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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SONOMA**

MARCO VICENTE, an individual, on behalf of
himself, the State of California, as a private
attorney general, and on behalf of all others
similarly situated,

Plaintiff,

v.

ENTERPRISE VINEYARDS, INC., a California
Corporation; and DOES 1 TO 50,

Defendants.

Case Number: 23CV00152

**Plaintiff's Notice of Motion and Motion for
Preliminary Approval of Class Action
Settlement**

Complaint Filed: August 17, 2023

Trial Date: None Set

Hearing Date: December 4, 2024

Hearing Time: 3:00 p.m.

Dept.: 19

Judge: Hon. Oscar A. Pardo

1 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that that on December 4, 2024, at 3:00 p.m., or as soon thereafter
4 as the matter may be heard, in Department 19 of the Sonoma County Superior Court for the State of
5 California, located at the Civil and Family Law Courthouse, 3055 Cleveland Avenue, Santa Rosa,
6 California 95403, before the Honorable Oscar A. Pardo, Plaintiff Marco Vicente (“Plaintiff”), on behalf
7 of himself, the State of California, as a private attorneys general, and on behalf of all others similarly
8 situated, will and hereby does move this court for entry of an order:

9 1. Preliminarily certifying the settlement class for purposes of settlement pursuant to
10 California Code of Civil Procedure section 382 and California Rules of Court, rule 3.769;

11 2. Preliminarily appointing Plaintiff as class representative for purposes of settlement;

12 3. Preliminarily appointing Jonathan Melmed and Kyle D. Smith of Melmed Law Group
13 P.C. as class counsel for purposes of settlement;

14 4. Preliminarily approving the settlement as fair, adequate, and reasonable, based upon the
15 terms set forth in the parties’ *Settlement Agreement and Release of Class Action* (the “Settlement
16 Agreement”), including payment by Defendant Enterprise Vineyards, Inc. (“Defendant”) of the non-
17 reversionary gross settlement amount of \$450,000.00 (“Gross Settlement Amount”);

18 5. Preliminarily approving payment of reasonable attorneys’ fees from the Gross
19 Settlement Amount in an amount not to exceed one-third of the Gross Settlement Amount (i.e., up to
20 \$150,000.00), plus necessary litigation costs not to exceed \$13,000.00;

21 6. Preliminarily approving a class representative service payment in an amount of up to
22 \$7,500.00 for Marco Vicente from the Gross Settlement Amount to compensate him for the
23 responsibilities, time, effort, and risks involved in coming forward on behalf of the proposed class;

24 7. Preliminarily approving the allocation of \$20,000.00 for penalties pursuant to the
25 California Labor Code Private Attorneys General Act of 2004, of which 75% (i.e., \$15,000.00) shall
26 be paid to the California Labor and Workforce Development Agency (“LWDA”) from the Gross
27 Settlement Amount, with the remaining 25% (i.e., \$5,000.00) payable to the aggrieved employees;
28

1 8. Appointing Phoenix Settlement Administrators (the “Settlement Administrator”) as the
2 settlement administrator to handle the notice and administration process and preliminarily approving
3 settlement administration costs estimated to be \$8,250.00;

4 9. Approving the proposed class notice and ordering it be disseminated to the class
5 members as provided in the Settlement Agreement;

6 10. Directing the Settlement Administrator to mail the class notice to the proposed class;

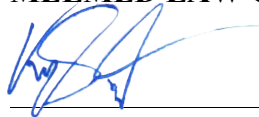
7 11. Approving the proposed deadlines for the notice and administration process as reflected
8 in this motion and in the Settlement Agreement; and

9 12. Setting a date for a final fairness hearing to determine, following dissemination of the
10 proposed class notice packet, whether to grant final approval of the settlement.

11 This motion is based on this Notice of Motion and Motion for Preliminary Approval of Class
12 Action Settlement; the Memorandum of Points and Authorities in support thereof; the declaration of
13 Plaintiff’s counsel Jonathan Melmed; the Settlement Agreement; the proposed class notice; the
14 proposed order granting preliminary approval of the Settlement Agreement and setting a settlement
15 fairness hearing; the other records, pleadings, and papers filed in this action; and upon such other
16 evidence or argument as may be presented to the court at the hearing of this motion.

17 Dated: November 6, 2024

MELMED LAW GROUP P.C.



KYLE D. SMITH

Attorney for Plaintiff, the Putative Class, and the
Aggrieved Employees

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1 settlement and the Aggrieved Employees, which is calculated as follows:

2	Gross Settlement Amount	\$450,000.00
3	Attorneys' Fees	(up to \$150,000.00)
4	Litigation Costs	(up to \$13,000.00)
5	Settlement Administration Costs	(up to \$8,250.00)
6	Service Award to Plaintiff	(up to \$7,500.00)
7	PAGA Payment to LWDA	(\$15,000.00)
8	Net Settlement Amount	\$256,250.00

9 This settlement is an excellent result considering the number of Class Members affected.
10 Plaintiff requests an order preliminarily approving the Settlement Agreement, directing that the
11 proposed class notice be distributed to the Class Members, and scheduling a hearing for final approval.

