Supreme Court No. S224611

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CHRISTOPHER MENDOZA, an individual, on behalf of himself and all other persons similarly situated
Plaintiff-Appellant-Petitioner

MEAGAN GORDON
Plaintiff-Intervenor-Petitioner

v.

NORDSTROM, INC., a Washington Corporation authorized to do business in the State of California
Defendant-Appellee-Respondent

After a Request by the Ninth Circuit Court of Appeals
Case Nos. 12-57130 consolidated with 12-57144

PLAINTIFF-APPELLANT-PETITIONER'S OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont.)

TABLE OF CONTENTS (cont.)

TABLE OF CONTENTS (cont.)

TABLE OF CONTENTS (cont.)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (cont.)

Page(s)

TABLE OF AUTHORITIES (cont.)

STATUTES

TABLE OF AUTHORITIES (cont.)

TABLE OF AUTHORITIES (cont.)

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Plaintiff-Appellant-Petitioner, CHRISTOPHER MENDOZA ("Plaintiff-Appellant-Petitioner") files this opening brief concerning questions posed by the Ninth Circuit Court of Appeals.

I.

INTRODUCTION

Appellant Christopher Mendoza ("Mendoza") is pursuing this action under the California Private Attorneys General Act ("PAGA"), codified in California Labor Code sections 2698-2699.3, on behalf of current and former hourly-paid California employees of Respondent Nordstrom, Inc. ("Nordstrom") who worked more than six consecutive days in violation of California's one day's rest in seven statutes, California Labor Code sections 551-558.[1]

II.

CERTIFIED QUESTIONS PRESENTED

On February 19, 2015, pursuant to California Rules of Court, Rule 8.548, the United States Court of Appeals for the Ninth Circuit requested that this Court grant review of the following questions:

(A) California Labor Code section 551 provides that "[e]very person employed in any occupation of labor is entitled to one day's rest therefrom in seven." Is the required day of rest calculated by the workweek, or is it calculated on a rolling basis for any consecutive seven-day period?

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[1] Herein California Labor Code section 551 and 552 shall be known as the "Day of Rest" statute.

(B) California Labor Code section 556 exempts employers from providing such a day of rest "when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof" (Emphasis added.) Does that exemption apply when an employee works less than six hours in any one day of the applicable week, or does it apply only when an employee works less than six hours in each day of the week?

(C) California Labor Code section 552 provides that an employer may not "cause his employees to work more than six days in seven." What does it mean for an employer to "cause" an employee to work more than six days in seven: force, coerce, pressure, schedule, encourage, reward, permit, or something else?

III.

STATEMENT OF FACTS

1. The claim being litigated in this lawsuit is Mendoza's PAGA claim that Nordstrom violated the day of rest statutes when Nordstrom scheduled and permitted employees such as Mendoza to work more than six consecutive days. (ER01790)

2. Nordstrom has never had a policy making one day of rest in seven available to California employees. (ER01114 lines 7-9)

3. Nordstrom has never had any formal policy regarding the implementation of the day of rest statutes. (ER01047) (ER01049) (ER01091-ER01093) (ER01095) (ER01099-ER01100) (ER01113-

ER01115) (ER02228-ER02278, p. 25:14-20)

4. Mendoza worked for Nordstrom from March 30, 2007, through August 13, 2009. (ER01788-ER01874)

5. Mendoza was a full-time employee at Nordstrom in California. (ER01282 line, 25) (ER01283 line 1-13) (ER01292, line 10-12, 22-24)

6. On three occasions, Mendoza worked more than six consecutive days[2]:

a. Mendoza worked more than six consecutive days from January 26, 2009, through February 5, 2009. During this period, Mendoza worked 11 consecutive days.

b. Mendoza worked more than six consecutive days from March 23, 2009, through March 29, 2009. During this period, Mendoza worked seven consecutive days.

c. Mendoza worked more than six consecutive days was from March 31, 2009, through April 7, 2009. During this period, Mendoza worked eight consecutive days.

(ER03783-ER03784) (ER03789) (ER03794-ER03795)

7. Nordstrom encouraged and pressured Mendoza to work more

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[2] There is no dispute as to the dates and times worked by Mendoza.

than six consecutive days. (ER01311 line 16-19, 4-9) (ER01287 lines 10-19) (ER00893-ER00915) (ER01336 lines 3-10) (ER00893-ER00915 at pp. 7-11) (ER01339 lines 18-24) (ER00893-ER00915 at pp.5-6) (ER01478 line 15-ER01479 line 2) (ER01026 lines 11-18) (ER01287 line 21-25) (ER-ER01288 line 1-9, 14-21) (ER01286 line 23-ER01287 line 4) (ER01300 lines 4-10)

8. Nordstrom has ultimate control over employee schedules and the days they work. (ER01286 line 13-19) (ER01292 lines 2-9) (ER01301 lines 21-25) (ER01029 lines 1-12, 19-21) (ER1030 lines 1-17) (ER001489 lines 14-22)

9. There is no evidence in the record that Mendoza ever knew that he was statutorily entitled to one day of rest in seven.

10. There is no evidence that information about an employee's right to take one day of rest in seven was ever disseminated to Nordstrom's employees.

11. Nordstrom produced time punch data for California employees from the time period of December 22, 2008, to November 19, 2011. (ER02496) (ER02507) (ER02091-ER02099, p. 2-3) The start of this time period represents the start of the statute of limitations period. The end of this time period represents a self-selected date by Nordstrom. Nordstrom has the ability to produce more current data, but declined to do so. (ER02904 lines14-16) (ER01930 lines 2-15) (ER02762-ER02771)

(ER01099 lines 8-14)

12. Based on Nordstrom's production of time punch data, Nordstrom's expert concluded that employees worked more than six consecutive days on 26,002 occasions between December 22, 2008, to November 19, 2011. (ER02084-ER02106 at paragraph 12)

13. Based on Nordstrom's production of time punch data, Mendoza's expert concluded that employees worked more than six consecutive days on 9,573 occasions between December 22, 2008, to November 19, 2011, where each day worked was over six hours. (ER00263-ER00491 at paragraphs 3 and 4)

14. Nordstrom produced some time schedules for employees who fell within the statute of limitations for the day of rest claims. (ER00494, paragraph 7) (ER00517-ER00518) (ER00521-ER00522) (ER00525-ER00526) (ER00551) (ER00576) (ER00584) (ER00586) (ER00591)

15. Based on these schedules and the time punch data produced by Nordstrom, employees were scheduled by Nordstrom to work more than six consecutive days and did, in fact, work more than six consecutive days as scheduled. (ER00517-ER00518) (ER00521-ER00522) (ER00525-ER00526) (ER00551) (ER00576) (ER00584) (ER00586) (ER00591)

16. Mendoza satisfied the requisite PAGA notice requirements prior to commencing his lawsuit as a PAGA representative. (ER03676-ER03677)

IV.

PROCEDURAL HISTORY

On December 22, 2009, Mendoza brought suit against Nordstrom alleging, among other claims,[3] violations of California's day of rest statutes, California Labor Code sections 551 and 552. (ER03800-ER03966)

On May 13, 2011, the district court issued an order denying Nordstrom's motion for summary judgment as to Mendoza's day of rest claims. At this early point, the district court in this case considered whether the statutorily mandated day of rest could be waived, finding:

> In addition, Nordstrom argues that it is not liable for violations of §§ 551 and 552 since it did not "cause" Mr. Mendoza to work more than six days in seven because he voluntarily chose[3] to work in excess of six consecutive days. *See* Cal. Lab. Code § 552 (prohibiting employers from "caus[ing] [their] employees to work more than six days in seven"). Nordstrom relies on a dictionary that defines cause as compelling by command, authority, or force. Accordingly, Nordstrom reasons that "employees have a right to be furnished with one day's rest in seven, but can choose to waive or forgo that right and work extra shifts without triggering any statutory violation." Mem. P. & A. Supp. Mot. at 12. As an initial matter, §§ 551, 552, and other related sections do not indicate that employees can waive this protection or that employers can bargain with employees to obtain such waivers. *Compare* Cal. Lab. Code § 551 (entitling employee to one day's rest in seven), *and id.* § 552

---

[3] All other claims alleged by Mendoza in the complaint were resolved by summary judgment.

> (prohibiting employer from causing employee to work more than six days in seven), *with id.* § 512 (permitting, in certain circumstances, waiver of the requirement that an employer provide employees with meal periods where the meal period is "waived by mutual consent of both the employer and employee"). This interpretation would also undermine a fundamental principle underlying these statutes. Indeed, the legislature has provided certain protections to employees based on the understanding that employers often have disproportionate bargaining power and can, in the absence of limitations, wield that power to coerce employees into unfair or undesirable labor arrangements.[4] *See Murphy v. Kenneth Cole Prods., Inc.* 40 Cal. 4th 1094, 1111 (2007) (explaining that "statutes regulating conditions of employment are to be liberally construed with an eye to protecting employees"). The protections provided in §§ 551 and 552 would mean far less if employers could routinely exert pressure on employees to "choose" to waive those protections. The Court agrees with Mr. Mendoza that the better interpretation of the statute is that it holds employers accountable when they cause – either in the sense of requiring or permitting-employees to work seven consecutive days.

