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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

GABRIELA CHAVEZ, on behalf of herself
and other similarly-situated employees

Plaintiff,

v.

SCHEID VINEYARDS INC., a Delaware
Corporation; and DOES 1 Through 10,
inclusive,

Defendants.

Case No. 21CV002126

CLASS ACTION (COMPLEX)

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

Date: December 16, 2022

Time: 8:30 a.m.

Dept: 14

Judge: Hon. Carrie M. Panetta

Complaint filed: July 2, 2021

Trial date: Not set

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I. INTRODUCTION

Plaintiff seeks preliminary approval of a \$1,250,000 non-reversionary wage and hour Class and Private Attorney Generals’ Act (PAGA) settlement for all current and former, hourly, nonexempt employees who worked for Scheid any time from July 2, 2017 through December 31, 2022 (“Class Period”) or any time from July 2, 2020 through December 31, 2022 (“PAGA Period”). Declaration of Isam Khoury, (“Khoury Decl.”), ¶12. The putative class has an estimated 434 members—142 field workers, who grew, maintained, and harvested the grapes, and 292 non-field workers, who assisted in the winery operations, including by bottling the wines—who worked an estimated 48,970 workweeks during the Class Period and 19,068 pay periods during the PAGA Period. Khoury Decl. ¶13, Exh. 1 – Class Action and PAGA Settlement Agreement and Class Notice, (“Agreement” or “SA”), ¶3.1.

II. PARTIES

Defendant Scheid Vineyards Inc. (“Scheid”), established in 1972, operates thousands of acres of vineyards in Monterey County, California and produces wines sold nationwide. Khoury Decl. ¶10. Plaintiff Gabriela Chavez (“Plaintiff”) was employed by Scheid as a non-exempt field worker, primarily picking grapes, from approximately August 2015 through February 2020. Khoury Decl. ¶11; Declaration of Gabriela Chavez, (“Chavez Decl.”), ¶2.

III. PROCEDURAL HISTORY

On July 1, 2021, Plaintiff submitted a PAGA Notice to the LWDA in accordance with the requirements of Labor Code section 2699.3(a). Plaintiff’s PAGA Notice alleged that Defendant had violated California Labor Code sections 201-204, 218.5, 226, 226.2, 226.7, 510-512, 860, 1174, 1194, 1197, 1197.1, 1198, and all applicable Industrial Welfare Commission (“IWC”) Wage Orders. Khoury Decl. ¶14; SA ¶2.1.

On July 2, 2021, Plaintiff commenced this Action by filing a Complaint in the Superior Court of California, County of Monterey. The Complaint alleged putative class claims against Defendant on behalf of Plaintiff and all hourly, non-exempt employees employed by Defendant in the state of California from July 2, 2017 through the date of trial, for violations of Labor Code sections 201-204, 218.5, 226, 226.2, 226.7, 510-512, 860, 1174, 1194, 1194.2, 1197,

1 1197.1, 1198, all applicable IWC Wage Orders, and California Business and Professions Code
2 §§ 17200, *et seq.* Khoury Decl. ¶15; SA ¶2.2.

3 On September 7, 2021, Plaintiff filed a First Amended Complaint, which added a cause
4 of action under the PAGA on behalf of all hourly, non-exempt employees employed by
5 Defendant in the state of California from July 2, 2020 through the date of trial. The First
6 Amended Complaint is the operative Complaint in the Action. Plaintiff also sought damages
7 and prejudgment interest for the class and civil penalties for the PAGA group. Khoury Decl.
8 ¶16; SA ¶2.3.

9 On October 25, 2021, Plaintiff served requests for production, requests for admission,
10 and interrogatories to Scheid, along with a notice of deposition of Scheid's persons most
11 qualified. Khoury Decl. ¶17. In November 2021, the parties agreed to mediate and to
12 informally exchange data and documents. Khoury Decl. ¶18.

