

MAR 20 2020

Sherri R. Carter, Executive Officer/Clerk  
By Michael Tran, Deputy  
Michael Tran

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES

JILL LAFACE, individually, and as a  
representative of all others similarly situated,

Plaintiff,

v.

RALPHS GROCERY COMPANY, THE  
KROGER CO., and DOES 1 through 10,  
inclusive,

Defendants.

Case No. BC632679

(Assigned to the Hon. Patricia D. Nieto  
for All Purposes)

**STATEMENT OF DECISION**

Date Action Filed: September 1, 2016  
Trial Date: November 12, 2019

**TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

A court trial was held in this action in Department 24, commencing November 12 and concluding December 3, 2019. Post-trial briefs were submitted on December 13, and closing arguments were presented on December 17, 2019 and January 6, 2020. The Court directed Defendant to prepare a Proposed Statement of Decision which was filed on January 27, 2020. Plaintiff's Objections to Proposed Statement of Decision was filed on February 10, 2020. The Court has reviewed and considered the Plaintiff's Objections to the Proposed Statement of Decision and OVERRULES Plaintiff's objections.

After reviewing and considering all of the evidence presented during the course of trial, including the admitted exhibits and the testimony of all witnesses and experts presented by both parties; and after reviewing the parties' trial briefs and post-trial briefs, and closing arguments; and reviewing the factors enunciated in *Kilby v. CVS Pharmacy, Inc.* (2016) 63 Cal.4th 1, the Court now issues the Statement of Decision and finds in favor of defendant Ralphs Grocery Company and against plaintiff Jill LaFace on all claims presented.

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1 **I. CASE BACKGROUND**

2 On September 1, 2016, plaintiff Jill LaFace (“Plaintiff” or “LaFace”) filed a Complaint  
3 against defendant Ralphs Grocery Company (“Defendant” or “Ralphs”) seeking civil penalties  
4 under the Labor Code Private Attorneys General Act of 2004 (“PAGA”).<sup>1</sup> On October 11, 2016,  
5 Plaintiff filed the operative First Amended Complaint.

6 Plaintiff, a Ralphs cashier, contends that Ralphs violated the seating requirements in  
7 section 14(A) and 14(B) of Industrial Welfare Commission (“IWC”) Wage Order No. 7. (Cal.  
8 Code Regs., tit. 8, § 11070, subd. 14.)<sup>2</sup>

9 Ralphs is a major supermarket chain headquartered in Compton, California. Ralphs  
10 presently owns and operates approximately 190 retail grocery stores throughout Southern  
11 California, one of which is Store 727 in Valencia, where plaintiff Jill LaFace works as a cashier.  
12 Plaintiff first started working for Ralphs in the service deli in 1987. She became a cashier in  
13 2012. As a member of the United Food and Commercial Workers Union, Plaintiff’s employment  
14 with Ralphs has at all relevant times been covered by the Collective Bargaining Agreement  
15 (CBA) negotiated between her union and Ralphs.

16 The operative First Amended Complaint alleges a single cause of action contending  
17 Ralphs violates section 14(A) of Wage Order 7 by failing to provide Plaintiff and other Ralphs  
18 cashiers in California with seats while they work in the checkstands of Ralphs grocery stores.  
19 (First Am. Compl. (FAC), filed Oct. 11, 2016, ¶¶ 19-21.) Although Plaintiff does not plead any  
20 facts that would give rise to a section 14(B) claim, she contended at trial that Ralphs also violates  
21 section 14(B) by not providing seats for cashiers to use during supposed “lulls” in operation.  
22 Plaintiff seeks unspecified civil penalties under the Labor Code Private Attorneys General Act of  
23 2004 (PAGA; Lab. Code, § 2698, et seq.) on behalf of Plaintiff and other allegedly “aggrieved  
24

25 \_\_\_\_\_  
26 <sup>1</sup> The Kroger Company, Ralphs’ parent company, was originally named as a defendant but  
was voluntarily dismissed by Plaintiff on December 2, 2016.

27 <sup>2</sup> Although there is no direct private right of action for alleged violations of section 14,  
Labor Code section 1198, which makes it unlawful to employ a person under conditions  
28 prohibited by an applicable Wage Order, can serve as a predicate for a PAGA claim. (See Lab.  
Code, § 2699.5; and see First Am. Compl., ¶ 14.)

1 employees.” (FAC, ¶¶ 14-16, 22.) Trial commenced on November 12, 2019, and the parties  
2 completed their presentation of evidence on December 3, 2019.

## 3 **II. LEGAL FRAMEWORK**

### 4 **A. The Labor Code Private Attorneys General Act of 2004 (PAGA).**

5 This case is a representative action under PAGA. PAGA authorizes an “aggrieved  
6 employee” to bring an action for civil penalties on behalf of the state for alleged Labor Code  
7 violations committed against the employee and other aggrieved employees, with seventy-five  
8 percent of any proceeds of the action going to the state. (*Iskanian v. CLS Transportation Los*  
9 *Angeles, LLC* (2014) 59 Cal.4th 348, 380; Lab. Code, § 2699, subs. (a), (i).)1 As a prerequisite  
10 to asserting a PAGA claim, the plaintiff must be an “aggrieved employee” who individually  
11 experienced a Labor Code violation. (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 558  
12 [“PAGA imposes a standing requirement; to bring an action, one must have suffered harm”]; and  
13 see Lab. Code, § 2699, subs. (a), (c) [a PAGA action may be brought only “by an aggrieved  
14 employee,” defined as someone “employed by the alleged violator and against whom one or more  
15 of the alleged violations was committed”].)

### 16 **B. Under section 14(A), it is the plaintiff’s burden to prove that the nature of the** 17 **work reasonably permits the use of seats.**

18 Section 14 of IWC Wage Order No. 7 states in full:

- 19 (A) All working employees shall be provided with suitable seats  
20 when the nature of the work reasonably permits the use of  
21 seats.  
22 (B) (B) When employees are not engaged in the active duties of  
23 their employment and the nature of the work requires standing,  
24 an adequate number of suitable seats shall be placed in  
25 reasonable proximity to the work area and employees shall be  
26 permitted to use such seats when it does not interfere with the  
27 performance of their duties.

28 In *Kilby, supra*, 63 Cal.4th at page 19, the Supreme Court set forth the framework for  
claims under section 14. *Kilby* noted that “the IWC modified the seating requirement in 1976 to  
expressly incorporate a reasonableness standard,” which “made explicit that, although the seating  
requirement was meant to protect workers, its implementation was not absolute.” (*Id.* at p. 19.)

1 *Kilby* explains that the IWC’s reasonableness standard, with “its attendant flexibility, was  
2 intended to balance an employee’s need for a seat with an employer’s considerations of  
3 practicability and feasibility.” (*Id.* at p. 18.) *Kilby* advises that “reasonableness remains the  
4 ultimate touchstone.” (*Id.* at p. 22.) *Kilby* makes clear that “[w]hether an employee is entitled to  
5 a seat under section 14(A) depends on the totality of the circumstances.” (*Kilby, supra*, 63  
6 Cal.4th at pp. 19-20.) To determine if the nature of the work “reasonably permits” the use of  
7 seats, the Court must undertake “a qualitative assessment of all relevant factors”.

8 *Kilby* gives guidance as to what factors to consider when determining whether “the nature  
9 of the work reasonably permits the use of seats” as set forth in section 14(A). (*Kilby, supra*, 63  
10 Cal.4th at pp. 8, 18-19.) These factors include:

- 11 • **The Nature of the Work:** Courts must consider the “nature of the work” and the  
12 “total tasks and duties by location,” including the frequency and duration each task is  
13 performed. (*Ibid.*) Courts “should look to the actual tasks performed, or reasonably  
14 expected to be performed, not to abstract characterizations, job titles, or descriptions  
15 that may or may not reflect the actual work performed.” (*Id.* at p. 18.)
- 16 • **Considerations of Feasibility:** “[C]onsiderations of feasibility” include “an  
17 assessment of whether providing a seat would unduly interfere with the work, or  
18 whether seated work would impact the quality and effectiveness of overall job  
19 performance.” (*Id.* at p. 20.) Courts should also “consider the relationship between  
20 the standing and sitting tasks done [at a particular location], the frequency and  
21 duration of those tasks with respect to each other, and whether sitting, or the frequency  
22 of transition between sitting and standing, would unreasonably interfere with other  
23 standing tasks or the quality and effectiveness of overall job performance.” (*Id.* at  
24 p. 18.) The feasibility inquiry is not a “rigid quantitative analysis based merely upon  
25 the counting of tasks or amount of time spent performing them,” but instead “involves  
26 a qualitative assessment of all relevant factors.” (*Id.* at p. 20.)
- 27 • **The Employer’s Business Judgment:** Other relevant considerations include the  
28 employer’s evaluation of the quality and effectiveness of overall job performance, its

1 reasonable expectations regarding customer service, and its role in setting job duties.  
2 (*Id.* at pp. 21-22.)

- 3 • **The Physical Layout of the Workspace:** The physical layout of the workspace  
4 should also be considered to the extent it informs the expectations of an employee's  
5 job duties. (*Id.* at p. 22.)