(Footnotes excluded; underlined emphasis added; ER03175-ER03332 at p. 7-8.)

On June 23, 2011, the district court denied Nordstrom's motion for modification or clarification and denied Nordstrom's motion to certify the issue for appeal, noting "The voluntariness of Mr. Mendoza's work was irrelevant in light of the Court's holding that 'the statute . . . holds employers accountable when they cause – either in the sense of requiring or permitting – employees to work seven consecutive days." (ER03111-

ER03114 at p. 3:13-16)

On June 14, 2012, at the final status conference, the district court noted: "There are certain issues that I don't think need evidence, such as the interpretation of 552, whether it's a defined work week or not, whether an employee can waive the rest day." (ER01687)

The district court determined that the best course of action for adjudicating this matter was to try Mendoza's and plaintiff-intervenor's cases individually. (ER01743-ER01744)

The court conducted an abbreviated two day bench trial on June 19 and June 21, 2012.

Before trial began on June 19, 2012, the district court discussed logistical issues with Mendoza's counsel, including issues about the adequacy of Mendoza as a representative and the availability of other witnesses or potential representatives to step forward and testify at trial about the circumstances and conditions under which they worked more than six consecutive days. (ER01274 line 16-ER01274 line 9) (ER01276 line 22-ER01277 line 12). The district court stated:

> I can assure you that no matter what I do with respect to Mr. Mendoza and Ms. Gordon, even assuming for argument sake that I agreed with Nordstrom on these issues, I'm not going to dismiss the case. What I would do, even in that worse case scenario for you, we would have a status conference and then you would let me know, respond to these issues and then we'll figure out where we're going to go from here.

(ER01277 lines 14-20)

Despite these previous rulings and statements, on September 21, 2012, the district court issued a Memorandum of Decision finding in favor of Nordstrom. (ER00677-ER00700) The district court found, for the first time, that the statute providing one day of rest in seven could be waived and Mendoza had waived it. The district court also found that employees who worked less than six hours any on any day in the relevant seven or more consecutive days would be exempted from being provided one day of rest in seven. Based on the hours Mendoza worked, the district court found that Nordstrom was exempt from providing Mendoza with one day of rest in seven on each of the three occasions where Mendoza worked more than six consecutive days.

The district court ordered Mendoza to show good cause why the action should proceed. (ER00676) The district court did not have a status conference.

Mendoza filed a response to the Order to Show Cause in which Mendoza identified other potential representatives, including one who Mendoza's counsel offered to put on at trial, and who fit the parameters of the district court's interpretation of the sections 551-558, including employees who were scheduled to work more than six consecutive days. Mendoza's expert counted 9,573 occasions where employees worked more than six days where each day worked was more than six hours. (ER00648-

ER00675) (ER00492-ER00647) (ER00009-ER00014)

On November 5, 2012, the district court found that Mendoza and plaintiff-intervenor, as individuals, no longer had viable claims or controversies and dismissed the entire representative action. (ER0006-ER00008)

On November 26, 2012, Mendoza filed a notice of appeal. (ER00001-ER00005)

On June 21, 2013, Mendoza filed his opening brief with the Ninth Circuit Court of Appeals.

On August 21, 2013, Nordstrom filed its answering brief.

On September 27, 2013, Mendoza filed his reply brief.

On December 12, 2015, the matter was argued and submitted to the Ninth Circuit.

On February 19, 2015, the Ninth Circuit issued an order certifying three questions to this Court.

On April 29, 2015, this Court granted the Ninth Circuit's request.

V.

SUMMARY OF ARGUMENT

Mendoza seeks review of the district court's interpretation of the California Labor Code sections 500 – 558. The interpretation of these statutes is a matter of first impression in California.

As California Labor Code section 551 provides that "[e]very person employed in any occupation of labor is entitled to one day's rest therefrom in seven," the required day of rest should be calculated on a rolling basis for any consecutive seven day period.

As California Labor Code section 556 exempts employers from providing such a day of rest "when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof," an exemption should apply only to a part-time employee who works less than six hours in each day of the week. This exemption should not apply to an employee who works less than six hours on only one day in the week.

As California Labor Code section 552 provides that an employer may not "cause his employees to work more than six days in seven," an employer should be prohibited from forcing, coercing, demanding, pressuring, scheduling, soliciting, suggesting, encouraging, rewarding, incentivizing or permitting an employee to work more than six or more consecutive days.

VI.

ARGUMENT

A. Question One: Is The Day Of Rest Statute To Be Calculated Based On Any Consecutive Seven-Day Period

Compliance with California Labor Code §§ 551 and 552 should be measured by the number of consecutive days an employee works, not how

many consecutive days were worked within an employer defined workweek.

1. Statutory Interpretation

"The starting point for [the] interpretation of a statute is always its language," *Community for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 739 [109 S.Ct. 2166]). Under California law, the interpretation of the statute begins with the text of the statute. (*People v. Scott* (Cal. 2014) 324 P.3d 827, 829.) "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Connecticut Nat'l Bank v. Germain* (1992) 503 U.S. 249, 253-254 [112 S.Ct. 1146]. "Judicial inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." (*Robinson v. Shell Oil Co.* (1997) 519 U.S. 337, 340 [117 S.Ct. 843, 846] [136 L.Ed.2d 808], citing *United States v. Ron Pair Enterprises, Inc.* (1989) 489 U.S. 235, 240 [109 S.Ct. 1026, 1030 [103 L.Ed.2d 290].)

2. The Language Of The Day Of Rest Statutes Is Clear And Unambiguous

Plain language prevails in the day of rest statutes. California Labor Code Sections 551 and 552 read as follows:

California Labor Code section 551 titled "One day's rest in seven:" "Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven."

California Labor Code section 552 titled "Maximum consecutive working days:" "No employer of labor shall cause his employees to work more than six days in seven."

In considering the question whether workers were entitled to one day of rest every seven consecutive days or one day of rest during every employer defined workweek, the district court noted:

> Nordstrom's attempt to insert ambiguity and an absent, defined term into section 552 fails. It asserts that, to evaluate an employer's compliance with California Labor Code sections 551 and 552, "courts must look to the defined, fixed seven-day workweek, not a rolling period." Mem. P. & A. Supp. Mot. At 7. Nordstrom therefore contends that "under the plain language [of sections 551 and 552], a violation only occurs if an employee works more than six days in a workweek." *Id.* at 6. If this interpretation was accepted, Nordstrom would not violate the statute unless it caused an employee to work Sunday through Saturday, which is its defined workweek. By this reasoning, Nordstrom argues that Mendoza working as many as eleven consecutive days in 2009 did not violate sections 551 and 552 because he received at least one day off during each of the relevant workweeks. Although Nordstrom is correct that section 500(b) defines "workweek" and "week" as "any seven consecutive days, starting with the same calendar day each week," California Labor Code section 500(b), neither term appears anywhere in section 551 and 552. Given that the legislature specifically defined "workweek" and "week," the absence of these terms from sections 551 and 552 significantly undermines Nordstrom's position. See California Civil Procedure

Code section 1858 (advising courts construing statutes to "ascertain and declare what is in terms or in substance contained therein, [and] not to insert what has been omitted, or to omit what has been inserted"); (*Neumarkel v. Allard* (1985) 163 Cal.App.3d 457, 461.) FN2

FN2 Nordstrom makes an additional argument that sections 551 and 552 must be read harmoniously with section 556, which provides that sections 551 and 552 do "not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." California Labor Code section 556 (emphasis added). It argues section 556's invocation of the defined term "week" requires sections 551 and 552's references to seven days to also be interpreted to mean "workweek" or "week" as defined in section 500(b). But the Court will not import defined terms from the one section into another, especially here where doing so would alter the plain and clear wording that exists in sections 551 and 552.

(ER02624-ER02625)

On this issue, the district court eventually found:

The plain and clear purpose of sections 551 and 552 is to prevent an employer from requiring its employee to work more than six consecutive days. Nothing in the day of rest statutes indicates that the California Legislature intended to limit the period during which the days must be consecutively worked. Mendoza worked on one occasion for eleven consecutive days. If Nordstrom's interpretation were adopted, an employer could require an employee like Mendoza to work these

> demanding hours, give him a day off, and then force him to work another eleven consecutive days. This unconscionable one day's rest in 12 work schedule could be repeated in perpetuity. The California Legislature surely never intended to provide such a loophole or invite such employer abuse.

