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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **OAKLAND DIVISION**

12 SAMER SROUR AYOUB, on behalf of
himself and all aggrieved employees,

13 Plaintiff,

14 v.

15 HARRY WINSTON, INC.,

16 Defendant.
17

) NO. 4:21-cv-1599-JST

) PLAINTIFF SAMER SROUR
) AYOUB'S NOTICE OF RENEWED
) MOTION AND MOTION TO
) APPROVE PAGA SETTLEMENT;
) MEMORANDUM OF POINTS AND
) AUTHORITIES; DECLARATION
) OF ADAM ROSE; EXHIBITS; AND
) [PROPOSED] ORDER

) Date: August 4, 2022
) Time: 2:00 p.m.
) Ctrm: 6

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22 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

23 Please take notice that on August 4, 2022 at 2:00 p.m. in Courtroom 6 of the
24 United States District Court for the Northern District of California located at 1301
25 Clay Street, Oakland, CA 94612, plaintiff Samer S. Ayoub will move the court
26 pursuant to Cal. Lab. Code § 2699(1)(2) to approve the PAGA settlement reached at
27 mediation on September 3, 2021.

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1 The motion is based on this notice, the memorandum of points and authorities,
2 the declaration of Adam Rose with its exhibits, pleadings on file, and arguments at
3 the hearing on the motion.

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5 Date: May 23, 2022

FRONTIER LAW CENTER

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7 /s/ Adam Rose
8 Attorney for Plaintiff
9 Samer S. Ayoub
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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction and Procedural Background

Plaintiff Samer S. Ayoub worked as a security officer at Defendant Harry Winston, Inc.'s ("Harry Winston") salon in San Francisco from March 15, 2019 to September 28, 2020. Harry Winston has three retail locations in California through which it sells jewelry. Plaintiff initiated this action for: (1) individual claims for alleged harassment, discrimination, and/or wrongful termination; and (2) claims for alleged wage and hour violations, pursuant to PAGA.

The case was initially filed in San Francisco Superior Court, on January 12, 2021. Harry Winston removed the action on March 8, 2021, and Mr. Ayoub filed the operative first amended complaint on May 28, 2021. The first case management conference took place on June 29, 2021 where the matter was referred to ADR.

The parties exchanged initial disclosures pursuant to the Northern District's initial discovery protocols and then on September 3, 2021, the parties attended a half-day mediation with experienced employment law mediator Deborah Saxe, Esq. at JAMS, and agreements were reached to separately resolve the individual and PAGA aspects of the case.

The individual settlement was for \$76,500 and the proposed PAGA settlement was for \$23,500, subject to Court approval.

A. Settlement Terms

There was an individual settlement for \$76,500, and the PAGA settlement was for \$23,500 (therefore a gross amount of \$100,000). From the individual settlement, Plaintiff will receive a \$38,000 check without tax withholdings, and \$10,000 check with tax withholdings.

The attorney fees attributed to the settlements are \$25,500 for the individual settlement (33.3%) and \$7,833.33 for the PAGA settlement (33.3%). Thus, of the gross amount of \$100,000, the total attorney fees are \$33,333.33. The total attorney

1 fees are 33.3% of the gross settlement. If the attorney fees for the PAGA case were
2 taken out altogether (the \$7,833.33), then the total attorney fees would be just 25.5%
3 of the gross settlement.

4 The total costs for the entire case were \$7,109.64 - \$3,134.64 of the costs was
5 attributed to the individual settlement, and \$3,500 of the costs is attributed to the
6 PAGA settlement.

7 Restated, for the \$23,500 proposed PAGA settlement, the proposed delineation
8 is the following: 1) \$7,833.33 in attorney fees, 2) \$3,134.64 in costs, 3) \$975 in
9 administration costs, 4) \$8,667.77 to the LWDA and 5) \$2,887.26 divided among the
10 15 aggrieved employees based on the length of time they worked for Harry Winston.
11 That is an average recovery of \$192.48 per aggrieved employee.