13 **IV. PLAINTIFF'S CLAIMS AND SCHEID'S DEFENSES¹**

14 Plaintiff alleged Class Members were not provided meal and rest periods or premium
15 wages in lieu thereof. Plaintiff first contended meal periods were not recorded, but Defendant
16 provided meal period time records for ten percent of the Class, rebutting this claim. Plaintiff
17 then contended time records analyzed revealed missed, late, or short meal periods for both field
18 and non-field Class Members. Further, Plaintiff alleged, and policy and pay records revealed,
19 Defendant had no policy to provide meal period premium wages to Class Members for meal
20 period violations. Plaintiff further alleged that field Class Members were required to walk to a
21 break area within the 30-minute timeframe allotted for meal periods, causing meal periods to be
22 short. Defendant rebutted this, contending Class Members took their meal breaks at or near the
23 trailer that Defendant parked near the designated work area and provided photographic
24

25 ¹ Plaintiff alleged she was not paid overtime in accordance with Labor Code section 860, but
26 Plaintiff's consultant determined based on her time and pay records that she was paid on this
27 basis. Therefore, no damages were assessed for mediation on this theory of recovery.
28 Additionally, Plaintiff alleged she was underpaid by several cents on at least two occasions
(identifying one \$0.12 one and \$0.21 underpayment). Even if such underpayments happened
for all 434 Class Members, the total underpayment would have only been a few hundred
dollars, which was also considered at mediation.

1 evidence showing this. Defendant also provided a written meal period policy providing for
2 meal breaks of one half hour and declarations of Class Members contending they were
3 informed of their right to take meal periods and did not miss them. Khoury Decl. ¶19.

4 Plaintiff further alleged 10-minute rest periods were not always authorized and
5 permitted. Further, Plaintiff alleged, and policy and pay records revealed, Defendant had no
6 policy to provide rest period premium wages to Class Members for rest period violations.
7 Plaintiff also alleged that because rest periods were separately compensated, first and second
8 rest periods were not counted toward hours worked and thus third rest periods were not
9 provided after 10 hours of work. Defendant countered that its collective bargaining agreement
10 provided for 15-minute rest breaks and offered Class Member declarations stating that they
11 were advised of their right to rest breaks at orientation, knew when to take them, and
12 consistently took all rest breaks to which they were entitled. Khoury Decl. ¶20.

13 Plaintiff further alleged that field Class Members had to walk for five minutes across
14 Scheid's property before roll call, but were not paid for this time. Defendant contended that
15 field Class Members parked very near to their roll call area, providing picture evidence. Khoury
16 Decl. ¶21.

17 Based on Defendant's alleged failure to provide minimum, overtime, meal period
18 premium, and rest period premium wages, Plaintiff alleged Defendant failed to provide Class
19 Members accurate wage statements and timely and complete final wages. Plaintiff further
20 contended that wage statements directly violated Labor Code section 226 by listing the
21 employer name as Scheid Vineyard Inc. rather than Scheid Vineyards Inc. Defendant countered
22 that it need not provide the entity name listed with the Secretary of State and that such a minor
23 deviation would not violate the Labor Code. *See, e.g. Noori v. Countrywide Payroll & HR*
24 *Solutions, Inc.* (2019) 43 Cal.App.5th 957, 964-965; *Elliot v. Spherion Pacific Work, LLC*
25 (C.D. Cal. 2008) 572 F.Supp.2d 1169, 1179. Khoury Decl. ¶22.

26 **V. INVESTIGATION AND MEDIATION**

27 The Parties agreed to mediate with Gig Kyriacou Esq., a respected mediator of wage
28 and hour class actions. For mediation, Scheid produced: Plaintiff's personnel file, including her

1 wage statements; Plaintiff's time records; a ten percent sample of time records for randomly
2 selected field and non-field workers; and information about the class, including the number of
3 each type of employee (field worker and non-field worker), the number of workweeks and pay
4 periods worked by each type, the number of separated employees, and the average hourly rates
5 of pay. Plaintiff's consultant analyzed the data and created a damages model. Before mediation,
6 the Parties also exchanged mediation briefs. Attached to Defendant's mediation brief were
7 photographs of where Class Members worked in the vineyards, Scheid's written CBA policies
8 as to time worked and meal and rest periods, and Class Member declarations supporting
9 Scheid's contentions. Khoury Decl. ¶23.