(ER00685, p. 9:1-4)

a. The Word "Workweek" Does Not Appear In Either California Labor Code Section 551 or 552

It is ". . . well settled that the court is without power to supply an omission." (*Estate of Pardue* (1937) 22 Cal.App.2d 178, 180–181, [70 P.2d 678].) Neither California Labor Code section 551 nor California Labor Code section 552 incorporates the word "workweek." It would be inappropriate to import or graft the omitted word "workweek" into these statutes. See, California Code of Civil Procedure section 1858. It would be equally inappropriate to seek to interpret these day of rest statutes by relying on other statutes which do include the word "workweek."

The evolution of the statutes at issue here is illuminating. California Labor Code sections 500 et seq. underwent a thorough revision in 1999 following the introduction of AB 60 titled "The Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999." 1999 Cal. Legis. Serv. Ch. 134 (A.B. 60). (ER03353-ER03363) AB 60 sought to amend sections 510, 554, 556, and 1182.1 of the California Labor Code and to add sections

500, 511, 512, 513, 514, 515, 516, 517, and 558. *Id.*[4]

AB 60's main purpose was to restore daily overtime laws in California for the benefit of worker safety and welfare. It has long been recognized that overtime compensation laws serve the "dual purpose of inducing the employer to reduce the hours of work and to employ more [individuals] and of compensating the employees for the burden of a long workweek." (*Walling v. Youngerman–Reynolds Hardwood Co.* (1945) 325 U.S. 419, 423–424 [65 S.Ct. 1242]; see also *Keyes Motors, Inc. v. Division of Labor Standards Enforcement* (1987) 197 Cal.App.3d 557, 564) (premium pay regulates maximum hours consistent with employees' health and safety needs). Further, "[n]umerous studies have linked long work hours to increased rates of accident and injury." (ER03427-ER03436) Overtime laws also serve to spread employment throughout the workforce by putting financial pressure on the employer, and to protect employees in a relatively weak bargaining position against the acknowledged "the evil of 'overwork'." (*Gentry v. Sup.Ct. (Circuit City Stores, Inc.)* (2007) 42 Cal.4th 443, 456.)

It is important to note that despite the massive overhaul made to this chapter, sections 551, 552 and 553 remained unchanged. While the

---

[4] It was at this time when the definition of the term "workweek" was added in section 500.

legislature found it important to add and define the term "workweek" in section 500, and to revise certain portions of section 554, the "consecutive days" language remained unchanged, and the term "workweek" was not utilized in any way in sections 551, 552 and 553. Further revisions to section 544 in 2009 (AB 1486) and 2010 (SB 1121) conserved the "consecutive days" language. (ER03454-ER03457)

b. The Day Of Rest Statutes Guarantee One Day Of Rest In Seven, Not One Day Of Rest In Twelve

A reading of the day of rest statutes based on an employer defined workweek would permit employees to work twelve consecutive days without a mandated day of rest. For example, if an interpretation of the day of rest statutes was adopted that allowed for only a single day of rest in an employer-defined workweek, employees could work twelve consecutive days without being entitled to a day of rest as so:

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Off	Work	Work	Work	Work	Work	Work
Work	Work	Work	Work	Work	Work	Off

Such a scheme would violate the plain language of the day of rest statutes, which contemplate one day of rest in seven, not one day of rest in twelve. No plausible interpretation of the day of rest statutes would allow

employees to work twelve consecutive days before they were legally entitled to a day of rest.

3. Public Policy Heavily Favors Granting One Of Day Rest In Each Seven Consecutive Days To California Workers

An interpretation of California Labor Code sections 551 and 552 that permits employees to work twelve consecutive days defeats the purpose of the one day's rest in seven requirement and disregards this Court's well established principle that statutes and regulations governing wages, hours and working conditions are remedial in nature and must be interpreted to safeguard and benefit employees. (*Prachasaisoradej v. Ralphs Grocery Co., Inc.* (2007) 42 Cal. 4th 217, 227.) California has a vested interest in protecting its workers from exhaustion and exploitation. "[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.... 'They are not construed within narrow limits of the letter of the law, but rather are to be given liberal effect to promote the general object sought to be accomplished....'" (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702 (emphasis added); see also *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103–1104; *Henning v. Industrial Welfare Com* (1988) 46 Cal.3d 1262, 1269; *Kerr's Catering Service v. Department of Industrial*

Relations (1962) 57 Cal.2d 319, 330 (the "Legislature and our courts have accorded to wages special considerations" in order to protect the "welfare of the wage earner").)

The object sought to be accomplished by California's day of rest statutes is to secure and provide the rest necessary for the health and safety of employees. "The need to provide for one day of rest at periodic intervals has been recognized by legislative enactments, both state and federal." (73 Am.Jur. 2d *Sundays and Holidays* § 4.) It has been long recognized by the United States Supreme Court that, "if the maximum output is to be secured and maintained for any length of time, a weekly period of rest must be allowed." (*McGowan v. Maryland* (1961) 366 U.S. 420, 479 [81 S.Ct. 1153].)

B. Question Two: Interpretation Of The Part-Time Employee Exception

1. Full-Time Employees Who Work More Than 30 Hours A Week Or More Than Six Hours In Any One Day Are Entitled To One Day Of Rest In Seven

a. Statutory Interpretation Of California Labor Code Section 556

(1) The Language Of The Section 556 Supports Mendoza's Interpretation Of The Exception

Section 556 is an exception to the day of rest statutes and it plainly

only applies to part-time employees. Part-time employees are less in need of a mandated day of rest. Section 556 reads, in full: "Sections 551 and 552 shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof."

Broken down into its two distinct pieces, section 556 reads:

> Sections 551 and 552 shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week.
>
> Sections 551 and 552 shall not apply to any employer or employee when the total hours of employment do not exceed six hours in any one day thereof.

Section 556 contains a double negative, making it a syntactically complex statement. With the understanding that the two "nots" cancel each other out, the statute should be read in the affirmative as follows: "Sections 551 and 552 shall apply to any employer or employee when the total hours of employment exceed 30 hours in any week or six hours in any one day thereof."

An employee who works more than six consecutive days falls under the protections of the day of rest statutes if the total number of hours that employee worked in a week was 30 hours or more, or if any one of the days the employee worked in that week was more than six hours. In other words, the employee was not a part-time employee. Conversely, an

employee who worked more than six consecutive days would fall under the exception in section 556 if that employee worked fewer than thirty hours in one week or worked six or fewer hours every day during the week.

Furthermore, in addition to the complicated syntax, section 556 also possesses dense grammar in the second portion of the statute. As the Ninth Circuit noted, "any" can mean "each" or "all." (Dkt 312, page 12) Replacing "any" with "each," would cause the latter portion of the statute to be read as follows: "when the total hours [worked by the employee] do not exceed 30 hours in any week or six hours in *each* day thereof."

This interpretation preserves the purpose of the day of rest statutes, exempting only truly part-time employees whose regular schedules are for less than six hours a day.

An interpretation of California Labor Code section 556 denying a day of rest to an employee who happens to work less than six hours on only one day of seven denies this important benefit. Such an interpretation is at odds with the purpose of the day of rest statutes.

b. The Purpose Of California Labor Code Section 556 Is To Account For The Fact That Truly Part-Time Employees Do Not Reasonably Need One Day Of Rest In Seven

The plain purpose of section 556 is to prevent a mandate that part-time workers are entitled to receive a day of rest. A part-time employee's

workload is lighter, the stress and strain on their physical and mental state is lessened and it is not necessary to provide them with a day's rest every seven days to recuperate.

Secondary sources universally describe section 556 as an exception designed to impact only part-time employees. Witkin states:

> The following are statutorily exempt from the hour and day limitations:
>
> . . . .
>
> (2) Part-Time Employees. An employee whose work hours do not exceed six hours per day or 30 hours per week. (Lab. C. 556.)

3 Witkin, Summary (10th ed. 2005) Agency, section 361, p. 456. (ER00923-ER00926)

Witkin states that an employee who works a part-time schedule, specifically a schedule that is under six hours every day or less than thirty hours in a week, is not statutorily entitled to a day of rest. The identification of an employee with this lighter schedule as "part-time" is helpful to understand the type of employee who would fit into the exemption – a true part-time employee with limited hours worked, as opposed to a full time employee who happened to work five and a half hours one day during a run of seven consecutive days.

The DLSE also has identified section 556 as an exception designed to only apply to part-time employees. A DLSE memorandum entitled "Understanding AB 60: An In Depth Look at the Provisions of the Eight

Hour Day Restoration and Workplace Flexibility Act of 1999" [5] opined on the day of rest statutes and the interrelation of California Labor Code sections 551 and 552 with section 556. It describes a part-time employee as an employee who worked less than 30 hours a week or less than six hours each day as a part-time employee, specifically stating:

> Day of Rest Requirement: AB 60 does not amend existing Labor Code sections 551 and 552, which provide that every employee is entitled to one day's rest in seven, and that no employer shall cause its employees to work more than six days in seven.
>
> . . . .
>
> Section 13 of AB 60 makes some minor changes to Labor Code § 556, which provides that sections 551 and 552, the sections which mandate one day's rest in seven, shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in a week or six hours in any one day of that week. We have been asked whether an employee who works such a part-time schedule would be entitled to seventh day premium pay, pursuant to section 510. The answer is yes, seventh day premium pay is required....

