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Attorneys for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

ROBERT SCHEFF, individually, and on behalf
of others similarly situated and other aggrieved
employees pursuant to the California Private
Attorneys General Act;

Plaintiff,

vs.

THE HARTFORD GOLD GROUP, LLC, a
California limited liability corporation; and
DOES 1 through 25, inclusive,

Defendant.

Case No.: 20STCV47565

**PLAINTIFFS' SUPPLEMENTAL
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: December 12, 2022

Time: 8:30 a.m.

Dept.: 39

[Assigned for all purposes to the
Honorable Stephen Goorvitch]

1 Plaintiff thanks the Court for the opportunity to supplement the record in support of his
2 motion for preliminary approval of class action settlement. Below, Plaintiff addresses the
3 concerns expressed by the Court in its November 15, 2022 order (“Order”).

4 **1. Plaintiff’s Incentive Payment**

5 In the Order, the Court expresses reluctance to approve an incentive award to the named
6 Plaintiff, Robert Scheff, in light of the significant individual settlement he is receiving under the
7 proposed settlement. Plaintiff understands the Court’s concern, and does not wish to hold up
8 the settlement over the relatively small sum that was to be his incentive award. In fact, the
9 proposed settlement itself contemplates that if the Court reduces or eliminates the incentive
10 award, the amount that would otherwise be an incentive award is instead to be distributed to all
11 class members pro rata according to their respective weeks worked for Defendant. (*See* Danas
12 Decl. Ex. 1, ¶¶ 21, 23)

13 **2. Plaintiff’s Individual Claims and the Timing of Asserting Those Claims**

14 In its Order, the Court notes that Plaintiff did not assert any individual claims in this case
15 until Plaintiff filed his First Amended Complaint in connection with this settlement. The timing
16 of that filing is the result of Plaintiff retaining new counsel, and the agreements of prior counsel
17 with Defendant’s counsel, regarding the prosecution of this case. It is not an indication of some
18 nefarious scheme.

19 The undersigned counsel became involved in this case in December 2021. Plaintiff’s
20 former counsel had already filed his original complaint, which included only a PAGA claim.
21 To the undersigned counsel, the strategy employed by Plaintiff’s former counsel appeared
22 inappropriate, particularly because of the strength of Plaintiff’s individual claims in comparison
23 to the PAGA claim. Moreover, there was a “co-employer” (Paychex Business Solutions) with
24 far more employees than Defendant, which was a more appropriate target for a PAGA case.

25 Though Defendant may disagree, Plaintiff’s individual claims are very strong. Plaintiff
26 began working for Defendant on August 21, 2019. For some time, that employment went very
27 well – Plaintiff was among the top-selling salespersons for Defendant. But, that all changed
28 when Plaintiff raised concerns about Defendant charging customers nearly double the spread it

1 advertised, and selling precious metals that it had not yet procured and did not have in its
2 inventory or stock. Defendant retaliated against Plaintiff, and abruptly terminated Plaintiff's
3 employment. At the time of mediation, Plaintiff's counsel calculated his lost income damages
4 alone, before the enhancements provided under Labor Code section 1102.5, at \$1,630,459.

5 Promptly upon appearing in this case, the undersigned counsel prepared a draft First
6 Amended Complaint, and secured the agreement of Defendant's counsel to file that amended
7 complaint. However, prior counsel had already scheduled a mediation and the parties had
8 agreed to forebear from all litigation activity in this case until the mediation, so the undersigned
9 counsel waited to file the amended complaint. The parties reached a settlement in principle at
10 the mediation, and so Plaintiff waited further to file the First Amended Complaint until the
11 settlement was memorialized. Following the mediation, the parties continued to negotiate
12 various aspects of the settlement agreement for several months. In preparing the preliminary
13 approval papers, the undersigned counsel recognized that the First Amended Complaint had still
14 not been filed, so he directed that it be filed along with the preliminary approval motion.

15 **3. Value of the PAGA Claim**

16 Finally, the Court requests additional information concerning the value of the PAGA
17 claim in this case, and, relatedly, the propriety of the allocation to the PAGA claim. PAGA
18 claims are notoriously difficult to value because of the remaining uncertainties in the law, and
19 the wide discretion granted to courts to deviate from the maximum civil penalties specified in
20 the Labor Code. (See, e.g., *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th
21 745, 759 ["We also note that PAGA gives a court broad discretion to 'award a lesser amount
22 than the maximum civil penalty amount,'" citing Lab. Code § 2699(e)(2)]. Nonetheless,
23 Plaintiff provides the explanation below of the rationale for the PAGA allocation.

24 Within the PAGA limitations period (one year prior to the notice letter to the LWDA),
25 Defendant's employees worked 3,571 weeks in the aggregate, for approximately 1,650 pay
26 periods. There are no known appellate court decisions authorizing, or prohibiting, "stacking"
27 of PAGA penalties, and some courts have suggested that stacking is not permitted. (See, e.g.,
28 *Hamilton v. Juul Labs, Inc.* (N.D. Cal. Nov. 16, 2021) 2021 U.S. Dist. LEXIS 221416, *27

1 [citing *Salazar v. PODS Enterprise, LLC* (C.D. Cal. May 8, 2019) 2019 U.S. Dist. LEXIS 78001,
2 2019 WL 2023726, *6; *Smith v. Lux Retail North America* (N.D. Cal. June 13, 2013) 2013 U.S.
3 Dist. LEXIS 83562, 2013 WL 2932243, *4 [questioning whether it was “really plausible that
4 we would pile one penalty on another for a single substantive wrong”].) Therefore, a
5 conservative estimate of potential PAGA penalties includes just one penalty per pay period.