12 **I. BACKGROUND**

13 On August 17, 2023, Plaintiff submitted a letter to the California Labor and Workforce
14 Development Agency ("LWDA") to notify the LWDA, pursuant to PAGA, of Plaintiff's intent to seek
15 civil penalties against Defendant for violations of the Labor Code and applicable Wage Orders. (Cal.
16 Code of Regs., tit. 8, §§ 11040, 11080, 11130, 11140; Melmed Decl., ¶ 14.) The letter attached
17 Plaintiff's original complaint, and incorporated the original complaint by reference, and thus sought
18 penalties for claims identical to those alleged in the case. For the Court's reference, a copy of Plaintiff's
19 letter to the LWDA is attached as **Exhibit B** to the concurrently filed Declaration of Jonathan Melmed.

20 On August 17, 2023, Plaintiff filed a class action complaint alleging causes of action against
21 Defendant for **(1)** failure to pay minimum wage for all hours worked in violation of Labor Code
22 sections 1194 and 1194.2, and the Applicable Wage Orders; **(2)** failure to pay proper overtime wages
23 in violation of Labor Code sections 510, 1197, and 1198, and the Applicable Wage Orders; **(3)** failure
24 to provide compliant rest periods and pay missed rest break premiums in violation of Labor Code
25 section 226.7 and the Applicable Wage Orders; **(4)** failure to provide compliant meal periods and pay
26 missed meal period premiums in violation of Labor Code sections 226.7 and 512, and the Applicable
27 Wage Orders; **(5)** failure to maintain accurate employment records in violation of Labor Code section
28 1174; **(6)** failure to pay timely wages during employment in violation of Labor Code sections 204, 210;

1 (7) failure to pay all wages due and owing at separation in violation of Labor Code sections 201, 202,
2 and 203; (8) failure to reimburse business expenses in violation of Labor Code sections 2802 and 2804;
3 (9) failure to provide complete and accurate wage statements in violation of Labor Code sections 226
4 and 226.3; and (10) deceptive, fraudulent, or otherwise unlawful business practices based on the
5 foregoing in violation of California’s Unfair Competition Law (Bus. & Prof. Code, §§ 17200–17210).
6 (Melmed Decl., ¶ 15.)

7 On October 23, 2023, Plaintiff filed a first amended complaint alleging causes of action against
8 Defendant for those described in the original Complaint and adding one cause of action for penalties
9 based on the foregoing pursuant to PAGA. (Lab. Code, §§ 2698–2699.6.) The first amended complaint
10 is the operative complaint in the action (the “Operative Complaint”). (Melmed Decl., ¶ 16.)

11 Thereafter, the Parties agreed to attend a private mediation with Howard Broadman. (Melmed
12 Decl., ¶ 17.) Prior to the mediation, Plaintiff’s counsel conducted significant informal discovery.
13 (Melmed Decl., ¶ 17.) Discovery, investigation, and prosecution has included, among other things,
14 numerous telephonic conferences with Plaintiff; inspection and analysis of thousands of pages of
15 documents, including Defendant’s relevant policies, and other information produced by Plaintiff and
16 Defendant; analysis of work-related data from a sample of Class Members and Aggrieved Employees;
17 an analysis of the legal positions taken by Defendant; investigation into the viability of class treatment
18 of the claims asserted in the action; analysis of potential class-wide damages, including information
19 sufficient to understand Defendant’s potential defenses to Plaintiff’s claims; research of the applicable
20 law with respect to the claims asserted in the Operative Complaint and the potential defenses thereto;
21 and assembling and analyzing of data for calculating damages. (Melmed Decl., ¶ 17.)

22 Among other key pieces of information, Plaintiff’s counsel requested, and Defendant produced,
23 the wage statements and time records for a statistically significant sample size of Class Members during
24 the Class Period. (Melmed Decl., ¶ 18.) From these records, Plaintiff’s expert was able to carefully
25 craft a damages model for each of the categories of alleged claims for which the data would reflect
26 violations. (Melmed Decl., ¶ 18.)

27 On June 27, 2024, the Parties participated in a full-day mediation with Howard Broadman who
28 is a full-time mediator with extensive experience in California wage and hour class action lawsuits.

(Melmed Decl., ¶ 19.) The mediation negotiations were contentious, but the Parties were eventually able to reach the broad terms of an agreement. After further negotiation, the Parties executed the longform Settlement Agreement now before the Court for approval. (Melmed Decl., ¶ 19.)

Plaintiff now seeks the Court’s preliminary approval of the Settlement Agreement.