(ER00937) (Emphasis added.)

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[5] See Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE) memorandum to all DLSE Professional Staff, Dec. 23, 1999, accessed at <http://www.dir.ca.gov/ dlse/AB60 update.htm> [as of July 19, 2012] ["Understanding AB 60: An In Depth Look at the Provisions of the 'Eight Hour Day Restoration and Workplace Flexibility Act of 1999'" at pg. 10.] (ER00937)

The DLSE memorandum defines an employee working less than six hours each day or less than 30 hours a week as a "part-time" employee within the meaning of the day of rest statutes.

Other secondary sources similarly parse the language of section 556 to alleviate the tension of the syntax and allow for a clearer understanding of the statute.[6] A broad and varied host of secondary sources, including those urged on the district court by defense counsel, have also understood and interpreted section 556 as not requiring that an employee working fewer than thirty hours in one week or working six or fewer hours every day during the week be given a day of rest.

For example, the DLSE's Enforcement Policies and Interpretations Manual states:

> 48.3 Work On Seventh Day In Workweek. Formerly the IWC orders had language permitting employment of 7 days in a workweek, "with no overtime pay required" provided the total of hours of employment do not exceed 30 in the week or 6 in any one day. In other words, such employees were exempt from the seventh day of rest requirement and the seventh day of work premium pay requirement if the 30 in the week or 6 in any one day test was met. . . .

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[6] See also Legis. Counsel's Dig., Assem. Bill No. 1396 (Ch. 1267) (1940-1941 Reg. Sess.) Summary Dig., p. 161. ("Declares provisions do not apply when hours do not exceed 30 in any week or 6 in any one day for that week.") (ER00965) and Cal. Chamber of Commerce, Digest of Cal. Labor Laws, 2nd Ed. Sec. 1, Wages and Hours. ("Employment when the hours do not exceed 30 hours a week, or 6 hours in any one day.") (ER00971)

> 48.3.1 In all the new orders except 14 and 15, the IWC deleted the phrase "no overtime pay required" permitting employment of 7 days in a workweek provided that total hours for the week do not exceed 30 with no more than 6 hours worked in any one day but required the payment of premium pay on the seventh day of work. . . .

(DLSE Enforcement Policies and Interpretations Manual (Revised) (2002 Update); emphasis added.) (ER00941-ER00942)

While the DLSE is contemplating payment of overtime, a topic that is not being litigated here, the way the DLSE reads the language of section 556 is instructive. The DLSE posits that the language from section 556 stating "do not exceed 30 hours in any week or six hours in any one day thereof" should be interpreted as "do not exceed 30 [hours] with no more than 6 hours worked in any one day." In other words, if the employee worked more than 30 hours in the week or more than six hours any day, overtime and day of rest rights are triggered.

Additionally, the California Labor Law Digest from the present year states:

> Mandatory days off: Generally, every employee is entitled to at least one day off in a seven-day workweek. However, an employee can accumulate rest days when the nature of employment requires him/her to work seven or more consecutive days. However, the employee must receive rest days equivalent to one day in seven during each calendar month. This requirement does not apply to emergencies, agricultural work, work performed in the protection of life or

> property from loss or destruction, or when hours worked do not exceed 30 in any workweek or 6 in any workday.

(California Labor Law Digest Ch. 11, p. 268 (52nd ed., 2012) ("A Comprehensive Reference of California and Federal Employment Laws, Regulations and Court Rulings"); emphasis added.) (ER00945)

California Employer Advisor states:

> § 6.18 D. Day of Rest
> Employees generally cannot be required to work more than 6 days in every 7. ...exceptions are provided for. . . .employees who work no more than 6 hours a day and 30 hours a week,. . .. Lab C §§ 554, 556.

(Advising California Employers and Employees (Cal CEB 2005), §6.18, emphasis added.) (ER00948)

Richard J. Simmons' *Wage and Hour Manual* § 4.1 supports Mendoza's interpretation of section 556. Describing the exception in section 556 to the day of rest statutes thusly:

> Furthermore, Sections 554 and 556 contain exemptions for the following: . . . An exemption applies under Labor Code section 556 where an employee does not work over 30 hours in a week or six hours in any day of the week.

(ER00951-ER00953 p. 200, emphasis added.)

Simmons agrees that in order for the exception in section 556 to apply to an employee, that employee would have had to work less than 30 hours a week or less than six hours each day of the week.

An interpretation of California Labor Code section 556, requiring a day of rest only for employees who work more than 30 hours a week and more than six hours each day thereof during that week, would defeat the purpose of the day of rest requirement. Under that interpretation, an employee would not be entitled to a day of rest if he worked eight hours a day, every day, Sunday through Saturday, but only 5.9 hours on the intervening Wednesday, 53.9 hours in a week[7] - this could happen every week for months or years on end without that employee ever being entitled to a day of rest pursuant to California Labor Code sections 551 and 552. The purpose of the statute, a fair interpretation of the language, practical application, public policy and the mandate to interpret labor laws in an employee-friendly fashion demand California Labor Code section 556 to be read as urged by Mendoza.

2. A Full Time Employee, Such As Mendoza, Is Not Subject To The Exception In California Labor Code Section 556

Mendoza was a full time employee. (ER01292 lines 10-12, 22-24) Mendoza was not a part time employee when he worked more than six

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7

Sun	Mon	Tues	Wed	Thurs	Fri	Sat	Total Hours
8 hrs	8 hrs	8 hrs	5.9 hrs	8 hrs	8 hrs	8 hrs	53.9 hrs

consecutive days on three different occasions. On each of those occasions, he worked more than thirty hours a week. He did not work less than six hours every day, as a part-time employee would. (ER03783-E03784) (ER03789) (ER03794-ER0375) As a full time employee working more than thirty hours a week, Mendoza should not be denied his entitlement to one day of rest in seven because, on a stray day or two, he worked fewer than six hours.

3. Even Under The District Court's Interpretation Of California Labor Code Section 566, Mendoza Has Identified 9,573 Violations Where Each Day Worked Exceeded 6 Hours

The district court found that to constitute a day of rest violation each day must exceed six hours. Even should this interpretation be accepted, Nordstrom produced records showing that on 9,573 occasions employees worked more than six consecutive days (up to 53 consecutive days) with each day's work in excess of six hours. (ER00263-ER00491 ¶¶ 2-4)

C. Question Three: Can The Day Of Rest Statutes Be Waived?

1. The Day of Rest Statutes Cannot Be Waived

a. It Is Improper to Apply the "Make Available" Standard From the *Brinker* Meal Break Case to This Day of Rest Case

Erroneous reliance upon *Brinker v. Rest. Corp. v. Superior Court*,

(2012) 53 Cal. 4th 1004 improperly creates a waiver exception for the day of rest statutes. *Brinker* held, in the context of meal and rest breaks, that the employer need only "make available" such breaks and the employee could waive his or her right to the meal break. (ER006898 lines 11-12) The *Brinker* standard is not applicable to the day of rest statutes.

(1) *Brinker* Provides No Basis For Adoption Of A Waiver Defense As To the Day of Rest Statutes

It is a guiding principle of *stare decisis* that "[a]n opinion is not authority for a point not raised, considered, or resolved therein." *Styne v. Stevens* (2001) 26 Cal. 4th 42, 57; *People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882, 890, ("courts do not establish precedent by implication"); *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal. 4th 1182, 1195 ("[i]t is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court," with the result that prior decisions may not be regarded as "authority for propositions not considered). In *Brinker*, the Court was considering only the limited issues before it: the employer's duty to provide meal periods. *Brinker* does not support the limitation of the application of sections 551 and 552, nor does Brinker create an affirmative defense of waiver where none previously existed.

Nothing in *Brinker* indicates that it was intended to be expanded to bind the day of rest statutes to the same standards as those governing meal breaks. Moreover, in *Brinker* this court itself took a narrow view of its own holding, even within the meal break context: "What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1040.)

