COHELAN KHOURY & SINGER
Michael D. Singer (SBN 115301)
msinger@ckslaw.com
Jeff Geraci (SBN 151519)
jgeraci@ckslaw.com
605 C Street, Suite 200
San Diego, CA 92101
Telephone: (619) 595-3001
Facsimile: (619) 595-3000

LEBE LAW, APLC
Jonathan M. Lebe (SBN 284605)
jon@lebelaw.com
Zachary Gershman (SBN 328004)
zachary@lebelaw.com
777 S. Alameda Street, Second Floor
Los Angeles, CA 90021
Telephone: (213) 358-7046

Attorneys for Plaintiff Julio Ochoa, individually and on behalf of all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

JULIO OCHOA, individually and on behalf of all others similarly situated, Plaintiff, v. SPEECH AND LANGUAGE DEVELOPMENT CENTER, INC.; and DOES 1 through 25, inclusive Defendants.	Case No. 30-2020-01143577-CU-OE-CXC ASSIGNED FOR ALL PURPOSES TO: The Honorable James J. Di Cesare Department C16 **CLASS ACTION** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: June 10, 2022 Time: 9:30 a.m. Dept: C16 Judge: Honorable James J. Di Cesare Reservation: 73725796 Complaint filed: June 18, 2020 Trial date: Not set

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I. INTRODUCTION

Plaintiff seeks preliminary approval of a $750,000 non-reversionary wage and hour class and Private Attorneys General Act (PAGA) settlement for 220 non-exempt employees of Speech and Language Development Center, Inc. ("SLDC" or "the School") who worked any time April 6, 2016 to March 13, 2020 ("Class Members"). Declaration of Jeff Geraci, ("Geraci Dec."), ¶11, Exhibit 1 – Settlement Agreement and Release of Class and Representative Action ("Settlement Agreement" or "SA") ¶¶5, 19.

II. THE PARTIES

A. Defendant

Defendant is a non-profit school and therapy center in Buena Park serving children and young adults with language, learning, emotional, social and neurological needs. Students have a broad scope of diagnoses, including Autism Spectrum Disorder. Two speech therapists began working with children in 1955, the School steadily grew, and incorporated under its current name in 1963. Its services include transportation by bus to and from school. Geraci Dec ¶12.

Due to the COVID-19 Pandemic, the School was closed by order of the Governor from March 13, 2020, until it slowly started to reopen in late August 2020. Geraci Dec ¶13.

B. Plaintiff and the Putative Class

Julio Ochoa worked for the School as a Special Education Paraprofessional, sometimes referred to as Aide or Bus Aide, from August 2012 through March 2020. Geraci Dec. ¶14.

The proposed Class is "all persons employed by Defendant in California as non-exempt employees at any time from April 6, 2016 through March 13, 2020 (the "COVID Closure Date"). Class Members worked an estimated 17,961 weeks from April 6, 2016 to March 13, 2020. An estimated 125 Class Members worked 2,053 Pay Periods in the PAGA Period, April 6, 2019 to July 19, 2021. SA ¶¶5, 25, 38. Class Members were paid an average rate of $15.62 per hour, and a $23.43 overtime rate, in average shifts of 6.5 hours. Geraci Dec. ¶15.

III. PROCEDURAL HISTORY, INVESTIGATION AND INFORMAL DISCOVERY

On March 31, 2020, Plaintiff's counsel formally requested his personnel file and obtained job applications, work schedules, timesheets, and bi-weekly earnings statements.

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Geraci Dec. ¶16. Defendant produced the requested documents April 30, 2020. On May 13, 2020, Plaintiff filed charges with the Labor and Workforce Development Agency (LWDA). On June 18, 2020, Plaintiff filed the above-captioned Action. *Id*.

Plaintiff filed a First Amended Class Action Complaint (FAC) adding PAGA claims on July 20, 2020. The FAC alleged SLDC failed to provide (1) minimum and overtime wages (§1194); (2) meal and rest periods (§226.7); (3) timely final wages (§203); (4) accurate wage statements (§226); and violated the (5) Unfair Competition Laws ("UCL") (Bus. & Prof. Code §17200); and, (6) PAGA (§2699 et seq.) (citations to the Labor Code, except UCL) **(**The statute of limitations was tolled. Cal. Rules of Court, App. I, Emergency Rule No. 9.) Geraci Dec. ¶17.

