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

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

14 Plaintiff,

15 v.

16 HARRY WINSTON, INC.,

17 Defendant.  
18 \_\_\_\_\_

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

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

) Date: February 3, 2022  
) Time: 2:00 p.m.  
) Ctrm: 6

22 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

23 Please take notice that on February 3, 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, and to dismiss his non-PAGA claims, with  
28 prejudice. The motion is based on this notice, the memorandum of points and

1 authorities, the declaration of Adam Rose with its exhibits, pleadings on file, and  
2 arguments at the hearing on the motion.

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4 Date: November 17, 2021

FRONTIER LAW CENTER

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/s/ Adam Rose  
Attorney for Plaintiff  
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. Following the end of his employment, Mr. Ayoub initiated this action, in which he alleged claims of two types: (1) individual claims for alleged harassment, discrimination, and/or wrongful termination; and (2) claims for alleged wage and hour violations, pursuant to the Labor Code Private Attorneys' General Act of 2004 ("PAGA"), which Mr. Ayoub sought to assert on behalf of himself and other non-exempt security officers in California.

Mr. Ayoub initially filed the case in San Francisco Superior Court, on January 12, 2021. Harry Winston removed the action to this Court on March 8, 2021, and Mr. Ayoub filed the operative First Amended Complaint ("FAC") on May 28, 2021. A case management conference took place on June 29, 2021.

Prior to the initiation of Mr. Ayoub's lawsuit, the parties had already discussed Mr. Ayoub's individual and wage and hour allegations. After Mr. Ayoub's FAC was filed, the parties exchanged initial disclosures pursuant to the Northern District's initial discovery protocols.

On September 3, 2021, the parties attended a half-day mediation before experienced mediator and employment lawyer Deborah Saxe, Esq. at JAMS, during which they reached agreements to separately resolve both Mr. Ayoub's individual allegations, as well as his representative claims pursuant to the PAGA.

Plaintiff agreed to resolve his individual claims for a confidential amount, and agreed to settle the PAGA claims for a total gross amount of \$23,500, subject to Court approval. Plaintiff now seeks approval of the PAGA settlement, pursuant to Cal. Labor Code § 2699(l)(2), and requests dismissal with prejudice of his individual claims.

1       **II.     The Court is Authorized to Approve the Settlement**

2           Pursuant to section 2699(1)(2) of the Labor Code, a PAGA settlement must be  
3 reviewed and approved by the Court, and the settlement shall be submitted to the  
4 agency at the same time that it is submitted to the court. Plaintiff submitted a copy of  
5 the parties' PAGA settlement to the Labor and Workforce Development Agency  
6 ("LWDA") through its online portal the same day as filing this motion.

7           There are no specified criteria for a court to consider on a motion to approve a  
8 PAGA settlement other than the settlement is fair and adequate in view of the  
9 purposes and policies of the [PAGA] statute. *O'Connor v. Uber Technologies, Inc.*,  
10 201 F.Supp.3d 1110, 1135 (N.D.Cal. 2016). Plaintiff submits that the settlement is  
11 fair and adequate, since as explained below it provides a recovery of approximately  
12 \$200 for each of the roughly 15 aggrieved employees (including Mr. Ayoub), and  
13 Harry Winston is now more cognizant of the need to closely follow the parameters of  
14 providing breaks to its employees consistent with IWC Wage Order 4.

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16       **III.   Settlement Terms**

17           The \$23,500 PAGA settlement will benefit the approximately 15 "aggrieved  
18 employees" as well as the State. The "aggrieved employees" consist of all current  
19 and former non-exempt security officers employed by Harry Winston in California  
20 during the period between December 18, 2019 and October 29, 2021. Pursuant to  
21 paragraph 9 of the parties' PAGA settlement agreement (the "PAGA Settlement"),  
22 Harry Winston agreed to pay a total gross amount of \$23,500 (the "Total Settlement  
23 Fund"). The following amounts will be paid from the Total Settlement Fund, per  
24 paragraph 10 of the PAGA Settlement: (1) Mr. Ayoub's counsel's attorneys' fees of  
25 \$7,833.33, (2) litigation costs of \$3,134.64, (3) settlement administration costs of  
26 \$975, (4) \$8,667.77 to the LWDA, and \$2,889.25 to the roughly 15 "aggrieved  
27 employees" (including Mr. Ayoub).