(a) Meal Break Provisions And The Day Of Rest Statutes Are Disparate

(i) The Word "Cause" In The Day Of Rest Statute Connotes A Different Meaning Than "Provide" In The Meal Break Provisions

California Labor Code section 552 states: "No employer of labor shall *cause* his employees to work more than six days in seven." *Merriam-Webster.com* defines "cause" as "something or someone that produces an effect, result, or condition: something or someone that makes something happen or exist." (*Merriam-Webster.com*. 2015. http://www.merriam-webster.com/dictionary/cause (June 2015).) Accordingly, "cause" can be to force, coerce, demand, pressure, schedule, solicit, suggest, encourage,

reward, incentivize or permit. The day of rest statutes are employee welfare statutes to protect employee health and safety by ensuring the employee receives an appropriate amount of rest and is sheltered from exploitation and overwork. The prohibition on employees working more than six consecutive days should be strictly interpreted to protect these employees against unscrupulous employers who will otherwise "cause" them to forego their mandated day of rest.[8]

In contrast, the meal break provision in California Labor Code section 512(a) states, in part: "An employer may not employ an employee for a work period of more than five hours per day without *providing* the employee with a meal period . . ." (emphasis added). *Merriam-Webster.com* defines "provides" as "to make (something) available : to supply (something that is wanted or needed)" (*Merriam-Webster.com*. 2015. http://www.merriam-webster.com/dictionary/provide) (June 2015).) The *Brinker* Court has determined that meal breaks must be "provided" or

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[8] Mendoza's manager acknowledged that an employee who works more shifts than his scheduled five shifts a week receives a higher rating on the employee's evaluation. (ER01478 line 15-ER01479 line 2; ER01026 lines 11-18) Such a system is inherently coercive and incentivizes employees to do without a day of rest in the hopes of pleasing the employer. Adopting a day of rest standard that permits an employee to forego a day of rest in any context other than the narrowly drawn statutory exceptions is ripe for exploitation. The circumstances surrounding an employee who "chooses" to sacrifice his day of rest will always be suspect.

"made available," a different standard than should be applied to the day of rest statutes.

The Legislature had the option of drafting the day of rest statutes to state that the employer should "provide" one day of rest to the employee, but the Legislature declined to draft the statute in such a fashion. Accordingly, "cause" must mean something different than "provide."

Under California Law, Meal Breaks Explicitly May Be Waived, But The Legislature Did Not Make Provisions For The Day Of Rest To Be Waived

Meal breaks may be lawfully waived. In stark contrast with the meal break provisions, there is no language in the day of rest statutes that provides for employee "waiver" of the right to one day of rest in seven.

The meal break provisions and the day of rest statutes are not analogous .[9] For the day of rest statutes, the concept and idea of waiver is one which is entirely foreign to the statutory language. The Legislature specifically created limited exceptions to the day of rest statutes and those specific exceptions are codified in California Labor Code sections 554 and 556. If the Legislature had intended the day of rest statutes to include a waiver provision, such a provision would be explicitly stated in the

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[9] The district court believed that the day of rest statutes and the meal break provisions to be analogous. (ER00688 lines 1-2)

statutory language. No waiver provision for the day of rest statutes exists. There is no authority, in either the day of rest statutes or in any Wage Order, for usurping a legislative function and importing a waiver provision into the day of rest statutes.

In contrast, meal break provisions specifically and explicitly permit for the possibility of waiver. Waiver of the meal break provisions are specifically contemplated and laid out in the applicable Wage Order. Wage Order 7(11)(A) states:

> No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

Wage Order 7(11)(C) permits an employer and employee to enter into a written agreement to modify the meal break requirement under precise, formal conditions:

> An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(Emphasis added.)

Furthermore, for on-duty meal break agreements to be valid, they must be in writing and meet strict formalities. The formalities of the meal

break waivers serve the purposes of memorializing the parties' mutual agreement, protecting the employee by informing the employee of the serious nature of the undertaking and providing that the agreement is revocable. In contrast, a waiver of the day of rest statutes as created by the district court denies the employee similar protections. The district court's waiver scheme for the day of rest statutes provides for an employee to casually, even unknowingly, waive an important statutory right.

The California Labor Code is replete with examples of statutes which have no waiver provision and which, in fact, cannot be waived pursuant to their statutory language. Such statutes are a far closer corollary to the day of rest statutes than the meal break provisions. Examples of sections of the California Labor Code which dictate that the employer "shall" conduct itself in a specific manner which do not have waiver provisions and the violation of which are also misdemeanors include:

California Labor Code Section	Pertinent Language	Exception?	Waiver?	Misdemeanor to Violate?
223 (Minimum Wage)	"[I]t **shall** be unlawful to secretly pay a lower wage" than minimum wage.	No	No	Yes, Labor Code §225
226 (Itemized Statements)	"Every employer **shall**... at the time of each payment of	Private homeowners employing help in home 226(d); the	No	Yes, Labor Code § 226.6

California Labor Code Section	Pertinent Language	Exception?	Waiver?	Misdemeanor to Violate?
	wages, furnish each of his or her employees… an accurate itemized statement in writing"	government 226(i)		
351 (Gratuities)	"No employer or agent **shall** collect, take, or receive any gratuity… paid, given to, or left for an employee by a patron…"	No	No	Yes, Labor Code § 354
510 (Overtime)	"Eight hours of labor constitutes a day's work. Any work in excess … **shall** be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day **shall** be compensated at the rate of no less than twice the	Limited to Alternative Workweek arrangements 510(a)(1), 511; Make-up time 513	No	Yes, Labor Code §§553, 1198

California Labor Code Section	Pertinent Language	Exception?	Waiver?	Misdemeanor to Violate?
	regular rate of pay for an employee."			
552 (One Day's Rest In Seven)	"No employer of labor **shall** cause his employees to work more than six days in seven."	Emergencies, trains, agriculture, "nature of the employment" 554	No	Yes , Labor Code §553
852 (Pharmacies)	The employer **shall** apportion the periods of rest to be taken by an employee so that the employee will have one complete day of rest during each week.	Emergencies, "construed as being accident, death, sickness or epidemic" 854	No	Yes , Labor Code §853
2350 (Bathroom)	Sufficient "toilet facilities **shall** be provided" when employing five or more employees of different gender.	No	No	Yes, Labor Code §§2354, 1198
2441 (Water)	"Every employer... **shall**, without making a charge therefore,	No	No	Yes, Labor Code §§ 2441(b), 1198

California Labor Code Section	Pertinent Language	Exception?	Waiver?	Misdemeanor to Violate?
	provide fresh and pure drinking water..."			

If a waiver provision can be read into a statute without an explicit waiver provision, then all of the statutes in the chart above may be waived by an employee on the same analysis, laying the framework for an employee even to waive his right to a minimum wage, if any given employee would "volunteer" to work for $2.00 an hour.

(b) *Brinker* Found That Employers Should Not Have To Police An Employee's Meal Period, A Concern Which Has No Relevance To Days Of Rest

In finding that an employer should not be obligated to "police" its employees to ensure breaks are taken, the *Brinker* Court reasoned that the policing required to ensure meal breaks exerts the same type of control of which the employees are supposed to be free while on break:

> Indeed, the obligation to ensure employees do no work may in some instances be inconsistent with the fundamental employer obligations associated with a meal break: to relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time. (See

> *Morillion v. Royal Packing Co., supra*, 22 Cal.4th at pp. 584-585, 94 Cal. Rptr.2d 3, 995 P.2d 139 [explaining that voluntary work may occur while not subject to an employer's control, and its cessation may require the reassertion of employer control].)

Brinker at 1039.

While an employer may not be required to police and enforce a meal break to be sure an employee is not working, an employer plainly should know which employees have reported to work on a given day.

The district court initially recognized as much, stating:

> "You know, you can't expect a big employer to go in to, especially a big company, and police to make sure that each of its employees is taking [meal and rest breaks.] I can understand that. But when it comes to working more than six days straight, you know, that's just the books and records, that's H.R., and that's easy to do. I see the circumstances much different than meal and rest periods."

(ER01703-ER01704)

On one hand, it would take extraordinary effort for a large employer to deploy personnel and expend resources to identify which employees should be on a 30 minute meal break at any given moment and hunt down employees to determine whether any particular employee was in fact taking a meal break or whether that employee was still working. However, screening records to identify which employees are about to work a seventh consecutive day is a far different and lesser undertaking. The determination

of whether an employee is showing up to work a seventh consecutive day does not require active "policing," but rather may be accomplished by appropriate scheduling and a straightforward record review process already in place at Nordstrom. Nordstrom states that it pays overtime to employees who work a seventh consecutive day, and thereby admits that it already screens its records to identify which employees are showing up to work a seventh day. (ER01046 lines 11-18) (ER01115 line 6 – ER0116 line 21)

b. Wage Order 7 Does Not Support The Finding Of A Waiver

Cal. Code Regs., tit. 8, section 11070 ("Wage Order 7") provides for overtime when an employee works on a seventh consecutive day. Such a provision does not mean, as Nordstrom appears to argue, that it is universally lawful for all employees to work more than six consecutive days in defiance of the provisions of sections 551 and 552, so long as they are properly paid their overtime. To the contrary, Wage Order 7 recognizes that extraordinary exceptions to the day of rest statutes exist and that in those instances, overtime compensation is necessary. For example, section 554 provides an exemption to the day of rest statutes "when the nature of the employment reasonably requires that the employee work seven or more consecutive days." The district court identified examples of the type of work that would be ripe for the application of the exemption in section 554 in the mercantile context, such as "certain types of produce sellers who

need to work extended schedules based on the perishability of their product." (ER00696 lines 7-8) If a produce broker works seven consecutive days pursuant to the nature of the employment exemption, Wage Order 7 requires he be paid overtime on his seventh consecutive day of work. Wage Order 7 cannot be read as giving blanket approval for all employees to work more than six consecutive days, provided the employer properly pays overtime.