After receiving LWDA charges and being served with the Action, Defendant retained a new payroll provider and revised its policies and procedures to, among other things, automatically pay premium wages for noncompliant meal periods, and to correctly calculate overtime wages for employees working at two different rates. Geraci Dec. ¶18.

During initial discussions, the Parties agreed to attend mediation. Plaintiff requested and Defendant produced all time and pay data for a random 10% sample of the class, along with policy documents in effect during the class period governing timekeeping, rounding, rest and meal periods, and payment of wages. Defendant also provided numbers of current and former Class and PAGA members, shift lengths, average regular rate, and meal period premiums paid, which were compared to, and confirmed by, an analysis of the data sample. Geraci Dec. ¶19.

IV. PLAINTIFF'S CONTENTIONS AND SLDC'S DEFENSES

Aides monitor and assist students, on the bus, on campus, and in the classroom. Each student is assigned at least one aide and staff to student ratio ranges from 1:1 to 1:3 for higher functioning students. About one-third of aides were paid different hourly rates depending on whether they were assisting students on the bus or in the classroom. Geraci Dec. ¶20.

Plaintiff contended the nature of caring for special needs students resulted in rest and meal period violations, and that meal violations were reflected in SLDC's records. Plaintiff also contended SLDC did not correctly calculate overtime wages for employees working at two different hourly rates during a pay period, and paid based only on the lower "bus" rate. Plaintiff

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also alleged Defendant paid wages on a rounded, rather than actual time, resulted in underpayment of wages. As a result of these violations, Plaintiff contended SLDC did not issue accurate wage statements, and did not pay all final wages when due. Geraci Dec. ¶21.

The School contended, while it provided appropriate care and education for students at all times, it had compliant rest and meal policies, adequate staffing and procedures to ensure breaks were taken, and to the extent breaks were not taken, or not accurately recorded, those were employee choices. Defendant also contended its rounding policy was facially neutral and resulted in no loss of wages. The School acknowledged a period of time overtime was calculated at the lower of two rates, but contended this effected less than one-third of employees and had little impact because they worked a negligible amount of overtime. Geraci Dec. ¶22.

The School emphasized that as soon as it became aware of alleged non-compliance, it reviewed and corrected all alleged infractions and paid Class Members properly, including by providing premium wages if compliant rest or meal periods were not provided. Geraci Dec. ¶23.

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V. MEDIATION

With substantial investigation, research, and analysis of data by a consultant, and a Class-wide damage model, the Parties mediated with Hon. Carl West (Ret.) on April 20, 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 non-reversionary payment of $750,000. The Parties continued to negotiate and entered a Settlement Agreement.

VI. SUMMARY OF PROPOSED SETTLEMENT

A. Settlement Terms

SLDC will pay the Gross Settlement Amount (GSA) of $750,000 which includes:(a) attorneys' fees of $250,000 (one-third GSA) to compensate Class Counsel for all work performed and remaining to be performed securing final approval (apportioned 50/50 between Class Counsel with Plaintiff's consent. Geraci Dec. ¶25); (b) litigation costs up to $12,500; (c) Class Representative Service Payment of $5,000 for risks undertaken and benefits conferred on the Class; (d) $25,000 in PAGA Penalties ($18,750/75% LWDA, $6,250/25% Class Members in PAGA Period); and (e) Administration expenses up to $6,000. Payments are allocated 10% to wages and 45% each to penalties and interest. Defendant will pay its share of payroll taxes in addition to GSA. SA ¶¶14, 51. Geraci Dec. ¶24.

After Court-approved deductions, the estimated Net Settlement Amount (NSA) $451,500 will be distributed based on the number of weeks each Class Member worked during the Class Period compared with the number all worked. SA ¶51. Class Members who do not opt-out will receive an average estimated $2,052 ($451,500/220). If the case is preliminarily approved, SLDC will provide workweek data to the administrator, and Plaintiff will provide the Court with the estimated high and low settlement payments, and Plaintiff's individual payout with the final approval motion. Geraci Dec. ¶26.