10 With significant investigation, research, informal discovery, and analysis of data by
11 Plaintiff and her damages consultant completed, the Parties mediated with Mr. Kyriacou on
12 July 14, 2022. After a full day of arms'-length negotiations, Mr. Kyriacou tendered a
13 mediator's proposal, accepted by the Parties on July 21, 2022. An MOU was fully executed on
14 August 29, 2022 and the Agreement, presented for preliminary approval, was fully executed on
15 October 10, 2022. Khoury Decl. ¶24.

16 **VI. SUMMARY OF PROPOSED SETTLEMENT**

17 **A. Settlement Terms**

18 Scheid will pay a non-reversionary, maximum Gross Settlement Amount ("GSA") of
19 \$1,250,000 which includes: (a) attorneys' fees not to exceed of \$416,666.67 (1/3 of GSA); to
20 compensate Class Counsel for work performed and remaining to secure final Court approval;
21 (b) litigation costs of \$15,000.00; (c) Class Representative Service Award of \$7,500.00 to
22 Plaintiff Gabriela Chavez, for work as Class Representative, risks undertaken for costs if the
23 case had not successfully concluded, and benefits conferred on the Class; (d) PAGA Payment
24 of \$125,000.00 [\$93,750.00 to LWDA (75%)/\$31,250.00 to Aggrieved Employees (25%)]; and
25 (e) Settlement Administration costs of up to \$10,000.00². Scheid will pay employer's payroll
26

27 ² CPT Group, Inc. estimated costs at \$9,500.00. Declaration of CPT Group, Inc., by Julie
28 Green, ("Green Decl."), ¶8. This is a fixed fee so long as the class size has been accurately
represented. *Id.*

1 taxes in addition to the GSA. Khoury Decl. ¶25, SA ¶¶4.1-4.2.

2 After approved deductions, the estimated \$675,833.33 Net Settlement Amount (“NSA”)
3 will be distributed to Participating Class Members. Individual Class Payments will be
4 calculated based on the number of Class Period workweeks that each Participating Class
5 Member worked. Class Members will receive an estimated \$13.80 for each workweek worked
6 during the Class Period (\$675,833.33/48,970 workweeks), with an average Individual Class
7 Payment of \$1,557.22 (\$675,833.33/434 Class Members). Settlement payments are
8 characterized as 33.33% unpaid wages (W-2), 33.33% unpaid interest (Form 1099), and
9 33.33% as alleged statutory and civil penalties (Form 1099). Khoury Decl. ¶26; SA ¶4.3

10 The Settlement distribution is fair and reasonable, does not give preferential treatment
11 to any Class Member, can be made from data readily available from Scheid, and the
12 Administrator can apply the formula fairly and transparently. Khoury Decl. ¶27; Green Decl.
13 ¶7.

14 **B. Settlement Administration and Class Notice**

15 CPT will search the National Change of Address database, update Class Members’
16 addresses, and mail the Notice of Settlement (“Class Notice”) to each Class Member. Green
17 Decl. ¶7; Khoury Decl. ¶28; SA ¶8.

18 The Class Notice explains how to challenge the basis of an Individual Settlement
19 Payment; object or opt-out; the release to be given; date of Final Approval hearing; how to get
20 further information; and that no claim form is necessary. Khoury Decl. ¶29.

21 **C. Released Claims**

22 All Participating Class Members, on behalf of themselves and their respective former
23 and present representatives, agents, attorneys, heirs, administrators, successors, and assigns,
24 irrevocably and unconditionally release the Released Parties from all claims that were alleged,
25 or reasonably could have been alleged, based on the allegations stated in the Operative
26 Complaint and ascertained in the course of the Action. The operative First Amended Complaint
27 alleged putative class claims against Defendant on behalf of Plaintiff and all hourly, non-
28 exempt employees employed by Defendant in the state of California from July 2, 2017 through

the date of trial, for violations of Labor Code sections 201-204, 218.5, 226, 226.2, 226.7, 510-512, 860, 1174, 1194, 1194.2, 1197, 1197.1, 1198, all applicable IWC Wage Orders, and California Business and Professions Code §§ 17200, *et seq.* as well as a cause of action under the PAGA on behalf of those employed from July 2, 2020 through the date of trial. Khoury Decl. ¶30; SA ¶¶ 2.2-2.3; 6.3.