6 At the heart of *Kilby* is the Supreme Court's instruction that courts must apply "[t]he  
7 [IWC's] reasonableness standard," which, with "its attendant flexibility, was intended to balance  
8 an employee's need for a seat with an employer's considerations of practicability and feasibility."  
9 (*Kilby, supra*, 63 Cal.4th at p. 18.) The *Kilby* court noted that "the IWC modified the seating  
10 requirement in 1976 to expressly incorporate a reasonableness standard," which "made explicit  
11 that, although the seating requirement was meant to protect workers, its implementation was not  
12 absolute," and must necessarily take into account the feasibility and practicability of providing a  
13 seat in the particular context at issue. (*Id.* at p. 19.) "[R]easonableness remains the ultimate  
14 touchstone," the Supreme Court emphasized. (*Id.* at p. 22.)

15 *Kilby* teaches that "[w]hether an employee is entitled to a seat under section 14(A)  
16 depends on the totality of the circumstances." (*Kilby, supra*, 63 Cal.4th at pp. 19-20.) The task-  
17 by-task analysis promoted by Plaintiff at trial is contrary to *Kilby*.

18 Certainly, it is Plaintiff's burden to prove that the nature of the work of a Ralphs cashier  
19 reasonably permits the use of seats. If a plaintiff is able to meet her burden to prove that the  
20 nature of the work reasonably permits the use of seats, *Kilby* instructs that "[a]n employer seeking  
21 to be excused from the requirement [then] bears the burden of showing compliance is infeasible  
22 because no suitable seating exists." (*Kilby, supra*, 63 Cal.4th at p. 24.)

23 *Kilby* explains that section 14(B) applies if there are "'lulls in operation' when an  
24 employee, while still on the job, is not then actively engaged in *any* duties." (*Kilby, supra*, 63  
25 Cal.4th. at p. 19, citation omitted.) Section 14(B) does not require seats to be provided if doing so  
26 would interfere with employees' performance of their duties. (Cal. Code Regs., tit. 8, § 11070,  
27 subd. 14(B).)

1 **III. FINDINGS REGARDING SECTION 14(A)**

2 The Court finds that Plaintiff failed to meet her burden at trial to show that the nature of  
3 the work of Ralphs cashiers reasonably permits the use of seats. In reaching this decision, the  
4 Court considered the items received into evidence and the testimony of all witnesses presented by  
5 both Plaintiff and Ralphs, including the experts and employee witnesses who testified on behalf  
6 of both sides. Based on the totality of the circumstances, and considering all of the relevant  
7 factors, including the nature of the work of Ralphs cashiers, considerations of feasibility, Ralphs'  
8 business judgment, and the physical layout of the front-end checkstands at Ralphs grocery stores,  
9 the Court finds that the dynamic nature of Ralphs cashiers' work does not reasonably permit the  
10 use of seats.

11 **A. The Nature of the Work of Ralphs Cashiers**

12 Based on the evidence presented at trial, the Court finds that the nature of the work of  
13 Ralphs cashiers requires continuous dynamic movement that should not or cannot be performed  
14 while seated. The overwhelming evidence showed that Ralphs cashiers continuously perform  
15 work that should or even must be performed while standing. Ralphs cashiers are responsible for  
16 checking out customer orders while, first and foremost, providing excellent customer service.<sup>3</sup>  
17 When cashiers check out customer orders, they are continuously moving and multi-tasking  
18 throughout the transaction.

19 Several of the witnesses described the duties of Ralphs cashiers. Plaintiff and the  
20 witnesses she presented did not substantially disagree with Ralphs' witnesses about the job duties  
21 Ralphs cashiers perform and the amount of movement that is required to perform the job.  
22 Substantial evidence shows that throughout the time they are checking out customer orders,  
23 Ralphs cashiers engage in continuous dynamic movement. They are scanning, reaching, pulling,  
24 pushing, bagging, handling items, accepting payment, moving in and around the checkstands, and  
25 exiting the checkstands, among other things. They sometimes use the telephone to make calls.

26  
27 <sup>3</sup> (Trial Tr. 11/19/2019 [Wackeen], 166:23-167:9, 168:8-17; Trial Tr. 11/14/2019 [Vallejo],  
28 107:16-19; Trial Tr. 11/19/2019 [Pickett], 90:19-92:5, 112:15-113:2; Trial Tr. 11/14/2019  
[LaFace], 170:2-4; Trial Tr. 11/15/2019 [Alvarez], 134:21-22.)

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1 They sometimes place items into customers' shopping carts. These activities, plus many others,  
2 require many types of physical movement that would be difficult or impossible or unsafe to  
3 perform seated.

4 Plaintiff claimed the nature of the work performed by Ralphs cashiers in the checkstand is  
5 static, not dynamic. The Court disagrees. Even when standing in front of the scanner, Ralphs  
6 cashiers are not standing statically; they continue to engage in constant dynamic movement,  
7 including extended reaches, overhead reaches, pulling, pushing, twisting, lifting, and grabbing.  
8 The evidence, including the video evidence, enhanced by the overwhelming testimony of Ralphs'  
9 ergonomics expert, Dr. Jeffrey Fernandez, supports the Court's conclusion.

10 **a. Ralphs cashiers continuously engage in extended reaches while checking out**  
11 **customer orders.** For example, cashiers reach to retrieve and sort items coming down the  
12 incoming conveyer belt;<sup>4</sup> to sort items on the back end of the checkstand, on the outgoing belt and  
13 counter;<sup>5</sup> to enter produce codes on the keyboard;<sup>6</sup> to take items from customers, such as loyalty  
14 cards or payments, and to grab receipts and hand them to customers.<sup>7</sup> They reach over the  
15 counter to use the hand scanner to scan items.<sup>8</sup> The evidence shows cashiers perform extended  
16 reaches continuously throughout transactions, even at times when they wait for the incoming  
17 conveyer belt to bring grocery items to the scanner's edge. (See, e.g., Trial Tr. 12/3/2019  
18 [Fernandez], 48:16-49:7, 109:10-23, 110:5-13, 111:16-112:6, Trial Exs. 1587.2, 1587.7, 1587.8.)

19 **b. Ralphs cashiers constantly move in and around their checkstands.** While they  
20 perform their work, Ralphs cashiers are on their feet, but they are not standing still. Rather,

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22 <sup>4</sup> (Trial Tr. 11/19/2019 [Pickett], 109:20-25, 124:17-22; Trial Tr. 12/3/2019 [Fernandez],  
98:20-99:1; Trial Exs. 1406.2, 1587.2, 1587.7, 1587.8, 1587.10, 1587.11, 1587.12, 1587.14,  
1587.15, 1587.21, 1587.23.)

23 <sup>5</sup> (Trial Tr. 11/19/2019 [Pickett], 109:26-110:4, 124:23-125:19; Trial Tr. 12/3/2019  
24 [Fernandez], 98:25-99:1; Trial Ex. 1218 ["Set fragile items aside."], 1387.3, 1587.6, 1587.13,  
1587.26.)

25 <sup>6</sup> (Trial Tr. 11/14/2019 [LaFace], 164:16-19; Trial Tr. 11/18/2019 [Yannoulatos], 145:19-21;  
Trial Exs. 1389.7, 1587.19, 1587.20.)

26 <sup>7</sup> (Trial Tr. 11/14/2019 [LaFace], 154:17-24; Trial Tr. 11/15/2019 [Alvarez], 133:15-134:9;  
Trial Tr. 11/15/2019 [Simmons], 168:23-28; Trial Tr. 11/18/2019 [Yannoulatos], 144:27-145:9;  
Trial Exs. 1218, 1387.4, 1389.9, 1409.1, 1587.4, 1587.5, 1587.9, 1587.16, 1587.17, 1587.18,  
27 1587.25.)

28 <sup>8</sup> (Trial Tr. 11/19/2019 [Pickett], 105:15-106:3; Trial Tr. 11/14/2019 [LaFace], 164:12-15;  
Trial Exs. 1410.2, 1587.37.)

1 “[t]hey are in constant motion moving around their cashier bay,” as Division Asset Protection  
2 Manager Brian Gray testified.<sup>9</sup> Cashiers move laterally and pivot and turn within the cashier  
3 well, including when they scan and sort items on the incoming and outgoing conveyer belts,<sup>10</sup> use  
4 the intercom telephone,<sup>11</sup> remove anti-theft caps from liquor bottles,<sup>12</sup> and bag groceries.<sup>13</sup> When  
5 the cash till pops open, or when opening the coupon drawer, cashiers have to step back to make  
6 room in the cashier well.<sup>14</sup> Cashiers turn their bodies to see and pull items as they come down the  
7 conveyer belt.<sup>15</sup> Cashiers also look over the checkstand counter to check the bottom of  
8 customers’ baskets for merchandise.<sup>16</sup> Even when scanning items, cashiers are never standing  
9 statically.<sup>17</sup> District Manager Michael Walker described cashier movement as “kind of like a  
10 dance going kind of back and forth. So you would move to your right to retrieve items, and then  
11 you are moving to your left usually to sort items.” (Trial Tr. 11/26/2019 [Walker], 82:13-25.)

