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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

JAMES ABERNATHY, as an individual
and on behalf of all others similarly
situated,

Plaintiff,

vs.

DEACON CONSTRUCTION, LLC, an
Oregon limited liability company; and
DOES 1 through 50, inclusive,

Defendants.

Case No.: 20CV367327

[Assigned for all purposes to the Hon. Charles F.
Adams, Dept. 7]

**[PROPOSED] ORDER GRANTING
PLAINTIFF'S MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: July 25, 2024
Time: 1:30 P.M.
Dept.: 7

Action Filed: June 17, 2020
Trial Date: None Set

1 Plaintiff James Abernathy’s (“Plaintiff”) application for an Order Granting Preliminary
2 Approval of Class Action Settlement was filed with the Court on July 2, 2024, and a hearing was
3 held before this Court on July 25, 2024. Appearances for Plaintiff and Defendant Deacon
4 Construction, LLC (“Defendant”) (together, the “Parties”) were noted on the record.

5 **I. INTRODUCTION**

6 This is a putative class and representative action arising out of various alleged wage and
7 hour violations. The operative class action complaint (“Complaint”), filed on June 17, 2020, sets
8 forth causes of action for: (1) violation of Labor Code §§ 226.7 and 512; (2) violation of Labor
9 Code § 2802; (3) violation of Labor Code § 226; (4) violation of Business and Professions Code
10 § 17200, *et seq.* (the “UCL”); and (5) violation of Labor Code § 2698, *et seq.*, the Private
11 Attorneys General Act (“PAGA”).

12 The Parties have reached a settlement. Plaintiff now moves for preliminary approval of
13 the settlement. The motion is unopposed.

14 **II. LEGAL STANDARD**

15 Generally, “questions whether a settlement was fair and reasonable, whether notice to the
16 class was adequate, whether certification of the class was proper, and whether the attorney fee
17 award was proper are matters addressed to the trial court’s broad discretion.” *Wershba v. Apple*
18 *Computer, Inc.* (2001) 91 Cal. App. 4th 224, 234-235, citing *Dunk v. Ford Motor Co.* (1996) 48
19 Cal. App. 4th 1794.

20 In determining whether a class settlement is fair, adequate and reasonable, the trial court
21 should consider relevant factors, such as “the strength of plaintiffs’ case, the risk, expense,
22 complexity and likely duration of further litigation, the risk of maintaining class action status
23 through trial, the amount offered in settlement, the extent of discovery completed and the stage
24 of the proceedings, the experience and views of counsel, the presence of a governmental
25 participant, and the reaction of the class members to the proposed settlement.” *Wershba, supra*,
26 91 Cal. App. 4th at pp. 244-245, citing *Dunk, supra*, 48 Cal. App. 4th at p. 1801 and *Officers for*
27 *Justice v. Civil Service Com’n*, etc. (9th Cir. 1982) 688 F.2d 615, 624.

28 “The list of factors is not exclusive, and the court is free to engage in a balancing and

weighing of factors depending on the circumstances of each case.” *Wershba, supra*, 91 Cal. App. 4th at p. 245. The court must examine the “proposed settlement agreement 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, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Ibid.*, quoting *Dunk, supra*, 48 Cal. App. 4th at p. 1801 and *Officers, supra*, 688 F.2d at p. 625, internal quotation marks omitted.

The burden is on the proponent of the settlement to show that it is fair and reasonable. However “a presumption of fairness exists where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and discovery are 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.” *Wershba, supra*, 91 Cal. App. 4th at p. 245, citing *Dunk, supra*, 48 Cal. App. 4th at p. 1802.

III. DISCUSSION

A. Provisions of the Settlement

The case has been settled on behalf of the following class: “all current and former non-exempt employees of Defendants who were employed in the State of California at any time during the Class Period and who worked more than five hours in any shift” (the “Class”) and a class of “all current and former exempt employees of Defendants who were employed in the State of California at any time between April 6, 2019, through June 21, 2020” (the “Exempt Class”) (the Class and Exempt Class collectively, “Class Members”). Declaration of Max W. Gavron in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement (“Gavron Decl.”), Ex. A (“Settlement Agreement”) ¶¶ 3, 4, 5. The Class Period is “the period commencing on April 6, 2016, and ending December 18, 2023.” Settlement Agreement ¶ 10.

