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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MELISSA MERLOS; MARA SARHAJ MORENO QUINONEZ, as individuals, on behalf of the state of California, as a private attorney general,

PLAINTIFFS,

v.

BISHOP GOLD GROUP, LLC; and DOES 1 thru 50, inclusive,

DEFENDANTS.

Case No. 22STCV07773

[Case Assigned for All Purposes to Hon. Rupert A. Byrdsong in Dept. 28]

NOTICE OF MOTION AND MOTION FOR APPROVAL OF INDIVIDUAL REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Filed concurrently with Declarations of Liane Katzenstein Ly in Support of Plaintiffs' Motion for Approval of Representative Action Settlement; [Proposed] Order, and Judgment]

Date: March 26, 2024
Time: 8:30 AM
Dept.: 28
RES ID: 178343839453

Complaint Filed: March 3, 2022
Trial Date: None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 26, 2024 at 8:30 AM in Department 28 of the above-entitled court, Plaintiffs MELISSA MERLOS; MARA SARHAJ MORENO QUINONEZ ("Plaintiff") will move the Court for an Order Granting Approval of Representative Action Settlement.

The Motion will be made on the grounds that the proposed Settlement is fair, adequate, reasonable, and in the best interest of Plaintiff and the Parties.

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of Liane Katzenstein Ly, the Settlement Agreement and Release of All Claims ("Agreement") (Exhibit "1" to the concurrently filed Ly Declaration), all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: February 7, 2024

KINGSLEY & KINGSLEY, APC

By: ______________________________

Liane Katzenstein Ly
Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff MARA SARHAJ MORENO QUINONEZ ("Plaintiff") submits this Memorandum of Points and Authorities in support of Motion for Approval of Representative Action Settlement. Plaintiff and Defendant BISHOP GOLD GROUP, LLC ("Defendant") (collectively, the "Parties") have reached a proposed individual settlement documented in a Confidential Settlement Agreement and Release of All Claims ("Agreement").[1] Plaintiff presents the instant motion to seek approval of the settlement of the PAGA representative claims on behalf of Plaintiff only.

This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699, et seq. ("PAGA"). The amount allocated to settle Plaintiff's individual PAGA claim is $1,000.00, and this amount is to be divided between the Labor and Workforce Development Agency ("LWDA") and Plaintiff, the aggrieved employee, as required by Labor Code section 2699(i). that amount is $1,000.00, with $750.00 (or 75%) going to the LWDA and $350.00 (or 25%) distributed to Plaintiff, the aggrieved employee.[2]

Plaintiff requests that the Court "review and approve any settlement of any civil action filed pursuant to this part" (*See* Lab. Code § 2699(1)(2).) If the Court deems the Agreement fair and acceptable, Plaintiff requests that the Court: (1) enter an order approving the Agreement and ordering the Parties to carry the terms of the Agreement.

II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY

A. Litigation Overview and Procedural History

On December 27, 2021, and in compliance with Labor Code § 2699.3(a)(1), written notice to Defendant and the Labor and Workforce Development Agency ("LWDA") was provided

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[1] The Parties entered into a settlement for Plaintiff's individual claims, including the PAGA representative claims on behalf of Plaintiff only. The Agreement is attached to the declaration of Liane Katzenstein Ly, but the details of the non-PAGA portion of the Settlement have been redacted due to its designation as "Confidential."

[2] Pursuant to PAGA, civil penalties recovered by aggrieved employees shall be distributed 75 percent to the Labor and Workforce Development Agency ("LWDA") and 25 percent to the aggrieved employee(s). Lab. Code § 2699(i).

seeking civil penalties under PAGA for violation of Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226.7, 226.8, 510, 512, 1194, 1194.2, 1199, and IWC Wage Order 4-2001. (Declaration of Liane Katzenstein Ly ("Ly Decl.") ¶5.)