12 **c. Cashiers handle and lift heavy, awkward, and fragile items.** Cashiers handle and lift  
13 items at times, including heavier items such as gallons of milk or laundry detergent, cases of  
14 water or soda, kitty litter, watermelons, whole turkeys and hams, all depending on what the  
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16  
17

18 <sup>9</sup> (Trial Tr. 11/15/2019 [Gray], 36:15-20, 57:3-58:14; and see Trial Tr. 11/15/2019  
19 [Simmons], 170:15-24; Trial Tr. 11/21/2019 [Fernandez], 141:9-12; Trial Tr. 11/22/2019  
[Fernandez], 60:20-61:1.)

20 <sup>10</sup> (Trial Tr. 11/19/2019 [Pickett], 109:15-110:23; Trial Tr. 11/26/2019 [Walker], 81:27-82:12  
[cashiers are “required to move laterally back and forth, right to left within their work space and  
21 checkstand”], 85:5-22; Trial Tr. 11/15/2019 [Alvarez], 135:3-22; Trial Tr. 11/18/2019  
[Yannoulatos], 141:16-142:12; Trial Exs. 1389.1, 1411.2, 1587.22.)

22 <sup>11</sup> (Trial Tr. 11/14/2019 [LaFace], 166:5-11; Trial Tr. 11/18/2019 [Yannoulatos], 145:12-18;  
Trial Exs. 1387.1, 1406.3.)

23 <sup>12</sup> (Trial Tr. 11/14/2019 [LaFace], 164:20-24; Trial Tr. 11/19/2019 [Pickett], 101:21-102:6;  
Trial Ex. 1407.2.)

24 <sup>13</sup> (Trial Tr. 11/14/2019 [LaFace], 166:28-167:8; Trial Tr. 11/15/2019 [Simmons], 168:4-22;  
Trial Exs. 1389.8, 1389.9, 1587.32, 1587.37.)

25 <sup>14</sup> (Trial Tr. 11/15/2019 [Alvarez], 144:25-145:6; Trial Tr. 11/18/2019 [Yannoulatos], 142:16-  
143:11; Trial Tr. 11/19/2019 [Wackeen], 189:4-7; Trial Exs. 1394.1, 1407.1, 1409.2, 1410.3.)

26 <sup>15</sup> (Trial Tr. 11/14/2019 [LaFace], 164:12-15; Trial Ex. 1587.22.)

27 <sup>16</sup> (Trial Tr. 11/14/2019 [LaFace], 165:2-9; Trial Tr. 11/15/2019 [Gray], 58:17-59:2; Trial Tr.  
11/18/2019 [Simmons], 50:12-27; Trial Tr. 11/19/2019 [Pickett], 126:5-20.)

28 <sup>17</sup> (Trial Tr. 11/19/2019 [Pickett], 110:5-23, 124:17-125:19; Trial Tr. 11/15/2019 [Gray],  
36:8-20; Trial Tr. 11/15/2019 [Simmons], 169:4-10, 169:20-170:6; Trial Tr. 11/21/2019  
[Fernandez], 141:9-12.)



1 customer is purchasing.<sup>18</sup> Cashiers also handle heavy composite bags of grocery items.<sup>19</sup>  
2 Cashiers handle and lift awkward items, such as large packages of toilet paper and paper towels,  
3 and fragile or delicate items, such as flower arrangements and iced cakes from the bakery.<sup>20</sup>  
4 Plaintiff, in her experience, admitted she is required to — and does — lift and carry items up to  
5 10 pounds “continuously.” (Trial Tr. 11/14/2019 [LaFace], 162:23-25, Trial Ex. 20.) She also  
6 admitted she is required to — and does — “frequently” lift and carry items up to 25 pounds.  
7 (Trial Tr. 11/14/2019 [LaFace], 163:12-16, Trial Ex. 20.)

8 **d. Cashiers bend, lean, twist, and turn when checking out customers’ grocery orders.**

9 Cashiers need to bend down and lean while they are working at their checkstands.<sup>21</sup> Plaintiff  
10 admitted that as a cashier, she is required to — and does — “frequently” bend, push, and pull, all  
11 as part of checking out customer orders. (Trial Tr. 11/14/2019 [LaFace], 164:2-5; Trial Ex. 20.)  
12 For example, when cashiers have to replace the cash register tape or the “Catalina” coupon tape,  
13 they need to bend and reach underneath the checkstand to retrieve the replacement tape.<sup>22</sup>  
14 Cashiers also bend to make money drops in the cache box or to grab cleaning supplies.<sup>23</sup>

15 **e. Cashiers bag groceries, even when they have a courtesy clerk available.** Cashiers’

16 job responsibilities include bagging groceries, including at times when there is a courtesy clerk  
17 available to assist.<sup>24</sup> Of course, courtesy clerks have many responsibilities and are not always  
18 available to help cashiers.<sup>25</sup> Cashiers need to bag items carefully.<sup>26</sup> When cashiers bag a

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20 <sup>18</sup> (Trial Tr. 11/19/2019 [Pickett], 104:10-105:14; Trial Tr. 11/14/2019 [LaFace], 161:25-28;  
21 Trial Tr. 11/15/2019 [Alvarez], 131:23-132:10; Trial Tr. 11/18/2019 [Yannoulatos], 143:12-  
144:8; Trial Tr. 11/15/2019 [Simmons], 170:15-24, 171:9-20; Trial Exs. 1406.2, 1411.1.)

22 <sup>19</sup> (Trial Tr. 11/14/2019 [LaFace], 163:12-16; Trial Tr. 11/22/2019 [Fernandez], 61:20-62:3;  
Trial Exs. 1387.5, 1406.1, 1587.33.)

23 <sup>20</sup> (Trial Tr. 11/15/2019 [Alvarez], 132:11-23; Trial Exs. 1389.3, 1389.4, 1587.32.)

24 <sup>21</sup> (Trial Tr. 11/26/2019 [Walker], 81:27-82:12 [cashiers need to squat down to drop money  
into the cache box]; Trial Tr. 11/14/2019 [LaFace], 163:22-164:8; Trial Tr. 11/15/2019  
[Simmons] 168:10-18.)

25 <sup>22</sup> (Trial Tr. 11/14/2019 [LaFace], 165:23-28; Trial Tr. 11/19/2019 [Pickett], 100:16-101:5;  
Trial Tr. 11/15/2019 [Gray] 57:3-58:3; Trial Tr. 11/18/2019 [Simmons], 89:16-90:16.)

26 <sup>23</sup> (Trial Tr. 11/15/2019 [Gray], 57:24-28; Trial Tr. 11/19/2019 [Wackeen], 189:8-10; Trial  
Tr. 11/26/2019 [Walker], 84:26-85:4.)

27 <sup>24</sup> (Trial Tr. 11/19/2019 [Pickett], 107:4-108:26; Trial Tr. 11/14/2019 [LaFace], 166:28-167:8;  
Trial Tr. 11/15/2019 [Simmons], 168:19-22; Trial Tr. 11/22/2019 [Fernandez], 112:9-14.)

28 <sup>25</sup> (Trial Tr. 11/19/2019 [Pickett], 136:20-137:19.)

<sup>26</sup> (Trial Tr. 11/15/2019 [Alvarez], 135:23-136:12.)

1 customer order, they will sometimes use the bagging area inside the cashier well, which requires  
2 them to turn and face the back of the checkstand.<sup>27</sup> Other times, such as for larger customer  
3 orders, cashiers will leave the cashier well and bag at the back of the checkstand.<sup>28</sup> Cashier John  
4 Yannoulatos testified he prefers to bag at the back of his checkstand.<sup>29</sup> Cashiers also exit the  
5 checkstand when they have to put groceries directly back into a customer's cart when the  
6 customer does not have a bag and does not want to buy one.<sup>30</sup>

7 **f. While they are working, cashiers leave the checkstand for a variety of reasons.**

8 Cashiers leave their checkstands during and between transactions for many reasons.<sup>31</sup> If a  
9 customer requests an item that is kept in a locked area, such as cigarettes or baby formula,  
10 cashiers need to exit the checkstand to retrieve the item if there is not a courtesy clerk to get it for  
11 them.<sup>32</sup> There are times cashiers need to exit the checkstand to scan an item a customer leaves in  
12 the cart.<sup>33</sup> And there are times when a cashier needs to help a customer unload a cart.<sup>34</sup> If a  
13 customer changes his mind about purchasing an item, a cashier will sometimes need to exit the  
14 checkstand to take the item to the "go-back baskets" near the front of the store.<sup>35</sup>

15 The amount of movement any given cashier engages in during the course of any given  
16 transaction will vary based on the cashier and, more significantly, on what customers do.

17 Customers are not predictable, customer needs are not predictable, and cashiers need to be

18 \_\_\_\_\_  
19 <sup>27</sup> (Trial Tr. 11/14/2019 [LaFace], 167:12-20; Trial Exs. 1587.37 [full transaction of video  
20 shown by Plaintiff where cashier turns to bag after providing receipt to customer to assist  
courtesy clerk], 1587.32 [video of cashier selected by Plaintiff turning inside well to bag along  
with courtesy clerk].)

21 <sup>28</sup> (Trial Tr. 11/14/2019 [LaFace], 167:21-24; Trial Tr. 11/15/2019 [Alvarez], 134:14-20.)

22 <sup>29</sup> (Trial Tr. 11/18/2019 [Yannoulatos], 146:24-28.)

