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SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF ORANGE

MANUEL GUTIERREZ, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

KITE ELECTRIC INCORPORATED, a
California corporation; and DOES 1 through 10,
Inclusive,

Defendants.

CASE NO. 30-2020-01133960-CU-OE-CXC
ASSIGNED FOR ALL PURPOSES TO:

The Honorable Peter J. Wilson
Department CX 102

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR ORDER GRANTING
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: February 3, 2022
Time: 2:00 p.m.
Dept: CX 102
Judge: Hon. Peter J. Wilson

Complaint filed: February 24, 2020
Trial date: Not set

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I. INTRODUCTION

Plaintiff Manuel Gutierrez seeks preliminary approval of a non-reversionary wage and hour class and Private Attorneys General Act (PAGA) settlement of \$458,991 - \$220,000 new money and \$238,991 paid for purported releases in May 2020, three months after the action was filed. The proposed Settlement will benefit 101 electricians employed by Kite Electric, Incorporated (“Kite”) in California at any time from February 24, 2016 to February 19, 2021 (“Class Period”). Declaration of Jeff Geraci, (“Geraci Decl.”), ¶¶11, 12.

II. THE PARTIES, CLASS, AND AGGREIVED EMPLOYEES

A. Plaintiff and Defendant

Kite is an electrical contractor that began in 2000 in Irvine, California. It performs work on new multi-family projects Orange County. Geraci Dec ¶13. Plaintiff Manual Gutierrez worked for Kite as an electrician from June to October 2019, and was paid on a piece-rate basis. Geraci Decl. ¶14.

B. The Class and Aggrieved Employees

The Class is, “all persons employed by Kite in California as non-exempt electricians at any time during the period from February 24, 2016 through February 19, 2021.” The 101 Class Members worked an estimated 13,016 workweeks in the Class Period. An estimated 71 aggrieved employees worked 2,675 Pay Periods from December 21, 2018 to February 19, 2021 (“PAGA Period”). Geraci Decl. ¶15.

Class Members generally performed electrical work on new construction. They generally worked in groups, took breaks and meals together, normally left work together by 3:30 p.m., and overtime work was relatively rare. Geraci Decl. ¶16. Class Members were sometimes paid solely or partially by the “piece,” or specific task completed, rather than by the hour. This arguably caused Class Members to perform unpaid work, such as unloading trucks; returning to a warehouse, or central location on a large job site, to retrieve supplies; traveling from one part of a job site to another; or remaining on a job site when the next project was not immediately available. It also arguably caused unpaid rest periods. *Vaquero v. Stoneledge Furniture, LLC*, 9 Cal.App.5th 98, 111 (2017) Geraci Decl. ¶17.

All Class Members would handwrite a number of hours at the end of a pay period, confirming scheduled hours had been worked. Some would record the number of “pieces” completed. Class Members were paid by the piece in only an estimated 6,424 shifts. Geraci Decl. ¶18.

1 Kite advised employees they were “required to take a 30-minute lunch and [are] entitled to rest
2 periods each workday at the rate of 10 minutes net rest time for each four hours of work or major
3 fraction,” and employees attested each period they had taken these breaks. Geraci Decl. ¶19.

4 Before December 31, 2019, Kite issued wage statements that did not reflect all hours worked, but
5 showed the amount earned in hourly and piece work, with a standard number of hours. For example, a
6 total amount of piece work earning might be arbitrarily divided into 80 hours of regular pay with the
7 remainder of the piece rate earnings shown as incentive pay, or another reference. Geraci Decl. ¶20.

8 Starting in January 2020, Kite changed payroll providers and began to issue compliant wage
9 statements, even in pay periods which included piece-rate wages. Geraci Decl. ¶21.

10 **III. PROCEDURAL HISTORY, INVESTIGATION AND INFORMAL DISCOVERY**

11 On October 16, 2019, Plaintiff’s counsel formally requested his personnel file and obtained job
12 applications, work schedules, and times and pay records. Geraci Decl. ¶22. Kite produced the requested
13 documents in November 2019. In January 2020, Plaintiff filed charges with the Labor and Workforce
14 Development Agency (LWDA). On February 24, 2020, Plaintiff filed this lawsuit. Geraci Decl. ¶23.