Class Members employed during the PAGA Period will receive a share of the $6,250 PAGA Penalties based on number of Pay Periods worked during the PAGA Period whether they opt-out or not. Geraci Del. ¶;27 SA ¶52. No portion of the GSA will revert to SLDC under any circumstances. After 180 days of issuance, all uncashed checks will be sent to the State of California Controller, Unclaimed Property Division for further handling on behalf of the Class Member's whose check was voided. Geraci Dec. ¶28; SA ¶70.

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B. Released Claims

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

> [C]laims, debts, liabilities, demands, obligations, damages, liens and/or actions or causes of action of any kind that were alleged in the Complaint, or could have been alleged based on the same nucleus of operative facts alleged in the Complaint, and including, but not limited to, claims under California Labor Code sections 201, 202, 203, 226(a), 226(e), 226.7, 558, 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. Geraci Dec. ¶29; SA ¶31.

Class Members employed during the PAGA Period will receive a share of PAGA Penalties, even if they opt-out. Geraci Dec. ¶30; SA ¶¶52, 66, 68.B.

C. Settlement Administration and Notice to the Class

Simpluris, Inc. ("Settlement Administrator"), will search the National Change of

Address database, update Class Member addresses, perform skip-tracing, and mail the Notice of Class Action Settlement ("Class Notice") to each Member in SLDC's employment records. Geraci Dec. ¶31; SA ¶55.A; Declaration of Eric Springer on behalf of Simpluris, Inc. ¶6.

The Class Notice explains: how to participate in the Settlement without submitting a claim; dispute the basis of an Individual Settlement Payment; object or opt-out; release to be given, date of Final Approval hearing, and how to obtain further information. Geraci Dec. ¶32; SA ¶55.A.

The method of distributing the Settlement is fair and reasonable and gives no preferential treatment to any Class Member. Information used is readily available from SLDC's records and the Administrator can apply the formula fairly and transparently. Geraci Dec. ¶33.

VII. ARGUMENT

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

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

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

B. The Settlement is Fair, Reasonable, and Adequate

In deciding whether to approve a proposed class action settlement under Code of Civil Procedure § 382, the Court must find the proposed settlement is "fair, adequate and reasonable." *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1801. The trial court considers all relevant factors, such as: "the strength of Plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the

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amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." *Id*. The Court's primary function is to determine the Settlement is not the product of fraud, overreaching, or collusion, and, taken as a whole, is fair, reasonable and adequate to all concerned. *Dunk, supra*, at 1801.

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

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

The Settlement was reached as a result of arm's-length negotiations facilitated by retired Los Angeles County Superior Court Judge, Hon. Carl J. West (Ret.). Though cordial and professional, negotiations have been adversarial and non-collusive. While Plaintiff believes in the merits of his case, he recognizes the inherent risks of litigation and the benefit of the Class receiving settlement funds immediately as opposed to risking an unfavorable decision on class certification, the merits of the case after trial, damages awarded, or an appeal that may take several years to litigate. Geraci Dec. ¶34.

2. Discovery and Stage of the Proceedings Support Settlement

Plaintiff's Counsel investigated the claims and SLDC's defenses before filing PAGA charges. When the Parties agreed to mediate, Plaintiff requested, and Defendant produced documents, information and data which allowed liability to be assessed and Class-wide damages to be calculated. Geraci Dec. ¶35. Proof of Class claims in a case of this type is based almost entirely on written policies and an analysis of time and pay records. *Id*.

Extensive investigation and information exchanged gave the Parties a clear understanding of the strengths and weaknesses of their positions before negotiations. Geraci Dec. ¶36. *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 410 (2010) (approving settlement where "considerable information [exists] from which to assess the strength of the class claims" and risks and expense of litigation).