12 A PAGA settlement does not affect the aggrieved employees' rights or options
13 to pursue individual claims since a PAGA settlement only precludes future PAGA
14 claims, it does not have the same preclusive effect as a class action judgment that
15 would bar individual claims. Cal. Lab. Code, § 2699(g)(1); *see also Arias*, 46 Cal.4th
16 at 987. Thus, the aggrieved employees could theoretically proceed with their own
17 individual employment law actions.

18 The individual case, as stated in the first amended complaint, relates to
19 allegations that one of Plaintiff's co-workers harassed Plaintiff due to his race and
20 national origin, and that when Plaintiff complained about the conduct, Harry Winston
21 retaliated. The PAGA case relates to Labor Code violations about missed breaks, off
22 the clock work, and derivative wage statement penalties.

24 **B. Pre-Mediation Investigation**

25 Although formal discovery was not done prior to mediation; the parties
26 exchanged information pursuant to the Initial Discovery Protocols. This is not a class
27 action, so General Order No. 71 does apply. The information obtained pursuant to
28 General Order No. 71 was certainly helpful in preparing for mediation.

1 Nonetheless, Plaintiff sent written discovery to Harry Winston before the
2 mediation, but Harry Winston requested to answer the discovery if the case did not
3 settle. Plaintiff was cognizant that the mediation needed to be complete within 90
4 days after the ADR referral (the referral was on July 20, 2021, so the mediation
5 completion was October 18, 2022). Given the difficulty in scheduling in-demand
6 mediators, the soonest practicable date with was selected once the ADR process was
7 agreed on.

8 Against that backdrop, Plaintiff did not receive the broad-reaching discovery
9 that plaintiffs typically receive before a class certification motion. However, this is
10 not a class action and a PAGA case is not the same as a class action. *Arias v.*
11 *Superior Court*, 46 Cal.4th 969 (2009).

12 Due to the rules guiding the ADR procedure, Plaintiff relied on the
13 information that was provided in the Initial Discovery Protocols exchange. Further,
14 the parties were aware that a PAGA case does not necessarily require the same
15 amount of data as a class action, since a PAGA case is not a class action. *McKenzie*
16 *v. Fed. Express Corp.*, 765 F.Supp.2d 1222, 1233 (C.D.Cal.2011).

17 Regardless, Plaintiff informally requested the following once mediation was
18 confirmed: 1) Plaintiff's entire personnel file, including time and payroll records;2)
19 Any evidence relating to Harry Winston's investigation and/or response to
20 complaints by Plaintiff of harassment or discrimination in the workplace; 3) All
21 employee handbooks that were applicable to the Aggrieved Employees during the
22 PAGA Period; 4) All written policies relating to meal and rest breaks, time rounding,
23 and procedures for clocking in and out; 5) The number of Aggrieved Employees,
24 broken down into current and former employees; 6) The total number of payroll
25 periods collectively worked by the Aggrieved Employees during the PAGA Period;
26 7) An exemplar of all meal break waivers or on duty meal break agreements; 8) A
27 25% random sampling of payroll records for the Aggrieved Employees during the
28 PAGA Period in excel format or other native electronic format; and 9) The time

1 records for the same 25% sampling of Aggrieved Employees from number 7, in
2 excel format or other native electronic format.

3 Harry Winston then provided the following data: 1) dates of employment of
4 the 15 Aggrieved Employees, and 2) timekeeping records of the 15 Aggrieved
5 Employees. Harry Winston also provided data in accordance with the Initial
6 Discovery Protocols.

7 Using this data, Plaintiff was able to create a model of the maximum liability,
8 which is discussed below. Plaintiff's initial motion contained inaccurate damage
9 calculations, as it was not based on the correct numbers. The correct damages
10 calculation is discussed below.

11 The initial PAGA letter was sent to Harry Winston on December 18, 2020, so
12 the PAGA period extends from December 18, 2019 to the date of approval. The
13 PAGA settlement agreement contained a typographical error in Section I, paragraph
14 14: the PAGA period starts one year prior to sending the PAGA letter (i.e., the
15 PAGA period starts on December 18, 2019 and not December 18, 2020). The
16 proposed notice to aggrieved employees also corrects the PAGA period from
17 December 18, 2019 to the date of approval.