15 Plaintiff filed a First Amended Class Action Complaint (FAC) adding PAGA claims (submitted
16 April 3, 2020, filed May 26, 2020 due to the pandemic). The FAC alleged Kite failed to provide (1)
17 minimum and overtime wages (Labor Code §1194); (2) rest periods or premium wages in lieu (Labor
18 Code §226.7); (3) timely final wages (Labor Code §203); (4) accurate wage statements (Labor Code
19 §226); and violated the (5) Unfair Competition Laws (Bus. & Prof. Code §§17200 et seq); and, (6)
20 PAGA (Labor Code §§2699 et seq.). Geraci Decl. ¶24.

21 By the end of May 2020, after receiving LWDA charges and being served with the Action, Kite
22 paid 98 Class Members for past damages based on the number of weeks each was paid with piece-rate
23 wages, a total of \$238,991, in exchange for purported releases of the claims alleged. Geraci Decl. ¶25.

24 In January 2020, Kite’s new payroll provider, Heartland Payroll, began correctly calculating
25 piecework wages, separately paying for rest periods and non-productive time. Geraci Decl. ¶26.

26 Plaintiff served Kite with form interrogatories (employment), special interrogatories, requests for
27 admission, and requests for production of documents, and a notice of taking deposition of Kite’s person
28 most qualified about topics relevant to the allegations. Geraci Decl. ¶27.

During discussions regarding outstanding discovery responses, the Parties agreed to mediate, and Plaintiff requested and Kite informally produced bankers boxes containing over 2,000 pages of documents and data for the relevant time period, including: (a) Employee Handbooks (in English and Spanish); (b) documents which allowed Plaintiff to determine the number of Class Members, including current and former employees; (c) aggregate number of Work Weeks; (d) aggregate number of Pay Periods during the PAGA Period; (e) a breakdown of pay periods in which at least some piece work was performed; (f) wage statements and time sheets for each Pay Period for each Class Member from February 24, 2016 to May 2020, (g) Pick Up Stix settlement agreements and releases (in English and Spanish); and (h) unredacted spreadsheets reflecting \$238,991 in Pick Up Stix payments to 98 Class Members, ranging from \$350 to \$10,900, in exchange for purported releases; and (i) detailed information showing how payments were calculated. Geraci Decl. ¶28. (Kite could not locate two Class Members who worked briefly in 2016, whose payments would have been \$200 and \$350. Plaintiff's payment, \$2,020, was calculated, but not paid. Geraci Dec. ¶29.)

IV. PLAINTIFF'S CONTENTIONS AND KITE'S DEFENSES

Plaintiff contended employees performing piece work were not compensated for time in which piece-rate wages could not be earned, or for rest periods. *Armenta v. Osmose*, 135 Cal.App.4th 314, 322-24 (2005); *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36, 41 (2013); *Vaquero v. Stoneledge Furniture, LLC*, 9 Cal.App.5th 98, 111 (2017). Plaintiff also contended Kite's wage statements did not display all required information, including inclusive dates, actual hours worked, number of pieces completed, and rates earned for all hours and pieces. Labor Code §226.

Kite contended no employee ever received less than the applicable minimum wage for all time worked during any pay period; not all Class Members received piece rate wages or received them in every pay period; there was little to no time that could be characterized as non-productive or unpaid when piece-rate was paid, as all time spent earned piece rate wages, or was directly related to tasks which earned those wages; if any overtime was worked, Kite's compensation plan properly paid for that small amount of time; Kite began to take steps to insure compliance, and did comply, with all Labor Code requirements after receiving a request for documents from an attorney, a PAGA charge, and this lawsuit, and paid all sums it believed in good faith could arguably be owed to current and

former employees; that in practice, it followed California law at all times by authorizing and permitting rest breaks, not discouraging employees from taking them, and that to the extent any missed a break, it was voluntarily. Geraci Decl. ¶30.

Plaintiff acknowledged Kite’s good faith in calculating and paying amounts owed, but contended not all damages and penalties were paid, and that the Court might not uphold its “Pick-Up Stix” settlement agreements. Geraci Decl. ¶31.

V. MEDIATION

With substantial investigation, research, and analysis of the voluminous data, and a Class-wide damage model, the Parties attended mediation with Hon. Jeffrey Winikow (Ret.) on February 19, 2021, and engaged in serious and informed arms’-length negotiations. By the end of the day, the Parties reached agreement on principle settlement terms, including a credit for the \$238,991 prior payments, and \$220,000 in “new money.” The Parties continued to negotiate and entered a Stipulation of Class and Representative Action Settlement Agreement and Release. Geraci Decl. ¶¶11, 12, 32 - Exh. 1 (“Settlement Agreement” or “SA”).

