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15 SUPERIOR COURT OF CALIFORNIA
16 COUNTY OF LOS ANGELES

17 IVANIE MURPHY, an individual, on
behalf of himself, all aggrieved employees,
18 and the State of California as a Private
Attorney General,

19 Plaintiff,

20 v.

21 NORDSTROM, INC., a Washington
corporation, and DOES 1-50, inclusive,

22 Defendants.
23
24
25
26
27
28

Case No. 22STCV25014

ASSIGNED FOR ALL PURPOSES TO:
JUDGE LIA MARTIN, DEPT. 16

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SETTLEMENT APPROVAL ORDER AND
JUDGMENT**

April 3, 2024
Time: 9:00 a.m.
Dept: 16

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INTRODUCTION

Plaintiff Ivanie Murphy ("Plaintiff") seeks approval of the settlement agreement (the "Settlement") reached by the parties that resolves her claims against Nordstrom, Inc. ("Defendant") for civil penalties under the Private Attorneys General Act ("PAGA") based on Defendant's alleged failure to provide employees who performed cashiering work at Nordstrom Rack stores in California with suitable seating in violation of Section 14 of Wage Order 7. The Settlement resolves the suitable seating claims asserted by Plaintiff on behalf of approximately 7,000 employees for the Gross Settlement Amount of \$500,000.

For the reasons explained below, the Settlement is fair and reasonable and should be approved by the Court. Plaintiff respectfully requests that the Court grant his unopposed motion for approval of the Settlement (to which Plaintiff anticipates the Labor Workforce Development Agency ("LWDA"), the real party in interest who has been given notice of the Settlement, will not object either) and award Plaintiff the full amounts of attorney's fees and costs requested.

LITIGATION HISTORY

On August 3, 2022, Plaintiff commenced this action by filing a complaint alleging one cause of action against Defendant for civil penalties under PAGA based on numerous Labor Code violations allegedly committed against all of Defendant's non-exempt employees, including failure to pay for all hours worked; failure to include nondiscretionary bonuses to calculate the regular rate of pay for overtime wages; failure to pay all sick wages; failing to provide meal breaks; failure to provide suitable seating; failure to provide accurate wage statements; and failure to pay all wages owed upon termination. (Karasik Decl. ¶ 6).

Following the propounding of discovery and Defendant's production of numerous documents, the parties on February 13, 2023 filed a stipulation agreeing that Plaintiff would dismiss his non-seating claims without prejudice and that Plaintiff could file a first amended complaint asserting only a claim for failure to provide suitable seats on behalf of employees who performed cashier work at Nordstrom Rack stores. The documents provided by Defendant which led Plaintiff to dismiss his non-seating claims included Plaintiff's personnel file and wage statements; Defendant's policy to pay for time spent in wellness checks; Defendant's policy to pay for all hours

1 worked; a declaration confirming that Defendant pays for all hours worked by its employees,
2 including hours reported as having been worked off the clock, and that Defendant pays hundreds of
3 thousands of dollars each year for off-the-clock work; an order from prior litigation against
4 Defendant, granting Defendant's motion for summary judgment regarding the plaintiff's claim for
5 off-the-clock work; multiple copies of Defendant's meal and rest period policies that Plaintiff had
6 signed; Plaintiff's schedules, confirming Defendant scheduled Plaintiff to take a 60-minute meal
7 period, one 15-minute rest break before the meal period and a second 15-minute rest break after the
8 meal period for each of his shifts; Defendant's written communication instructing employees
9 working in Plaintiff's position not to take their radios on meal periods or rest breaks; sample wage
10 statements confirming Defendant accurately calculated the regular rate of pay; Defendant's sick
11 leave policy; sample wage statements confirming Defendant accurately paid sick leave wages; and
12 orders from previous seating cases filed against Defendant. (Karasik Decl. ¶ 7).

13 On May 18, 2023, the Court issued an order approving the parties' stipulation which
14 dismissed Plaintiff's non-seating claims without prejudice and allowed Plaintiff to file the proposed
15 first amended complaint. The first amended complaint was thereafter filed on May 22, 2023.
16 (Karasik Decl. ¶ 8).