II. SUMMARY OF THE CLAIMS, DEFENSES, AND EXPOSURE

Plaintiff alleges several categories of wage and hour violations on behalf of the Class Members and Aggrieved Employees (together, the “Employees”). Plaintiff’s primary claims stem from unlawful rounding practices, off-the-clock work, and regular rate violations resulting from multiple different rates of hourly pay earned by the Class Members. Plaintiff also alleged that the Class Members were not reimbursed for vehicle fuel expenses. From these allegations, Plaintiff alleged derivative claims for waiting time penalties, inaccurate itemized wage statements, unfair competition, and PAGA penalties based on the foregoing. (Melmed Decl., ¶ 20.)

Defendant has persistently denied all liability of any kind associated with the claims and allegations, and further denied that the Employees are entitled to any relief. Defendant also denies that these allegations are appropriate for class or representative treatment for any purpose other than the settlement. Defendant maintains, among other things, that it has complied with California laws in all respects. (Melmed Decl., ¶ 21.)

A summary of the legal and factual basis for each claim, the applicable defenses, and the potential damages are summarized in more detail below. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133; *Munoz v. BCI CocaCola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409.)

A. UNPAID WAGE ALLEGATIONS

An employer’s failure to pay for any particular time worked by an employee is unlawful, even if averaging an employee’s total pay over all hours worked, paid or not, results in an average hourly wage above minimum wage. (*Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324; see also Lab. Code, § 1197.) Here, Plaintiff alleged the Class Members’ hours were unlawfully rounded to the nearest half-hour resulting in time worked time off-the-clock. Specifically, Plaintiff alleged that the Class Members’ time records were all hand-written by the Class Members’ supervisors, rather than the Class

1 Members themselves, and reflected scheduled time, rather than actual time worked. This resulted in
2 non-payment of regular and minimum wages, and also resulted in an inaccurate calculation of the Class
3 Members' meal periods. (See Lab. Code, § 512.) Plaintiff further alleged that, because the Class
4 Members' hours were improperly shortened, the Class Members were deprived of rest periods that they
5 otherwise should have received based on hours actually worked (rather than their scheduled hours).
6 (See Lab. Code, § 226.7; Melmed Decl., ¶ 23.)

7 Defendant denied that it underpaid regular or minimum wages to the Class Members, and
8 further denied that the Class Members' meal periods were recorded inaccurately. Defendant asserted
9 that the Employees recorded all hours worked, without completing any additional off-the-clock work,
10 and that their pay was based precisely on this recorded time. Defendant further argued that any off-the-
11 clock work was *de minimus* such that it would be difficult or impossible to prove, both at trial and for
12 the purposes of class certification. (Melmed Decl., ¶ 24.)

13 Based on the informal discovery produced and Plaintiff's expert analysis, Class Members
14 worked an estimated 28,520 workweeks at an average regular rate of pay of approximately \$22.00 per
15 hour. Plaintiff estimated that Class Members spent approximately 30 minutes working off-the-clock
16 per week, resulting in approximately \$313,720 in potential exposure for the Class Members' off-the-
17 clock work. Plaintiff further alleged that the Class Members were deprived, on average, of one meal
18 period and one rest period per week (either because they were short, missed, or late). With 28,520
19 workweeks, the meal and rest period premiums for this claim increased Defendant's potential exposure
20 by an additional \$1,243,000. In total, Defendant's *maximum* exposure for this category of allegations
21 was \$1,556,720. (Melmed Decl., ¶ 25.) Plaintiff, however, faced various risks to the success of this
22 claim, including the possibility that class certification would be denied and the inherent difficulty in
23 proving unrecorded, off-the-clock work. Accordingly, Plaintiff applied an 85% discount, reducing
24 Plaintiff's realistic settlement value for this claim to **\$233,508**. (Melmed Decl., ¶ 25.)

25 **B. OVERTIME ALLEGATIONS**

26 Labor Code section 510 requires employers to pay overtime to employees at either one and one-
27 half times their regular rate of pay or twice their regular rate of pay, depending on the number of hours
28 worked. The "regular rate of pay" for these purposes is not the same as the employee's base hourly

1 rate, but rather it must include “adjustments to the straight time rate, reflecting, among other things,
2 shift differentials and the per-hour value of any nonhourly compensation the employee has earned.”
3 (*Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 554.)

4 Here, Plaintiff alleged that the Class Members periodically received multiple rates of pay
5 depending on the category of work they performed. Plaintiff alleged, however, that the Class Members’
6 overtime rates were only paid out at 1.5 times the Class Members’ lowest base hourly rate, rather than
7 their regular rate of pay (which would be a blended rate of the Class Members’ multiple rates of pay).
8 (Melmed Decl., ¶ 26.) Defendant argued that its exposure on this claim was minimal, as the vast
9 majority of wage statements reflected only a single rate of pay worked during the applicable pay period.
10 Defendant further argued that many of the pay periods involving multiple rates of pay did not include
11 any overtime worked, and, as such, there was no regular rate violation for those pay periods. (Melmed
12 Decl., ¶ 26.)