Furthermore, to the extent that there is a conflict or confusion between a Wage Order and the Labor Code, the Labor Code controls. A ministerial officer may not, under the guise of a rule or regulation, vary or enlarge the terms of a legislative enactment. (*First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 550.) The authority always rests with the statute.

c. The Law in California Prohibits an Employee From Waiving His Right to One Day of Rest in Seven

(1) As The Day of Rest Statutes Were Enacted For The Public Good, They Cannot Be Waived Under California Civil Code Section 3513

California Civil Code section 3513 states: "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." "'A party

may waive a statutory right where its public benefit is merely incidental to its primary purpose, but a waiver is unenforceable where it would seriously compromise any public purpose that the statute was intended to serve.'" (*Azteca Constr., Inc. v. ADR Consulting, Inc.*, (2004) 121 Cal.App.4th 1156, 1166 [18 Cal. Rptr. 3d 142] (internal quotations and alterations omitted).) Section 3513 prohibits a waiver of statutory rights where one of the primary purposes of the statute is to benefit the public. *Id.*

The fundamental purpose of the PAGA statute is not the preservation of the rights of the individual employees, but the public good. As this Court recently noted, "[t]he PAGA was clearly established for a public reason. . ." (*Iskanian v. CLS Transp. Los Angeles*, LLC (2014) 59 Cal.4th 348, 383 [173 Cal.Rptr.3d 289, 312-13] [327 P.3d 129, 149] cert. denied, (2015) 135 S.Ct. 1155 [190 L.Ed.2d 911].) The primary beneficiary of a PAGA action is the public at large, not the private individuals involved. *Arias v. Superior Court* (2009) 46 Cal.4th 969 noted that "any direct financial benefit to those harmed by the employer's unlawful conduct is ancillary to the primary object" of a PAGA claim,—namely, to further the reach of the LWDA and protect the public's interest. *Id.* at 987 n.7. Accordingly, an employee cannot waive his right to a day of rest, a claim that is only accessible through PAGA and designed for the public good.

(2) Violation Of The Day Of Rest Statutes Is A Crime And Employees Cannot Consent To A Crime And Decriminalize Employer's Conduct

California Labor Code sections 551 and 552 also cannot be waived because the conduct at issue is a *misdemeanor* under California Labor Code section 553. An employee does not have it in his or her power to decriminalize the conduct. Any defense of "employee waiver" is inherently inconsistent with the Legislature's decision to make employer conduct that violates these sections a misdemeanor.

This is particularly true in the employment context where any claim of voluntary waiver must be viewed through the prism of unequal bargaining power and implicit economic coercion. In the present matter, Nordstrom claims that Mendoza waived his rights merely by acceding to requests to work a seventh consecutive day. If compliance with a request, alone, is determined to be a valid waiver of the right to a day of rest, there is, realistically, *no* circumstance where employer conduct would ever fall into the purview of California Labor Code section 553.

d. The Creation Of A Waiver Exception To The Day Of Rest Statute Defeats The Stated Purpose Of PAGA

The right to enforce a PAGA claim belongs to the State of

California. The Legislature authorized "aggrieved employees" to prosecute these claims that were previously only the purview of the State Attorney General. The PAGA was enacted as a "statutory representative action" designed to enforce the Labor Code through private attorneys general. (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489.) In bringing a PAGA action, the aggrieved employee acts as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public. (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, *review denied* (Feb. 16, 2011).) "The purpose of the PAGA is not to recover damages or restitution, but to create a means of "deputizing" citizens as private attorneys general to enforce the Labor Code." (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501, as modified (July 20, 2011).) "The relief is in large part 'for the benefit of the general public rather than the party bringing the action.' " (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 491 [128 Cal.Rptr.3d 854.]) As per section 2699(i), the "civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the [Labor and Work Force Development Agency "LWDA"] ... and 25 percent to the aggrieved employees."

After the district court found that the day of rest may be waived by employees, Nordstrom argued that evaluating liability for one day's rest in

seven violations involves individual issues (ER00015-ER00161, p. 2:18-7:16) and the district court agreed, that "This case is exactly the type of case that should *not* proceed on a representative basis." (ER00015-ER00161, p. 7:15-16) On this flawed analysis, no action to enforce day of rest rights could ever be brought. The "individual" nature of the action would prevent a PAGA action and no private right of action exists. Here, the day of rest statutes trigger PAGA violations, it is plainly appropriate that such cases be litigated on a representative basis. The Nordstrom "waiver" defense should not be adopted to protect all employers who overwork their employees.

e. Public Policy Militates Against Waiver Of The One Day Of Rest In Seven

It is well established that statutes and regulations governing wages, hours and working conditions are remedial in nature and must be liberally construed for the protection and benefit of employees. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) Employment laws are remedial, not punitive. Indeed, they are intended to shape employer conduct. The employers, who by definition have "control over employees' wages and hours" are charged with compliance with the California Labor Code. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 71, *reh'g denied* (June 30, 2010), *as modified* (June 9, 2010).)

The "evil of overwork" that the *Gentry* court warned about is currently upon us. The danger is real, prevalent and pressing. The pressures on employees of all walks and stations are such that there will always be employees willing to "volunteer" to work a seventh consecutive day, an eight consecutive day, or, in the case of one weary Nordstrom shoe shiner, a 48th consecutive day.[10] The day of rest statutes were intended to protect and shield workers from being worked to the ground. An erosion of the day of rest laws would incentivize all California employers, to exploit workers' weaker barging power, resulting in untold numbers of employees "volunteering" to waive their day of rest.

If an employee's promotion, and ability to adequately support himself or herself, rests on whether he or she is willing to choose to waive the day of rest and "volunteer" to work seven or more consecutive days, the employee may well "waive" his day of rest, just as Mendoza did. The district court initially recognized the inherent tension that comes from an employer telling an employee that it is not mandatory for the employee to work a seventh consecutive day, but then rating an employee on his willingness to work longer and harder, commenting "I see a huge opportunity for mischief." (ER01702) In response to Nordstrom's waiver

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[10] (ER02789-ER02792)

arguments, the district court stated that if the day of rest is: "permissive and passive as you say, I just see employers saying, 'Oh, we're not requiring you, but look at all the people that get ahead and have the work. They're working more than six consecutive days,' and then you will have employees who will want to work more than six days." (ER01703) Allowing such a waiver undercuts the protections that the Legislature intended to provide to employees, rendering the day of rest statutes meaningless.

Examples from Nordstrom's time punch detail data evidence that Nordstrom employees are no strangers to overwork. Nordstrom's data shows that employees regularly work more than 20 consecutive days - for example Employee Nos. 1992064, 3342508 and 3712692 all worked more than 20 consecutive days. (ER02808-ER02809) (ER02811-ER02812) (ER02814-ER02815) Employee No. 6841746, the shoe shiner, once worked 48 consecutive days. After working these 48 days straight, the shoe shiner finally enjoyed a single day of rest before he worked another 24 consecutive days shining shoes. (ER02789-ER02792) Employee No. 7584410 worked an astounding 53 consecutive days. (ER02785-ER02787)

Other examples from Nordstrom's data show that employees working lengthy stretches of consecutive days is not an anomalous event. For example, Nordstrom Employee No. 4261822 is a Materials Handler. Between the limited time-frame of June 12, 2009 and April 20, 2010, alone,

Employee No. 4261822 worked more than six consecutive days as follows:

Nordstrom Employee ID No.	Start Date of Occasion	End Date of Occasion	Number of Days Consecutively Worked
4261822	6/12/2009	7/3/2009	22
4261822	7/5/2009	7/17/2009	13
4261822	8/12/2009	8/20/2009	9
4261822	8/30/2009	9/29/2009	31
4261822	10/11/2009	10/30/2009	20
4261822	11/1/2009	11/25/2009	25
4261822	11/29/2009	12/24/2009	26
4261822	1/3/2010	1/17/2010	15
4261822	1/26/2010	2/14/2010	20
4261822	2/16/2010	2/24/2010	9
4261822	2/26/2010	3/23/2010	26
4261822	4/5/2010	4/20/2010	16

(ER02794-ER02821)

2. **Even If It Is Determined That The *Brinker* Standard Applies To The Day Of Rest Statutes And The Day Of Rest Can Be Waived, An Employer Violates The Day Of Rest Statutes By Not Having A Policy Or Standard Practice Of Making One Day Of Rest In Every Seven Available To Employees**

a. **Even If The *Brinker* Standard Is Applicable To The Day Of Rest Statutes, An Employer Must Meet The Formalities Of The *Brinker* Standard To Comply With The Law**

Brinker found: "[c]laims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." (*Brinker, supra*, 53 Cal.4th at p. 1033.) *Brinker* specifically considered whether the employer's policy was lawful, not whether the individual plaintiff had her meal break made available to her. "*Brinker* leads us now to conclude [the employer] would be liable upon a determination that [the employer's] uniform on-duty meal break policy was unlawful." (*Faulkinbury v. Boyd & Associates* (2013) 216 Cal.App. 220 [156 Cal. Rptr. 632.])