VI. SUMMARY OF PROPOSED SETTLEMENT

A. Settlement Terms

Kite will pay the Gross Settlement Amount (GSA) of \$458,991, (\$220,000, plus \$238,991 paid to 98 class members pre-mediation) which includes: (a) attorneys’ fees of \$152,997 (one-third of GSA) to compensate Class Counsel for all work performed and remaining to be performed securing final Court approval (apportioned 50/50 between Class Counsel with Plaintiff’s consent. Geraci Decl. ¶34); (b) litigation costs up to \$9,500; (c) Service Payment of \$10,000 for work as Class Representative, foregoing an individual settlement payment, risks undertaken for costs if the case had not successfully concluded, and benefits conferred on the Class; (d) \$10,000 in PAGA Penalties (\$7,500/75% to the LWDA, \$2,500/25% to the Class Members in PAGA Period); and (e) Settlement Administration expenses up to \$7,500. Kite will pay the employer’s share of payroll taxes in addition to the GSA. Geraci Decl. ¶33.

After Court-approved deductions, the estimated Net Settlement Amount (NSA) \$30,003 will be distributed based on the number of weeks worked during the Class Period. Class Members who do not

1 opt-out will receive an estimated \$2.31 for each week worked during the Class Period, and an average
2 estimated \$297.06 (\$30,003/101), in addition to payments received after the Action was filed and before
3 mediation. Geraci Decl. ¶35. Class Members employed during the PAGA Period will receive a share
4 of the \$2,500 PAGA Penalties based on number of Pay Periods worked during the PAGA Period
5 whether they opt-out or not. Geraci Del. ¶36. No portion of the GSA will revert to Kite under any
6 circumstances. After 180 days of issuance, all uncashed checks will be sent to the State of California
7 Controller, Unclaimed Property Division for further handling on behalf of the Class Member's whose
8 check was voided. Geraci Decl. ¶37.

9 **B. Released Claims**

10 Class Members who do not opt out, will release all:

11 [C]laims, debts, liabilities, demands, obligations, damages, liens and/or actions or causes of
12 action of any kind that were alleged in the Complaint, or could have been alleged based on
13 the same nucleus of operative facts alleged in the Complaint, and including, but not limited
14 to, claims under California Labor Code sections 201, 202, 203, 226(a), 226(e), 226.7, 558,
15 1174, 1174.5, 1194, 1194.2, 2699(f), 2699.3, and the Wage Orders promulgated thereunder;
and California Business & Professions Code section 17200 *et seq.* The Released Claims
specifically exclude claims for workers' compensation, unemployment insurance and state
disability compensation, claims under the Employment Retirement Income Security Act of
1974, and claims for previously vested benefits under any Employer-sponsored benefits plan.

16 SA ¶31. Aggrieved employees will receive a share of PAGA Penalties, and release PAGA claims
17 alleged, even if they opt-out. Geraci Decl. ¶¶38, 39; SA ¶¶52, 66, 68.B.

18 **C. Settlement Administration and Notice to the Class**

19 ILYM Group, Inc. ("Settlement Administrator"), will search the National Change of Address
20 database, update Class Member addresses, perform skip-tracing, and mail the Notice of Class Action
21 Settlement ("Class Notice") to each Member in Kite's employment records. Geraci Decl. ¶40; SA
22 ¶55.A; Declaration of ILYM, by Johnathan Paul, ¶¶3, 4.

23 The Class Notice explains: how to participate in the Settlement without submitting a claim;
24 dispute the basis of an Individual Settlement Payment; object or opt-out; release to be given, date of
25 Final Approval hearing, and how to obtain further information. Geraci Decl. ¶41; SA ¶55.A.

26 The method of distributing the Settlement is fair and reasonable and does not give preferential
27 treatment to any Class Member. The information used is readily available from Kite's records, and the
28 Administrator can apply the formula fairly and transparently. Geraci Decl. ¶42.

1 **VII. ARGUMENT**

2 **A. Class Action Settlements Are Subject to Court Review and Approval**

3 “Before final approval, the court must conduct an inquiry into the fairness of the proposed
4 settlement.” CRC, Rule 3.769(g). Where a settlement is reached on terms agreeable to all Parties, a
5 court should disapprove of the settlement “only with considerable circumspection.” *Jamison v. Butcher*
6 *& Sherrerd* (E.D. Pa. 1975) 68 F.R.D. 479, 481. (California courts may look to federal authority
7 guidance on class issues. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 239-40 (2001)).