23 <sup>30</sup> (Trial Tr. 11/14/2019 [LaFace], 167:25-168:3.)

24 <sup>31</sup> (Trial Tr. 11/19/2019 [Pickett], 106:4-107:3; Trial Tr. 11/15/2019 [Alvarez], 134:10-20;  
25 Trial Tr. 11/14/2019 [LaFace], 167:21-28 [leaving to bag at the back of the checkstand and to put  
26 groceries back in customer's cart]; Trial Tr. 11/15/2019 [Gray], 57:3-10; Trial Tr. 11/21/2019  
[Albrecht], 74:15-19; Trial Tr. 11/22/2019 [Fernandez], 62:17-26; Trial Exs. 1410.4, 1587.34)

27 <sup>32</sup> (Trial Tr. 11/14/2019 [LaFace], 164:25-165:1; Trial Tr. 11/19/2019 [Pickett], 106:4-16;  
28 Trial Ex. 1406.4.)

29 <sup>33</sup> (Trial Tr. 11/15/2019 [Simmons], 170:7-14; Trial Tr. 11/26/2019 [Walker], 81:27-82:12  
[cashiers might need to use the hand scanner and "go around the checkstand, walk around the  
checkstand and take care of a heavy item like, 40-pound dog food or a 24-pound turkey this time  
of year"]; Trial Ex. 1384.1.)

30 <sup>34</sup> (Trial Tr. 11/15/2019 [Gray], 54:14-16; Trial Tr. 11/15/2019 [Simmons], 168:23-169:3;  
Trial Tr. 11/19/2019 [Pickett], 106:7-107:3; Trial Tr. 11/21/2019 [Albrecht], 65:2-3.)

31 <sup>35</sup> (Trial Tr. 11/19/2019 [Pickett], 111:21-26.)

1 reactive in order to be able to respond to any situation presented. (Trial Tr. 11/19/2019 [Pickett],  
2 103:9-104:9.) As Store Manager Janet Pickett explained, cashiers need to be “first responders to  
3 the needs of our customers.” (*Id.*, 103:9-104:9, 126:21-127:10.)

4 **g. Cashiers are never idle and in between customer orders, cashiers have other duties**  
5 **that require them to move in and around the checkstands and the store.** The evidence also  
6 establishes that if there is a break in time between customers, cashiers are not supposed to be  
7 standing around idly. (Trial Tr. 11/21/2019 [Wackeen], 57:1-5.) In between ringing up customer  
8 orders, there are many activities Ralphs expects cashiers to perform at their checkstands and at  
9 other locations throughout the store. Ralphs cashiers are required to be active and busy at all  
10 times.

11 **h. Cashiers do not engage in static standing for their entire shifts without rest.**

12 As the evidence shows that cashiers do not engage in long periods of static standing.  
13 Rather, they are expected to be moving and are constantly moving throughout their shifts. (See  
14 Section V.A.1.a, *ante.*) And, cashiers are not on their feet for their entire shift without any  
15 opportunities to rest. (Trial Tr. 11/14/2019 [LaFace], 153:9-13, 153:28-154:5; Trial Tr.  
16 11/15/2019 [Gray], 68:3-15; Trial Tr. 11/26/2019 [Walker], 93:5-21.) During Plaintiff’s rest and  
17 lunch breaks, which she takes, she has the opportunity to sit down at seats located in or in front of  
18 the store. (Trial Tr. 11/14/2019 [LaFace], 153:28-154:2, 154:6-12.) Nobody at Ralphs has ever  
19 told Plaintiff she could not take her breaks, and she has never asked Ralphs for an additional  
20 break. (*Id.*, 154:3-5, 13-15.) Ralphs encourages its cashiers to take their rest breaks and lunches,  
21 and their days off, because Ralphs does not want them “to be overtired,” and because Ralphs  
22 wants its associates “to take care of themselves” and wants “to provide a work.” (Trial Tr.  
23 11/19/2019 [Pickett], 114:9-115:4, 121:11-17.)

1 i. **Dr. Jeffrey Fernandez’s unrebutted quantitative**  
2 **analyses and qualitative assessments show that the**  
3 **nature of Ralphs cashiers’ work requires standing.**

4 Ralphs’ ergonomics expert, Dr. Jeffrey Fernandez, is a certified professional ergonomist  
5 and a registered professional engineer. (Trial Tr. 11/21/2019 [Fernandez], 106:19-23.)<sup>36</sup>  
6 Dr. Fernandez has worked in the field of ergonomics for over thirty-five years as a consultant,  
7 engineer, and tenured professor. (*Id.*, 103:13-17; 106:24-107:8.) Dr. Fernandez has written  
8 extensively in the field of ergonomics, having published an ergonomics textbook and over 150  
9 articles, and has received many awards for his work in the field, most recently including the  
10 Board of Certified Ergonomists Distinguished Service Award in Ergonomics. (*Id.*, 119:23-  
11 121:13; 122:11-123:4.) Dr. Fernandez has previously worked for the National Institute for  
12 Occupational Safety and Health (NIOSH), an agency within the Center for Disease Control that  
13 does research to support standards promulgated by the Occupational Safety and Health  
14 Administration (OSHA). (*Id.*, 108:27-109:24.) Dr. Fernandez was also engaged in enforcement  
15 activities with OSHA, including one of the largest cases where OSHA fined a company for  
16 violating the general duty clause. (*Id.*, 107:22-108:24.)

17 Dr. Fernandez conducted a robust quantitative analysis and qualitative assessment of the  
18 nature of the work of Ralphs cashiers and the physical layout of the Front End checkstand  
19 configurations at Ralphs stores in California. Dr. Fernandez and his team visited 30 Ralphs stores  
20 and took detailed measurements of the Front End checkstand configurations at those stores.  
21 (Trial Tr. 11/22/2019 [Fernandez], 27:13-68:19.) He observed cashiers performing their jobs.  
22 (*Id.*, 60:20-67:17.) He reviewed Ralphs documents and relevant academic literature. (Trial Tr.  
23 11/21/2019 [Fernandez], 152:6-167:22; Trial Tr. 11/22/2019 [Fernandez], 17:6-27:12; Trial Tr.  
24 11/26/2019 [Fernandez], 12:24-13:3.) He and his team reviewed more than 140 hours of videos  
25 showing cashiers performing their jobs, and documented the movements of the cashiers. (Trial  
26 Tr. 11/22/2019 [Fernandez], 100:23-101:28.) Based on the data he gathered, Dr. Fernandez  
27 determined that Ralphs cashiers’ work requires frequent foot movements between the register,

28 <sup>36</sup> Dr. Fernandez’s additional professional experience and credentials are documented on his  
Curriculum Vitae, Trial Exhibit 118.

1 scanner, bagging area, and aisles; frequent extended reaches; frequent neck twists; back flexions  
2 and twists; heavy items being handled (lifted, pulled, pushed); and items being scanned and  
3 bagged. (*Id.*, 102:1-105:24.) Dr. Fernandez analyzed the data and information he collected and  
4 concluded that Ralphs cashiers should perform their job tasks in a standing position, and that the  
5 nature of their work does not reasonably permit the use of seats. (Trial Tr. 11/21/2019  
6 [Fernandez], 125:8-126:7 [cashier tasks do not reasonably permit the use of seats including  
7 sit/stand stools, lean stools, and butt rests]; Trial. Tr. 11/22/2019 [Fernandez], 163:13-27  
8 [“cashiers’ tasks do not reasonably permit” the use of a sit/stand device].)

9 Dr. Fernandez and his team also conducted an extensive analysis of Plaintiff’s store and of  
10 Plaintiff performing her work as a cashier. He visited Plaintiff’s Store 727 and took  
11 measurements of the Front End registers there. (Trial Tr. 11/22/2019 [Fernandez], 91:5-92:26;  
12 101:15-17; Trial Exs. 1572, 1573.) He and his team conducted video analysis of cashiers  
13 working at Store 727, including Plaintiff. (Trial Tr. 11/22/2019 [Fernandez], 101:24-26.)  
14 Dr. Fernandez observed that tasks Plaintiff performs at the Front End register location at Store  
15 727 require foot movements between the register, scanner, bagging area, and aisles; frequent  
16 extended reaches; frequent neck twists; back flexions and twists; heavy items being handled  
17 (lifted, pulled, pushed); and items being scanned and bagged.<sup>37</sup> Dr. Fernandez concluded based  
18 on his observations that from an ergonomics perspective, Plaintiff should perform her tasks in a  
19 standing position, and that the nature of her work does not reasonably permit the use of a seat.  
20 (Trial Tr. 11/22/2019 [Fernandez], 159:10-16.)

21 Dr. Fernandez’s report was produced to Plaintiff on June 15, 2018. (Trial Tr. 12/3/2019  
22 [Fernandez], 69:9-17.) Rebuttal reports were due on September 21, 2018. (See Order re:  
23 (1) Protocol for Site Inspections, and (2) Expert Witness Discovery, Feb. 6, 2018, at p. 5.)  
24 Plaintiff did not offer any rebuttal to Dr. Fernandez’s June 15 report or to his trial testimony.  
25  
26

27 <sup>37</sup> (Trial Tr. 11/22/2019 [Fernandez], 120:25-124:4, 143:10-159:16; Trial Exs. 1407, 1407.1-  
28 1407.3, 1408, 1409, 1409.1-1409.4, 1410, 1410.1-1410.6, 1411, 1411.1-1411.9, 1587.01-  
1587.28, 1587.32-1587.35, 1587.37-1587.38.)