18 The data provided by Harry Winston in connection with mediation, which
19 covered from December 16, 2019 (two days before PAGA period) to June 15, 2021
20 (10 weeks before mediation), was extrapolated to show work through August 4,
21 2022. In other words, for the aggrieved employees who were still working when the
22 data was shared, there was an extrapolation to show how the number of workweeks
23 through approval, i.e. during the PAGA period from December 18, 2019 to present.

24 There are collectively 679.36 workweeks by the 15 aggrieved employees in
25 the PAGA period using the extrapolated figure. This number is divided by two since
26 there are two workweeks in each pay period. The quotient is 339.68, and this number
27 will be multiplied by the applicable base PAGA penalty to show the maximum
28 PAGA liability below.

II. The Court is Authorized to Approve the Settlement

Pursuant Cal. Lab. Code, § 2699(l)(2), a PAGA settlement must be reviewed and approved by the Court, and the settlement shall be submitted to the LWDA at the same time that it is submitted to the court. Plaintiff submitted a copy of the PAGA settlement to the Labor and Workforce Development Agency through its online portal the same day as filing this motion.

There are no specified criteria for a court to consider on a motion to approve a PAGA settlement other than the settlement is fair and adequate in view of the purposes and policies of the PAGA statute. *O'Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1135 (N.D.Cal. 2016). Plaintiff submits that the settlement is fair, reasonable and adequate, since as explained below it provides a recovery of approximately \$192.48 for each of the 15 aggrieved employees and Harry Winston is now more aware of the need to closely follow the parameters of providing breaks to its employees consistent with IWC Wage Order 4.

III. Bases for PAGA Penalties

There were three themes for the PAGA aspect of the case: 1) missed breaks, 2) unpaid off the clock time, and 3) derivate wage statement penalties.

A. Maximum PAGA Exposure

The next part of the motion calculates the maximum exposure for PAGA penalties. After that discussion, an analysis follows about how the risks could affect reductions to the maximum exposure.

1. Missed Meal and Rest Periods

Plaintiff maintained that he could not take compliant meal and rest periods while working at Harry Winston's San Francisco salon. Under the recent case of *Bernstein v. Virgin America, Inc.*, 3 F.4th 1127 (9th Cir. 2021), the higher,

subsequent PAGA penalties do not apply until the employer is notified of the violations; thus the initial PAGA penalty figure is used for the calculation.

The maximum PAGA penalty exposure for missed rest breaks is based on: \$100 penalty under Cal. Lab. Code § 2699 multiplied by 339.68 pay periods worked by the aggrieved employees in the PAGA period; this amount is \$33,968.

The maximum PAGA exposure for missed meal periods is based on: \$50 penalty under Cal. Lab. Code § 558 multiplied by 339.68 pay periods worked by the aggrieved employees in the PAGA period; this amount is \$16,984.

In sum, the maximum PAGA penalty exposure for the missed breaks allegation is \$33,968 for the missed rest periods plus \$16,984 for the missed meal periods, or \$50,682 total.

2. Off the Clock Work

The maximum PAGA penalty exposure for missed rest breaks is based on: \$100 penalty under Cal. Lab. Code § 1197.1 multiplied by 339.68 pay periods worked by the aggrieved employees in the PAGA period; this amount is \$33,968.

3. Wage Statement Penalties

The maximum PAGA penalty exposure for missed rest breaks is based on: \$100 penalty under Cal. Lab. Code § 2699 multiplied by 339.68 pay periods worked by the aggrieved employees in the PAGA period; this amount is \$33,968.