Accordingly, under *Brinker*, an employer must be able to show that it had a standardized universal policy of making one day of rest in seven

available to its employees, as required by sections 551 and 552. Nordstrom can make no such showing. (ER01114 lines 7-9) In fact, Nordstrom admits that it had no uniform policy regarding the application of sections 551 and 552 at all. (ER01047 line 6-16) (ER01048 line 4-11) (ER010914-ER01093 line 1) (ER01095 line 1-2) (ER01099 line 18) (ER01100 line 9)(ER01113 line 25-ER01115 line 3) (ER02230, lines 14-20). Under *Brinker*, the Court need not dig around in the individual circumstances of whether one day of rest in seven was made available to each individual employee on each of the approximately 26,000 times the employees worked more than six consecutive days between December 22, 2008, to November 19, 2011. The admitted lack of a compliant day of rest policy should be dispositive.

Nordstrom asserted that it has an "expectation" that employees are only scheduled for five days each Sunday through Saturday workweek. (ER001046 line 21-22) (ER01057 line 7-12). Nordstrom's representatives refer to this "expectation" as a "general policy." (ER01045 lines 17-21). This "general policy" is likewise non-compliant with sections 551 and 552. Nordstrom claims it makes available two rest days in each employer defined workweek. The law requires one day of rest in each seven consecutive days.

Nordstrom put on testimony at trial that managers were only regularly scheduling employees to work five days in a workweek, with

Nordstrom's definition of a "workweek" running from Sunday through Saturday. (ER01046 line 21-22, ER01047 line 9-13.) At trial, Nordstrom's Senior HR Compliance Strategy and Project Manager, Camlynn Blumenthal, testified:

> Q: Is the company's expectation about having employees be scheduled for just five days in a workweek in a formal written policy of some kind?
>
> A: We do not have any formal written policy regarding this. It's something we don't believe necessitates a formal written policy. Our managers are regularly scheduling five days in a workweek with two days of rest and we are reviewing and monitoring to that expectation.

(ER01047 lines 6-13)

Under sections 551 and 552, an employer must make days of rest available based on consecutive days worked. An employee is entitled to one day of rest in seven consecutive days, regardless of how those days fall in a workweek. The difference between a day of rest in a workweek and a day of rest in seven consecutive days is not merely academic. Nordstrom's expectation of scheduling employees to work five days a workweek allows for an employee to work ten consecutive days across two Nordstrom defined workweeks. In fact, as shown, Nordstrom employees are regularly scheduled for lengthy work periods well in excess of six days in violation of even Nordstrom's unwritten non-compliant "policy."

The district court agreed, finding "The plain and clear purpose of Sections 551 and 552 is to prevent an employer from requiring its employee to work more than six consecutive days. Nothing in the day of rest statutes indicated that the California Legislature intended to limit the period during which the days must be consecutively worked." (ER00684 lines 20-23)

Throughout the underlying litigation, Nordstrom asserted that it only needed to make one day of rest available per Nordstrom's defined work week (Sunday through Saturday), not one day of rest in every seven consecutive days. Accordingly, Nordstrom's "expectation" that employees would only be scheduled to work five days in a Nordstrom-defined workweek provides for an employee to be scheduled to work ten consecutive days, in violation of the day of rest statutes.

Under *Brinker*, liability is triggered by an unlawful policy that fails to provide or make meal breaks available. An employer is legally obligated to make one day of rest in seven available to all its employees and the unwritten "policy" that Nordstrom developed did not provide for one day of rest in seven. Pursuant to *Brinker*, liability under the day of rest statutes should follow.

Testimony at trial showed that Nordstrom employees did have to work more than six consecutive days. (ER01059 line 23-ER01060 line 21) (ER01089 lines 1-20). At trial, Blumenthal, testified:

> [There] would be some circumstances where we may need to request an employee to potentially work seven days in a workweek. Examples I can think of would be on our loss prevention team. For example, it's a smaller team and you have got a couple people that are out sick and another person calls in unexpectedly, that's a position that requires specialized training for surveillance and other things so we couldn't just call anyone else to cover for their shift. Another example would be maintenance. So you have an elevator that breaks down, it's not like anyone else can step in. Cosmetics area, not anyone can do a makeup application. So there may be times when we may need to request an employee to work on a seventh day, but it really should not happen often and doesn't happen often.

(ER01060 lines 8-21)

This trial testimony echoes Blumenthal's deposition testimony in which she testified that Nordstrom made the determination as to when an employee would work more than six consecutive days. (ER02228, ER02230, p. 25: 5-11)

An employer's absence of a formal, standardized policy concerning one day of rest in seven makes the employer liable for each time an employee works more than six consecutive days. (*Faulkinbury,* 216 Cal. App. 4th 220 [156 Cal. Rptr. at 643].) To the extent that *Brinker* is considered to be applicable to an interpretation of the day of rest statutes, Nordstrom's lack of an adequate day of rest policy fails the *Brinker* standard.

b. Employers Must Inform Employees Of Their Right To A Day Of Rest

An employer cannot withhold information as to the existence of the right to one day's rest in seven from its employees. In this context, Nordstrom's day of rest "expectation" created a "stealth" right - the employer knows that an employee has a right to one day of rest in seven, but declines to explain or generally disseminate that information to its employees so the employees can appreciate the nature and implication of that right.

After Mendoza wrote to the LDWA to initiate this litigation, Nordstrom wrote to the LDWA, acknowledging that Nordstrom was "well aware of California's one day's rest in seven requirements" and asking for guidance on the implementation of the day of rest statutes. (ER03763-ER03782) Nordstrom itself was unclear about the precise application of the day of rest statutes. Nonetheless, Nordstrom charges its employees with knowledge of the day of rest statutes and expects the employees to have such a sophisticated understanding of these statutes that the employee knows when the day of rest is triggered, how the day of rest is applied and how the day of rest can, purportedly, be waived.

Nordstrom's withholding information about the existence and the parameters of the statutory right to one day of rest in seven is in stark contrast to Nordstrom's conduct in apprising their employees about their

right to waive a meal period if the shift being worked is six hours or less. For example, before Mendoza waived a meal period for a short shift, he received and reviewed a written waiver form to be signed by both the employee and the employee's manager. Furthermore, the form states: "Nordstrom strongly encourages and supports employees taking their meal period." The meal break waiver then explains the nature of the right being waived and the terms of the waiver. (ER03737-ER03762) If Nordstrom goes to such lengths to educate its employees about the meal break waiver and secure the employees' specific, written consent to such waiver, it is telling that Nordstrom has not taken any steps at all to inform employees about their statutory right to one day of rest in seven.

c. An Employee Waiving a Right Must Only Be Permitted to Do So if the Waiver Is Knowing and Voluntary

To constitute a waiver, it is essential that there be an existing right, benefit or advantage, a knowledge -actual or constructive- of its existence, and an actual intention to relinquish it or conduct so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that it has been relinquished. (*Outboard Marine Corp. v. Superior Court In and For Sacramento County* (1975) 52 Cal.App.3d 30, 41.) It has long been held that waiver is the intentional relinquishment of a known right after knowledge of the facts. (*Bettelheim v. Hagstrom Food Stores, Inc.* (1962)

113 Cal.App.2d 873.)

It is well established that a defendant bears the burden of proving that the affirmative defense of waiver applies. (*See, e.g., Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31, 33 (as cited by the concurring opinion in *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1053.) The burden, moreover, is to prove waiver "by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.'" (*Church v. Public Utilities Com.* (1958) 51 Cal.2d 399, 401 [333 P.2d 321, 323]; *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107-08 [410 P.2d 369, 371].)

It is also well established that an employee cannot knowingly waive what he never knew he had. (*Record v. Indemnity Ins. Co. of North America* (1951) 103 Cal.App.2d 434 (the primary essentials of a waiver are knowledge and intent).)

In the context of the matter of at bar, Nordstrom has conceded that (1) an employee must know of his entitlement to a day of rest; and (2) an employee has a "right" to a day of rest. In considering whether employees waived their day of rest, Nordstrom states: "Rather, what matters is employees' understanding of their right to take days off." (ER00162-ER00262 at p. 7:13) There is no evidence in the record that Mendoza, or any other employee, was aware of the right to one day of rest in seven when that right was purportedly waived.

As set forth above, Nordstrom has no formalized company policy regarding employee rights pursuant to California Labor Code sections 551 and 552. Nor, is there is any evidence in the record that the right to one day of rest in seven was ever discussed in an employee handbook, posted in an informational bulletin or provided in an employee handout.