The Settlement Agreement also contains a subset of aggrieved employees that are defined as “all current and former non-exempt employees of Defendants who were employed in the State of California at any time during the PAGA Period and who worked more than five hours in any shift PAGA Period” (“PAGA Members”) and “all current and former exempt employees of Defendants who were employed in the State of California at any time between April 6, 2019,

1 through June 21, 2020” (“Exempt PAGA Members”). Settlement Agreement ¶¶ 23, 24. The
2 PAGA Period is “the period commencing on April 6, 2019, ending December 18, 2023.” *Id.* ¶
3 26.

4 According to the terms of settlement, Defendant will pay a gross, non-reversionary
5 amount of \$650,000.00. Settlement Agreement ¶ 19. The gross settlement amount includes
6 attorney fees of \$216,666.67 (1/3 of the gross settlement amount), litigation costs not to exceed
7 \$35,000.00, an incentive award for the class representative not to exceed \$10,000.00, settlement
8 administration costs not to exceed \$8,250.00, and an allocation of PAGA penalties of \$60,000.00
9 (75% of which will be paid to the LWDA and 25% of which will be paid to the aggrieved
10 employees). *Id.* ¶¶ 7, 12, 21, 25, 39.

11 The net settlement amount will be distributed to the class members on a pro rata basis
12 based on the number of pay periods worked during the Class Period. Settlement Agreement ¶ 56.
13 Similarly, aggrieved employees will receive a pro rata share of the 25% portion of the PAGA
14 payment allocated to them based on the number of pay periods worked during the PAGA Period.
15 *Id.* ¶ 55.

16 Checks remaining uncashed more than 180 days after mailing will be void and the funds
17 from those checks will be transmitted to the California State Controller’s Unclaimed Property
18 Fund in the name of the individual(s) to whom the funds relate. Settlement Agreement ¶ 74.

19 In exchange for the settlement, class members agree to release Defendant, and related
20 persons and entities, from the applicable claims asserted in this action. More specifically,
21 members of the Class will release “all claims pled or which could have reasonably been pled
22 based on the factual allegations contained in the operative complaint or any amendments thereto,
23 including claims for: (i) violation of Labor Code §§ 226.7 and 512; (ii) violation of Labor Code
24 §§ 201, 202, 203; (iii) violation of Labor Code § 226; (iv) violation of Labor Code § 2802; and
25 (vi) violation of Business & Professions Code §§ 17200, which are premised on the violations
26 described above, that accrued during the Class Period” (“Released Claims”). Settlement
27 Agreement ¶¶ 30, 79.a. Members of the Exempt Class will release “all claims pled or which
28 could have reasonably been pled based on the factual allegations contained in the operative

1 complaint or any amendments thereto, including claims for: (i) violation of Labor Code § 226,
2 that accrued during the period of April 6, 2019, through June 21, 2020” (“Exempt Released
3 Claims”). *Id.* ¶¶ 31, 79.b.

4 The aggrieved employees agree to release Defendant, and related persons and entities,
5 from the applicable claims for civil penalties sought under PAGA asserted in this action. More
6 specifically, PAGA Members will release “all claims pled or which could have reasonably been
7 pled based on the factual allegations contained in the operative complaint or any amendments
8 thereto, for civil penalties under the PAGA including claims premised on alleged violations of
9 Labor Code §§ 201, 202, 203, 226.7, 512, 1174, 1198, 1199, and 2802, that accrued during the
10 PAGA Period” (“PAGA Released Claims”). Settlement Agreement ¶¶ 32, 80. Exempt PAGA
11 Members will release “all claims pled or which could have reasonably been pled based on the
12 factual allegations contained in the operative complaint or any amendments thereto, for civil
13 penalties under the PAGA including claims premised on alleged violations of Labor Code §§
14 226, 226.3, that accrued during the period of April 6, 2019, through June 21, 2020” (“Exempt
15 PAGA Released Claims”). *Id.* ¶¶ 33, 81.