4. Total Maximum PAGA Penalty Exposure

The above calculations show the following:

1. \$16,984 in PAGA penalties for missed meal periods
2. \$33,968 in PAGA penalties for missed rest periods
3. \$33,968 in PAGA penalties for unpaid overtime
4. \$33,968 in PAGA penalties for wage statement violations

1 The total maximum PAGA penalty liability is therefore \$118,708.

2 The proposed settlement of \$23,500 is 19.7% of the total maximum PAGA
3 penalty exposure. Thus, the proposed settlement is arguably within the range of
4 reasonableness. *See, e.g., Reynolds v. Direct Flow Medical, Inc.*, No. 17-cv-00204-
5 KAW, 2019 WL 4168959 *3 (N.D. Cal. Sept. 3, 2019) (granting final approval for a
6 settlement amount representing 13% of plaintiffs' estimated full-verdict value);
7 *Stovall-Gusman v. Granger, Inc.*, No. 13-cv-02540-HSG, 2015 WL 3776765, at *4
8 (N.D. Cal. June 17, 2015) (granting final approval of a net settlement amount
9 representing 7.3% of the plaintiffs' potential recovery at trial).

10 Nonetheless, there were risks that Plaintiff could not recover the total
11 maximum PAGA exposure if the case proceeded without a settlement. The next
12 portion of the motion summarizes these risks and why a more realistic maximum
13 exposure is less than the full amount.

14 15 **B. Risks Associated with the PAGA Allegations**

16 Typically, Courts “may presume that through negotiation, the Parties, counsel,
17 and mediator arrived at a reasonable range of settlement by considering Plaintiff's
18 likelihood of recovery.” *Garner v. State Farm Mut. Auto. Ins. Co.*, No. 08-cv-1365-
19 CW, 2010 WL 1687832, at *9 (N.D. Cal. Apr. 22, 2010). Additionally, difficulties
20 and risks in litigating weigh in favor of approving a class settlement. *Rodriguez v. W.*
21 *Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009). The risks are described below.

22 23 **1. Risks with the Missed Breaks Allegations**

24 The information that Harry Winston provided, which was time punches for all
25 the aggrieved employees from December 16, 2019 to June 15, 2021, showed that
26 Harry Winston did pay premium pay if it determined that an employee missed a meal
27 break, so it may be difficult to show missed breaks if there were payments for missed
28 breaks. Further, the time records showed that for roughly half of the shifts, the

1 aggrieved employees worked less than six hours so the requirement for meal breaks
2 would not be implicated as paragraph 11 of Wage Order 4, there is no duty to
3 provide a meal period when the shift is under six hours.

4 It should also be noted that during the part of the PAGA period, Harry
5 Winston was closed due to Covid. These risks taken together would lead to an
6 arguable reduction of 50% for the meal break allegations, since if up to half of the
7 shifts were less than six hours, and premium pay was paid for some incomplete meal
8 periods, 50% is a reasonable figure to reduce the maximum meal period violations.

9 Thus, the maximum liability for the missed meal periods would be reduced
10 from \$32,250 to a more realistic maximum liability of \$8,492. Regarding the missed
11 rest break violations, there may not be facts to show risks.

12 13 **2. Risks with the Overtime Allegations**

14 Plaintiff claimed he had to come in up to an hour early to prepare for his shifts,
15 including suiting up in required security gear, for which he alleged he was not paid.
16 However, Harry Winston did keep track of Plaintiff's and the aggrieved employees'
17 time, except from roughly March 2020 to June 2020 (the initial stage of Covid),
18 Harry Winston rounded time rather than recording it to the minute.

19 There is risk that the alleged pre-shift work was limited to Plaintiff, based on
20 his rather antagonistic relationship with co-workers. This risk should reduce the
21 potential liability since there are no records to prove pre-shift, unpaid work and the
22 aggrieved employees were routinely paid overtime. Given that employees tended to
23 work six days a week, the one day a week of no work comprised 14% of the week.

24 Arguably, the maximum PAGA liability of \$33,968 could be reduced by 14%
25 (time where there was no work) to a more realistic maximum liability of \$29,212.48.