On March 3, 2022, Plaintiff filed a putative representative action complaint against Defendant in in Los Angeles County Superior Court, Case No. 22STCV07773, entitled *MELISSA MERLOS; MARA SARHAJ MORENO QUINONEZ, as individuals, on behalf of the State of California, as a private attorney general, PLAINTIFFS, v. BISHOP GOLD GROUP, LLC; and DOES 1 thru 50, inclusive, DEFENDANTS.* (Ly Decl. ¶6.) Plaintiff's complaint alleges a single cause of action against Defendant for penalties pursuant to Labor Code § 2699, *et seq*. ("PAGA") for violations of Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226.7, 226.8, 510, 512, 1194, 1194.2, 1199, and IWC Wage Order 4-2001. (Hereafter, the "Action".) (Ly Decl. ¶7.)

Plaintiff has not received any response from the LWDA to the formal written notice. As Plaintiff has waited more than sixty-five (65) days from the December 27, 2021 postmark date of his written notice before filing his action, Plaintiff has complied with all of the requirements set forth in Labor Code § 2699.3 to commence a representative action under PAGA. (Ly Decl. ¶8.)

After the filing of the complaint and meeting and conferring with Defendant's Counsel, Plaintiff's Counsel was provided with a copy of an arbitration agreement signed by Plaintiff that includes a class action waiver. (Ly Decl. ¶9.)

On or around September 8, 2022, Defendant filed its motion to compel Plaintiff's individual PAGA claim to arbitration and to dismiss Plaintiff's representative PAGA claim. (Ly Decl. ¶10.) On or around October 3, 2022, the Court ordered Plaintiff's individual claims to arbitration and stayed the Action pending the results of arbitration. (Ly Decl. ¶11.)

B. The Discovery Process and Mediation

The Parties engaged in extensive informal and formal discovery in arbitration. Based on Defendant's records, the data reveals that there is an estimated total of 4 pay periods at issue. (Ly Decl. ¶12.)

The Parties engaged in good faith settlement negotiations as to Plaintiff's individual claims, including the PAGA representative claims on behalf of Plaintiff only, which led to this formal

Settlement Agreement and Release of All Claims. (Ly Decl. ¶13.) The PAGA representative claims, on behalf of Plaintiff only, are subject to the approval of the Court. (Ly Decl. ¶14.)

Although Defendant denies that it violated any pertinent law, it recognized the risks and attendant costs of litigation, and the Parties were able to reach a tentative settlement subject to finalization of a formal Settlement Agreement and Release of All Claims and the approval of the Court. (Ly Decl. ¶15.) The Parties negotiated the terms and conditions of the Agreement and now present the agreed-upon Agreement to the Court for Approval of the PAGA representative settlement on behalf of Plaintiff only. (*Id.*)

III. PAGA ACTIONS AND THE REQUIREMENTS

A. The PAGA Statutory Scheme

PAGA creates a means of "deputizing" citizens as private attorney generals to enforce the Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501, review den. (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910. A plaintiff may not — and Plaintiff here does not — bring a PAGA claim simply on his or her own behalf as an individual claim, but "as the proxy or agent of the state's labor law enforcement agencies." *Id.*, at 986; *see also Reyes v. Macy's, Inc.* 202 Cal.App.4th 1119, 1123-1124(2011); *Iskanian v. CLS Transp. Los Angeles*, LLC, 59 Cal. 4th 348, 380).

When an aggrieved employee brings a PAGA claim, "the government is always the real party in interest." *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234 Cal.App.4th 1109, 1119 (2015); *Montano v. The Wet Seal Retail, Inc.* 232 Cal.App.4th 1214, 1222 (2015) ("[A] PAGA action is a dispute between an employer and the State agency."). Accordingly, a plaintiff that brings a PAGA claim represents "the same legal right and interest as state labor law enforcement agencies," in that the plaintiff is seeking to recover those civil penalties that otherwise would have been assessed and collected by the LWDA. *Arias*, *supra*, 46 Cal.4th at 986; Lab. Code § 2699 (a) & (f); *Securitas*, *supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825 (holding "PAGA plaintiffs do not have property rights in their cases."). This is borne out by the fact that the LWDA receives 75 percent of any civil penalties recovered; thus, recoveries are principally for the state and only secondarily for aggrieved employees. Lab. Code § 2699 (i). Therefore, when a plaintiff brings a PAGA claim, he or she is properly conceived of as a private attorney general prosecuting violations of California's labor laws on behalf of the state.