1           **j. Plaintiff’s experts concede that any sitting or leaning or perching would only be**  
2           **done for short periods of minutes or even seconds.**

3           Both of Plaintiff’s experts — Dr. Stephen Morrissey (Plaintiff’s ergonomics expert)<sup>38</sup> and  
4 Dr. James Kent (Plaintiff’s kinesiology expert)<sup>39</sup> — concede that given all of the cashiering tasks  
5 that require standing, any sitting (or “leaning” or “perching”) would only be done for “short  
6 periods of time” — “minutes” or even “seconds.”<sup>40</sup> Neither Dr. Morrissey nor Dr. Kent  
7 recommend seating for all cashier tasks in the checkstand.<sup>41</sup> They agree that would not be  
8 feasible.<sup>42</sup> Further, Dr. Morrissey agrees that not all cashier duties can be done from a sitting  
9 posture. (Trial Tr. 11/13/2019 [Morrissey], 71:21-23.) Indeed, Dr. Morrissey concedes that in  
10 his opinion, many of the tasks Ralphs cashiers perform should, or even *must*, be performed from a  
11 standing posture.

12           **k. Plaintiff’s ergonomic experts did not conduct any analysis specific to Plaintiff or**  
13 **her store 727.**

14           Plaintiff’s ergonomic expert did not visit Plaintiff’s Store 727. (Trial Tr. 11/13/2019  
15 [Morrissey], 126:26-28.) He did not read Plaintiff’s deposition. (*Id.*, 126:2-4.) Except for “at  
16 most a minute, a minute-and-a-half” of video he looked at a month before trial, Dr. Morrissey did  
17 not watch videos of Plaintiff or anyone at her store performing their work. (*Id.*, 126:5-17.) Nor  
18

19           <sup>38</sup> Dr. Morrissey taught at two separate institutions, but never became a full tenured professor.  
20 (Trial Tr. 11/12/2019 [Morrissey], 186:3-9; 11/13/2019 [Morrissey], 135:19-26.) He currently  
21 works for Oregon’s OSHA Consultation Program where he responds to industry requests to  
22 provide safety health ergonomics evaluations. (Trial Tr. 11/12/2019 [Morrissey], 186:11-20.)

23           <sup>39</sup> Dr. James Kent is a forensic kinesiologist who specializes in biological and accident  
24 reconstruction pertaining mainly to criminal or accident related matters. (Trial Tr. 11/13/2019  
25 [Kent], 156:18-24.) Dr. Kent is not a certified ergonomist and is not an expert in workplace  
26 design. (*Id.*, 171:20-176:2.) Dr. Kent consults for the American Academy of Physical Medicine  
27 and Rehabilitation to review articles discussing biomechanics. (*Id.*, 164:6-10.) Dr. Kent has been  
28 retained as an expert by Plaintiff’s counsel around 200 times over the span of 30 years. (Trial Tr.  
11/14/2019 [Kent], 57:22-58:3.)

29           <sup>40</sup> (Trial Tr. 11/13/2019 [Morrissey], 69:25-27 [Under Dr. Morrissey’s model, cashiers could  
30 be sitting “minutes or less”, 70:16-19 [mere seconds is not enough], 71:3-12 [mere seconds  
31 would be “ludicrous” and cashiers need at least 15 to 20 seconds]; Trial Tr. 11/14/2019 [Kent],  
32 70:5-13 [micro breaks could last 5, 10, 15, or 20 seconds].)

33           <sup>41</sup> (Trial Tr. 11/13/2019 [Morrissey], 71:21-23 [not all cashier duties can be done from a  
34 seated posture]; Trial Tr. 11/14/2019 [Kent], 83:18-22 [standing may be better for cashiers under  
35 some circumstances].)

36           <sup>42</sup> (Trial Tr. 11/13/2019 [Morrissey], 71:21-79:17; Trial Tr. 11/14/2019 [Kent], 80:17-26.)

1 did he review any other information about Store 727. (*Ibid.*) Dr. Morrissey did not submit a  
2 rebuttal report or otherwise respond to Dr. Fernandez’s extensive review of videos showing  
3 Plaintiff performing her job, or the measurements Dr. Fernandez took of the front end registers at  
4 Store 727. (Trial Tr. 11/13/2019 [Morrissey], 124:1-5, 126:26-28; 127:8-9, 21-24, 27-28.)  
5 Dr. Morrissey offered no rebuttal to Dr. Fernandez’s testimony at trial.

6 The Court finds that the dynamic nature of the work of a Ralphs cashier does not  
7 reasonably permit the use of seats.

8 **B. Considerations of Feasibility**

9 The feasibility inquiry is not a “rigid quantitative analysis based merely upon the counting  
10 of tasks or amount of time spent performing them,” but instead “involves a qualitative assessment  
11 of all relevant factors.” (*Kilby, supra*, 63 Cal.4th at p. 20.) The Court finds that considerations of  
12 feasibility further confirm that the nature of a Ralphs cashier’s work does not reasonably permit  
13 the use of seats. Seating would interfere with standing tasks and create a safety hazard for  
14 cashiers and customers. Moreover, seated work would interfere with the quality of cashiers’  
15 work and their overall job performance. Here, the evidence shows that feasibility considerations  
16 weigh heavily in favor of Ralphs.

17 **a. Providing a seat would unduly interfere with other standing**  
18 **tasks.**

19 Dr. Morrissey proposes that during the times when a cashier’s essential duties must be  
20 performed from a standing posture, the cashier could pick up and “move the chair to the left or  
21 right of where they were working in the middle.” (Trial Tr. 11/13/2019 [Morrissey], 13:19-22;  
22 50:16-18.) This proposition was not supported by the evidence. The evidence shows there is no  
23 room for a seat. Cashiers move in the cashier well throughout transactions. (See Section  
24 V.A.1.a., *ante.*) A seat would be in the way, it would impede access to essential checkstand  
25 components like the bagging station, cash till, drawers, and supplies, and it would interfere with  
26  
27  
28

1 the standing tasks cashiers must perform. Many witnesses confirmed this, based on their many  
2 years of experience cashiering and observing cashiers performing their jobs.<sup>43</sup>

3 **b. Providing a seat in the cashier well would be a safety**  
4 **hazard for cashiers and customers.**

5 Substantial evidence establishes the safety concerns that would arise for cashiers and  
6 customers if seats were provided in the checkstands. For example, Dr. Fernandez testified about  
7 the safety hazards that seats in the checkstands would present for Ralphs cashiers and customers  
8 from an ergonomics perspective, which the Court found to be persuasive. A seat would increase  
9 the risk that cashiers would suffer musculoskeletal disorders (“MSDs”).

10 In addition to increasing the risk of MSDs, a seat would be a tripping hazard for both  
11 cashiers and customers. A seat could injure a cashier trying to navigate around it inside the  
12 cashier well.<sup>44</sup> A cashier could fall off of a seat while trying to use it.<sup>45</sup> A seat could be knocked  
13 into a customer, or tripped over by a customer.<sup>46</sup> As Dr. Fernandez testified, the pilot lean stool  
14 study he attempted as part of his consulting engagement for Ralphs had to be stopped after just  
15 two-and-a-half hours due to safety concerns. The seat was being pushed into the adjacent aisle  
16 and the manager was concerned it would cause a customer to trip or hit the seat with their  
17 shopping carts. (Trial Tr. 12/3/2019 [Fernandez], 61:10-22.) Even now, there are times when  
18 cashiers standing in their checklanes are bumped by the customers in the lanes behind them.<sup>47</sup>  
19 With a seat in the checkstand, the situation would be even tighter, and more precarious.<sup>48</sup> There  
20 are busy times (which vary by store, by day, and by season), when all checkstands are open.

21 \_\_\_\_\_  
22 <sup>43</sup> (Trial Tr. 11/15/2019 [Gray], 60:10-61:10, 61:26-62:8; Trial Tr. 11/15/2019 [Simmons],  
23 176:18-177:16, 178:16-24; Trial Tr. 11/19/2019 [Pickett], 111:4-10, 123:25-124:16, 126:21-  
24 127:14; Trial Tr. 11/19/2019 [Wackeen], 187:28-190:7; Trial Tr. 11/21/2019 [Wackeen], 27:18-  
25 28:13; Trial Tr. 11/21/2019 [Albrecht], 63:28-65:4; Trial Tr. 11/26/2019 [Walker], 85:23-86:20.)

26 <sup>44</sup> (Trial Tr. 11/19/2019 [Pickett], 123:25-124:16; Trial Tr. 11/15/2019 [Gray], 60:10-61:1;  
27 Trial Tr. 11/19/2019 [Wackeen], 188:20-26, 187:28-188:4; Trial Tr. 11/21/2019 [Albrecht],  
28 64:11-19; Trial Tr. 11/22/2019 [Fernandez] 160:7-21.)