8 At the preliminary approval stage, a court “limits its inquiry to the extent necessary to reach a
9 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
10 between, the negotiating parties.” *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006).

11 **B. The Settlement is Fair, Reasonable, and Adequate**

12 In deciding whether to approve a proposed class action settlement under Code of Civil Procedure
13 § 382, the Court must find the proposed settlement is “fair, adequate and reasonable.” *Dunk v. Ford*
14 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. The trial court considers all relevant factors, such as:
15 “the strength of Plaintiff’s case, the risk, expense, complexity and likely duration of further litigation,
16 the risk of maintaining class action status through trial, the amount offered in settlement, the extent of
17 discovery completed and the stage of the proceedings, the experience and views of counsel, the
18 presence of a governmental participant, and the reaction of the class members to the proposed
19 settlement.” *Id.* The Court’s primary function is to determine the Settlement is not the product of fraud,
20 overreaching, or collusion, and, as a whole, is fair, reasonable and adequate. *Dunk, supra*, at 1801.

21 A proposed class action settlement is presumed fair where: (1) the parties reached agreement after
22 extensive arms’-length negotiations; (2) investigation and discovery were sufficient to allow counsel
23 and the Court to act intelligently; (3) counsel is experienced in similar litigation; and, (4) the percentage
24 of objectors is small. *Id.*, at 1802.

25 **1. Serious, Informed, Non-Collusive Negotiations Led to Settlement**

26 The Settlement was reached as a result of arm’s-length negotiations facilitated by retired Los
27 Angeles County Superior Court Judge, Hon. Jeff Winikow (Ret.). Though cordial and professional,
28 negotiations have been adversarial and non-collusive. Geraci Decl. ¶43.

1 Plaintiff believes in the merits of his case, but recognizes the inherent risks of litigation and the
2 benefit to the Class of receiving settlement funds immediately, and not risking unfavorable decisions
3 on class certification, the merits of the case, damages, or a lengthy appeal. *Id.*

4 **2. Discovery and Stage of the Proceedings Support Settlement**

5 Plaintiff's Counsel investigated the claims and Kite's defenses before filing PAGA charges.
6 When the Parties agreed to mediate, Plaintiff requested, and Defendant produced documents,
7 information and data for the entire Class for nearly the entire Class Period, to allow liability to be
8 assessed and Class-wide damages to be calculated. Geraci Decl. ¶44. Proof of Class claims in a case of
9 this type is based almost entirely on written policies and an analysis of time and pay records. *Id.*

10 Extensive investigation and information exchanged gave the Parties a clear understanding of the
11 strengths and weaknesses of their positions before negotiations. Geraci Decl. ¶45. *See Munoz v. BCI*
12 *Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 410 (2010) (approving settlement where
13 "considerable information [exists] from which to assess the strength of the class claims" and risks and
14 expense of litigation).

15 **3. Counsel are Experienced in Similar Litigation**

16 Plaintiff's Counsel have significant experience in litigating wage and hour employment class
17 actions. Geraci Decl. ¶¶2-10, 46. This allowed Counsel to compare settlement of Class claims with the
18 risks of further litigation, including trial and appeals. Defense counsel, James W. Michalski is a skilled
19 and an experienced wage and hour litigator who defended his clients vigorously throughout this case,
20 including through mediation and subsequent negotiations. *Id.*

21 Plaintiff's Counsel believes the Settlement is fair, reasonable, and in the Class' best interest in
22 light of the monetary recovery, risks of certification/decertification, summary adjudication, the lengthy
23 process of establishing damages, delay and uncertainty of appeals, the substantial prior settlement
24 payments, and the risk releases obtained would be found enforceable. Geraci Decl. ¶47.

25 The view of the attorneys actively conducting the litigation "is entitled to significant weight" in
26 deciding whether to approve the settlement. *Fisher Bros. v. Cambridge Lee Industries, Inc.*, 630 F.Supp.
27 482, 488 (E.D. Pa. 1985). The Settlement satisfies the three *Dunk* requirements, should be presumed
28 fair, adequate and reasonable, and preliminarily approved.

1 **4. The Settlement is Fair and Reasonable Based on the Strengths of Plaintiff’s**
2 **Case and the Risks and Costs of Further Litigation**

3 Plaintiff and his counsel concluded the proposed Settlement is reasonable. As described below,
4 Kite strongly disputed certification, liability, and damages.

