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11 NATIONWIDE MUTUAL INSURANCE
COMPANY and SCOTTSDALE INSURANCE
12 COMPANY

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

17 JULIAN FRASER, JOSEPH WUCHER,
IRENE DAMSKY, KIM ZAIA, and
18 CHRIS JACKSON as individuals and in
their representative capacity,

19 Plaintiffs,

20 v.

21 NATIONWIDE MUTUAL INSURANCE
22 COMPANY, a corporation,
SCOTTSDALE INSURANCE
23 COMPANY, dba Nationwide
E&S/Specialty, a corporation,

24 Defendants.
25

Case No. 3:17-cv-03702-EMC

**REVISED JOINT REQUEST AND
~~PROPOSED~~ ORDER GRANTING
APPROVAL OF PAGA SETTLEMENT
AND DISMISSAL OF THE ACTION**

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Attorneys for Plaintiffs,
JULIAN FRASER, *et al.*

1 Plaintiffs Julian Fraser, Joseph Wucher, Irene Damsky, Kim Zaia, and Chris Jackson
2 (“Plaintiffs”) and Defendants Nationwide Mutual Insurance Company and Scottsdale Insurance
3 Company (“Defendants”), through their respective counsel of record, jointly submit and request as
4 follows:

- 5 1. Plaintiffs filed a Complaint against Defendant Nationwide Mutual Insurance
6 Company on or about June 28, 2017, in the Northern District of California pleading
7 ten causes of action, including a claim under the California Private Attorneys General
8 Act (“PAGA”), seeking civil penalties for the State of California. There are no class
9 action or collective action allegations in the Complaint.
- 10 2. On September 26, 2017, Plaintiffs filed a First Amended Complaint asserting the
11 same causes of action but adding Scottsdale Insurance Company as an additional
12 defendant.
- 13 3. The Parties engaged in mediation on April 2, 2018 with experienced mediator Jeffrey
14 Ross. The Parties continued negotiations with the assistance of Mr. Ross following
15 the mediation and reached a settlement. The Parties fully executed a confidential
16 settlement agreement on or about June 19, 2018.
- 17 4. Pursuant to the settlement agreement, the settlement amount apportioned to PAGA
18 civil penalties is \$16,000.00, subject to the Court’s approval as required by Labor
19 Code section 2699(1)(2). Defendants have agreed to pay \$12,000, which is 75% of
20 \$16,000, to the California Labor and Workforce Development Agency following the
21 dismissal of this action.
- 22 5. The settlement was negotiated at arm’s-length by experienced counsel well versed in
23 the intricacies of litigation before a well-respected mediator. During the mediation,
24 Mr. Ross communicated to Plaintiffs that he believed the underlying overtime claims
25 were stronger than many of the derivative claims, such as meal and rest breaks or
26 waiting time penalties, that would require additional difficult elements of proof even
27 if Plaintiffs prevailed in establishing that they were misclassified, which would be
28 challenging in its own right. For instance, a jury could find that the Plaintiffs, who

1 often worked from home or on the road, were capable of taking the full meal and rest
2 breaks a non-exempt employee would be entitled to. As a consequence, the overtime
3 claims and alleged damages for overtime drove Plaintiffs' assessment of what a well-
4 calibrated settlement would be during the mediation. There are also litigation risks
5 unique to the PAGA claims. For example, if the matter were to go to trial, there is the
6 risk that the Court could exercise its discretion under PAGA to not award the full
7 measure of penalties available under that statute given the difficult exemption issues
8 underlying the alleged violations and the issues going to whether there was a good
9 faith dispute as to the exemption status of the Plaintiffs.

10 6. Nonetheless, after reaching resolution, the amount allocated to PAGA represents
11 approximately the same proportion of Plaintiffs' computed total PAGA penalties as
12 the proportion of total computed damages allocated to Plaintiffs directly in settlement
13 of their underlying claims, when adjusted for the extra weight Plaintiffs placed on the
14 overtime claims, which they viewed to carry less litigation risk than the remaining
15 claims. The majority of the Plaintiffs were former employees at the time the case was
16 filed, and thus have very few workweeks within the one-year PAGA statute of
17 limitations period. Plaintiffs Wucher, Damsky and Fraser have 2, 11 and 22 PAGA-
18 eligible workweeks respectively. *See* Declaration of Steven G. Zieff in Support of this
19 Request, ¶ 7.¹