<sup>45</sup> (Trial Tr. 11/22/2019 [Fernandez], 161:15-162:2; Trial Tr. 11/25/2019 [Fernandez], 93:28-  
94:10; Trial Tr. 12/3/2019 [Fernandez], 66:11-19.)

<sup>46</sup> (Trial Tr. 11/22/2019 [Fernandez], 98:3-18; Trial Tr. 11/26/2019 [Walker], 86:9-20.)

<sup>47</sup> (Trial Tr. 11/15/2019 [Simmons], 176:6-21; Trial Tr. 11/21/2019 [Albrecht], 59:26-60:3;  
and see Trial Ex. 1587.3.)

<sup>48</sup> (Trial Tr. 11/22/2019 [Fernandez], 160:7-21; Trial Tr. 11/15/2019 [Simmons], 176:18-  
177:13; Trial Tr. 11/21/2019 [Albrecht], 63:28-64:19.)



1 (Trial Tr. 11/19/2019 [Pickett], 102:10-28.) If a seat were in the checkstand and pushed back, it  
2 could go into the customer or shopping cart in the adjacent lane. (Trial Tr. 11/18/2019  
3 [Simmons], 8:4-16.)

4 A seat would be in the way of cashiers as they performed their work, impeding access to  
5 essential checkstand components and interfering with the standing tasks Ralphs expects cashiers  
6 to perform. This was supported by the evidence presented at trial.<sup>49</sup>

7 Dr. Fernandez presented quantitative and qualitative analyses based on scientific  
8 methodology to support his opinion that the nature of the work of Ralphs cashiers at Ralphs'  
9 front-end checkstands does not reasonably permit the use of seats. The Court found  
10 Dr. Fernandez's testimony to be persuasive and credible. Dr. Fernandez's quantitative and  
11 qualitative analyses were un rebutted by Plaintiff's experts or any other witnesses.

12 Plaintiff's experts did not conduct any extensive analysis, nor did they conduct an analysis  
13 specific to Plaintiff or Plaintiff's Store No. 727. At trial, Plaintiff's ergonomics expert,  
14 Dr. Stephen Morrissey, presented very little evidence in terms of analysis or videos of the work  
15 performed by Ralphs cashiers. Dr. Morrissey conceded that many tasks should be done in a  
16 standing position, such as performing extensive foot movements, engaging in extended reaches,  
17 placing hands at or above the shoulders, bagging, and lifting items weighing over ten pounds.  
18 Both of Plaintiff's experts, Dr. Morrissey (her ergonomics expert) and Dr. James Kent (her  
19 kinesiology expert), admitted that given all of the cashiering tasks that require standing, any  
20 sitting or "perching" would only be done for very short periods of time.

21 Plaintiff claimed there are some tasks Ralphs cashiers perform in the checkstands, if taken  
22 in isolation, that cashiers might be able to perform from a seated posture. Under *Kilby*, the Court  
23 must consider the totality of the circumstances. *Kilby* rejects the task-by-task analysis that  
24 Plaintiff proposes. When considering all of the job duties Ralphs cashiers perform at the front-  
25 end checkstands, seats are not feasible. Dr. Fernandez offered overwhelming evidence as to all

26 \_\_\_\_\_  
27 <sup>49</sup> (Trial Tr. 11/15/2019 [Gray], 60:10-61:10, 61:26-62:8; Trial Tr. 11/15/2019 [Simmons],  
28 176:18-177:16, 178:16-24; Trial Tr. 11/19/2019 [Pickett], 111:4-10, 123:25-124:16, 126:21-  
127:14; Trial Tr. 11/19/2019 [Wackeen], 187:28-190:7; Trial Tr. 11/21/2019 [Wackeen], 27:18-  
28:13; Trial Tr. 11/21/2019 [Albrecht], 63:28-65:4; Trial Tr. 11/26/2019 [Walker], 85:23-86:20.)

1 the tasks that are performed by Ralphs cashiers and how they have to be done standing in order to  
2 be done safely. According to Dr. Fernandez, performing a task from a seated position even one  
3 time can cause injury if the task should be performed standing (e.g., lifting a heavy item).

4 Plaintiff referred to documents issued by the National Institute for Occupational Safety  
5 and Health (“NIOSH”), the Food Marketing Institute (“FMI”), and the Occupational Safety and  
6 Health Administration (“OSHA”) stating that employers should “consider” a “sit/stand stool” or  
7 an “adjustable sit/stand or lumbar support.” But, this is not a rule that any witness testified is  
8 mandatory. The word “consider” is a suggestion and nothing more. A “sit/stand” device is only  
9 an option that may be considered where feasible. Whether such a device is appropriate depends  
10 on the circumstances, including the space in the workspace and safety considerations. The Court  
11 finds that a “sit/stand” device is not suitable for Ralphs cashiers.

12 The Court also rejects the recommendations of Plaintiff’s experts for “microbreaks” or  
13 short periods of rest. Dr. Kent recommended using a “sit/stand device” for periods as short as “5,  
14 10, 15, or 20 seconds.” (Trial Tr. 11/14/2019 [Kent], 69:27-70:13.) But Dr. Kent’s testimony  
15 about the supposed benefits of “perching” for microbreaks is unsupported by science. (See Trial  
16 Tr. 11/14/2019 [Kent], 70:20-22 [Kent has never tested the efficacy of microbreaks in reducing  
17 lower back fatigue]; 71:4-27, 73:9-25, 86:28-87:6; Trial Tr. 11/25/2019 [Young], 19:11-19.) This  
18 recommendation was not supported by any reliable scientific evidence. Moreover, Plaintiff’s  
19 ergonomics expert Dr. Morrissey opined (in contradiction to Dr. Kent) that sitting for less than 15  
20 seconds at a time would not be a reasonable amount of time for an employee to be able to benefit  
21 from sitting before having to jump up again. Dr. Douglas Young, Ralphs’ kinesiology expert,  
22 explained that the kinds of “microbreaks” Dr. Kent recommends are more likely to increase than  
23 decrease discomfort, fatigue, and pain to the lower back.

24 Moreover, the Court finds that the frequency of transitioning from sitting to standing  
25 would interfere with cashiers’ performance of their job duties. Ralphs’ witnesses testified that it  
26 would be difficult and exhausting to constantly alternate between sitting and standing. Further,  
27 substantial evidence showed that seated work would interfere with the quality, effectiveness, and  
28 efficiency of Ralphs cashiers’ overall job performance.

1 The Court finds, based on the overwhelming evidence, that the feasibility factors further  
2 confirm the nature of the work performed by Ralphs cashiers does not reasonably permit the use  
3 of seats.

4 **C. Ralphs' Business Judgment**

5 *Kilby* recognizes that an employer's business judgment is a relevant consideration in  
6 evaluating whether the nature of an employee's work reasonably permits the use of a seat. (*Kilby*,  
7 *supra*, 63 Cal.4th at pp. 21-22.) Here, Ralphs' business judgment that providing seats to cashiers  
8 while they work in the checkstands would be unsafe, and that the cashier position requires  
9 standing, is entitled to deference. And Ralphs, as the employer, has the right to define the job  
10 duties to be performed by its cashiers. *Kilby* explains, "[t]here is no question that an employer  
11 may define the duties to be performed by an employee." (*Kilby, supra*, 63 Cal.4th at p. 21.) The  
12 Court has considered the testimony of all of the witnesses presented by both sides and concludes  
13 that the transition or frequency of transitioning between sitting and standing (regardless of the  
14 seat being used) would unreasonably interfere with the other standing tasks Ralphs expects its  
15 cashiers to perform, and would affect the quality, effectiveness, and efficiency of the job  
16 performance of Ralphs cashiers.

17 Importantly, the evidence at trial showed that introducing a seat would create a safety risk.  
18 The Court recognizes Ralphs' concern for safety, including safety of its cashiers and its  
19 customers. Safety is a Core Value at Ralphs. The Court finds that introducing a seat into the  
20 checkstand would introduce a safety hazard to both cashiers and customers.

21 Ralphs' business judgment that providing seats to cashiers in the checkstands would be  
22 unsafe for cashiers and for customers, and that the cashier position requires standing, further  
23 supports that the nature of the work Ralphs cashiers perform does not reasonably permit the use  
24 of seats.

25 **D. The Physical Layout of the Workspace**

26 Technical aspects of workplace configurations may be relevant to determining whether  
27 suitable seating can be provided. (*Kilby, supra*, 63 Cal.4th at p. 22.) The physical layout of  
28 Ralphs' Front End checkstands — including the location of the bagging stations, the cash drawer,

1 the phone, the keypad, the scanner, the receipt printer, the intercom phone, the replacement  
2 register and coupon tape, the length and location of conveyer belts, and various other attributes —  
3 is relevant to the ways in which cashiers have to move throughout transactions when they check  
4 out customer orders. The evidence presented by Ralphs was overwhelming with respect to the  
5 physical layout of the front-end checkstands and the fact that they cannot reasonably  
6 accommodate a seated cashier.

7 **Ralphs' checkstands are tightly designed, highly functional**  
8 **spaces that cannot accommodate a seated cashier.**

9 Ralphs' front-end checkstands are tightly designed, highly functional spaces.  
10 Dr. Fernandez testified about all the different variations of checkstands at Ralphs. The evidence  
11 at trial showed that Ralphs' current checkstand configurations are too tight to accommodate a  
12 seated cashier.