An employee may commence a PAGA action by fulfilling the requirements of Cal. Lab. Code § 2699.3 (a)(1), which simply states:

> "The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation."

Lab. Code § 2699.3 (a)(1)

As explained above, Plaintiff has complied with the notice requirements and has properly pled a PAGA cause of action.

B. The Court Has Discretion When Awarding the Amount of Penalties

PAGA provides for penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation. Lab. Code § 2699(f)(2). "PAGA penalties...are mandatory, not discretionary" and must be awarded upon a showing that Defendant violated the Labor Code.[3] (*Amaral v. Cintas Corp. No. 2* 163 Cal. App. 4th 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942, at *3.)

However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code §2699(e)(2) states that "a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Here, Defendant denies that it violated any law or that it engaged in any knowing or intentional conduct giving rise to liability, and expressly deny that any employees suffered harm.

C. Standards for Settlement Approval

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[3] *See also Willner v. Manpower Inc.*, *supra*. 35 F. Supp. 3d at 1136; *McKenzie v. Federal Exp. Corp*, *supra*, 765 F.Supp.2d at 1232.

When approving a settlement of a PAGA action, the statute simply requires the Court to "review and approve any settlement of any civil action filed pursuant to this part." (Lab. Code § 2699(*l*)(2).) PAGA does not set forth standards for evaluating such settlements, and the California appellate courts have not weighed in on the issue. However, trial courts have approved PAGA settlements where the penalties are "genuine and meaningful" and "consistent with the underlying purpose" of the statute. (See *O'Connor v. Uber Techs., Inc*. (N.D. Cal. 2016) 201 F. Supp. 3d 1110, 1113.) Additionally, as explained in *Arias v. Superior Court* (2009) 46 Cal.4th 969, class action procedural rules do not apply in PAGA cases, including the two-step preliminary and final approval process. Rather, the approval process consists of one step where the court decides if the settlement should go into effect.

IV. THE SETTLEMENT

Defendant will pay the total sum of $1,000.00 in full and final settlement of the individual PAGA claims alleged on behalf of Plaintiff only. (Ly Decl. ¶16., Exhibit 1, ¶3.) In accordance with Labor Code § 2699(i), Plaintiff, the aggrieved employee, shall receive the remaining 25% ($350.00) share of the PAGA Penalties. (Ly Decl. ¶17., Exhibit 1, ¶¶3 and 15.)

V. ARGUMENT

A. The Court Should Approve the Agreement

The Parties recognize that in accordance with Labor Code §2699(l), Court approval is required in the event of a settlement of a PAGA action on a representative basis. However, as explained in *Arias v. Superior Court* 46 Cal.4th 969 (2009), the Parties are not obligated to follow the class action procedural rules in PAGA cases and therefore need not obtain approval of the PAGA settlement through a motion for primary or final approval. Nonetheless, in order to comply with the requirements of Labor Code §2699, the Parties submit the instant Motion and the redacted Agreement (Exhibit "1" to the Ly Declaration) for Court approval.

B. The Risks of Moving Forward with Plaintiffs' PAGA Claim

To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation and discount taken follows. (Ly Decl. ¶18.) Plaintiff believed that Defendant may persuasively argue that the Court should exercise its discretion to significantly reduce or altogether waive any penalties under PAGA. (Ly Decl. ¶19.) The court in a PAGA action has the same discretion "to assess a civil penalty" that the Labor Commissioner would have, as well as complete discretion to "award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Labor Code § 2699(e)(1) and (e)(2)).

PAGA Counsel anticipated that, at trial, Counsel for Defendant would make an argument that Defendant properly classified Plaintiff as an independent contractor. While Plaintiff disagrees that this analysis is legal correct or persuasive, PAGA Counsel had to consider these arguments and how they might impact any judgment ultimately awarded to Plaintiff, the aggrieved employee, if the Court were persuaded by them. (Ly Decl. ¶20.)