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3. Counsel are Experienced in Similar Litigation

Plaintiff's Counsel have significant experience in litigating wage and hour employment class actions. Geraci Dec. ¶¶2-10, 37; Declaration of Jonathan M. Lebe ("Lebe Dec.") ¶¶3-10. This allowed Counsel to compare settlement of Class claims with the risks of further litigation, including trial and appeals. Defense counsel, William Browning of BrowningHocker is a skilled and an experienced wage and hour litigator who defended his client vigorously, including through mediation and subsequent negotiations. Geraci Dec. ¶38.

Plaintiff's Counsel believes the Settlement is fair, reasonable, and in the Class' best interest in light of the monetary recovery, risks of certification, summary adjudication, the lengthy process of establishing damages, and delay and uncertainty of appeals. Geraci Dec. ¶39.

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

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

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

C. The Settlement is a Reasonable Compromise of Claims

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

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provided there is a record which allows "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." *Munoz*, 186 Cal.App.4th at 409.

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

Class Counsel relied on similar documents and data as in *Munoz,* including time and pay records for Class Members. Class Counsel reviewed, organized, and analyzed all information, and calculated Class-wide damages through the date of mediation. Geraci Dec. ¶40.

Plaintiff's primary claim was that needs of the School's students prevented timely, uninterrupted meal breaks for staff, and this was reflected in Defendant's records. *Donohue v. AMN Services, LLC*, 11 Cal. 5th 58, 78 (2021).

1. Labor Code § 226.7 Meal Period Premiums

California employers must provide "an uninterrupted 30-minute period during which the employee is relieved of all duty," and "first meal periods must start after no more than five hours." *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1035, 1042 (2012).

Plaintiff contended SLDC's data showed a facial meal period violation (potentially late, short, missed) in 50.4% of shifts over five hours and maximum exposure was $419,402. (26,850 shifts x $15.62). Geraci Dec. ¶41.

The School established the existence of compliant written meal period policies and argued facial exceptions alone cannot support certification or liability, even after *Donohue.* It also argued individual inquires as to why particular employees did not take compliant breaks was likely to prevent certification. Geraci Dec. ¶42.

Plaintiff believed there was a 50% probability of prevailing at trial, and realistic exposure could not be more than $209,771. Geraci Dec. ¶43.

2. Labor Code § 226.7 Rest Period Premiums

California employers must authorize the first rest period in "shifts from three and one-half to six hours in length..." *Brinker Restaurant Corp., Id.,* at 1029.

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Based on Plaintiff's experience, the structure of the school day which appeared to allow for ten-minute rest periods, average shifts of 6.5 hours with about 30% less than six hours, meaning only one rest period would be required, Plaintiff assumed a violation rate for rest periods of 25% for maximum exposure of $199,686. (12,784 shifts x $15.62). Geraci Dec. ¶44.

The School contended, correctly, there were no records which could establish rest period violations and argued individual issues would prevent certification. Plaintiff believed there was only a 20% probability of prevailing at trial, and realistic exposure could not be more than $39,937. Geraci Dec. ¶45.

3. Labor Code § 1194 Unpaid Wages (Rounding)

A California employer may use a rounding policy "if the rounding policy is fair and neutral on its face and it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." *See's Candy Shops v. Superior Court,* 210 Cal.App.4th 889, 907 (2012).

A comparison of actual and rounded time showed a small net loss, $13,308, through 2018, and overpayments in 2019 and 2020. Geraci Dec. ¶46. Defendant contended further analysis would show no net loss, and such a minimal loss was not a violation. Plaintiff believed there was a 20% probability of prevailing for realistic exposure of $2,661. Geraci Dec. ¶47.

4. Labor Code § 510 Unpaid Overtime

Analysis of the data provided showed a small amount of overtime worked in 10% of shifts. Overtime damages were calculated by isolating pay periods in which two pay rates were paid, blending those rates, (avg. blended rate $17.18), multiplying by the 1.5 overtime premium, multiplying by the average amount of overtime worked in those shifts (.9 hours), <u>then</u> subtracting the estimated amount of overtime paid at the unblended, lower hourly rate. Total maximum exposure was $11,244. (5,339 shifts x .9 x $17.18 x 1.5 <u>minus</u> 5,339 x .9 x $15.62 = $123,827 - $112,583). Geraci Dec. ¶48.