13 Dr. Fernandez testified extensively about his analysis of the variable physical layouts of  
14 the Front End checkstands at Ralphs grocery stores, including Plaintiff's Store 727, and about his  
15 conclusion that introducing a seat into the cashier well would produce a number of adverse  
16 consequences. The size of the cashier wells at Ralphs is inadequate to safely fit a seat, or for a  
17 cashier to function from a seat.

18 Dr. Fernandez explained that there would be inadequate vertical thigh and knee clearance  
19 for a seated cashier. (See Trial Tr. 11/22/2019 [Fernandez], 165:11-176:19.) Even crediting  
20 Dr. Morrissey's incorrect measurements (assuming the scanner is only 4 inches high) and his  
21 proposed modifications (assuming everything between the scanner and the toe kick can be  
22 removed), there is not enough room for anyone larger than the 5th percentile female. (Trial Tr.  
23 11/22/2019 [Fernandez], 172:15-22; Trial Tr. 12/3/2019 [Fernandez], 134:2-23, 135:11-21.) But  
24 in reality, the scanner is not just 4 inches high, because there are electrical components, and other  
25 items — such as Lanehawk — under the checkstands. (Trial Tr. 11/19/2019 [Guth], 44:6-25;  
26 Trial Tr. 11/22/2019 [Fernandez], 168:25-169:13.) "There's hardly any empty space underneath  
27 the checkstand. There's a myriad of electrical and connections that go underneath that." (Trial  
28 Tr. 11/19/2019 [Guth], 44:6-25.) Using Dr. Fernandez's measurements and calculations (and

1 assuming the Front End checkstands could be modified to remove everything between the bottom  
2 of the scanner and the toe kick, which they cannot), even the 5th percentile female would not fit.  
3 (Trial Tr. 11/22/2019 [Fernandez], 173:11-27; and see Section V.A.1.d, *post.*)

4 The cashier well is not wide enough to accommodate a seat, either. Dr. Fernandez  
5 calculated how much horizontal clearance would be needed to accommodate a 5th percentile  
6 female and 95th percentile male leaning on a sit-stand stool with a base of 15 inches, and  
7 determined that neither would fit inside the cashier well. (Trial Tr. 11/22/2019 [Fernandez],  
8 176:4-19.) Rather, both would intrude into the lane of customers behind them. (Trial Tr.  
9 11/22/2019 [Fernandez], 91:10-93:24.)

10 Dr. Fernandez’s un rebutted calculations make clear there is insufficient space for a seated  
11 cashier to fit and function in Ralphs’ checkstands. The physical layout of the Front End registers  
12 cannot feasibly or safely accommodate seats for Ralphs cashiers.

13 The Court finds that Ralphs did not “unreasonably design [its checkstands] to further a  
14 preference for standing.” (See *Kilby, supra*, 63 Cal.4th at p. 22.)

15 **Ralphs could not modify its checkstands to create more knee**  
16 **clearance without compromising the structural integrity of the**  
17 **checkstands.**

18 Plaintiff proposed that creating room for a seated cashier would be as simple as knocking  
19 out shelving under the scanner to create knee clearance. But the evidence does not align with that  
20 simple analysis. Jeff Guth, Regional Director for Construction at Kroger (Ralphs’ parent  
21 company), who has been in the business of supermarket construction for 31 years and is familiar  
22 with the composition of Ralphs’ checkstands, testified that to provide for knee clearance  
23 underneath the checkstands for a seated cashier would require replacing all of the checkstands at  
24 all 190 of Ralphs’ stores. (Trial Tr. 11/19/2019 [Guth] 3:7-12, 16:5-16, 17:19-23, 18:5-16, 41:10-  
25 25, 73:16-74:18.) By analogizing to a kitchen remodel, Mr. Guth explained that all of a  
26 checkstand’s component parts work together and provide the structural support for the whole.  
27 (*Id.*, 32:3-21, 33:3-34:18, 39:22-26.) And, just as with a kitchen remodel, “to modify a check  
28 stand, it isn’t just [as] easy as taking shelves out because they’re built into the checkstand.” (*Id.*,  
38:21-23, 39:22-26 [“[I]t isn’t just as simple as removing components because each cabinet is its

1 individual component that [is] connected in a series that make up your kitchen or in this case  
2 make up a checkstand.”.) You cannot “just take out the toe kick,” “because that is the bottom  
3 part of that piece of the checkstand and . . . the toe kick is an integral part. It makes up a box. It  
4 has to [have] rigidity on four sides, and it takes out the bottom rigidity” if you remove it, “so it  
5 would have to be reengineered and redesigned.” (*Id.*, 40:16-27.)

6 The “minor modifications” (as Plaintiff’s counsel likes to refer to them) would require  
7 completely redesigning, reengineering, and replacing all of Ralphs’ checkstands. Doing  
8 otherwise would compromise the structural integrity of the checkstand. (*Id.*, 34:13-24, 38:7-  
9 40:27, 41:10-25, 73:16-74:18.) Removing and replacing all checkstands at all 190 Ralphs stores  
10 “would be a major undertaking” that would need to be handled in multiple phases and would be  
11 disruptive to Ralphs’ business. (*Id.*, 41:26-43:24, 46:11-47:3.) And, as the Court has determined,  
12 such major modifications are not to be considered in this case. (Ralphs’ Motion in *Limine* No. 1  
13 to Exclude Evidence of Proposed Modifications to Ralphs’ Checkstands.)

14 **There is no evidence that Ralphs unreasonably designed its**  
15 **checkstands to further a preference for standing.**

16 Plaintiff has pointed to Ralphs’ installation of new checkstands during the PAGA period.  
17 (See, e.g., Trial Tr. 11/12/2019 [Plaintiff’s Opening], 165:15-20.) But the replacement of  
18 checkstands as needed in the ordinary course of business is not evidence of any “redesigning” or  
19 “reengineering” of checkstands. (Trial Tr. 11/19/2019 [Guth], 36:13-38:4.) There is no evidence  
20 that any modification could be made to a newly-designed checkstand that would be reasonable  
21 and would be able to accommodate a seated Ralphs cashier and enable her to perform her job.

22 First, Plaintiff offered no evidence regarding the checkstand design process at Ralphs.  
23 Second, as the evidence showed and even Plaintiff’s experts agree, Ralphs cashiers need to stand  
24 the majority of the time while performing their work. (See Trial Ex. 20 (Cashier Job  
25 Description); Trial Tr. 11/15/2019 [Gray], 36:11-20; Trial Tr. 11/18/2019 [Simmons], 6:21-8:16;  
26 see also Section IV.A.1, *supra*.) Given that so many tasks Ralphs cashiers perform must be done  
27 standing, it is appropriate that the work surface heights of cashier work stations are designed to  
28 conform to their standing work. (Trial Tr. 11/22/2019 [Fernandez], 59:20-60:1.) And, in some

1 circumstances, the checkstands are shorter in length with a smaller cashier well in order to  
2 provide more retail space for groceries. (Trial Tr. 11/15/2019 [Gray], 50:9-51:18.) Designing  
3 workstations to make efficient use of retail space is not a violation of section 14(A).

4 The evidence also showed that at workstations where the nature of the work does permit  
5 the use of seats, Ralphs provides seats to its employees. (Trial Tr. 11/21/2019 [Albrecht], 62:2-7  
6 [seats provided in the bookkeeper's office and the computer room]; Trial Tr. 11/14/2019  
7 [Vallejo], 112:1-22 [seats provided to associates separating price changes]; Trial Tr. 11/14/2019  
8 [LaFace], 156:1-7 [Plaintiff was provided a seat when she separated price changes].)

9 The law does not require Ralphs to change the nature of the work it expects Ralphs  
10 cashiers to perform, nor change the configurations of its front-end checkstands, to allow for  
11 seating. The Court finds that the physical layout of Ralphs' front-end checkstands cannot feasibly,  
12 safely, or reasonably accommodate a seated cashier.

13 **E. Conclusions as to Section 14(A)**

14 Based on the Court's consideration of the evidence presented at trial and the Court's  
15 evaluation of the totality of the circumstances and all relevant factors, the Court finds that the  
16 dynamic nature of a Ralphs cashier's work does not reasonably permit the use of seats. It was  
17 Plaintiff's burden to prove that the nature of the work Ralphs cashiers perform at the front-end  
18 checkstands reasonably permits the use of seats. The Court finds that Plaintiff failed to meet her  
19 burden.

20 **IV. NO SUITABLE SEAT EXISTS**

21 Even if the Court had found that Plaintiff successfully proved the nature of the work of  
22 Ralphs cashiers reasonably permits the use of seats, the Court finds that Ralphs would still prevail  
23 because Ralphs met its burden to show that no suitable seat for the work exists.