5 **C. The Settlement is a Reasonable Compromise of Claims**

6 “[T]o ensure that the recovery represents a reasonable compromise, given the magnitude and
7 apparent merit of the claims being released, discounted by the risks and expenses of attempting to
8 establish and collect on those claims by pursuing the litigation,” information is presented to the Court,
9 as a fiduciary for absent class members. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 129
10 (2008). *Kullar* does not require the parties to submit an illusory prediction of the outer reaches of
11 exposure without taking into account the actual risks of certification, decertification, dispositive
12 motions, and trial. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal.App.4th 399, 408
13 (2010). *Kullar* also does not require an explicit statement of the maximum amount the plaintiff class
14 could recover if it prevailed on all claims provided there is a record which allows “an understanding of
15 the amount that is in controversy and the realistic range of outcomes of the litigation.” *Munoz*, 186
16 Cal.App.4th at 409.

17 *Munoz* examined the trial court record including number of class members, payroll data,
18 declarations regarding hours worked, and variances in duties and rest and meal period experience. It
19 found this “an adequate basis from which to garner a reasonably adequate understanding of the amount
20 that is in controversy within the meaning of *Kullar*.” *Id.*

21 Class Counsel relied on similar documents and data as in *Munoz*, including time and pay records
22 for all Class Members. Class Counsel reviewed, organized, and analyzed all information, and calculated
23 Class-wide damages through the date of mediation. Geraci Decl. ¶48.

24 Plaintiff’s primary claim was Kite’s pay plan did not compensate the Class for paid rest periods
25 or non-productive time, at least at minimum wage, for all time under Kite’s control, piece-rate wages
26 could not be earned. *Armenta v. Osmose*, 135 Cal.App.4th 314, 322-24 (2005); *Gonzalez v. Downtown*
27 *LA Motors, LP*, 215 Cal. App. 4th 36, 41 (2013); *Vaquero v. Stoneledge Furniture, LLC*, 9 Cal.App.5th
28 98, 111 (2017) (Cohelan Khoury & Singer, counsel of record. Geraci Decl. ¶¶3, 9, 10, 17-19, 24)
 Plaintiff also alleged failure to provide accurate itemized wage statements, timely final wages, and

PAGA violations. *Id.*

Class Members worked an estimated 13,016 weeks, an average of 4 shifts per week, at an average rate of \$25.00 per hour. In 6,424 shifts, piece-rate wages were paid. Geraci Decl. ¶49. If claims were certified, liability proven, and damages awarded, the Class could not obtain a double recovery and Defendant would receive a complete offset for its post-filing, pre-mediation payments.

1. Labor Code § 1194 Unpaid Wages for Non-Productive Time

California employers cannot satisfy the obligation to pay employees at least minimum wage for all time worked by averaging wages earned in time spent in “earning,” with “non-earning” time. *Armenta*, supra, at 322-24; *Gonzalez*, supra at 41. Based on Plaintiff’s work experiences, and the typical physical layout of Kite’s projects, an average of 20 minutes of non-productive time per shift was assumed, and unpaid wages estimated at \$25,156 to which liquidated damages of \$25,156 were added for maximum exposure of \$50,314. Labor Code § 1194.2. (1,606 weeks piece work paid x average 4 shifts per week = 6,424 shifts x 20 minutes per shift = 128,480/60 = 2,141 hrs x avg minimum wage \$11.75 per hr = \$25,156). Geraci Decl. ¶50.

Plaintiff’s counsel believed there was a 50% probability this claim would be certified, based on potential individual issues and differences among employees in the need to perform allegedly “non-earning” work in shifts piece-rate wages were paid. It was also believed liquidated damages were unlikely given the relatively small amount of piece-rate work and the apparent good faith of Kite demonstrated by its post-suit payments and change of policy. Plaintiff’s counsel concluded realistic exposure was 25% of maximum, or \$12,579. Geraci Decl. ¶51.

2. Labor Code § 1194 Unpaid Overtime

Kite’s recording and payment of overtime was inconsistent before December 31, 2019, and overtime wages were not paid in all pay periods in which piece-work was paid. Kite contended class members could not have worked more than 30 minutes of overtime per week at an aggregate average \$20 per hour base rate, and \$30 per overtime rate, and based its pre-mediation payment on that calculation. Based on a review of all time and pay data, including pay periods in which only hourly rates were paid, Plaintiff assumed an average base rate of \$25 per hour, \$37.50 overtime rate, and an average of one hour of overtime per employee per week, for maximum exposure of \$60,225 [1,606

1 piece work weeks x 1 hour OT x \$37.50 (\$25 x 1.5)]. Geraci Decl. ¶52.