26 27 **3. Risks with the Wage Statement Allegations**

28 The wage statement penalty claims are derivative of the off the clock claim,

1 yet wage statement penalties do not apply for missed breaks. *Naranjo v. Spectrum*
2 *Security Services, Inc.*, 40 Cal.App.5th 444 (2019). The Supreme Court issued a
3 ruling on May 23, 2022 that reversed *Naranjo*, but it is unclear at this point if there is
4 a retroactive effect. The theory for the wage statement violations is that the wage
5 statements arguably did not list the accurate amount of hours worked based on the
6 off the clock work. The risk with this allegation is like the overtime allegation,
7 namely that Harry Winston did in fact keep track of the aggrieved employees' time.

8 There is also a risk that other employees could state they did not work off the
9 clock. Thus, there would be a dispute about how much time the aggrieved employees
10 actually worked off the clock, so Harry Winston could argue there is no way to cure
11 the allegation. Plaintiff stopped working for Harry Winston on September 28, 2019.
12 Although, Plaintiff may seek PAGA penalties for violations that occurred up to a
13 year before filing. *Johnson v. Maxim Healthcare Services, Inc.*, 66 Cal.App.5th 924
14 (2021), there is an argument that the complaint filed in San Francisco Superior Court
15 on January 12, 2021 might cut off wage statement penalties December 18, 2019 to
16 January 12, 2020 since the wage statement penalties go back one year.

17 This could cut off 1 month of the 55-month PAGA period, or 1.8%. Thus, with
18 a 1.8% reduction in the maximum amount of PAGA penalties, a more realistic
19 PAGA exposure for the wage statement violations is \$33,356.58.

20 21 **C. Range of Reasonableness**

22 Using corrected calculations, the proposed \$23,500 PAGA settlement is 19.7%
23 of the maximum PAGA liability. Yet with the risks that should be considered if the
24 case proceeded further, a more realistic and corrected maximum liability would be
25 \$8,492 for missed meal breaks, \$33,968 for missed rest breaks, \$29,212.48 for
26 unpaid overtime, and \$33,356.58 for wage statement violations, or a total of
27 \$75,008.06. The proposed \$23,500 PAGA settlement is 31.3% of the arguably more
28 realistic maximum exposure, and that is also within the range of reasonableness.

1 **IV. Conclusion**

2 The average recovery per aggrieved employee is \$192.48 depending on the
3 length of time he or she worked for Harry Winston, which is a favorable recovery.
4 Further, the costs incorporated in the PAGA settlement are roughly half of the
5 overall case costs, so the requested costs reimbursement are being split evenly
6 between the individual settlement and the PAGA settlement.

7 Addressing the court's concerns about clear sailing, the PAGA settlement
8 agreement provides that if the requested \$7,833.33 of attorney fees is not recovered,
9 the difference will be added to the Net Settlement Fund. This means that any
10 difference would be added to the amount allocated to the LWDA and aggrieved
11 employees. For example, if the attorney fees were reduced to \$7,500, then the
12 \$333.33 difference would be added to the \$11,555.03 earmarked to be shared among
13 the LWDA and aggrieved employees. PAGA settlements nearly always contain a
14 component for attorney fees, since PAGA provides for reasonable attorney fee
15 awards, but PAGA does not provide a standard for evaluating attorneys' fees in a
16 settlement of PAGA claims. Cal. Lab. Code § 2699(g)(1).

17 In the Ninth Circuit, district courts generally may award attorneys' fees under a
18 fee-shifting statute using either the lodestar method or the percentage of the fund
19 method. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); the
20 settlement here provides for the percentage of the fund method.

21 Finally, the total attorney fees for the individual and PAGA settlements is
22 \$33,333.33. This is 33.3% of the gross settlement. Also, the total costs are being
23 reasonably split between the individual and PAGA settlements. Based on the
24 foregoing, Plaintiff respectfully requests the court to grant the renewed motion.

25 Date: May 23, 2022

FRONTIER LAW CENTER

26
27 /s/ Adam Rose
28 Attorney for Plaintiff
 Samer Srour Ayoub