17 The parties subsequently participated in a mediation before mediator Jeff Krivis on June 9,
18 2023. Prior to the mediation, Defendant provided Plaintiff with photographs of the seats Defendant
19 provides in its Nordstrom Rack stores; orders from previous seating cases filed against Defendant; a
20 May 2020 evaluation from an ergonomics expert concluding that Defendant's employees at
21 Nordstrom Rack stores could not safely perform their cashier duties while seated; a Loss Prevention
22 Job Analysis; Defendant's seating policy; and the number of PAGA Pay Periods that allegedly
23 aggrieved employees worked from May 31, 2021 through December 31, 2022. After a full day of
24 arms-length negotiations, followed by subsequent communications between the mediator and the
25 parties, agreement was reached on the material terms of a settlement, which were later memorialized
26 in a Memorandum of Understanding ("MOU"). A true and correct copy of the MOU, signed by all
27 parties, is attached as Exhibit 1 to the Declaration of Gregory N. Karasik. Subsequently, following
28 negotiation of additional settlement details, a more formal settlement agreement (the "Settlement")

1 was prepared. A true and correct copy of the Settlement, which has been signed by Defendant, is
2 attached as Exhibit 2 to the Declaration of Gregory N. Karasik. As a result of unanticipated personal
3 difficulties (including a death in the family and the loss of his cell phone), Plaintiff has not yet
4 signed the Settlement. But Plaintiff has indicated to his counsel that he intends to do so and once
5 signed by Plaintiff a copy of the fully signed Settlement will be submitted to the Court.
6 as (Karasik Decl. ¶ 9).

7 MATERIAL TERMS OF THE SETTLEMENT

8 The material terms of the Settlement are as follows:

- 9 ☐ The Gross Settlement Amount is \$500,000.
- 10 ☐ There are approximately 7,000 aggrieved employees encompassed by the Settlement.
- 11 ☐ Under the Settlement, "Affected Employees" are defined as individuals who worked for
12 Defendant in a Service Experience, Customer Service, Selling & Service, Merchandise &
13 Inventory, Sales (Apparel, Accessories, Shoes, Women's, Men's, Kid's), Store Management,
14 Support, Stock, Web Fulfillment, Logistics, or Inventory department at a Nordstrom Rack
15 store in California during the PAGA Period.
- 16 ☐ Under the Settlement, the "PAGA Period" means the period from May 31, 2021 through the
17 earlier of October 21, 2023 or the date on which the total PAGA Pay Periods reaches
18 153,669.
- 19 ☐ After deductions from the Gross Settlement Amount are made for settlement administration
20 expenses, litigation costs and attorney's fees, 75% of the Net Settlement Amount shall be
21 paid to the LWDA and the remaining 25% of the Net Settlement Amount shall be paid to
22 Affected Employees. The amount of settlement benefits payable to Affected Employees shall
23 be based on the number of workweeks they worked during the PAGA Period.
- 24 ☐ Defendant shall not object to an award of attorney's fees to Plaintiff's counsel up to the
25 amount of \$166,666.67 (1/3 of the Gross Settlement Amount) or to an award of litigation
26 costs up to the amount of \$11,500.

ARGUMENT

I. The Settlement Is Fair And Reasonable

Labor Code Section 2699(1)(2) provides that a court “shall review and approve” any settlement of claims for civil penalties brought under PAGA. In *Montz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 72 the court of appeal established that the standard for determining whether a PAGA settlement should be approved is whether it is “fair, reasonable and adequate in view of PAGA’s purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws.”

Although the legal standard for approving a PAGA settlement resembles and to a large degree is based on the “fair, reasonable and adequate” standard for approving settlements in class actions, there is one significant difference between a PAGA action and a class action that bears on the legal standard for approving a settlement. A plaintiff bringing an action for civil penalties acts as the proxy or agent acting on behalf of the LWDA. See, *Arlas v. Superior Court* (2014) 46 Cal.4th 969, 986 (employee plaintiff in PAGA action “represents the same legal right and interest as state labor law enforcement agencies.”); *ZB, NA v. Superior Court* (2019) 8 Cal.5th 175, 185 (PAGA claims are “brought on the state’s behalf”). Thus, unlike unnamed class members in a class action, aggrieved employees bound by a PAGA settlement have no personal interest in the recovery of civil penalties and have no right to object to a proposed settlement. Every PAGA claim “is a dispute between an employer and the state.” *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 386; accord, *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 81. See also, *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003 (PAGA “does not create property rights or any other substantive rights;” therefore an aggrieved employee cannot assign a right to pursue a PAGA claim “because the employee does not own an assignable interest”).

When deciding whether to approve a class action settlement, a trial court has a “fiduciary responsibility” to protect the rights of unnamed class members. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129. “The purpose of this requirement is ‘the protection of those class members, including named plaintiffs, whose rights may not have been given due regard during the

1 negotiating process.” *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1117
2 [quoting *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801].