2 Plaintiff's counsel believed this claim was likely to be certified, but complete recovery was
3 unlikely as it appeared little overtime was worked generally, Kite did pay overtime, primarily in non-
4 piece-rate shifts, and proof that overtime was worked specifically during a piece-work shift would be
5 difficult. Plaintiff's counsel concluded realistic exposure was 25% of maximum, or \$15,056. Geraci
6 Decl. ¶53.

7 **3. Labor Code § 226.7 Rest Period Premiums**

8 California employers must authorize the first rest period in "shifts from three and one-half to six
9 hours in length..." *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1029. A piece-
10 rate, or commission, compensation formula must compensate separately for rest periods. *Vaquero*,
11 *supra* at 111.

12 Based on *Vaquero's* holding, Plaintiff assumed a violation for rest periods during shifts class
13 members were paid piece-rate wages for maximum exposure of \$160,600. (6,424 shifts x \$25). Geraci
14 Decl. ¶54.

15 Plaintiff's counsel believed this claim was likely to be certified, and liability proven, but
16 Defendant would receive a significant offset, particularly for this claim, as the majority of its post-filing
17 payments were based on the number of pay periods in which Class Members received some piece-rate
18 wages. Based on the offset, Plaintiff's counsel concluded realistic exposure was likely only 10% of
19 maximum, or \$16,060. Geraci Decl. ¶55.

20 **4. Labor Code § 226 Wage Statement Penalties**

21 Wage statements must show, among other things, "total hours worked by the employee" and
22 "corresponding number of hours worked at each hourly rate." Labor Code § 226 (a)(2)(9). An
23 employer's failure to provide accurate itemized wage statements requires it to pay the greater of actual
24 damages or \$50 per employee for the initial pay period and \$100 per employee for each subsequent pay
25 period, not to exceed \$4,000.

26 Kite's wage statements did not consistently show actual hours or rates paid until 2020. Based on
27 estimated class members and pay periods from February 24, 2017, three years before filing, through
28 December 31, 2019, Plaintiff estimates maximum exposure of \$373,750. (\$50 x 57 class members +

1 \$100 x 3,709 pay periods). Geraci Decl. ¶56.

2 To recover these penalties, Plaintiff must prove the underlying violations, and prove this was a
3 “willful violation” against Kite’s good faith defenses. Also, only wage claims may support this claim.
4 “[W]e hold that section 226.7 actions do not entitle employees to pursue the derivative penalties in
5 sections 203 and 226.” *Naranjo v. Spectrum Security Services, Inc.*, 40 Cal. App. 5th 444, 474 (2019).

6 Given that Plaintiff’s Counsel believed the strongest claim was the section 226.7 rest period claim,
7 the wage claims were small, any penalties awarded would be offset by amounts paid by Kite, and it
8 would make a compelling good faith belief defense, exposure on the section 226 claim was seen as
9 extremely limited.

10 Maximum exposure is also overstated. While non-piece-rate wage statements contained some
11 violations, these were based largely on the allegation time was not kept precisely during all pay periods.
12 Arguably, the clearest violations were in pay periods in which piece-rate wages were paid before
13 January of 2020, of which there were only 803. (Maximum exposure of \$83,050). Even if wages were
14 found to be owed during those periods, “The fact that a defense is ultimately unsuccessful will not
15 preclude a finding that a good faith dispute did exist.” *Wilson v. Skywest Airlines, Inc.*, 19-cv-01491-
16 VC, (N.D. Cal. Jul. 12, 2021) citing 8 C.C.R. § 13520(a).

17 Based on these risks, Plaintiff believed realistic exposure was no more than 10% of the piece-rate
18 wage statement maximum exposure, or no more than \$8,305. Geraci Decl. ¶57.

19 **5. Labor Code § 203 Penalties (Derivative)**

20 An employer must pay all wages due to an involuntarily terminated employee at the time of
21 termination, or within 72 hours to an employee voluntarily terminating. If an employer willfully fails
22 to timely pay all wages to separated employees, the wages continue at the same rate for up to 30 days.
23 Labor Code § 203.

