Incentive bonuses include flat sum bonuses. To properly compute overtime on a flat sum bonus, the bonus must be divided by the maximum legal regular hours worked in the bonus-earning period, not by the total hours worked in the bonus-earning period. This calculation will produce the regular rate of pay on the flat sum bonus earnings. Overtime on a flat sum bonus must then be paid at 1.5 times or 2 times this regular rate calculation for any overtime hour worked in the bonus-earning period.

Roman was not paid overtime owed as a non-exempt employee. Roman would often work more than eight (8) hours in a day and/or more than 40 hours in a week. Yet not all her time was compensated because her and many other similarly situated employees' overtime was not properly calculated to include their bonus.

7. <u>Failure to Provide Accurate Itemized Statements</u>

Labor Code §226(a) requires employers to provide accurate itemized wage statements for each wage payment. *Labor Code* §226(e) provides for a recovery of the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars ($4,000) (per employee).

Labor Code §226.3 provides in relevant part that any employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars ($250) per employee per violation in an initial citation and one thousand dollars ($1,000) per employee for each violation in a subsequent citation for which the employer fails to provide the employee a wage deduction statement or fails to keep the record required in subdivision (a) of Section 226. The civil penalties provided for in this section are in addition to any other penalty provided by law.[2]

In this case, Ross did not provide Roman with accurate and proper itemizations in her wage statements due to their failure to account for all withholdings, hours, wage rates, overtime, meal and rest breaks premium, among other things.

8. <u>Untimely Payment of Wages</u>

Labor Code §210(a) provides that any employer who fails to timely pay the wages of each employee, pursuant to *Labor Code* §204 which requires all wages are due and payable twice during each calendar month, shall be subject to a penalty in the amount of one hundred dollars ($100) per employee per violation in an initial citation, and two hundred dollars per employee for each violation in a subsequent citation, or any willful and intentional violation, plus 25 percent of the amount unlawfully withheld. The civil penalty provided for in this section is in addition to any

[2] Section 226.3 is subject to private enforcement. *Brewer v. Premier Golf Properties* (2008) 168 Cal.App.4th 1243, 1252.

other penalty provided by law and can be recovered by the employee as a statutory penalty.

In this case, Ross failed to timely pay Roman overtime as stated above. Therefore, Roman is entitled to such civil penalty provided therein.

9. <u>Unlawful Withholding of Wages</u>

California Labor Code §216 provides that it is a misdemeanor for an employer to "willfully refuse… to pay wages due and payable after demand has been made" or "falsely den[y] the amount or validity thereof." *California Labor Code* §225.5 provides a penalty of $100 for an initial violation and $200 for any subsequent violation of §216 plus 25% of the withheld amount.

This letter is a demand in conformity with §216. Failure to pay the wages owed here is an unlawful withholding of wages.

10. <u>Waiting time Penalties</u>

An employee who is terminated from a job must be paid all unpaid, earned wages within 24 hours (1 day) of the termination (*Labor Code* §203). This payment must include wages for days worked up to and including the last day of work, plus payment for any accrued, unused vacation time. It is unlawful for an employer to withhold final pay until the regular payday if that payday is later than the last day of work.

If an employer willfully fails to pay, any wages of an employee who is discharged or quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefore is commenced; but the wages shall not continue for more than 30 days. [Labor Code §203(a)] Severance pay and bonuses also constitute wages. "'[P]ursuant to the present-day concept of employer-employee relations, the term "wages" should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as part of his compensation.'" (*Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1972) 24 Cal.App.3d 35, 44; *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 780.)

Roman, and possibly others similarly situated, are entitled to waiting time penalties.

<u>OTHER VIOLATIONS</u>

11. <u>Negligence</u>

Ross owes a duty to its employees to provide them with a safe, non-discriminating, and non-retaliatory work environment; to make sure that its supervisors take action against employees practicing workplace discrimination and retaliation; to make sure supervisors and managers look after the safety of employees during their watch; to pay employees proper wages when due; and to provide them with proper wage statements. Ross breached this duty to Roman as highlighted above. In so doing, Ross harmed Roman including causing her general and consequential damages.

12. Negligent Infliction of Emotional Distress

As stated above, Ross was negligent. As a result of this negligence, Roman suffered and continues to suffer serious emotional distress in the form of stress, anxiety, embarrassment, and depression. This was a foreseeable result of Ross's negligence.

13. Violation of the Unfair Business Practices Act

For carrying out these and other unlawful, unfair, or fraudulent business acts and/or practices Ross has violated the *California Business and Professions Code* § 17200 et. seq. For such violations, Roman is entitled to the restoration of any money or property, which Ross may have acquired by means of such unlawful, unfair, or fraudulent business acts and/or practices. (*California Business and Professions Code* § 17203).

NOTICE OF PRESERVATION OF EVIDENCE

Please be further advised that you are hereby given notice to immediately take all steps necessary to prevent the destruction, loss, concealment, or alteration of any paper, document, or electronically stored information and other data or information generated by and/or stored on your computers and storage media (e.g., hard disks, floppy disks, backup tapes, etc.), and e-mail related to this matter. Because hard copies do not preserve electronic searchability or metadata, they are not an adequate substitute for ESI. If information exists in both electronic and paper form, you should preserve them both.

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. You must also intervene to prevent loss due to routine operations and employ proper techniques to safeguard all such evidence.

With regard to documents, tangible things, and ESI that are created or come into your custody, possession, or control subsequent to the date of delivery of this letter, potentially relevant evidence is to be preserved. You should take all appropriate action to avoid destruction of potentially relevant evidence.

REQUEST FOR EMPLOYEE FILE

Roman also requests that you forward her personnel file, all W2 information, all signed documents pursuant to *Labor Code* § 432, all wage related documents in her file pursuant to *Labor Code* § 226(b) and all personnel files pursuant to *Labor Code* § 1198.5. In the event you refuse to provide her personnel file, please let us know when we may accompany Roman to inspect the file pursuant to *Labor Code* §1198.5. You are requested to produce these documents within the time prescribed by the law.

ATTORNEY'S FEES AND COSTS

The provisions provided in this letter entitle an employee to recover attorney's fees and costs in an action on such claims. It is not uncommon for fees and costs to exceed $200,000 in an employment case that is tried before a jury.

If you have any questions or concerns regarding the foregoing, do not hesitate to contact us. Otherwise, please respond to this letter by no later than **January 3, 2024** and confirm that we will be receiving the files requested.

Regards,
BITTON & ASSOCIATES

Lei Wei, Esq.

cc: Client