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 settlement terms are agreeable to all Parties, a court should disapprove a settlement “only with considerable circumspection.” *Jamison v. Butcher & Sherrerd*, 68 F.R.D. 479, 481 (E.D. Pa. 1975). At preliminary approval, 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 the Court must find a proposed settlement is “fair, adequate and reasonable.” *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996). The trial court considers all relevant factors and determines whether the Settlement is fair, reasonable and adequate to all concerned. *Id.* A proposed settlement is presumed fair where: (1) parties agree after extensive arms’-length negotiations; (2) sufficient investigation and discovery allow counsel and the Court to act intelligently; (3) counsel is experienced; and, (4) percentage of objectors is small. *Id.* at 1802.

Here, the first three *Dunk* factors are met, so the settlement is presumably fair. The fourth *Dunk* factor, percentage of objectors, cannot be known until the Class has notice and opportunity to respond.

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

The Settlement was reached through arm’s-length negotiations facilitated by Gig

Kyriacou, Esq., an experienced and respected mediator. Though cordial and professional, negotiations were at all times adversarial and non-collusive. Khoury Decl. ¶31; Declaration of Sahag Majarian II, (“Majarian Decl.”), ¶4.

2. Discovery and Stage of the Proceedings Support Settlement

Plaintiff’s Counsel investigated all claims and defenses before filing. When the Parties agreed to mediation, Plaintiff requested, and Defendant produced, all data and documents needed to assess liability and calculate Class-wide damages. Khoury Decl. ¶32.

Investigation and informal discovery gave the Parties a clear understanding of their strengths and weaknesses before negotiations. *Id.*, *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 litigation risks). Proof of wage and hour class claims is based, at any stage, almost entirely on written policies, class member and workweek numbers, and time and pay records. Plaintiff’s counsel obtained those records, and an expert analyzed them and prepared a damage model before a settlement was negotiated. Khoury Decl. ¶33.

3. Counsel are Experienced in Similar Litigation

Plaintiff’s Counsel have significant experience in wage and hour employment class actions. Khoury Decl. ¶¶3-9; Majarian Decl. ¶¶1-3. Counsel was able to compare settlement of Class claims with risks of certification, trial, and appeal. Scheid’s counsel, Gilbert J. Tsai and Josue R. Aparicio of Hanson Bridgett LLP are skilled lawyers, with significant class action experience, who defended Scheid vigorously at all stages. Khoury Decl. ¶34.

Experienced counsel believe 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 uncertainty of appeals. Khoury Decl. ¶35; Sahag Decl. ¶5. The view of attorneys actively conducting the litigation “is entitled to significant weight” in settlement approval. *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.

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,” the Court acts 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 in to account 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). It also does not require an explicit statement of the maximum amount the class could recover if it prevailed on all claims provided the record allows “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” *Id.*, at 409. An analysis made based on the number of class members, payroll data, and declarations is sufficient. *See id.*

Class Counsel reviewed all relevant policies and relied on similar data as in *Munoz*. Plaintiff’s consultant analyzed voluminous data and documents, and calculated Class-wide damages through the date of mediation. Khoury Decl. ¶36.

Based on the damage assessments made for each claim, the \$1,250,000 GSA is fair and reasonable given that it represents approximately 110% of the \$1,134,979.90 rationally discounted damages on the claims alleged (inclusive of interest, but exclusive of PAGA Penalties).³ Khoury Dec. ¶37.

1. Labor Code §§ 1194, 510—Unpaid Minimum & Overtime Wages

Employers must pay at least minimum wage for all time worked or subject to the employer’s control and must pay for hours in excess of 8 per day or 40 per weeks at a rate not less than one and one-half the employee’s regular rate. Labor Code §§ 1194(a), 510(a).