13 Based on the informal discovery produced and Plaintiff’s expert analysis, Plaintiff estimated
14 that approximately 5% of all wage statements involved both multiple rates of pay and overtime worked
15 at an underpaid regular rate. The total amount of underpayment for each of these workweeks, however,
16 often ranged from about \$5 per workweek to about \$15 per workweek. Plaintiff therefore estimated an
17 average underpayment of \$10 per workweek in which multiple rates of pay were at issue and overtime
18 was worked. With 28,520 workweeks at issue, Plaintiff estimated Defendant’s exposure for this claim
19 to be **\$14,260**. (Melmed Decl., ¶ 27.)

20 **C. DERIVATIVE ALLEGATIONS**

21 From the allegations described above, Plaintiff alleged several categories of derivative
22 penalties. First, Plaintiff alleged that Defendant violated Labor Code sections 226, subdivision (a),
23 226.3, and 1174, subdivision (d), by failing to keep an accurate record of the hours worked by the Class
24 Members., their gross wages earned, and all applicable hourly rates in effect during the pay period.
25 Second, Plaintiff alleged that Defendant violated Labor Code sections 204 and 210 by failing to timely
26 pay all wages to the Class Members due to the unpaid wages described above. Third, Plaintiff alleged
27 that Defendant owed all formerly-employed Class Members waiting time penalties under Labor Code
28 section 203 due to the unpaid wages described above. Fourth, Plaintiff alleged that, by virtue of the

1 allegations that Defendant failed to properly pay the Employees their wages as described above,
2 Defendant had likewise failed to provide the Employees with compliant wage statements reflecting
3 their gross wages earned and their net wages earned. Plaintiff therefore alleged that Defendant owed
4 the Class Members wage statement penalties under Labor Code section 226, subdivision (e). (Melmed
5 Decl., ¶ 28.)

6 Defendant denied liability for each of these derivative claims. First, Defendant argued that the
7 Employees were fully compensated and that such violations were rare and nominal in value, if they
8 occurred at all. Defendant thus concluded that Plaintiff could not claim wage statement penalties
9 because there were no wage statement violations. (Melmed Decl., ¶ 29.) Second, Defendant argued that
10 its payments to the Class Members were made in good faith such that no penalties could be awarded.
11 Third, Defendant argued that purely derivative wage statement claims could not support a cause of
12 action for penalties. Rather, the plaintiff must establish injury from the inaccuracy and independent
13 inaccuracies different from underpayments or derivative claims. Defendant argued that Plaintiff would
14 be unable to prove “injury” for purposes of recovering penalties. (Melmed Decl., ¶ 29.)

15 Based on the informal discovery produced and Plaintiff’s expert analysis, Plaintiff estimated
16 Defendant’s *maximum* exposure for these derivative penalty claims to be \$1,648,000. However, after
17 ascribing a 90% discount due to the very real risks that this court would agree with Defendant’s good
18 faith defense and because the claim is derivative of the underlying claims which may also fail to be
19 certified or win on the merits, Plaintiff estimated Defendant’s realistic exposure for these derivative
20 claims to be approximately **\$164,800**. (Melmed Decl., ¶ 30.)

21 **D. REIMBURSEMENT ALLEGATIONS**

22 Labor Code section 2802 provides that “an employer shall indemnify his or her employees for
23 all necessary expenditures or losses incurred by the employee in direct consequence of the discharge
24 of his or her duties, or of his or her obedience to the directions of the employer.” The purpose of this
25 section is to “prevent employers from passing along their operating expenses onto their employees.”
26 (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 562.) Employers have a “duty to
27 exercise due diligence and take any and all reasonable steps to ensure that the employee is paid” for
28 their reimbursable expenses. (*Stuart v. RadioShack Corp.* (N.D. Cal. 2009) 641 F.Supp.2d 901, 904.)

1 Here, Plaintiff alleged Defendant failed to reimburse employees for expenditures they incurred
2 as a requirement for performing their job duties. Specifically, Plaintiff alleged that Defendant required
3 the Class Members to use their own vehicles to transport all the company tools for work-related
4 purposes and that the Class Members were not reimbursed for these expenses. Defendant argued that
5 it did not require employees to use their personal vehicles. Defendant also argued that there was
6 multiple individualized liability issues related to the expense reimbursement claims, and that many
7 (perhaps most) Class Members never used their personal vehicles at all. Defendant argued that there
8 would be significant variation between the Employees in terms of what kinds of expenses were actually
9 incurred. Thus, Defendant concluded that the individualized inquiries necessary to determine liability
10 and damages would render any class action unmanageable. (*Soderstedt v. CBIZ Southern California,*
11 *LLC* (2011) 197 Cal.App.4th 133, 157; Melmed Decl., ¶ 31.)