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1       **IV.   Bases for PAGA Penalties**

2           Based on information provided in connection with the mediation, the  
3 approximately 15 aggrieved employees worked a total of approximately 470 weeks  
4 during the period between December 18, 2019 and June 15, 2021.

5  
6           **A. Missed Meal and Rest Periods**

7           Mr. Ayoub maintained that he could not take compliant meal and rest periods  
8 while working at Harry Winston’s San Francisco salon. Harry Winston disputed Mr.  
9 Ayoub’s allegations and, moreover, maintained that it paid all non-exempt  
10 employees with a meal period premium in accordance with California law on any  
11 days when employees’ timekeeping records did not reflect a compliant meal period  
12 was taken. However, because of the absence of clear records to demonstrate when  
13 meal periods were interrupted or whether and when any paid rest breaks were or  
14 were not provided, this claim had a likelihood of splintering into a “he said she said”  
15 situation if the case were to proceed to trial.

16           The maximum PAGA exposure for missed meal periods is \$46,200 (at 470  
17 workweeks) under Cal. Lab. Code § 558. Correlatively, the maximum exposure for  
18 PAGA penalties for missed rest periods is \$92,500 under Cal. Lab. Code § 2699,  
19 assuming that the “aggrieved employees” could recover “stacked” penalties, which  
20 Harry Winston disputes.

21           Regarding the possible realistic range of recovery, this gross amount of  
22 \$138,700 for missed breaks should initially be reduced by half to \$69,350 based on  
23 the lack of evidence either way about the missed breaks. This amount should further  
24 be reduced by a third to \$46,234 since the missed breaks issue might be endemic to  
25 the San Francisco salon (as opposed to the Beverly Hills and Costa Mesa salons).

26  
27           **B. Overtime**

28           Mr. Ayoub claimed he had to come in up to an hour early to prepare for his

1 shifts, including suiting up in required security gear, for which he alleged he was not  
2 properly compensated. Assuming the same was true of all non-exempt security  
3 officers in California during the relevant time period, the maximum PAGA exposure  
4 for this claim would be \$116,000 under Cal. Lab. Code § 1197.1

5 However, this claim, which relies entirely on testimony to prove, could  
6 necessitate unmanageable individualized inquiries to adjudicate.<sup>1</sup> *See, e.g., Ortiz v.*  
7 *CVS Caremark Corp.*, 2014 WL 1117614, at \*4 (N.D. Cal. Mar. 19, 2014) (granting  
8 motion to strike PAGA claims on grounds of manageability; “Proof of ...[plaintiff’s  
9 off-the-clock] claim would be unmanageable, and could not be done with statistical  
10 or survey evidence but only with detailed inquiries about each employee claimed to  
11 have done so and her manager’s knowledge thereof.”). Further, as in the case of the  
12 meal and rest break allegations, it is possible that any purported pre-shift off-the-  
13 clock work was limited to the San Francisco salon. Accordingly, these issues should  
14 reduce the PAGA exposure to a third of the maximum recovery to \$38,666.

### 15 16 **C. Wage Statement Penalties**

17 Mr. Ayoub’s wage statement penalty claims are derivative of the claims for  
18 meal and rest violations and unpaid wages. For the wage statement penalties, the  
19 wage statements arguably did not list the accurate amount of hours worked. In  
20 *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308 (2018), the court a  
21 drew distinction between wages earned and hours worked with respect to wage  
22 statements and stated: “[O]nly the absence of the hours worked will give rise to an  
23 inference of injury,” and “the absence of accurate wages earned will be remedied by  
24 the violated wage and hour law itself.”