³ \$62,602.85 (unpaid minimum and overtime wages) + \$329,447.72 (meal period premium wages) + \$235,339.97 (rest period premium wages) + \$176,629.76 (wage statement penalties) + \$330,959.60 (waiting time penalties) = \$1,134,979.90.

1 Multiplying the five minutes for which Plaintiff alleges field Class Members were not
2 paid per shift for walk time by the number of shifts worked yields damages of \$171,034.36
3 [121,735 shifts x 5 minutes, or 0.083 hours= 10,104 hours; (8,084 hours x \$15.39 =
4 \$124,412.76) + (2,020 hours x \$23.08=\$46,621.60) = \$171,034.36].⁴ Khoury Decl. ¶38.

5 Given the difficulty in certifying and prevailing on this off the clock claim, Plaintiff
6 believed the reasonable value of this claim was 25% of maximum exposure, or \$42,758.59.
7 With interest, this value is **\$62,602.85**.⁵ Khoury Decl. ¶39.

8 **2. Labor Code § 226.7—Meal Period Premiums**

9 Employers must provide a first uninterrupted 30-minute meal period before the end of
10 the fifth hour of work and a second such meal period before the end of the tenth hour of work.
11 Labor Code § 512; see also *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal. 4th 1004,
12 1005. Otherwise, the employer owes one hour of pay to the employee at their regular rate of
13 pay. Labor Code § 226.7. If records show a missed, late, short, or interrupted meal period there
14 is a presumption of liability, which the employer may rebut. *Donohue v. AMN Servs., LLC*
15 (2021) 11 Cal. 5th 58, 77.

16 Plaintiff contends that Scheid's time records showed unique missed, late, or short meal
17 periods for Class Members: 1,908⁶ for 15 field workers analyzed and 2,754⁷ for 29 non-field
18 workers analyzed. Plaintiff's consultant extrapolated this sample data to the group,
19 extrapolating 17,912 violations for 142 field workers and 32,441 violations for 292 non-field
20 workers. Plaintiff contends Scheid did not offset these alleged violations with meal period
21 premiums. Khoury Decl. ¶40.

22 Multiplying the total number of unique meal period violations by the hourly pay rate
23 yields unpaid meal period premium damages of \$774,932.67 [17,912 + 32,441= 50,353
24 violations x \$15.39 = \$774,932.67]. Khoury Decl. ¶41.

25 ⁴ Assuming 4/5 shifts were unpaid regular hours and 1/5 were unpaid overtime hours.

26 ⁵ Adding ten percent per year, for four years, per *Naranjo v. Spectrum Sec. Servs., Inc.* (2022)
13 Cal. 5th 93, 122. [\$42,758.59 x 1.1 x 1.1 x 1.1 x 1.1= \$62,602.85].

27 ⁶ 1,265 late first meals, 71 shifts with no meal, and 822 shifts with no second meal.

28 ⁷ 752 short meal periods, 1,126 late first meals, 916 shifts with no meal, and 847 shifts with no
second meal.

1 However, recognizing only one meal period premium may be owed per shift, regardless
2 of the number of meal period violations suffered, and that a second meal period may be waived
3 if the first meal period is taken, a more appropriate exposure figure of \$502,668.18 was
4 calculated, subtracting the premium wages for failure to provide a second meal period.⁸ Also
5 recognizing that Scheid could raise individualized defenses to liability (e.g. that Class Members
6 chose to skip meal periods) which could prevent certification or a finding of liability, Plaintiff
7 believed the reasonable value of this claim was 50% of maximum exposure, or \$251,334.09.
8 With interest, this value is **\$329,447.72**.⁹ Khoury Decl. ¶42.

9 **3. Labor Code § 226.7—Rest Period Premiums**

10 Employers must authorize and permit a first uninterrupted 10-minute rest break after
11 three and one-half (3.5) hours worked, a second such rest break after six (6) hours worked, and
12 a third such rest break after ten (10) hours worked. Labor Code § 226.7; see also *Brinker Rest.*
13 *Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1029. Otherwise, the employer owes one hour
14 of pay to the employee at their regular rate of pay. Labor Code § 226.7.