12 Plaintiff estimated \$10 as the weekly rate of unreimbursed gas and vehicle expenses. With an
13 estimated 28,520 workweeks at issue, Plaintiff estimated Defendant's exposure for this claim to be
14 approximately \$280,520. Plaintiffs then ascribed a 75% discount based on the risk that a factfinder
15 might agree with Defendant's defenses on the claim, reducing Defendant's realistic exposure for this
16 claim to **\$70,130**. (Melmed Decl., ¶ 32.)

17 **E. PAGA ALLEGATIONS**

18 Under former Labor Code section 2699, subdivision (f)(2), and section 2699.5, employers that
19 violate certain provisions of the Labor Code are subject to penalties according to the following formula:

- 20 1. \$100.00 for the initial violation per employee per pay period; and
- 21 2. \$200.00 for each subsequent violation per employee per pay period.

22 These penalties must be allocated seventy-five percent (75%) to the LWDA and twenty-five
23 percent (25%) to the affected employees. (Lab. Code, § 2699, subd. (i).) Plaintiff alleged that, because
24 of the violations described above, Defendant was liable for these penalties for each applicable pay
25 period during the applicable PAGA Period. (Melmed Decl., ¶ 33.)

26 In ascertaining Defendant's exposure for this claim, Plaintiff considered several important
27 cases. First, courts to consider the issue have refused to "stack" PAGA penalties, severely limiting the
28 recoverable PAGA penalties. (See *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529

1 [approving PAGA penalty reduction to \$5 per pay period]; accord *Atempa v. Pedrazzani* (2018) 27
2 Cal.App.5th 809.) Second, Defendant argued that Plaintiff is not entitled to recover PAGA penalties at
3 the subsequent violation rate of \$200 per pay period. (Melmed Decl., ¶ 33.) California’s appellate
4 courts have held that “[u]ntil the employer has been notified that it is violating a Labor Code provision
5 (whether or not the commissioner or court chooses to impose penalties), the employer cannot be
6 presumed to be aware [of the violation]” and therefore, until a Court or the Commissioner issues a
7 finding of a violation, the initial \$100 violation rate applies for each pay period in which the alleged
8 violation occurred. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209.) Defendant
9 further argued that, given the nature of the allegations and Defendant’s efforts at good faith compliance
10 with the Labor code, there is a likelihood that a further reduction of the penalty to \$5 per pay period as
11 approved in *Carrington* would apply. (Melmed Decl., ¶ 33; *Carrington v. Starbucks Corp., supra*, 30
12 Cal.App.5th at p. 529.)

13 Here there were approximately 12,364 pay periods within the applicable PAGA period.
14 (Melmed Decl., ¶ 34.) Considering Defendant’s defenses to the PAGA claim, Plaintiff faced the risk
15 that a court would reduce the amount of awarded PAGA penalties, especially considering that PAGA
16 penalties themselves rival the amount of wages actually owed. Accordingly, Plaintiff followed the
17 approach in *Carrington* and ascribed a settlement value of \$5 per pay period for a total realistic
18 settlement value of **\$61,820**—acknowledging, however, that many of the pay periods may have
19 involved no violation at all. (Melmed Decl., ¶ 34; see also *Carrington v. Starbucks Corp.* (2018) 30
20 Cal.App.5th 504, 529.)

21 **III. SUMMARY OF THE PROPOSED SETTLEMENT**

22 Under the terms of the Settlement Agreement, Defendant will be released of all claims asserted
23 in the Complaint in exchange for Defendant’s agreement to pay a non-reversionary settlement Gross
24 Settlement Amount of \$450,000.00. (See generally, Settlement Agreement.)

25 **A. REASONABLENESS OF THE GROSS SETTLEMENT AMOUNT**

26 Plaintiff has applied appropriate discounts on the maximum settlement value as calculated
27 above to come to Defendant’s realistic exposure of \$544,518. (Melmed Decl., ¶ 35.) As explained
28 above, the issues in this case were hotly contested—both legally and factually. (Melmed Decl., ¶ 35.)

1 While Plaintiff continues to believe in the merits of the case, Defendant argued that it fully complied
2 with California’s wage and hour laws, and thus faced minimal exposure, if any. (Melmed Decl., ¶ 35.)
3 Therefore, the Gross Settlement Amount of \$450,000.00 is an excellent result and within the zone of
4 reasonableness for all parties. (Melmed Decl., ¶ 35.) If preliminary approval is granted, Plaintiff will
5 have recovered **82.64%** of the estimated settlement value for the Class Members in this case—a fair
6 compromise of the claims, by any measure. (Melmed Decl., ¶ 35.)