C. The Risks Associated with the Misclassification Claim

Although any person rendering service for another is generally presumed to be an employee (*see* California Labor Code section 3357), Plaintiff alleges that Defendant knowingly and willfully misclassified Plaintiff as an "independent contractor" in violation of California Labor Code § 226.8.

Plaintiff was employed as an account executive. (Ly Decl. ¶21.) Plaintiff's job duties included working with clients and assisting with the sales of precious metals and gold and gold related investments. (Ly Decl. ¶22.)

However, at all times while working for Defendant, Plaintiff alleges that Plaintiff was actually an employee of Defendant rather than an independent contractor because, *inter alia*: Defendant had control or the right to control Plaintiff's work by overseeing and instructing Plaintiff how to complete assignments. (Ly Decl. ¶23.)

California Labor Code § 226.8 makes it unlawful for any person or employer to willfully misclassify an individual as an independent contractor. California presumes that workers are employees "and places the burden on the hirer to establish that the worker is an independent contractor." (*Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 913, 951, n. 23; Cal. Lab. Code, § 2775(b)(1).) To be considered an independent contractor, the hiring entity must demonstrate each prong of the "ABC" test:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(B) The person performs work that is outside the usual course of the hiring entity's business.

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(Cal. Lab. Code, § 2775(b)(1)(A)-(C).) This was the test established in *Dynamex,* which presumes that workers are employees. (*Dynamex,* 4 Cal.5th at p. 955, 957.)[4] Defendant can only defeat this presumption by establishing *each* of the three "ABC" prongs. (*Ibid.*; see also Cal. Lab. Code, § 2775.) "[E]ach part of the ABC test may be independently determinative of the employee or independent contractor question." (*Dynamex,* 4 Cal.5th at p. 955.)

The definition of "employee" under the California Wage Orders is "intended to be broader and more inclusive" than the common law test, and than the federal "economic reality" standard. (*Id*. at pp. 953, 956.) In contrast to the common law, which provides the narrowest definition of an employee in order "to limit one's vicarious liability for the misconduct of a person rendering service to him," *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350 ("*Borello*"), California "adopt[s] a distinct standard that provides broader coverage of workers with regard to the very fundamental protections afforded by wage and hour laws and wage orders." (*Dynamex,* 4 Cal.5th at p. 949.)

1. <u>Plaintiff alleges she is an Employee as Plaintiff Was Hired, Trained, and Required to Perform Sales Services Which Defendant is in the Business of Providing</u>

If an employer is unable to show "that the worker performs work that is outside the usual course of the hiring entity's business," then that worker is an employee pursuant to the ABC test.

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4 "[T]he Legislature made clear that it was broadly adopting the Dynamex holding for purposes of all benefits to which employees are entitled under the . . . Labor Code[] and all applicable wage orders. (*People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 277, <u>as modified on denial of reh'g (Nov. 20, 2020), review denied (Feb. 10, 2021)</u>.), at *3.)

(*Dynamex*, 4 Cal.5th at p. 964.) The California Supreme Court provided two examples of the application of this element:

> [W]hen a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. [Citation.] On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company [Citation], or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes [Citation], the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees.

(*Id*. at p. 959-60.)

Here, Plaintiff alleges that Defendant is in the business of providing precious metals and gold and gold related investment services, among other services, which it advertises to its customers as such. Plaintiff alleges she was hired and trained by Defendant to perform these very tasks.

Plaintiff alleges that Defendant will be unable to carry its burden under part B of the ABC test, and Plaintiff will show that Plaintiff suffered wage and hour violations due to misclassification during the relevant time period.