24 Ralphs' ergonomics expert and his team analyzed over 500 commercially available seats.  
25 (Trial Tr. 11/22/2019 [Fernandez], 68:23-69:2.) They looked at a number of specifications for  
26 each seat (including for example the width and depth of the seat base, the width and depth of the  
27 seat pan, and the weight of the seat) and compiled all of the data into a spreadsheet. (*Id.*, 69:3-  
28 69:17, 70:12-71:20, 72:2-74:8.) They assessed the various seats with respect to the tasks

1 performed by Ralphs cashiers and concluded that no suitable seat exists that would both fit in the  
2 Ralphs checkstands and allow a Ralphs cashier to properly function. (*Id.*, 69:18-20, 74:9-22;  
3 Trial Tr. 12/3/2019 [Fernandez], 104:20-28. Based on the specifications for each seat, the tasks  
4 Ralphs cashiers perform, and the physical layout of the workspace, Ralphs' evidence showed that  
5 no suitable seat exists that would both fit in Ralphs' checkstands and allow a Ralphs cashier to  
6 properly and safely function from a seat.

7 The Court finds that none of the options presented by Plaintiff is satisfactory. Plaintiff's  
8 expert, Dr. Morrissey, recommended that the seat should have a base less than 15 inches, given  
9 the size of the cashier well. Dr. Fernandez testified that seats with such small bases would be  
10 unstable. Dr. Fernandez's un rebutted testimony is that a seat with a base under 15 inches is not  
11 suitable because it would not be stable. (Trial Tr., 11/25/2019 [Fernandez], 93:28-94:10 ["But  
12 when you get to less than 15 [inches], in ergonomics, we do not consider those because then the  
13 seat pan is larger than the base. When the seat pan is larger than the base, it is a stability issue.  
14 The Court agrees.

15 Plaintiff's experts recommended specific seats, including the Muvman seat, the Varichair,  
16 the Alera Plus, the Black Sit to Stand Perch Stool by Alera, and a wall chair. (Trial Tr.  
17 11/22/2019 [Fernandez], 75:4-7, 94:23-95:13, 95:21-28, 96:9-14, 99:1-6.) Dr. Fernandez  
18 assessed these seating options and determined that they would not be suitable for a Ralphs cashier  
19 for various reasons, including the lack of knee clearance, the heavy seat weight (which affects the  
20 physiological cost of moving the seat), the large amount of space the seat base would take up in  
21 the cashier well when a cashier is sitting on the seat, such that it would be pushed into the next  
22 customer aisle behind the cashier, and other safety concerns. (*Id.*, 74:25-76:5, 83:7-17, 90:9-  
23 92:17, 93:25-94:9, 95:14-97:13, 99:1-100:12.)

24 Dr. Morrissey also recommended a "butt rest" that has a base that comes to a point. (Trial  
25 Tr. 11/13/2019 [Morrissey], 50:4-10 ["if you went to the butt rest, which is a microscopic version,  
26 that aces everything"]; 135:2-10 [describing "the very, very portable butt rests" as being "the  
27 most easily – amenable right now with [Ralphs] designs"].) According to Dr. Fernandez, this  
28 type of "seat" "should never be an option." Such a "seat" (if it can even be called one) requires a



1 “constant balancing act,” so “instead of relieving the work,” the “muscles in the lower extremities  
2 are constantly doing work.” Not to mention, the seat would fall over as soon as the person stood  
3 up, and become a tripping hazard. (Trial Tr., 11/22/2019 [Fernandez], 97:16-98:24; Trial Tr.,  
4 12/3/2019 [Fernandez], 103:27-104:19.) “From an ergonomics perspective, it is certainly not an  
5 acceptable seat.” (Trial Tr., 11/22/2019 [Fernandez], 98:25-28.)

6 Plaintiff also suggested a bar or a rail on which cashiers could lean. Dr. Fernandez  
7 testified that a bar or a rail is not a seat, and the Court agrees.

8 Ralphs provided substantial evidence to show that no suitable seat exists for the work  
9 Ralphs cashiers perform. The testimony of Dr. Fernandez and the research and analysis relied  
10 upon by Dr. Fernandez overwhelmingly supports this conclusion and the findings by the Court.

11 **V. FINDINGS REGARDING SECTION 14(B)**

12 The Court also finds that Plaintiff failed to prove any violation of section 14(B) of Wage  
13 Order No. 7.

14 Section 14 of IWC Wage Order No. 7 states in full:

15 (B) When employees are not engaged in the active duties of their  
16 employment and the nature of the work requires standing, an  
17 adequate number of suitable seats shall be placed in reasonable  
18 proximity to the work area and employees shall be permitted to use  
19 such seats when it does not interfere with the performance of their  
20 duties.

19 *Kilby* explains that section 14(B) applies if there are “‘lulls in operation’ when an  
20 employee, while still on the job, is not then actively engaged in *any* duties.” (*Kilby, supra*, 63  
21 Cal.4th. at p. 19, citation omitted.) Section 14(B) does not require seats to be provided if doing so  
22 would interfere with employees’ performance of their duties. (Cal. Code Regs., tit. 8, § 11070,  
23 subd. 14(B).)

24 Based on the evidence presented at trial, the Court finds that the job of a Ralphs cashier  
25 includes other tasks when they are not actively checking out a customer at their checkstand. For  
26 example, cashiers may be cleaning their workspace, restocking candy or grocery shelves, helping  
27 others in the store, or fishing for customers (i.e., assisting customers and directing them as needed  
28 to their checkstands). The nature of the job requires cashiers to always stay busy.

1 Plaintiff and her witnesses agreed that Ralphs expects them, as part of their job duties, to  
2 keep busy and not stand around idly.<sup>50</sup> Both parties' ergonomics experts observed cashiers doing  
3 these things when not actively checking out a customer.<sup>51</sup> Further, Ralphs requires its cashiers, as  
4 food clerks, to help out anywhere they are needed in the store in the event there are no other tasks  
5 that need to be done at the Front End.<sup>52</sup> "In the grocery industry, there's very little time to stand  
6 still." There's always something to do and cashiers are "constantly moving." (Trial Tr.,  
7 11/15/2019 [Simmons], 170:15-171:8.)

8 Ralphs cashiers are required, as part of their job duties, to be active and busy at all times,  
9 unless they are on their regulated work breaks, a fact which Plaintiff's witnesses conceded. It is  
10 part of the job requirements for cashiers to always be active, and this was supported by the  
11 evidence presented at trial.

12 The Court finds that Plaintiff failed to present evidence at trial that supported any  
13 violation of Wage Order Section 14(B). Furthermore, it is the Court's findings that the testimony  
14 presented at trial overwhelmingly substantiates this conclusion.

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21 <sup>50</sup> (Trial Tr. 11/15/2019 [Alvarez], 130:19-26 ["[i]t's against Ralphs' policy for cashiers to  
22 just stand around and talk to each other"], 130:27-131:2 [Ralphs prefers that cashiers "go out to  
23 the end of the registers, the back end, and fish for customers, straighten the candy, clean up our  
24 registers"]; Trial Tr. 11/18/2019 [Yannoulatos], 147:9-25 [A cashier is "not supposed to have  
25 dead time." They are "supposed to be keeping busy by cleaning or organizing magazines or the  
26 gum or going out front to fish for customers."]; and see Trial Tr. 11/14/2019 [LaFace] 148:14-20,  
168:4-10.)

24 <sup>51</sup> (Trial Tr. 11/13/2019 [Morrissey] 48:4-17, 131:26-132:4 ["I have [video of] cashiers  
25 standing there looking for something to do and then going off and finding something to do and  
26 then having to run back when customers show up."]; Trial Tr. 11/22/2019 [Fernandez], 62:4-26;  
27 Trial Tr. 12/3/2019 [Fernandez], 52:20-53:3, 84:14-85:13, 123:8-14.; Trial Exs. 1587.33,  
1587.34.)

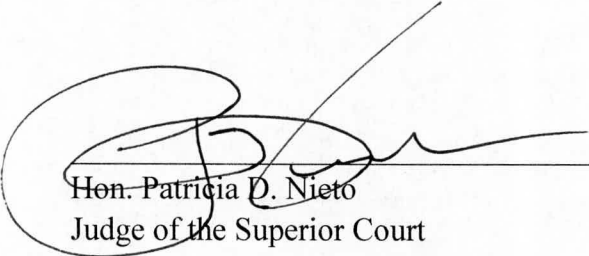
27 <sup>52</sup> (Trial Tr. 11/26/2019 [Walker], 83:22-84:6; and see Trial Ex. 20-1 (Cashier Job  
28 Description) ["Be qualified, knowledgeable, able and prepared to perform all the duties of an  
experienced grocery clerk when assigned or requested to do so"].) "[I]f it's slow, they're not just  
standing there. They're asked to do other things." (Trial Tr. 11/15/2019 [Gray], 59:15-60:2.)

1 **VI. CONCLUSION**

2 Accordingly, based on all of the evidence and arguments provided by both parties at trial,  
3 and the Court's careful review of all of the evidence presented, the testimony, the admitted  
4 exhibits, the parties' closing arguments, and the parties' briefs, the Court finds in favor of  
5 defendant Ralphs Grocery Company and against plaintiff Jill LaFace on all claims presented.  
6 The Court now adopts its Statement in Decision in full and the Court enters the Proposed  
7 Judgment.

8 Any costs and fees to be awarded to the defendants, as may be allowed by law, based  
9 upon any timely filed Memorandum of Costs and/or Motion for Attorney's Fees.

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12 Dated: **MAR 20 2020**

  
Hon. Patricia D. Nieto  
Judge of the Superior Court

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