25 Mr. Ayoub contended that the wage statements issued by Harry Winston did  
26 not state the actual amount of hours worked, in part due to time rounding and/or

27  
28 <sup>1</sup> “[C]ourts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike claims that cannot be rendered manageable.” *Wesson v. Staples the Office Superstore, LLC*, 68 Cal. App. 5th 746 (2021) (affirming order striking PAGA claim on grounds of manageability).

1 alleged off-the-clock work. However, there was a risk with this theory, since Harry  
2 Winston did keep track of its employees' time to the minute and, under *Maldonado*,  
3 there could be a counterargument that the remedy is already encompassed in the  
4 unpaid overtime. Further, if there were rounding, it was not necessarily obvious from  
5 time records.

6 The maximum PAGA exposure for the wage statement violations under Cal.  
7 Lab. Code § 2699 for the rounding totals \$92,500,<sup>2</sup> but it considering the above it  
8 should be reduced to a quarter of that amount to \$23,125.

#### 9 10 **D. Reasonable Range of Recovery**

11 Based on the above, a more realistic maximum range of recovery for PAGA  
12 penalties is \$46,234 (missed breaks) + \$38,666 (overtime) + \$23,125 (wage  
13 statements), or \$108,025 for 15 aggrieved employees who worked a total of 235 pay  
14 periods during the PAGA time period.

15 The PAGA allocation in the proposed settlement is 21% of this figure and it is  
16 within the range of reasonableness; although the “stacking” of PAGA penalties is  
17 allowed, it is not necessarily utilized since a court may award a lesser amount than  
18 the maximum civil penalty amount specified if, based on the facts and circumstances  
19 of the particular case, to do otherwise would result in an award that is unjust,  
20 arbitrary and oppressive, or confiscatory. Cal. Lab. Code § 2699(e)(2).

21 Also, courts have concluded that ranges within 20–30 percent of the estimated  
22 damages are within the range of possible approval. *See Brown v. CVS Pharmacy,*  
23 *Inc.*, No. CV 15-7631 PSG (PJWx), 2017 WL 3494297, at \*4 (C.D. Cal. Apr. 24,  
24 2017) (approving settlement that represented 27 percent of possible recovery); *see*  
25 *also Rigo v. Kason Indus., Inc.*, No. CV 11-0064 MMA (DHBx), 2013 WL 3761400,  
26 at \*5 (S.D. Cal. July 16, 2013) (“[D]istrict courts have found that settlements for  
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28 <sup>2</sup> Again, this assumes that multiple PAGA penalties could be “stacked” and recovered by each aggrieved employee per pay period.

1 substantially less than the plaintiff's claimed damages were fair and reasonable,  
2 especially when taking into account the uncertainties involved with the litigation.”).

3 Thus, Plaintiff submits that the \$23,500 PAGA allocation is reasonable.  
4

5 **V. Conclusion**

6 The average recovery per aggrieved employee is about \$200 depending on the  
7 length of time he or she worked for Harry Winston, which is arguably a favorable  
8 recovery for both the aggrieved employees and the LWDA.

9 Further, the costs incorporated in the PAGA settlement are roughly half of the  
10 overall case costs, so the costs are being split between the individual FEHA  
11 settlement and the PAGA settlement. Based on the foregoing, Plaintiff respectfully  
12 requests the court to grant the motion to approve the PAGA settlement.

13 Further, because Plaintiff has separately resolved his individual claims, the  
14 Court may dismiss the non-PAGA causes of action in their entirety, with prejudice.  
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16 Date: November 17, 2021

FRONTIER LAW CENTER

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18 /s/ Adam Rose  
19 Attorney for Plaintiff  
20 Samer Srour Ayoub  
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