20 7. The Parties agree that the settlement is specifically limited to Plaintiffs' claims only,
21 and does not release any PAGA claims of any other alleged aggrieved employees, to
22 the extent any such individuals exist. Defendants will not assert and waive any
23 collateral estoppel or res judicata defense that would rely on the settlement in this
24 matter (but do not waive any other collateral estoppel or res judicata defense that may

25 _____
26 ¹ The Zieff Declaration, which includes the full length settlement agreement as an exhibit, addresses
27 the Court's Order (Dkt. No. 55) that the Parties provide additional detail sufficient to allow the Court
28 to understand and assess how the PAGA allocation was calculated and the proportion of the total
settlement it represents. Because it contains confidential information pertaining to the Parties'
settlement, it is filed separately and attached to an Administrative Motion to File Under Seal
pursuant to Northern District Local Rules 7-11 and 79-5.

1 otherwise exist) to PAGA actions brought by the State of California or aggrieved
2 employees (other than Plaintiffs) for the same claims.

3 8. Accordingly, this request for PAGA approval is to approve the settlement of
4 Plaintiffs' individual PAGA claims, not the claims of any other alleged aggrieved
5 employees. Moreover, as this is not a class or collective action, no class action or
6 collection action notices have gone out to any other employees, and thus there is no
7 basis to presume any employees have or will forestall pursuit of their own individual
8 or PAGA claims in reliance of this case.

9 9. The Parties have further agreed to seek the dismissal of this action with prejudice as
10 to Plaintiffs and without prejudice as to other purported "aggrieved employees," to
11 the extent any such individuals exist, with the Court to retain jurisdiction to enforce
12 the terms of the settlement until performance in full of the terms of the settlement.

13 10. Pursuant to Labor Code section 2699(1)(2), the court shall review and approve any
14 settlement of any civil action filed pursuant to the PAGA.

15 11. Labor Code section 2699(1)(2) does not prescribe any procedure for how to request
16 Court approval of a PAGA settlement.

17 12. Pursuant to Labor Code section 2699(1)(2), the proposed settlement terms were
18 submitted to the California Labor and Workforce Development Agency ("LWDA")
19 on June 29, 2018 through the concurrent submission of the joint request submitted to
20 the Court on the same day. As of the time of this filing, the LWDA has not
21 responded to notification of the proposed settlement.

22 Based on the foregoing, the Parties request:

- 23 1. The Court approve the settlement amount apportioned to Plaintiffs' PAGA claim in
24 the amount of \$16,000.00 pursuant to Labor Code section 2699(1)(2); and
25 2. The Court dismiss this action with prejudice as to Plaintiffs and without prejudice as
26 to other purported "aggrieved employees," to the extent any such individuals exist,
27 with the Court to retain jurisdiction to enforce the terms of the settlement until
28 performance in full of the terms of the settlement.

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Dated: July 25, 2018

Respectfully submitted,
LITTLER MENDELSON, P.C.

/s/ Lisa K. Horgan
LISA K. HORGAN
JAMES J. OH
COURTNEY M. OSBORN
Attorneys for Defendants

Dated: July 25, 2018

Respectfully submitted,
RUDY, EXELROD, ZIEFF & LOWE, LLP

/s/ Chaya M. Mandelbaum
STEVEN G. ZIEFF
CHAYA M. MANDELBAUM
WILLIAM P. MCELHINNY
Attorneys for Plaintiffs

FILER'S ATTESTATION

Pursuant to Local Rule 5-1, I, the filer of this document, attest that all other signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

/s/ Lisa K. Horgan
Lisa K. Horgan
LITTLER MENDELSON, P.C.

~~PROPOSED~~ ORDER

THE COURT HEREBY FINDS, having read and considered the Joint Request for approval of a Private Attorneys General Act (“PAGA”) settlement and the dismissal of this action,

IT IS HEREBY ORDERED THAT:

Good cause exists to approve the PAGA settlement of \$16,000.00 pursuant to Labor Code section 2699(1)(2) and the settlement is so approved.

This action is now hereby dismissed in its entirety with prejudice as to Plaintiffs and without prejudice as to the “aggrieved employees,” other than Plaintiffs, to the extent any such individuals exist.

Defendants shall pay \$12,000, which is 75% of \$16,000, to the Labor and Workforce Development Agency (“LWDA”) within twenty-one (21) business days after the dismissal of this action.

This Court shall retain jurisdiction to enforce the terms of the settlement until performance in full of the terms of the settlement. Plaintiffs are hereby ordered to submit a copy of this Order to the LWDA within ten (10) days after its entry.

IT IS SO ORDERED.

DATED: August 3, 2018



THE HONORABLE EDWARD M. CHEN
United States District Judge

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