7 **B. SETTLEMENT CONSIDERATION AND ALLOCATION**

8 The Gross Settlement Amount includes: **(1)** the fees and expenses of the Settlement
9 Administrator, currently estimated to not exceed \$8,250.00; **(2)** Plaintiff’s counsel’s attorney fees not
10 to exceed one-third of the Gross Settlement Amount, i.e., \$150,000.00; **(3)** litigation expenses and costs
11 not to exceed \$13,000.00; **(4)** a service award to the named Plaintiff of up to \$7,500.00; and
12 **(5)** payment to the LWDA of \$15,000.00 for its 75% share of the settlement for civil penalties pursuant
13 to PAGA. (Settlement Agreement, at pp. 3, 4, 18, 19.) After all Court-approved deductions from the
14 Gross Settlement Amount, the Net Settlement Amount, which consist of at least \$256,250.00, will be
15 distributed to all Class Members who do not request exclusion from the settlement and the Aggrieved
16 Employees. (Settlement Agreement, at p. 19.)

17 **C. NOTICE PROCEDURES**

18 Within 14 days of the Court granting preliminary approval of the Settlement Agreement,
19 Defendant shall provide the Settlement Administrator with an updated list of Class Members and
20 Aggrieved Employees containing names, number of Class Period workweeks, number of PAGA Period
21 pay periods, addresses, and social security numbers (the “Class Data”). (Settlement Agreement, at p.
22 23.) Within 28 days of receiving the Class Data, the Settlement Administrator shall send the Class
23 Notice by bulk first class mail, forwarding requested, to the Class Members at the addresses identified
24 through the process described above. (Settlement Agreement, at p. 24.) Plaintiff proposes using the
25 Class Notice attached as **Exhibit D** to the Declaration of Jonathan Melmed.

26 **D. CY PRES DISTRIBUTION**

27 Class Members will have 180 days to cash their settlement checks. (Settlement Agreement, at
28 p. 29.) If a Class Member fails to cash his/her check by the deadline, then the Settlement Administrator

1 shall distribute such funds to the California State Controller for deposit in the Unclaimed Property Fund
2 in the name of the individual whose check was uncashed. (Settlement Agreement, at pp. 29–30.)

3 **IV. THE CLASS SHOULD BE PRELIMINARILY CERTIFIED**

4 **A. THE LESSER STANDARD OF SCRUTINY FOR SETTLEMENT-ONLY**
5 **CONSIDERATION IS APPROPRIATE**

6 California Rules of Court, rule 3.769, subdivision (d), provides that the Court may make an
7 order approving certification of a provisional settlement class at the preliminary approval stage. It is
8 well-established that trial courts should use a “lesser standard of scrutiny” for determining the propriety
9 of certifying a settlement class, as opposed to a litigation class. (*Dunk v. Ford Motor Co.* (1996) 48
10 Cal.App.4th 1794, 1807, fn. 19.) Since no trial is anticipated in a class-based settlement, the case
11 management issues inherent in determining if the class should be certified need not be confronted, and
12 the Court’s fairness review of the settlement focuses on protecting the interests of the non-
13 representative class members. (*Ibid.*; see also *Officers for Justice v. Civil Service Com’n of City and*
14 *County of San Francisco* (9th Cir. 1982) 688 F.2d 615, 633; *Amchem Products, Inc. v. Windsor* (1997)
15 521 U.S. 591, 620 [117 S.Ct. 2231, 2248] [“Confronted with a request for settlement-only class
16 certification, a district court need not inquire whether the case, if tried, would present intractable
17 management problems . . . for the proposal is that there be no trial.”].)

18 As discussed below, for settlement purposes only, the Parties ask this court to conditionally
19 certify the Class, as defined above, under section 382 of the Code of Civil Procedure.

20 **B. THE PROPOSED CLASS IS NUMEROUS, ASCERTAINABLE, AND SHARE**
21 **A WELL-DEFINED COMMUNITY OF INTEREST**

22 Numerosity is met if a proposed class is so large that joinder of all members would be
23 impracticable. (See Code Civ. Proc., § 382.) A proposed settlement class is ascertainable if the class
24 members can be objectively identified and given notice of the litigation without unreasonable time or
25 expense. (See *Medraza v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 101.) Defendant has
26 represented that the proposed Class consists of approximately 319 Class Members ascertained through
27 Defendant’s records. As such, the numerosity requirement is met.

28 To justify certification, the class proponent must show that questions of law or fact common to

1 the class predominate over the questions affecting the individual members. (See *Arenas v. El Torito*
2 *Restaurants, Inc.* (2010) 183 Cal.App.4th 723 [citing *Washington Mutual Bank, FA v. Superior Court*
3 (2001) 24 Cal.4th 906, 913].) The commonality element is satisfied here because common legal and
4 factual questions exist, such as (a) whether individuals working for Defendant were subject to unlawful
5 wage-and-hour policies and/or practices under the California Labor Code; (b) whether these violations
6 triggered derivative claims for penalties; and (c) whether Defendant's violations were knowing or
7 willful. Likewise, Plaintiff's claims are typical of the Class Members because he was subject to
8 Defendant's policies and practices described above in Plaintiff's analysis of the claims and defenses,
9 which were consistently applied to class-wide.