2. <u>Plaintiff also alleges that she is an Employee Since Defendant Controlled the Details of Plaintiff's Work</u>

If an employer is unable to show "that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact," then the worker is an employee pursuant to part A of the ABC test. (*Dynamex*, 4 Cal.5th at p. 964.) Thus, if the employer has either the right to control or actual control over *how* the worker accomplishes the desired result, then the worker is an employee under part A. (*Id*. at p. 958; see *Angelotti v. Walt Disney Co*. (2011) 192 Cal.App.4th 1394, 1405 [holding "[i]n light of the nature of the work and the evidence of his actual experience on the job, [hiring entity] clearly had the right to control the manner and method of [plaintiff's] work."].)

Here, Plaintiff maintains that Defendant had the right to control the manner of Plaintiff's work. Plaintiff alleges that Defendant provided Plaintiff with specific instructions pertaining to the job performance, practices and policies Plaintiff must follow, and provided training materials to Plaintiff. (*See Caso v. Nimrod Productions, Inc*. (2008) 163 Cal.App.4th 881, 890 [applying *Borello*, finding that three stunt choreographers satisfied their burden on summary judgment to demonstrate they were employees of Touchstone when Touchstone "retained control over the entire production, including the ability to create, edit and even transform the production as it saw fit," and "reported to Touchstone producers."].)

Plaintiff alleges that all meaningful aspects of the business relationship are controlled by Defendant. Thus, Plaintiff alleges that Defendant will be unable to carry its burden to show a lack of control over Plaintiff under part A of the ABC test.

D. <u>The Risks Associated with the Wages/Overtime Claim</u>

Plaintiff alleges that Defendant failed to pay Plaintiff for earned wages and overtime. Cal. Labor Code section 510(a) requires "[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." Further, "[a]ny work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee" and "any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee." (Cal. Lab. Code, § 510(a).)

Plaintiff maintains that Defendant failed to pay Plaintiff for all hours worked at the proper rate. (Ly Decl. ¶24.) Every employer is required to pay each employee not less than the applicable minimum wage for all hours worked and at the applicable overtime rate for worked performed over 8 hours per day and/or 40 hours per week. Plaintiff alleges that, as a result of the alleged misclassification, she was not paid at the proper corresponding rate for all hours worked, including overtime. (Ly Decl. ¶25.)

As mentioned above, if Plaintiff was in fact properly classified as an independent contractor, then there would be no basis for Plaintiff's overtime claim. (Ly Decl. ¶26.) As such, Plaintiff took these risks into account when settling.

E. The Risks Associated with the Meal Period Claim

Under California Labor Code section 512 and IWC Wage Order No. 4, no employer shall employ any person for a work period of more than five hours without providing a meal period of not less than thirty minutes.

Here, Plaintiff alleges that she consistently worked shifts over five (5) hours. (Ly Decl. ¶27.) Plaintiff alleges that Defendant failed to apprise Plaintiff of Plaintiff's rights associated with meal periods, failed to record meal periods, and failed to provide compliant meal periods. (Ly Decl. ¶28.)

The right to meal periods hinges on whether or not Plaintiff can establish misclassification, and Plaintiff took this risk into account when settling. (Ly Decl. ¶29.)

F. The Risks Associated with the Rest Period Claim

Labor Code section 226.7, subdivision (c), requires an employer to pay an additional hour of compensation for each workday the employer fails to provide a rest period according to law. Employees are entitled to a paid ten (10) minute rest break for every four (4) hours worked, or major fraction thereof. (Cal. Code Regs., tit. 8, § 11070, subd. 12(A).)

Employers must authorize and permit a net ten-minute paid rest period for every four hours, or major fraction thereof, of work for its employees. If an employer does not, then the employer must pay the employee one hour of pay at the employee's regular rate of pay for each workday that the rest period is not provided. (Cal. Code Regs., tit. 8, § 11040, subd. 12(B).)

Here, Plaintiff alleges that Defendant failed to maintain a lawful procedure of providing rest breaks to Plaintiff. (Ly Decl. ¶30.) The same risk of losing on misclassification applies here. (Ly Decl. ¶31.)