Defendant noted the minimal amount found, and contended further analysis would show less or no unpaid overtime. Plaintiff believed there was a 50% probability of prevailing for realistic exposure of $5,622. Geraci Dec. ¶49.

5. Labor Code § 226 Wage Statement Penalties

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

The School's liability for wage statement violations was completely derivative of its other alleged violations. Based on estimated class members and pay periods from April 6, 2017, three years before filing, through March 13, 2020, Plaintiff estimates maximum exposure of $500,000. (125 class members x $4,000). Geraci Dec. ¶50.

To recover these penalties, Plaintiff must prove the underlying violations, and prove this was a "willful violation" against SLDC's good faith defenses. Further, "[W]e hold that section 226.7 actions do not entitle employees to pursue the derivative penalties in sections 203 and 226." *Naranjo v. Spectrum Security Services, Inc*., 40 Cal. App. 5th 444, 474 (2019).

Given that Plaintiff's Counsel believed the strongest claim was the section 226.7 meal period premium claim, exposure on the section 226 claim was severely limited. Based on these risks, Plaintiff believed there was only a 10% chance of prevailing on certification and liability for this claim for a realistic exposure of approximately $50,000. Geraci Dec. ¶51.

6. Labor Code § 203 Penalties (Derivative)

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

This violation is derivative and requires Plaintiff to prevail on the underlying wage claim and show the violation was "willful." To the extent this claim depends on failure to pay meal break premium wages, it fails. *Naranjo, supra*, 40 Cal. App. 5th 444, 474 (2019).

Based on the School's records it was estimated 55 employees, from April 6, 2017 to July 21, 2021, were owed wages when their employment ended, for maximum exposure of

$167,525. [55 class members x 6.5 hours x $15.62 per hour x 30 days]. (Although employees did not work at all for at least five months, some did not return, and some worked intermittently when they did, and the alleged violations were corrected before employees returned, the section 203 final wages claim was calculated through the release period, July 19, 2021, rather than stopped at the Covid Closure date, March 13, 2020. This was based on the theory that a final wage violation could have occurred during this period.) Geraci Dec. ¶52.

Plaintiff's counsel believed there was only a 20% probability of prevailing based on the necessity of certifying and proving the underlying wage violations and showing willfulness, and estimated realistic exposure for this claim at $33,505, based on these risks. Geraci Dec. ¶53.

7. 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." (citations omitted) *Mejia v. Walgreen Co*., 2020 U.S. Dist. LEXIS 220685, *26 (E.D. Cal. Mar. 24, 2021).

Using initial violation rates for 2,053 pay periods, maximum penalties were estimated at $1,115,600 for five violations: Sec. 226.7 (meal) - $205,300; Sec. 226.7 (rest) - $205,300; Sec. 510, 1194 (all wage claims) – $205,300; Sec. 226.3 (wage statements) – $513,250; Sec. 203 (final pay) – $2,500. (all at $100 per pay period, 226.3 at $250.) Geraci Dec. ¶54.

A court has authority to completely reduce penalties, as long as not to "zero." *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1135 (2012). *See Carrington v. Starbucks Corp*., 30 Cal. App. 5th 504, 517 (2018) (Plaintiff requested "nearly $70 million in penalties," trial court's $150,000 award upheld on appeal).

Initial violation rates were used, based on Defendant's argument, "courts have held that

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

Violations were assumed in every pay period. This was overstated, as meal period, rest period, and regular rate violations occurred in much less than all shifts and, although they could have occurred in a greater percentage of pay periods, would not have occurred in all.

Maximum exposure was discounted for several reasons, i.e., the risk of not proving underlying violations, and Court's authority to reduce penalties, as long as not to "zero." *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1135 (2012). Further, Labor Code §2699 specifically grants the Court the ability to reduce or eliminate any civil penalty that is deemed punitive or confiscatory under the circumstances. *Carrington v. Starbucks*, 30 Cal.App.5th 504 (2018), where the Court, rather than imposing the full penalty of $50 per violation, noting it would be unjust, arbitrary and oppressive, imposed a penalty of only $5 per violation, reducing the penalty from $1.5 million to $150,000. Court's discretion was upheld by California's Fourth District Court of Appeal. *See, also In Re Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 589 (2010) (holding trial court did not abuse its discretion in approving a class action settlement attributing $0 to PAGA penalties.) Based on these risks, Plaintiff discounted PAGA penalties for settlement 25%, for a maximum settlement value of $278,900. Geraci Dec. ¶55.