15 Scheid's sampled time records revealed 44 Class Members worked 22,441 shifts over
16 three and one-half hours, entitling them to a rest period, which Plaintiff's consultant
17 extrapolated to 233,322 shifts for 434 Class Members. Khoury Decl. ¶43.

18 Assuming a rest break violation was suffered once per week, there would have been a
19 rest period violation on 46,664 shifts, yielding \$718,158.96 in damages (46,664 x \$15.39). The
20 potential value of this claim was discounted substantially given the challenges of proving when
21 each Class Member missed a rest period and certifying a rest period claim, especially given that
22 Scheid had a written policy to provide 15-minute rest periods to Class Members. Given these
23 issues, Plaintiff believed the reasonable value of this claim was 25% of maximum exposure, or
24 \$179,539.74. With interest, this value is **\$235,339.97**.¹⁰ Khoury Decl. ¶44.

25 ⁸ Field workers' 822 shifts with no second meal + non-field workers' 847 such shifts = 1,669
26 violations, which extrapolated to the Class is 17,691 violations x \$15.39= \$272,264.49 in
missed second meal period violations. \$774,932.67-\$272,264.49= \$502,668.18.

27 ⁹ Adding seven percent per year, for four years, per *Naranjo*, 13 Cal. 5th at 104. [\$251,334.09 x
28 1.07 x 1.07 x 1.07 x 1.07= \$329,447.72].

¹⁰ Adding seven percent per year, for four years, per *Naranjo*, 13 Cal. 5th at 104. [\$179,539.74
x 1.07 x 1.07 x 1.07 x 1.07= \$235,339.97].

1 **4. Labor Code § 226—Wage Statement Penalties**

2 Employers must provide their employees with accurate itemized wage statements
3 showing, among other things, the name of the employer and gross and net wages earned. Labor
4 Code §226(a)(1)(5)(8). Otherwise, each Class Member is entitled to recover \$50 for the first
5 violation and \$100 for each subsequent violation, with a maximum aggregate penalty of
6 \$4,000. §226(e). Plaintiff alleged her wage statements were non-compliant because they failed
7 to show all wages earned including meal and rest break premiums and included an incomplete
8 employer name. To recover on this derivative claim, Plaintiff understood she would need to
9 prevail on the underlying claims and show any violation was knowing, intentional, or willful.
10 *Pedroza v. PetSmart, Inc.* (C.D. Cal. June 14, 2012) 2012 U.S. Dist. LEXIS 189530 *20.

11 Multiplying 10,780, the number of Pay Periods going back one-year from the date of
12 filing, by the initial violation rate¹¹ of \$50 yielded a maximum exposure of \$539,000.
13 Assuming Plaintiff prevailed on at least one underlying claim, Plaintiff estimated probability of
14 certification at 50% and probability of prevailing at trial at 50%, resulting in a discounted
15 realistic exposure of \$134,750. With interest, this value is **\$176,629.76**.¹² Khoury Decl. ¶45.

16 **5. Labor Code § 203—Waiting Time Penalties**

17 An employer must pay all wages due to an involuntarily terminated employee at the
18 time of termination, or within 72 hours after voluntary termination. If an employer willfully
19 fails to timely pay all wages to separated employees, the wages continue at the same rate for up
20 to 30 days. § 203.

21 Multiplying the number of former employees during the statutory period by their
22 average daily wage for thirty days produces maximum exposure of \$1,009,950 [250 separated
23 employees x \$134.66 average daily wage¹³ x 30 days]. Khoury Decl. ¶46.

24 _____
25 ¹¹ See, e.g. *violations Robinson v. Open Top Sightseeing S.F.*, 2018 U.S. Dist. LEXIS 24556, at
26 *53 (N.D. Cal. Feb. 14, 2018) (holding the initial violation rate under Labor Code section 226
should apply any time before the employer is notified of the violations)

27 ¹² Adding seven percent per year, for four years, per *Naranjo*, 13 Cal. 5th at 104. [\$134,750 x
28 1.07 x 1.07 x 1.07 x 1.07= \$176,629.76].