Nordstrom argues that the culture of Nordstrom is to provide two days of rest per Nordstrom workweek. This fact, even if true, cannot support a knowing waiver, as sections 551 and 552 require one day of rest in seven. A practice of misapplying the statutes cannot support a conclusion that accurate information regarding the right to one day of rest in seven was given to all employees.

Nor did Nordstrom show by any evidence that employees voluntarily waived the right to one day of rest in seven. Nordstrom encouraged and pressured its employees to work additional shifts, often leading to an employee working a seventh consecutive day. Mendoza agreed to work additional shifts in order to be a more promising candidate for promotion. (ER01311 lines 16-19,4-9) (ER01287 lines 10-19)

The performance reports that Nordstrom uses to rate employee performance include a category called "Work scheduled shifts." (ER00893-ER00915) Mendoza received his first performance report from his manager, Dare, on March 6, 2008, giving Mendoza a "meets expectation" rating regarding his performance working his scheduled shifts. (ER01336

line 3-10) (ER00893-ER00915) On February 12, 2009, three days after Mendoza worked 11 consecutive days, Mendoza received a second, more positive performance report from Dare. The February 12, 2009, performance report gave Mendoza an "exceeds expectation" rating regarding his performance working extra shifts. (ER01339) (ER00893-ER00915 pp. 7-11) At trial, Dare explained Mendoza "exceeded expectations" in the category of working extra shifts:

> Q: Turning back to the first page of the performance review under "team," again paragraph 9 it looks like with respect to working scheduled shifts you rated Mr. Mendoza as "exceeds expectations." Do you see that?
> A: Yes, I do.
> Q: Can you explain to me what that represents?
> A: Simply exceeds expectations. My expectation is five days a week, and when people are sick, people needed a day off, people from another store needed coverage, Chris would pick up those shifts because he wanted to pick up those shifts. And so my expectation is to work five days that you are scheduled that I schedule, and anything extra is an exceeds the expectation.

(ER01478 line 15-ER01479 line 2)

Dare also explained in greater detail that Mendoza would not have received such an exceptionally high rating on his performance report had Mendoza simply worked his scheduled shifts and not worked the extra shifts:

> Q: If you as his manager are grading him on working extra shifts as was developed in your direct testimony

as we saw on his performance evaluation, you recall he got an "exceeds expectations" because he worked extra shifts; correct?

A: Yeah.

Q: If he had said no to you and hadn't worked extra shifts, then he wouldn't get that rating; correct?

A: No. He would just meet expectation, not exceed it.

Q: That's right. He would get a lesser rating if he didn't work the shifts that you asked him to work; correct?

A: Yeah, but we rate on a bunch of different things.

Q: I'm talking about that particular rating.

A: Okay. Yes, he would have met his expectation.

(ER01026 lines 11-18)

After receiving his improved performance report, in which he was found to have exceeded expectations, Mendoza was indeed promoted to a higher paying job in April 2009. (ER01287 lines 21-25) (ER01288 lines 1-9, 14-21) Mendoza testified:

Q: And did you believe that your promotion had anything to do with your willingness to work extra shifts?

A: That was a big part of my being promoted. I scored over and beyond on their -- it's a rating of me that actually really helped me get promoted.

(ER01286 line 23-ER01287 line 4)

In the climate Nordstrom has created, employees must work additional shifts in order to improve their performance reviews and improve their chances of being promoted. If advancement through a company is dependent on working longer, harder and more consecutive days, employees will do so. The district court initially understood the insidious

nature of allowing employees to "freely volunteer" to work additional consecutive days, stating "And I know that there are many people that will work themselves to death, and although the work doesn't require them to work more than six days, they want to provide for their family, they want to give opportunities to their children, and so they will work themselves to death. And, you know, this is the United States of America. It's not China. It's not Vietnam." (ER01702-ER01703) To characterize an employee's willingness to work additional shifts to advance in the company as an employee "volunteering" mischaracterizes the employment circumstances.

Brinker recognized the inherent inequities of power between the employer and the employee who is striving to please the employer and remain gainfully employed. *Brinker* holds that employers must take the active step of "afford[ing] an off duty meal period," which means "actually relieving an employee of all duty" and "relinquish[ing] control over their activities," without "pressuring employees to perform their duties in ways that omit breaks," and without "exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks." *Brinker* at 1040. Mendoza's testimony demonstrated that Nordstrom has pressured its employees and has created incentives to forego the statutorily guaranteed day of rest and has encouraged employees to work seven or more consecutive days.

Equally compelling is the irrefutable evidence of the time punch data showing that Mendoza and thousands of other Nordstrom employees repeatedly worked seven or more consecutive days. The sheer volume of violations is compelling evidence, establishing a culture of widespread coercion preventing any employee from asserting his day of rest.

d. An Employer Which Controls And Schedules Its Employees In Violation Of The Day Of Rest Statutes Cannot Rely On A Defense Of Waiver

In addition, the evidence presented by Nordstrom negated the necessary element that any waiver was "intentional" on the part of the employee. Rather the evidence established that the decision to schedule employees to work more than six consecutive days always remained with Nordstrom.

In an effort to rebut Mendoza's evidence that employees were encouraged and pressured to pick up additional shifts, Ms. Blumenthal testified, "So the only expectation that we would have would be that they work their scheduled shifts. . ." (ER1049 lines 1-3) Nordstrom, not the employee, was in control of scheduling, including scheduling employees to work more than six consecutive days.

Examples of this conduct, in the limited scheduling information produced by Nordstrom, are rife. The following examples show that Nordstrom scheduled employees to work more than six consecutive days:

Employee ID Number	Dates Scheduled By Nordstrom For Employee To Work	Dates Actually Worked By Employee	Total Consecutive Days Employee Scheduled To Work That Employee Worked	ER Citation
Employee No. 7729890 (Children's Apparel)	September 10-16, 2010	September 10-16, 2010	7	ER00517-ER00518
Employee No. 7729890 (Children's Apparel)	September 28-October 4, 2010	September 28-October 4, 2010	7	ER00521-ER00522
Employee No. 7729890 (Children's Apparel)	November 9-16, 2010	November 9-16, 2010	8	ER00525-ER00526
Employee No. 8461998 (Café Kitchen)	June 9-15, 2010	June 9-15, 2010	8	ER00551
Employee No. 2146934 (Tailor)	October 7-14, 2009	October 7-14, 2009	8	ER00576

Employee ID Number	Dates Scheduled By Nordstrom For Employee To Work	Dates Actually Worked By Employee	Total Consecutive Days Employee Scheduled To Work That Employee Worked	ER Citation
Employee No. 2146934 (Tailor)	March 3-9, 2011	March 3-9, 2011	7	ER00584
Employee No. 2146934 (Tailor)	March 17-23, 2011	March 17-23, 2011	7	ER00586
Employee No. 703595 (Alterations)	September 16-23, 2010	September 16-23, 2010	8	ER00591

Complete scheduling data would show that this conduct is the norm at Nordstrom. Employees do not control their own schedules.

VII.

CONCLUSION

The Court is asked to make the following findings:

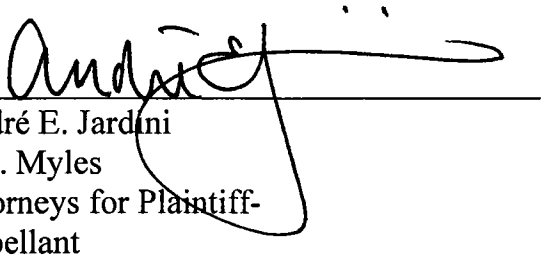
1. The day of rest statutes apply to days of work exceeding six days, and are not confined to any "work week."

2. The exception to the day of rest statutes for part-time employees under section 556 requires an employee work less than 30 hours a week or less than six hours in each workday.

3. The day of rest statutes may not be waived by employees. An employer must have a compliant policy as to the day of rest protections for employees to avoid violation of the day of rest statutes.

Dated: July 1, 2015

KNAPP, PETERSEN & CLARKE

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(d), the attached Plaintiff-Appellant-Petitioner's Opening Brief contains 13,498 words.

Dated: July 1, 2015

KNAPP, PETERSEN & CLARKE

By: _____

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PROOF OF SERVICE
MENDOZA V. NORDSTROM
California Supreme Court Case No.: S224611
USDC Case No.: SACV 10-00109 CJC (MLGx)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action. My business address is 550 North Brand Boulevard, Suite 1500, Glendale, California 91203-1922. On July 2, 2015, I caused the foregoing document(s) described as PLAINTIFF-APPELLANT-PETITIONER'S OPENING BRIEF to be served on the interested parties in this action as follows:

By placing a true copy thereof enclosed in a sealed envelope(s) addressed as stated on the attached mailing list.

[X] **BY MAIL:** I sealed and placed such envelope for collection and mailing to be deposited in the mail on the same day in the ordinary course of business at Glendale, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 2, 2015, at Glendale, California.

Mindy Menahen
(Type or print name)

Mindy Menahen
(Signature)

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