G. The Risks Associated with the Section 204 Penalties Claim

"Section 204 imposes an obligation of timely payment of wages upon California employers and provides rules for scheduling wage payments. Specifically, for most employees, section 204 requires payment of wages twice during a calendar month, and an employer is subject to penalties for violating section 204." *See's Candy Shops, Inc. v. Superior Court*, 210 Cal.App.4th 889, 904

(2012) (citing to Labor Code §§ 204(a); 210).

Labor Code § 204(a) provides:

> All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month.

Labor Code § 204(d) provides:

> The requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than **seven** calendar days following the close of the payroll period (emphasis added).

Here, Plaintiff asserts that Defendant's payroll practices are defective in that they fail to timely pay Plaintiff's wages in accordance with California law. (Ly Decl. ¶32.) Thus, Plaintiff maintains that Defendant is liable for each wage statement issued.

H. The Risks Associated with the Wage Statement Claims

California Labor Code §226(a) requires Defendant to provide its employees with an accurate, itemized written wage statement that shows a number of specific items such as, but not limited to, the total hours worked by the employee, deductions, inclusive dates for each pay period, the name and employee and only the last four digits of his or her social security number, the name and address of the legal entity that is the employer, all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee, and the piece rate units paid, among other items.

Here, Plaintiff alleges that Defendant does not furnish Plaintiff with itemized wage statements at all. (Ly Decl. ¶33.)

As this is a derivative claim, the same risks present for the above claims were present for this claim. (Ly Decl. ¶34.)

I. The Risks Associated with the Waiting Time Penalties Claim

Under Labor Code section 203, if an employer fails to provide wages at the time of an employee's termination or within seventy-two (72) hours of resignation, then the employee's wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203 reflects a public policy that favors the full and prompt payment of earned wages. (See, e.g., *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.)

Here, Plaintiff is no longer employed by Defendant. If, as alleged, Defendant failed to pay all wages owed and due upon their termination and/or resignation, waiting time penalties are appropriate. (Ly Decl. ¶35).

The risk analysis for the section 203 claim flows from the risk analysis for the underlying wage claims discussed above. If Defendant could prove that Plaintiff was properly classified and paid for all hours worked, there would be no recovery of wages and no waiting time penalties that flow therefrom.

Plaintiff also factored in the risk of establishing that any violation was "willful" and the fact that this claim is derivative. (Ly Decl. ¶36.) Plaintiff maintains that Defendant was fully aware that Plaintiff was being denied wages. Thus, Plaintiff contends it is clear that Defendant's unlawful employment practices were not the result of inadvertent error, rather willfully engaging in practices intended to deny Plaintiff of Plaintiff's substantive rights under the Labor Code.

In light of all these significant risks and given that PAGA gives the Court broad discretion to reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross PAGA Settlement Amount of $1,000, was fair and reasonable. (Ly Decl. ¶37., Exhibit 1, ¶¶3 and 15.)

J. <u>A Court May Exercise its Discretion to Reduce the Maximum Civil Penalty Awarded for Technical Violations of the Labor Code</u>

"PAGA penalties…are mandatory, not discretionary" and must be awarded upon a showing that Defendant violated the Labor Code. *Amaral v. Cintas Corp. No.* 2 163 Cal. App 4th 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942, at *3.

However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code section 2699(e)(2) states that "a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory."

In *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047, the Court exercised its discretion to reduce the PAGA penalty amount. There, the plaintiff brought a PAGA claim for violations of section 226(a) based on the following issues: (a) the statements did not show either an employee identification number or the last four digits of the social security number of the employee; (b) the statements did not show the beginning date of the pay period for which the employee was paid; (c) the statements identified Covidien as the employee's employer. (*Id*. At *2). There were approximately 28,000 wage statements at issue. (*Id*. at *3). The *Fleming* court calculated the maximum potential civil penalty exposure at $2.8 million ($100 per wage statement). (*Ibid*; *see also* Labor Code § 2699(f)(2)). After a bench trial, the Court elected to exercise its discretion to reduce the civil penalty per wage statement to $18 per wage statements, reflecting 18% of the potential exposure. (*Id*. at *4). The Court reasoned:

> Here, the aggrieved employees suffered no injury due to the erroneous wage statements, and made no complaint of the errors or omissions contained therein prior to filing suit. Also, Defendants were not aware that the wage statements violated the law and took prompt steps to correct all violations once notified. Given these circumstances, the Court finds a $2.8 million penalty unjust according to § 2699(e)(2). Accordingly, in its discretion, the Court reduces the penalty to $500,000.