¹³ Records revealed an average shift length of 8.5 hours and an average hourly wage of \$15.39,
with an overtime wage of \$23.08. [(8 hours x \$15.39) + (0.5 hours x \$23.08) = \$134.66].

1 Plaintiff considered this derivative violation requires Plaintiff to prevail on the
2 underlying wage claim and to show the violation was “willful.” Even if Scheid were found to
3 owe wages to some former employees, it could be found to have a good faith belief it was
4 paying wages properly, and “a good faith dispute that any wages are due will preclude
5 imposition of waiting time penalties under Section 203.” *Hill v. Walmart Inc.*, 2021 U.S. Dist.
6 LEXIS 20950, *17 (N.D. Cal. January 14, 2021) (triable issues found as to whether Walmart
7 actually misclassified employees as independent contractors, but court found Walmart had a
8 “good faith belief” it properly classified them and could not be liable for waiting time
9 penalties). Khoury Decl. ¶47.

10 Based on the risk an underlying violation would not be proven, and if proven, the
11 likelihood Scheid would be found to have a good faith belief it was providing all wages owed,
12 Plaintiff believed realistic exposure was less than 25% of maximum exposure, or no more than
13 \$252,487.50. With interest, this value is **\$330,959.60**.¹⁴ Khoury Decl. ¶48.

14 **6. Labor Code §§ 2699 PAGA Penalties**

15 “PAGA penalties are paid 75% to the California Labor and Workforce Development
16 Agency and 25% to aggrieved employees. Thus, in wage and hour class action cases that settle,
17 “very little of the total settlement is paid to PAGA penalties in order to maximize payments to
18 class members.” *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058, 1101 (2019). “[T]he
19 amount of the common settlement fund reserved for PAGA penalties [is adequate], as courts
20 frequently approve settlements in wage and hour class action and PAGA actions that minimize
21 the total amount of the settlement that is paid to PAGA penalties in order to maximize
22 payments to class members.” (citations omitted) *Mejia v. Walgreen Co.*, 2020 U.S. Dist. LEXIS
23 220685, *26 (E.D. Cal. Mar. 24, 2021).

24 Based on Scheid’s data, there were an estimated 19,068 pay periods from the start of the
25 PAGA period, July 2, 2020, through mediation. Khoury Decl. ¶49.

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27 _____
28 ¹⁴ Adding seven percent per year, for four years, per *Naranjo*, 13 Cal. 5th at 104. [\$252,487.50
x 1.07 x 1.07 x 1.07 x 1.07= \$330,959.60].

Using initial violation rates¹⁵ maximum penalties were estimated at \$9,559,000, for six violations: Sec. 1194 (minimum wages) – \$1,906,800; Sec. 510 (overtime) – \$1,906,800; Sec. 226.7 (meal) – \$1,906,800; Sec. 226.7 (rest) - \$1,906,800; Sec. 226 (wage statements)– \$1,906,800¹⁶; Sec. 203 (final pay) for 250 formers - \$25,000 (all claims at \$100 per pay period). Khoury Decl. ¶50.

Maximum realistic exposure was discounted to 5%, or **\$477,950**. Even if the PAGA claim is viable, there were risks Plaintiff would not prove the underlying violations; and, if proven, the Court has authority to reduce penalties, as long as not to “zero.” *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1135 (2012); *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). Khoury Decl. ¶51.

D. The Settlement is Fair, Adequate, and Reasonable

Plaintiff gave serious consideration to all facts and arguments and concluded the Settlement is fair and reasonable. The Gross Settlement Amount represents approximately 110% of the maximum reasonable value of the Class claims. The proposed settlement is well within the “ballpark” of reasonableness. Khoury Decl. ¶52.