3 But no such “fiduciary responsibility” exists in connection with approval of a PAGA
4 settlement because aggrieved employees in a PAGA action have no substantive rights or personal
5 financial interests at stake. As noted in *Moniz*, “PAGA does not require the trial court to act as a
6 fiduciary for aggrieved employees.” *Moniz*, 72 Cal.App.5th at 77. Even more so than a class action
7 settlement, a PAGA settlement is “a private consensual agreement between the parties” to which
8 “[d]ue regard should be given.” *Cellphone Termination Fee Cases*, 180 Cal.App.4th at 1117.

9 In light of the differences between a class action and a PAGA action, Plaintiff submits that,
10 while a court must always assure that any settlement is not the product of fraud or collusion, the
11 paramount consideration for a court ruling on a motion to approve a PAGA settlement is whether
12 the LWDA, the real party in interest on whose behalf the plaintiff was empowered to pursue civil
13 penalties, has any objection to the settlement. While a court need not accept the LWDA’s view on
14 matters of statutory interpretation, any opinion by the LWDA regarding the furthering of PAGA’s
15 purposes should be entitled to deference. Indeed, many courts have deemed the lack of objection to
16 a settlement from the LWDA as determinative. See, e.g., *Jordan v. NCI Group, Inc.* (C.D. Cal.
17 2018) 2018 WL 1409590, at *3 (lack of objection from LWDA considered “persuasive”); *Echavez*
18 *v. Abercrombie & Fitch Co., Inc.* (C.D. Cal. 2017) 2017 WL 3669607, at *3 (non-response from
19 LWDA “is tantamount to its consent to the proposed terms”). Moreover, case law suggests that, in
20 the absence of any objection from the LWDA that a settlement did not promote the purposes of
21 PAGA, a trial court would have extremely limited grounds for not approving a PAGA settlement.
22 *Cf.*, *Cellphone Termination Fee Cases*, 180 Cal.App.4th at 1125 (trial court abused its discretion
23 when it refused to approve fee provision in class action settlement because its rationale “lacked any
24 nexus to the goal of protecting unnamed class members”).

25 With the foregoing principles in mind, Plaintiff explains below why all the material terms of
26 the Settlement are fair and reasonable such that the Settlement, in the absence of any objection from
27 the LWDA, should be approved.
28

1 The Gross Settlement Amount

2 The Gross Settlement Amount of \$500,000 reflects a recovery of at least \$3.25 a pay period.
3 Although significantly lower than the maximum penalty amount of \$100 per period under PAGA,
4 this amount of recovery is fair and reasonable under the circumstances of this case because it would
5 have been extremely difficult for Plaintiff to overcome the opinion of Defendant's expert that
6 cashiers at Nordstrom Rack stores could not perform their duties safely or adequately while seated,
7 (Karasik Decl. ¶ 11). In the context of class actions, the "the most important factor" in determining
8 the fairness of a settlement is "the strength of the case for plaintiffs on the merits." *Kullar v. Foot*
9 *Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130. Here, Plaintiff had a very weak case.

10 Despite having an extremely low chance of prevailing on the merits, Plaintiff achieved a
11 settlement that reflects a higher percentage of recovery (approximately 3.25%) than other PAGA
12 settlements approved by courts. For example, in *Jennings v. Open Door Marketing, LLC* (N.D. Cal.
13 2018) 2018 WL 4773057, at *9, the court approved a settlement that only recovered 0.6% of the
14 estimated maximum value of the PAGA claims in light of the "risks of no recovery" and "lack of
15 objection from the LWDA"; and in *Ruch v. AM Retail Group, Inc.* (N.D. Cal. 2016) 2016 WL
16 5462451, the court approved a settlement that only recovered 0.27% of the maximum potential
17 value of the PAGA claims. In light of the significant risks that Plaintiff would not have obtained
18 any recovery if this case went to trial, it is the view of Plaintiff's counsel, who have years of
19 experience litigating and negotiating settlements of class actions and PAGA representative actions,
20 that the Gross Settlement Amount of \$500,000 reflects a fair and reasonable result in this case that
21 promotes the underlying purposes of PAGA. (Karasik Decl. ¶ 11).

22 Attorney's Fees

23 Plaintiff requests attorney's fees in the amount of \$166,666.67 which is equal to 1/3 of the
24 Gross Settlement Amount of \$500,000. This fee request comports with typical fee requests in
25 connection with settlement of wage and hour class actions in California state courts which are
26 commonly around 33.3% of the gross settlement amount. *See, In re Consumer Privacy Cases* (2009)
27 175 Cal.App.4th 545, 558, n.13 ("fee awards in class actions average around one-third of the
28 recovery").