16 Plaintiff further agrees to a general release of claims against Defendant. *Id.* ¶ 78.

17 **B. Fairness of the Settlement**

18 Plaintiff asserts that the settlement is fair, reasonable, and adequate, given the strength of
19 his claims, the inherent risks of litigation, including risks relative to decertification and the merits
20 of the claims, and the costs of pursuing litigation. After Plaintiff initiated the action, Defendant
21 provided Plaintiff with informal discovery, which included data and information pertaining to the
22 number of putative class members and wage statements issued to each Class Member, Plaintiff’s
23 personnel file, employee handbook, meal period policies, and copies of wage statements to
24 putative class members. Gavron Decl. ¶ 5. Subsequently, the parties attended mediation with
25 Honorable Richard M. Silver (Ret.), which was unsuccessful. *Id.* ¶ 6. The parties engaged in
26 further discovery, including written discovery and the mailing of a *Belaire-West* notice for the
27 disclosure of the putative class members’ identities and contact information. *Id.* ¶ 7. The parties
28 also took the depositions of Plaintiff, Defendant’s Persons Most Knowledgeable, and several

witnesses. *Id.* ¶ 9. Thereafter, the parties engaged in mediation with Honorable Ronald M. Sabraw (Ret.) and later reached a settlement agreement. *Id.* ¶ 10.

Plaintiff details the estimated exposure and challenges in achieving a complete victory at trial in support of his Motion. Overall, the court finds the settlement is fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

C. Incentive Award, Fees, and Costs

Plaintiff requests an incentive award of \$10,000 for the class representative. The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. These “incentive awards” to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit. *Cellphone Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1394-1395, quotation marks, brackets, ellipses, and citations omitted. Prior to the final approval hearing, the class representative shall file a supplemental declaration specifically detailing his participation in the action and an estimate of the time spent. The court will make a determination at that time.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. *See Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal. App. 4th 123, 127-128.) Plaintiff’s counsel will seek attorney fees of \$216,666.67 (1/3 of the gross settlement fund). Plaintiff’s counsel shall submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees.

1 Plaintiff's counsel shall also submit evidence of actual costs incurred as well as settlement
2 administration costs.

3 **D. Class Certification**

4 On December 16, 2022, this court certified a Meal Period Class consisting of "All current
5 and former non-exempt employees of Defendant in the State of California who worked at any
6 time during the period of April 6, 2016 through the date of class certification and who worked
7 more than five hours in any shift" and a Wage Statement Class consisting of "All current and
8 former employees of Defendant in the State of California who were paid wages at any time
9 during the period of April 6, 2019 through June 21, 2020."

10 The parties have adapted the certified Meal Period Class as the Class, as defined in the
11 Settlement Agreement, for the purposes of this settlement. The certified Wage Statement Class
12 has been adapted into the Exempt Class, as defined in the Settlement Agreement.

13 Plaintiff states there are approximately 267 class members that can be ascertained from
14 Defendant's representation. There are common questions regarding whether class members were
15 subjected to common practices that violated wage and hour laws. No issue has been raised
16 regarding the typicality or adequacy of Plaintiff as class representative. In sum, the court finds
17 that the proposed settlement classes should be conditionally certified.

18 **E. Class Notice**

19 The content of a class notice is subject to court approval. "If the court has certified the
20 action as a class action, notice of the final approval hearing must be given to the class members
21 in the manner specified by the court." Cal. Rules of Court, rule 3.769(f).

22 The notice generally complies with the requirements for class notice. Settlement
23 Agreement, Ex. A. It provides basic information about the settlement, including the settlement
24 terms, and procedures to object or request exclusion.

25 Having considered the Joint Stipulation of Class Action and PAGA Settlement and all
26 other papers filed in this action, the Court HEREBY FINDS AND ORDERS as follows:

27 1. This Court grants preliminary approval of the Agreement between Plaintiff and
28 Defendant filed herewith. The Settlement Agreement appears to be fair, adequate, and reasonable

1 to the Class Members.

2 2. The Class Representative and Defendant (hereafter, “Settling Parties”), through
3 their counsel of record in the Litigation, have reached an agreement to settle the class and PAGA
4 claims in the Litigation as set forth in the Settlement Agreement, on behalf of the Class Members
5 (as defined below and in the Settlement Agreement).

6 3. The Court hereby conditionally certifies the following classes for settlement
7 purposes:

8 all current and former non-exempt employees of Defendants who were employed
9 in the State of California at any time during the Class Period and who worked
10 more than five hours in any shift (the “Class”); and

11 all current and former exempt employees of Defendants who were employed in
12 the State of California at any time between April 6, 2019, through June 21, 2020
13 (the “Exempt Class”) (the Class and Exempt Class collectively, “Class
14 Members”).

15 Should for whatever reason the Settlement Agreement not become Final, the fact that the
16 Parties were willing to stipulate to certification of the Class and Exempt Class as part of the
17 Settlement Agreement shall have no bearing on, or be admissible in connection with, the
18 Litigation.