Id. at *4. A court exercising its discretion to significantly reduce the civil penalty awarded under PAGA is not a rare occurrence. *See e.g., Carrington v. Starbucks Corp*. (2018) 30 Cal. App. 5th 504, 529 (awarding 10% of maximum civil penalty for meal break claims in light of Starbuck's "good faith attempts" to comply and because the violations were minimal).

Here, the Court could use its discretion to reduce the penalties.

K. <u>Based on the Risks Above and the Analysis of the Maximum Penalties Available, Plaintiff Believes this Settlement is Fair and Reasonable</u>

Based on these figures, the maximum potential exposure for the PAGA claims for Plaintiff is $400.00 (4 pay periods at issue multiplied by $100 a pay period). If these penalties are stacked, the full exposure could be as high as $2,800.00. There is also a penalty of between $5,000.00 and

$25,000.00 for misclassification pursuant to Labor Code Section 226.8. In light of the immense discretion available, Plaintiff believes the Agreement is reasonable. Given that this Agreement is for $1,000 in PAGA penalties, Plaintiff believes this is a very fair and reasonable settlement.

VI. CONCLUSION

Plaintiff submits that the proposed settlement as documented in the Agreement is fair, adequate, reasonable, and in the best interest of the Parties and the State of California. Plaintiff respectfully requests that the Court approve the Settlement of the PAGA representative claims as to Plaintiff only and Order that the Settlement is carried out according to the terms of the Agreement.

DATED: February 7, 2024 KINGSLEY & KINGSLEY, APC

By: ____________________________

Liane Katzenstein Ly
Attorneys for Plaintiffs

(PROOF OF SERVICE)
[CCP 1013(a)(3)]

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 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On February 7, 2024, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR APPROVAL OF INDIVIDUAL REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Paul A. Rigali
prigali@larsonllp.com
Chloë N. Coleman
ccoleman@larsonllp.com
Mehrunisa Ranjha
mranjha@larsonllp.com
Clinton Ford
cford@larsonllp.com
Lori Cruz
lcruz@larsonllp.com
LARSON LLP
555 South Flower Street, 30th Floor
Los Angeles, California 90071

[XX] **BY ELECTRONIC SERVICE:** I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (https://dir.tfaforms.net/315) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] **(BY ELECTRONIC MAIL TRANSMISSION)**: I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the above email address(es).

[XX] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 7, 2024, at Woodland Hills, California.

____
Michelle Tanzer

Make a Reservation

MELISSA MERLOS, et al. vs BISHOP GOLD GROUP, LLC

Case Number: 22STCV07773 Case Type: Civil Unlimited Category: Other Employment Complaint Case
Date Filed: 2022-03-03 Location: Stanley Mosk Courthouse - Department 28

Reservation

Case Name: MELISSA MERLOS, et al. vs BISHOP GOLD GROUP, LLC	Case Number: 22STCV07773
Type: Motion re: (Approval of Individual Representative Action Settlement)	Status: RESERVED
Filing Party: Mara Sarhaj Moreno Quinonez (Plaintiff)	Location: Stanley Mosk Courthouse - Department 28
Date/Time: 03/26/2024 8:30 AM	Number of Motions: 1
Reservation ID: 178343839453	Confirmation Code: CR-UOAXKJGSBYYFMEUJV

Fees

Description	Fee	Qty	Amount
Motion re: (name extension)	60.00	1	60.00
Credit Card Percentage Fee (2.75%)	1.65	1	1.65
TOTAL			**$61.65**

Payment

Amount: $61.65	Type: MasterCard
Account Number: XXXX4583	Authorization: 60137Z
Payment Date: 1969-12-31	

Print Receipt Reserve Another Hearing

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