1 Because this case does not involve a class action settlement but a PAGA settlement, a
2 lodestar cross check is not required for protecting against the possibility that an unreasonably high
3 attorney's fee award might unfairly reduce settlement benefits payable to class members. The fact
4 that the LWDA has the right to object to a request for a fee award it deems too high a price to pay
5 for the benefits achieved by the plaintiff's counsel on its behalf suffices to ensure that a fee award in
6 a PAGA case is reasonable. Nevertheless, as set forth in the declarations from Plaintiff's counsel a
7 lodestar cross check confirms that Plaintiff's fee request is reasonable. The lodestar value of the
8 time spent by Plaintiff's counsel on this case is \$202,478.50, which reflects a lodestar multiplier of
9 approximately 0.82% (which, being less than 1.0, is considered a "negative" multiplier). In the
10 experience of Plaintiff's counsel, a negative multiplier falls below the typical range of lodestar
11 multipliers for fee awards in class action and PAGA settlements, which routinely exceed 1 and are
12 often between 2 and 4. (Karasik Decl. ¶ 16).

13 Attorney's Costs

14 The declarations from Plaintiff's counsel substantiate that their costs in this case are
15 \$11,273.97 (Karasik Decl. ¶ 15). There is no dispute about the reasonableness of these costs and the
16 amount of costs requested by Plaintiff is less than the maximum amount of costs allowed by the
17 Settlement without objection from Defendant.

18 Scope of the Release

19 The release applicable to Affected Employees bound by the Settlement is properly limited to
20 claims "for civil penalties under PAGA based on the failure to provide suitable seats at Nordstrom
21 Rack stores in California during the PAGA Period that were asserted in the Operative Complaint or
22 that are reasonably related to the facts alleged in the Operative Complaint." (Settlement Agreement
23 par. 5.1.1). The release is not impermissibly overbroad.

24 **II. Plaintiff Gave Notice Of The Settlement To The LWDA**

25 In accordance with Labor Code Section 2699(1)(2), Plaintiff has given the LWDA notice of
26 the Settlement (and the MOU), the notice of Plaintiff's motion and the supporting memorandum
27 (Karasik Decl. ¶ 18). Unless the LWDA objects to the Settlement, the Court should not have any
28 reason for not granting approval of the Settlement because there is no evidence whatsoever the

1 Settlement resulted from any fraud or collusion. There is no dispute that the parties, represented by
2 experienced counsel, engaged in sufficient discovery to evaluate the strength and weaknesses of their
3 respective claims or defenses, and only reached a settlement after a mediation session with an
4 experienced mediator.

5 A class action settlement is presumed to be fair when: "1) the settlement is reached through
6 arms-length bargaining; 2) investigation and discovery are sufficient to allow counsel and the court
7 to act intelligently; 3) counsel is experienced in similar litigation; and 4) the percentage of objectors
8 is small." *Dunk*, 48 Cal.App.4th at 1802. A similar presumption should apply here. Therefore, unless
9 the LWDA objects to the Settlement, the Court should conclude that this presumption stands
10 un rebutted and there are no grounds for reaching any conclusion other than that, for all the reasons
11 explained herein, the Settlement is fair and reasonable and should be approved.

12 CONCLUSION

13 Plaintiff respectfully requests that the Court, if the LWDA does not object, grant Plaintiff's
14 motion for an order approving the Settlement and award Plaintiff the full amounts of attorney's fees
15 and litigation costs requested.

16 Dated: October 25, 2023

KARASIK LAW FIRM

17
18 By: *s/ Gregory N. Karasik*
Gregory N. Karasik
19 Attorneys for Plaintiff
20
21
22
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1 **PROOF OF SERVICE**

2 Murphy v. Nordstrom, Inc.
3 Los Angeles County Superior Court, Case No. 22STCV25014

4 I am employed in the State of California, County of Los Angeles. I am over the age of
5 18 and not a party to the within action. My business address is 16021 Aiglon St., Pacific
6 Palisades, California 90272.

7 I served the document described as **MEMORANDUM OF POINTS AND
8 AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SETTLEMENT
9 APPROVAL ORDER AND JUDGMENT** on the interested parties in this action listed
10 below or on the attached service list as follows:

11 [x] **BY E-MAIL:** Based on court order or the agreement of the parties to accept service
12 by electronic transmission, I caused the documents to be sent to the person(s) at the
13 email address(es) listed below.

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Attorneys for Plaintiff

27 I declare under penalty of perjury under the laws of the State of California that the
28 foregoing is true and correct. Executed on October 25, 2023 at Pacific Palisades, California.


Gregory N. Karasik