19 4. The Court appoints and designates: (a) Plaintiff James Abernathy as the Class
20 Representative and (b) Larry W. Lee and Max W. Gavron of Diversity Law Group, P.C. as Class
21 Counsel for the Class. Class Counsel is authorized to act on behalf of the Class with respect to all
22 acts or consents required by, or which may be given, pursuant to the Settlement Agreement, and
23 such other acts reasonably necessary to finalize the Agreement and its terms. Any Class Member
24 may enter an appearance through his or her own counsel at such Class Member’s own expense.
25 Any Class Member who does not enter an appearance or appear on his or her own behalf will be
26 represented by Class Counsel.

27 5. The Court hereby approves the terms and conditions provided for in the
28 Settlement Agreement. The Court finds that on a preliminary basis the Settlement Agreement
falls within the range of reasonableness of a settlement, including the amount of the PAGA

1 penalties, and appears to be presumptively valid, subject only to any objections that may be
2 raised at the final fairness hearing and final approval by the Court. It appears to the Court on a
3 preliminary basis that the settlement is fair, adequate, and reasonable as to all potential Class
4 Members when balanced against the probable outcome of further litigation relating to liability,
5 decertification, and damages issues. It also appears that investigation and research into the
6 claims, liability, and damages have been conducted so that counsel for the Settling Parties are
7 able to reasonably evaluate their respective positions. It appears to the Court that settlement at
8 this time will avoid substantial additional costs by all Settling Parties, as well as avoid the delay
9 and risks that would be presented by the further prosecution of the Litigation. It also appears that
10 settlement has been reached as a result of intensive, serious, and non-collusive arm's-length
11 negotiations.

12 6. A final fairness hearing on the question of whether the proposed Settlement
13 Agreement, the allocation of payments to Class Members, attorneys' fees and costs to Class
14 Counsel, payment to the Settlement Administrator, payment to the Labor Workforce &
15 Development Agency and aggrieved employees, and the incentive payment to the Class
16 Representative should be finally approved as fair, reasonable, and adequate as to the members of
17 the Class is hereby set for _____, at _____ in this Court. The Motion for Final
18 Approval shall be filed by the Class Representative no later than sixteen (16) court days before
19 the final fairness hearing.

20 7. The Court hereby approves, as to form and content, the Notice of Class Action
21 Settlement ("Class Notice") to be sent to Class Members, which is attached to the Settlement
22 Agreement as **Exhibit A**. The Court finds that distribution of the Class Notice to Class Members
23 substantially in the manner and form set forth in the Settlement Agreement and this Order meets
24 the requirements of due process and shall constitute due and sufficient notice to all parties
25 entitled thereto.

26 8. The Court appoints and designates Phoenix Settlement Administrators as the
27 Settlement Administrator. The Court hereby directs the Settlement Administrator to provide the
28 approved Class Notice to Class Members using the procedures set forth in the Settlement

1 Agreement.

2 9. Any Class Member may choose to opt out of and be excluded from the Settlement
3 as provided in the Settlement Agreement and Class Notice, and by following the instructions for
4 requesting exclusion. Any person who timely and properly opts out of the Settlement will not be
5 bound by the Settlement Agreement except for the PAGA Released Claims and Exempt PAGA
6 Released Claims, as applicable, from which there is no opt out, or have any right to object,
7 appeal, or comment thereon. Any Request for Exclusion must be in writing and signed by each
8 such Class Member opting out and must otherwise comply with the requirements delineated in
9 the Class Notice. Class Members who have not requested exclusion by submitting a valid and
10 timely request by the deadline shall be bound by all determinations of the Court, the Settlement
11 Agreement, and Judgment.

12 10. Any Class Member may object to the Settlement Agreement or express his or her
13 views regarding the Settlement Agreement, and may present evidence and file briefs or other
14 papers that may be proper and relevant to the issues to be heard and determined by the Court as
15 provided in the Class Notice.

16 11. The Court reserves the right to adjourn or continue the date of the Settlement
17 Fairness Hearing and all dates provided for in the Settlement Agreement without further notice to
18 Class Members, and retains jurisdiction to consider all further applications arising out of or
19 connected with the Agreement.

20 **IT IS SO ORDERED.**

21
22 DATED: _____

23 HON. CHARLES F. ADAMS
24 SUPERIOR COURT OF CALIFORNIA
25
26
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28