The $25,000 PAGA allocation is well within the range approved by California courts. See *Alcala v. Meyer Logistics, Inc.*, 2019 LEXIS 166879, *26 (C.D. Cal. June 17, 2019) (PAGA penalties 1.25% of settlement reasonable, "falls within the zero to two percent range for PAGA claims approved by courts."); *In re M.L. Stern Overtime Litig.*, 2009 LEXIS 31650, *1 (S.D. Cal. Apr. 13, 2009) (PAGA settlement of 2%); *Magadia, Id.*, at 1101, citing, *Ceja-Corona v. CVS Pharm., Inc*., 2015 U.S. Dist. LEXIS 5118 (E.D. Cal. Jan. 14, 2015) ($10,000 penalties, $900,000 settlement, recommendation adopted, 2015 U.S. Dist. LEXIS 25730 (E.D. Cal. Mar. 3, 2015). (This Motion and its exhibits were provided to the LWDA, via its website on the date filed with the Court.) Geraci Dec. ¶61 – Exh. 2.

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D. The Settlement is Fair, Adequate, and Reasonable

Plaintiff and his Counsel gave serious consideration to all facts and arguments and concluded the Settlement is fair and reasonable. The Gross Settlement Amount represents over 57% of the maximum exposure for Class claims. ($750,000 /$1,311,165 = 0.572), and over 100% of their reasonable value ($750,000/$641,810 = 1.16). Geraci Dec. ¶56.

Settlement Payments are characterized as 10% wages, 45% penalties and 45% interest. Geraci Dec. ¶57; SA ¶14. This is roughly consistent with alleged maximum exposure: $2,755,759/100% - $643,638/23.35% (wages, rest/meal premiums), $2,419,496/11.94% (interest), $1,783,125/64.71% (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 Settlement is an excellent recovery for the Class and well within the "ballpark" of reasonableness. Geraci Dec. ¶58; Lebe Dec. ¶11.

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., Id.*, at 1021.

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 SLDC's records and joinder is impracticable.

The community of interest requirement embodies three factors: predominant common

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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 meal breaks. Where the same alleged conduct forms the basis for claims of Plaintiff and the class, it is common for settlement purposes. *Id.*

Plaintiff has and will continue to adequately protect the interests of the Class. He accepted the risks of serving as class representative, including by placing his name on a lawsuit on behalf of the class, which may diminish his prospects with certain employers, and which exposed him to the risk of a judgment for Defendant's costs if the case did not successfully conclude. He has spent significant time communicating with me and my office and assisting in the prosecution of the action, and has at all times placed the interests of the class above his own. Geraci Dec. ¶59.

If the case is preliminarily approved, Mr. Ochoa will provide a declaration regarding the nature of his participation in the action, time committed and risks faced. *Id.*, See *Wershba*, *Id.*, at 238; *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 Class interests. *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442, 450 (1976). Geraci Dec. ¶¶2-10, 60; Lebe Dec. ¶3-10.

IX. PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS

Plaintiff proposes the following schedule for further settlement 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

COHELAN KHOURY & SINGER
605 C Street, Suite 200
San Diego, CA 92101

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605 C Street, Suite 200
San Diego, CA 92101

X. CONCLUSION

Plaintiff requests the Settlement be preliminarily approved, Notice ordered mailed to the Class, Simpluris Group appointed Administrator, Cohelan Khoury & Singer, and Lebe Law, APLC appointed Class Counsel, Plaintiff Julio Ochoa appointed Class Representative, and a Final Approval Hearing date be set.

Respectfully submitted,

LEBE LAW, APLC
COHELAN KHOURY & SINGER

Dated: March 24, 2022

By: Jeff Geraci
Jeff Geraci
Attorneys for Plaintiff Julio Ochoa, individually and on behalf of all others similarly situated