24 This violation is derivative and requires Plaintiff to prevail on the underlying wage claim and
25 show the violation was “willful.” As noted above, to the extent this claim depends on failure to pay rest
26 break premium wages, it fails. *Naranjo, supra.*, at 474.

27 Based on a review of original time records and wage statements, there were 40 former employees
28 in the period starting three years before filing, February 24, 2017. Maximum exposure was \$240,000.

[40 class members x 8 hours x \$25 per hour x 30 days = \$240,000]. Geraci Decl. ¶58.

Like wage statement penalties, even if Kite were found to have owed wages to some former employees, it could be found to have a good faith belief it was paying wages properly, and “a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.” *Hill v. Walmart Inc.*, 2021 U.S. Dist. LEXIS 20950, *17 (N.D. Cal. January 14, 2021).

Also like wage statement penalties, the primary support for this derivative claim was based on pay periods in which piece-work wages were paid, with some former employees arguably being owed a small amount, or no wages, at termination.

Based on these risks, Plaintiff believed realistic exposure was no more than 5% of maximum exposure, or no more than \$12,000. Geraci Decl. ¶59.

6. Labor Code §§ 2699 PAGA Penalties

“PAGA penalties are paid 75% to the California Labor and Workforce Development Agency and 25% to aggrieved employees. Thus, in wage and hour class action cases that settle, [] very little of the total settlement is paid to PAGA penalties in order to maximize payments to class members.” *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058, 1101 (2019).

“[T]he amount of the common settlement fund reserved for PAGA penalties [is adequate], as courts frequently approve settlements in wage and hour class action and PAGA actions that minimize the total amount of the settlement that is paid to PAGA penalties in order to maximize payments to class members.” *Mejia v. Walgreen Co.*, 2020 U.S. Dist. LEXIS 220685, *26 (E.D. Cal. Mar. 24, 2021).

There are 2,675 pay periods during the PAGA period, December 21, 2018 to February 19, 2021, but only 1,233 through December 31, 2019, after which Kite remedied its arguably non-compliant policies. Using initial violation rates for 1,333 pay periods, maximum penalties were estimated at \$603,850, for four violations: Sec. 1194 (wages) – \$133,300; Sec. 226.7 (rest) - \$133,300; Sec. 226.3 (wage statements)– \$333,250; Sec. 203 – \$4,000 (final pay) (40 formers). (all at \$100 per pay period, 226.3 at \$250). Geraci Decl. ¶60.

Initial violation rates were used, based on Defendant’s argument, “courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code.” *Vieyara-Flores v. Sika*

1 Corp., 2019 U.S. Dist. LEXIS 98081, *13 (C.D. Cal. 2019).

2 Maximum exposure was discounted for several reasons, i.e., the risk of not proving underlying
3 violations, and Court’s authority to reduce penalties, as long as not to “zero.” *Thurman v. Bayshore*
4 *Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1135 (2012). *See Carrington v. Starbucks Corp.*,
5 30 Cal. App. 5th 504, 517 (2018) (Plaintiff requested “nearly \$70 million in penalties,” trial court’s
6 \$150,000 award upheld on appeal).

7 The Court also has the authority to reduce or eliminate any civil penalty deemed punitive or
8 confiscatory under the circumstances. Labor Code §2699. Although successful, Kite remains a small,
9 family business, and, perhaps more importantly, took immediate steps to compensate its employees
10 when it learned of its alleged violations. Under all the circumstances here, regardless of liability proven
11 or damages awarded, it would be extremely unlikely to obtain a significant amount of PAGA penalties,
12 and perhaps no award.

13 The \$10,000 PAGA allocation is well within the range approved by California courts. *See, In Re*
14 *Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 589 (2010) (no abuse of discretion approving a
15 class action settlement attributing \$0 to PAGA penalties.); *Alcala v. Meyer Logistics, Inc.*, 2019 LEXIS
16 166879, *26 (C.D. Cal. June 17, 2019) (PAGA penalties 1.25% of settlement reasonable, “falls within
17 the zero to two percent range for PAGA claims approved by courts.”); *In re M.L. Stern Overtime Litig.*,
18 2009 LEXIS 31650, *1 (S.D. Cal. Apr. 13, 2009) (PAGA settlement of 2%); *Magadia, Id.*, at 1101,
19 citing, *Ceja-Corona v. CVS Pharm., Inc.*, 2015 U.S. Dist. LEXIS 5118 (E.D. Cal. Jan. 14,
20 2015) (\$10,000 penalties, \$900,000 settlement, recommendation adopted, 2015 U.S. Dist. LEXIS
21 25730 (E.D. Cal. Mar. 3, 2015). (This Motion and its exhibits were provided to the LWDA, via its
22 website on the date filed with the Court. Geraci Decl. ¶62 – Exh. 2).