10 A proposed class representative must establish that they will adequately represent the proposed
11 class. (See *Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540, 546.) Plaintiff is
12 adequate as a class representative because he is a member of the Class, experienced the same wage and
13 hour practices as the rest of the Class, is committed to representing the interests of the Class, has no
14 interests that are adverse to members of the Class, and understands and accepts his duty to represent
15 the best interests of the Class. Plaintiff is committed to the Class and is adequate to represent the
16 interests of the Class in this litigation. (Melmed Decl., ¶ 48.)

17 **V. PRELIMINARY APPROVAL SHOULD BE GRANTED**

18 The Settlement Agreement was negotiated at arm's length between counsel using a professional
19 and well-respected third-party neutral. (Melmed Decl., ¶ 38.) Counsel for both parties were thoroughly
20 familiar with the complex legal and factual questions at issue in this litigation. (Melmed Decl., ¶ 38.)
21 The Settlement Agreement is a product of intensive negotiations, supported by investigation and direct
22 exchanges of information through informal discovery, during the course of settlement negotiations,
23 including a full-day mediation. (Melmed Decl., ¶ 38.) Although Plaintiff and his counsel believed the
24 class claims had merit and there was a possibility of certifying the class and claims, they recognized
25 the potential risk, expense, and complexity posed by litigation, such as unfavorable decisions on class
26 certification, summary judgment, at trial and/or on the damages awarded, and/or on an appeal that can
27 take several more years to litigate. The resulting Settlement Agreement was based on calculations, risk
28 assessment, and non-collusive negotiation. It takes the risks identified above and others into account in

1 arriving at the non-reversionary Gross Settlement Amount. (Melmed Decl., ¶ 38.)

2 In addition, the parties are represented by skilled and experienced counsel with extensive
3 backgrounds in complex litigation and experience litigating similar wage and hour class actions.
4 (Melmed Decl., ¶¶ 8–13.) The Settlement Agreement was reached after extensive investigation and
5 research, calculations and risk evaluation, substantial exchanges of documents, and Plaintiff’s
6 counsel’s thorough factual investigation, which were sufficient to evaluate Defendant’s defenses.
7 (Melmed Decl., ¶ 40.) The Settlement Agreement came only after the case was thoroughly investigated
8 by Plaintiff’s counsel. (Melmed Decl., ¶ 40.) Plaintiff’s counsel all agree that this settlement is fair,
9 adequate, and reasonable, and in the best interests of Class Members. (Melmed Decl., ¶ 40.)

10 As described above, Defendant had strong defenses to Plaintiff’s claims, which create a real
11 possibility that the claims might not be certified or might fail on the merits. (Melmed Decl., ¶ 41.)
12 Proceeding with litigation would impose a significant risk of no recovery as well as ongoing, substantial
13 additional expenditures of time and resources. If settlement were not achieved, continued litigation of
14 the claims would take a substantial amount time and possibly confer no benefit on Class Members. By
15 contrast, the settlement will yield a prompt, certain, and substantial recovery for the Class Members,
16 which also benefits the Parties and the Court. In considering these risks, the choice was
17 overwhelmingly in favor of settlement. (Melmed Decl., ¶ 41.)

18 Experienced counsel, operating at arm’s length, have weighed the strengths and risks of the
19 case, and endorse the proposed settlement. (Melmed Decl., ¶ 43.) The view of the attorneys actively
20 conducting the litigation is entitled to significant weight in deciding whether to approve the settlement.
21 (*Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18, *aff’d* (9th Cir. 1981) 661 F.2d
22 939 “[T]he fact that experienced counsel involved in the case approved the settlement after hard-
23 fought negotiations is entitled to considerable weight.”]; *Kullar v. Foot Locker Retail, Inc.* (2008) 168
24 Cal.App.4th 116, 128 [court must take into account the experience and view of counsel].)

25 **VI. THE ATTORNEYS’ FEE ALLOCATION UNDER THE SETTLEMENT**
26 **AGREEMENT IS FAIR**

27 In addition, at the time of final approval, Plaintiff’s counsel will request attorneys’ fees of up
28 to one-third of the Gross Settlement Amount, (i.e., \$150,000.00), plus reimbursement of litigation

1 expenses and costs of up to \$13,000.00. (Settlement Agreement, at p. 4.) As the California Supreme
2 Court has made clear, one-third of the common fund is a reasonable percentage for a trial court to
3 award as attorneys' fees in a class action where a common fund was generated as a result of the case.
4 (See *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 506 [finding no abuse of discretion
5 where trial court approved a fee request of one-third of the common fund].)