6 Moreover, though PAGA’s default civil penalty provision provides that civil penalties
7 will be assessed at \$100 per “initial violation,” and \$200 per “subsequent violation” (Lab. Code
8 § 2699(f)(2)) most authorities also limit an award of heightened penalties at the \$200 per
9 violation amount to instances in which a court or the Labor Commissioner has previously cited
10 the employer for the violation. (See, e.g., *Gunther v. Alaska Airlines, Inc.* (2021) 72 Cal. App.
11 5th 334; *Steenhuyse v. UBS Financial Services, Inc.* (N.D. Cal. 2018) 317 F.Supp.3d 1062,
12 1067-68 [finding that defendant cannot face a “subsequent” violation under PAGA’s default
13 penalty provision — resulting in a \$200 per pay period penalty -- without first being found liable
14 for an “initial” violation.”]) So, a conservative estimate of the potential PAGA penalties here
15 are \$165,000 (1,650 pay periods x \$100 per pay period). But, even if liability were proven,
16 courts have broad discretion, pursuant to Labor Code § 2699(e)(2), to award any amount of
17 penalty up to the maximum, so the ultimate PAGA award in this case could be substantially less
18 than \$165,000. Courts frequently employ this discretion to dramatically reduce civil penalties
19 from the maximum value, especially where the violations were not deliberate. (See, e.g.,
20 *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529 [affirming a civil penalty award
21 of only \$5 per pay period because any violations that occurred were the result of human error in
22 enforcing the company’s lawful policies]; also see *Thurman v. Bayshore Transit Management,*
23 *Inc.* (2012) 203 Cal.App.4th 1112, 1135-1136 [affirming the trial court’s substantial reduction
24 of PAGA civil penalties – “We conclude that the trial court reasonably determined that an award
25 of the maximum penalty amount would be unjust under the facts and circumstances of this
26 case.”]; *Magadia v. Wal-Mart Associates, Inc.* (N.D. Cal. 2019) 384 F.Supp.3d 1058, 1104
27 [80% reduction in PAGA penalties where the amount requested by the plaintiffs “would be
28 unjust and oppressive, and . . . a significant reduction is appropriate [because] California courts

1 have held that a defendant's attempt to comply with the law is a basis for reduction in a PAGA
2 penalties award”].)

3 Using the rate applied by the *Carrington* court, the PAGA penalties in this case could be
4 just \$8,250 (1,650 pay periods x \$5 per pay period). And, none of that takes into account the
5 potential problems in proving the number of violations in any PAGA case, including this one.

6 Moreover, the \$10,000 allocation to PAGA (out of maximum reasonable exposure of
7 \$165,000), is approximately 6%, which is far more than other courts have required for purposes
8 of approval. For instance, in *Viceral v. Mistras Group, Inc.*, 2016 U.S. Dist. LEXIS 140759,
9 2016 WL 5907869, * 9 (N.D. Cal. Oct. 11, 2016), Judge Chen approved a settlement of PAGA
10 claims for 0.15% of their maximum value, because the “settlement taken as a whole” vindicated
11 employee rights and may have a deterrent effect on the defendant employer and others. (See
12 also *Hamilton*, 2021 U.S. Dist. LEXIS 221416 at *27 [approving settlement of PAGA civil
13 penalties that were between 1.3% and 2.2% of the maximum exposure].)

14 Ultimately, because PAGA claims are exceptionally difficult to value, courts are
15 deferential to the settlements of litigants, even when the amount allocated to a PAGA claim is
16 relatively small. (See, e.g., *Nordstrom Commission Cases* (2010) 186 Cal.App.4th 576
17 [affirming approval of \$9 million settlement that allocated \$0 to the PAGA claim].). That is
18 particularly true where, as here, the LWDA does not object to the settlement. (See *Echavez v.*
19 *Abercrombie & Fitch Co.* (C.D. Cal. March 23, 2017), No. CV 11-09754-GAF, 2017 U.S. Dist.
20 LEXIS 141134, at *10 [because the LWDA was notified of the proposed settlement and did not
21 respond in any way, court drew an inference that LWDA did not object to the terms of
22 settlement].)

23
24 Dated: December 2, 2022

SHENKMAN & HUGHES PC

25
26 By: /s/Kevin Shenkman
27 Kevin I. Shenkman
28 *Attorneys for Plaintiff*

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 28905 Wight Rd., Malibu, California 90265.

On December 2, 2022 I served true copies of the following document(s) described as
SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

on the interested parties in this action as follows:

David Fishman
Ballard Rosenberg Golper & Savitt, LLP

BY EMAIL: I emailed the document(s) as .pdf file(s) to the above-referenced interested parties.

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

Executed on December 2, 2022 at Malibu, California.

/s/Kevin Shenkman
Kevin Shenkman