23 **D. The Settlement is Fair, Adequate, and Reasonable**

24 Plaintiff and his Counsel gave serious consideration to all facts and arguments and concluded the
25 Settlement is fair and reasonable. The Gross Settlement Amount represents over 85% of the maximum
26 value of Class claims. ($\$458,991/\$534,189 = 0.859$). The “new money” obtained represents over 41%
27 of maximum exposure ($\$220,00/\$458,991 = 0.411$). Geraci Decl. ¶61.

28 ///

Settlement Payments are characterized as 20% wages and 80% penalties and interest. Geraci Decl. ¶62. This is roughly consistent with alleged maximum exposure: \$1,333,609/100% - \$271,139/20.33% (overtime, rest period premium wages), \$135,570/10.16% (interest), \$926,900/69.51% (wage statement, waiting time, PAGA penalties). *Id.*

A settlement is not judged solely against what might have been recovered at trial, nor must a settlement provide 100% of the damages sought to be fair and reasonable. *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998). Adequacy must be judged as “a yielding of absolutes. . . . Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 624 (9th Cir. 1982) (citation omitted). “It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not . . . render the settlement inadequate or unfair.” *Id.* at 628.

The proposed Settlement reflects an excellent recovery for the Class and is well within the “ballpark” of reasonableness and should be granted preliminary approval. Geraci Decl. ¶61.

VIII. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE

When an ascertainable and sufficiently numerous class exists, with a well-defined community of interest, and class litigation would be superior to alternate means, certification is appropriate. See *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012).

Ascertainability is determined by examining class definition, size, and means for identifying members. *Reyes v. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). The class is ascertainable from Kite’s records, and joinder is impracticable.

The community of interest requirement embodies three factors: predominant common questions of law or fact; class representatives with claims typical of the class; and class representatives who can adequately represent the class. *Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1089 (2007).

Plaintiff alleges each Class Member was subject to policies Plaintiff alleged caused damage to him and the Class, including policies which caused underpaid wages, non-compliant rest breaks, and non-compliant wage statements. Where the same alleged conduct forms the basis for claims of Plaintiff and the class, it is common for settlement purposes.

Plaintiff can adequately protect the interests of the Class. See *Wershba, Id.*, at 238. Plaintiff accepted the risks of serving as a class representative, spent significant time assisting in the prosecution of the action, and placed the interest of the class above his own. *Clark v. American Residential Services LLC*, 175 Cal.App.4th 785, 804-807 (2009).

Plaintiff's attorneys are qualified to conduct the litigation and Plaintiff's interests are not antagonistic to the interests of the Class. *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442, 450 (1976). Geraci Decl. ¶¶2-10, 14, 46.

IX. PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS

The Parties propose the following schedule for the fairness hearing and final proceedings:

- | | |
|--|---|
| 1. Class Data provided to Administrator: | Within 14 calendar days of Preliminary Approval |
| 2. Mail Notice Packet to the Class: | Within 10 business days of receipt of Class Data |
| 3. Notice Response Deadline: | On or before the 45th calendar day from initial date Administrator mails Notice Packet to Class |
| 4. File Motion for Final Approval and Administrator's Declaration Re Claims: | No sooner than 20 days after the close of the Notice Response Deadline |
| 5. Final Approval Hearing: | A date convenient on the Court's calendar |

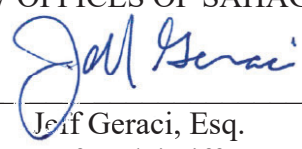
X. CONCLUSION

Plaintiff requests the Settlement be preliminarily approved, Notice approved and ordered disseminated to the Class, ILYM Group, Inc. be appointed Administrator, Cohelan Khoury & Singer appointed Class Counsel, Plaintiff Manuel Gutierrez be appointed as the Class Representative, and a Final Approval Hearing date be set.

Respectfully submitted,

COHELAN KHOURY & SINGER
LAW OFFICES OF SAHAG MAJARIAN II

Dated: January 4, 2022

By: 
Jeff Geraci, Esq.

Attorneys for Plaintiff Manuel Gutierrez, on behalf of himself and all others similarly situated