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

¹⁵ Initial violation rates were used because “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.” *Vieyra-Flores v. Sika Corp.*, 2019 U.S. Dist. LEXIS 98081, *13 (C.D. Cal. 2019).

¹⁶ The default penalty of \$100 per pay period should apply, not the \$250 per pay period penalty, when the employer does furnish a wage statement, but it is inaccurate. *See Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334, 355 (2021).

1 settlement amounting to only a fraction of the potential recovery does not . . . render the
2 settlement inadequate or unfair.” *Id.* at 628.

3 **E. The Proposed PAGA Settlement is Reasonable**

4 The \$125,000 PAGA settlement, will be paid \$93,750 (75%) to the LWDA, and
5 \$31,250 (25%) to Aggrieved Employees. SA, ¶4.25. Where PAGA penalties are negotiated in
6 good faith, with “no indication [the] amount was the result of self-interest at the expense of
7 other Class Members,” such amounts are considered reasonable. *Hopson v. Hanesbrands Inc.*,
8 Case No. 08-00844, 2009 U.S. Dist. LEXIS 33900, at *24 (N.D. Cal. Apr. 3, 2009). Khoury
9 Decl. ¶53.

10 The \$125,000 PAGA allocation, representing ten percent of the GSA, is well within the
11 range approved by California courts. See *Alcala v. Meyer Logistics, Inc.*, 2019 LEXIS 166879,
12 *26 (C.D. Cal. June 17, 2019) (PAGA penalties 1.25% of settlement reasonable, “falls within
13 the zero to two percent range for PAGA claims approved by courts.”); *In re M.L. Stern*
14 *Overtime Litig.*, 2009 LEXIS 31650, *1 (S.D. Cal. Apr. 13, 2009) (PAGA settlement of 2%).
15 Khoury Decl. ¶54. The LWDA was served with the motion for approval when filed. Khoury
16 Decl. ¶58, Exh. 2 – LWDA Confirmation of Receipt.

17 **VIII. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

18 When an ascertainable and sufficiently numerous class exists, with a well-defined
19 community of interest, and class litigation is superior to alternate means, certification is
20 appropriate. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1021 (2012).
21 Ascertainability is determined by examining class definition, size, and means for identifying
22 class members. *Reyes v. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987). The Class is
23 ascertainable from Scheid’s records, and is so numerous joinder would be impracticable.
24 Khoury Decl. ¶55.

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

28 ///

Plaintiff alleges each Class Member was subject to the same policies which damaged her, including the lack of a policy to provide meal and rest periods premium wages, which led to these damages and to derivative penalties.¹⁷ Where the same alleged conduct forms the basis for Plaintiff and class claims, it is common for settlement purposes. *Id.*, at 1090. Khoury Decl. ¶56.

Plaintiff can and will continue to protect the interests of the Class. *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 her own. Khoury Decl. ¶57; Chavez Decl. ¶¶3-15. *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 interest of the Class. *McGhee v. Bank of Am.*, 60 Cal.App.3d 442, 450 (1976). Khoury Decl. ¶¶3-9; Majarian Decl. ¶¶1-3; Chavez Decl. ¶15.

IX. CONCLUSION

Plaintiff requests the Settlement be preliminarily approved, Notice approved and ordered disseminated to the Class, CPT Group appointed Administrator, Cohelan Khoury & Singer and Law Offices of Sahag Majarian II confirmed as Class Counsel, Plaintiff confirmed as Class Representative, and a Final Approval Hearing date set.

Respectfully submitted,

**COHELAN KHOURY & SINGER
LAW OFFICES OF SAHAG MAJARIAN II**

Dated: November 8, 2022

By: 

Michael D. Singer

Isam C. Khoury

Counsel for Plaintiff GABRIELA CHAVEZ, on behalf of herself and other similarly-situated employees

¹⁷ Although Plaintiff alleges the relatively minor off-the-clock claim only applied to field Class Members, this should not defeat predominance as to the Class. *See Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 338 (holding a class can be certified based on partial commonality, meaning not every single member of the proposed class needs to be exposed to the wrongful practice nor does the practice have to be unlawful or lawful as to every class member).