6 The requested fee of one-third of the Gross Settlement Amount is also consistent with awards
7 obtained in similar wage and hour class action cases approved by various courts in California. (See
8 *Stuart v. RadioShack Corp.* (N.D. Cal., Aug. 9, 2010, No. C-07-4499 EMC) 2010 WL 3155645
9 [approving fee award of one-third of a \$4.5 million settlement and noting that the fee award of one-
10 third of the total settlement was "well within the range of percentages which courts have upheld as
11 reasonable in other class action lawsuits"]; *Singer v. Becton Dickinson and Co.* (S.D. Cal., June 1,
12 2010, No. 08-CV-821-IEG (BLM)) 2010 WL 2196104, at * 8 [approving fee award of 33.33% of the
13 common fund]; *Romero v. Producers Dairy Foods, Inc.* (E.D. Cal., Nov. 14, 2007, No. 1:05CV0484
14 DLB) 2007 WL 3492841, at *4 [awarding fees of one-third of common fund in a wage and hour class
15 action, noting: "[f]ee awards in class actions average around one-third of the recovery."]; *Martin v.*
16 *FedEx Ground Package System, Inc.* (N.D. Cal., Dec. 31, 2008, No. C 06-6883 VRW) 2008 WL
17 5478576, at *8 [approving attorneys' fees of one-third of common fund].)

18 As part of the final approval motion, Plaintiff's counsel will request approval of the attorneys'
19 fees and costs described in this motion and in the Settlement Agreement, which will be heard at the
20 final approval hearing. Accordingly, the Court need not decide the fees and costs at this time, but only
21 authorize the Class Notice to inform class members that counsel will seek fees and costs up to one third
22 of the Gross Settlement Amount in fees, plus actual litigation costs.

23 **VII. THE CLASS REPRESENTATIVE SERVICE AWARD IS FAIR AND APPROPRIATE**

24 Plaintiff will request payment of a service award from the Gross Settlement Amount of up to
25 \$7,500.00 in addition to whatever payment he is otherwise entitled to receive as a Class Member.
26 (Melmed Decl., ¶ 46; Settlement Agreement, at p. 18.) The proposed service award is reasonable
27 compensation given the time and effort that Plaintiff devoted to this case, the valuable assistance he
28 provided to counsel, and the fact that he entered into a general release of claims that is broader than the

1 release of the Class. (Melmed Decl., ¶ 46; Settlement Agreement, at pp. 33–35.)

2 The requested service award for Plaintiff falls within the range of service payments typically
3 awarded to class representatives in similar class actions. (See, e.g., *Bond v. Ferguson Enterprises, Inc.*
4 (E.D. Cal. June 30, 2011) No. 1:09-cv-1662 OWW MJS, 2011 WL 2648879 [approving **\$11,250.00**
5 service awards]; *Ross v. US Bank National Association* (N.D. Cal. Sept. 29, 2010) No. C 07-02951 SI,
6 2010 WL 3833922, at *2 [approving **\$20,000** service award]; *Vasquez v. Coast Valley Roofing, Inc.*
7 (E.D. Cal. 2010) 266 F.R.D. 482, 493 [approving **\$10,000** service awards]; *West v. Circle K Stores,*
8 *Inc.* (E.D. Cal. Oct. 19, 2006) NO. CIV. S-04-0438 WBS GGH, 2006 U.S. Dist. LEXIS 76558, at *28
9 [approving **\$15,000** service awards]; *Glass v. UBS Fin. Servs.* (N.D. Cal. Jan. 26, 2007) No. C-06-4068
10 MMC, 2007 U.S. Dist. LEXIS 8476, at *52 [approving **\$25,000** service awards]; *Louie v. Kaiser*
11 *Found. Health Plan, Inc.* (S.D. Cal. Oct. 6, 2008) No. 08cv0795 IEG RBB, 2008 U.S. Dist. LEXIS
12 78314, at *18 [approving **\$25,000** service award].)

13 **VIII. SUBMISSION TO THE LWDA**

14 The Settlement Agreement and this motion are concurrently being submitted to the LWDA in
15 accordance with Labor Code section 2699, subdivision (l)(2). (Melmed Decl., ¶ 50.) The proof of
16 electronic submission is attached as **Exhibit C** to the Declaration of Jonathan Melmed.

17 **IX. CONCLUSION**

18 For these reasons, Plaintiff’s motion for preliminary approval of the parties’ class action
19 settlement should be granted.

20 Dated: November 6, 2024

MELMED LAW GROUP P.C.

21
22 

23 **KYLE D. SMITH**

24 Attorney for Plaintiff, the Putative Class, and the
25 Aggrieved Employees
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