

**Electronically Filed
by Superior Court of CA,
County of Santa Clara,
on 7/2/2024 2:25 PM
Reviewed By: R. Walker
Case #20CV367327
Envelope: 15821053**

Larry W. Lee (State Bar No. 228175)
Max W. Gavron (State Bar No. 291697)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile
lwlee@diversitylaw.com
mgavron@diversitylaw.com

Attorneys for Plaintiff and Class Members

**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]

**DECLARATION OF MAX W. GAVRON IN
SUPPORT OF 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
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

I, Max W. Gavron, declare as follows:

1. I am an attorney at law, duly licensed to practice before all Courts in the State of California, and am with the law firm Diversity Law Group, counsel of record for Plaintiff James Abernathy (“Plaintiff”). I have personal knowledge of the facts set forth below and if called to testify I could and would do so competently.

PROCEDURAL HISTORY

2. On June 10, 2020, Plaintiff filed his written notice with the California Labor & Workforce Development Agency (“LWDA”), alleging violations of Labor Code §§ 226, 226.7, 512, 1174, 1198, 1199, and 2802, pursuant to the Private Attorneys General Act, Labor Code § 2699 (“PAGA”).

3. On June 17, 2020, Plaintiff filed a class and PAGA complaint (“Complaint”) against Defendant Deacon Construction, LLC (“Defendant”) in the Superior Court of California, County of Santa Clara. The Complaint alleges causes of action for: (1) violation of Labor Code §§ 226.7 and 512; (2) violation of Labor Code § 2802; (3) violation of Labor Code § 226; (4) violation of Business and Professions Code § 17200, *et seq.*; and (5) violation of Labor Code § 2698, *et seq.*

4. Plaintiff's class and PAGA claims as pled in the Complaint are predicated upon the following allegations. With respect to Plaintiff's meal period claim, Plaintiff contends that Defendant failed to provide timely, off-duty meal breaks to employees working shifts of five hours or longer. Meal breaks were regularly provided to employees after the fifth hour of work. In addition, employees were not allowed to accurately record their hours worked, including start and stop times of the work shift and meal periods. Employees were not paid premium compensation in lieu of missed, late, or improper breaks. With respect to Plaintiff's reimbursement claim, Plaintiff contends that employees were required to use their personal cell phones for work purposes but were not reimbursed for the costs of such use. Finally, Plaintiff contends that Defendant issued deficient wage statements to employees. The wage statements issued to Plaintiff failed to identify the pay period start date and legal name of the employer. As

1 a result of the above, Plaintiff seeks damages, penalties, attorneys' fees, and costs.

2 5. After the filing of the Complaint, the Parties met and conferred and agreed to
3 participate in private mediation. In connection with mediation, the Parties engaged in informal
4 discovery to allow Plaintiff to assess the claims and liability, as well as analyze the maximum
5 exposure of damages and penalties. Defendant provided Plaintiff's counsel with data relating to
6 the number of Class Members and wage statements issued to each Class Member, as well as
7 Plaintiff's personnel file, employee handbook, meal period policies, and copies of wage
8 statements to putative Class Members. The information allowed Plaintiff to review and analyze
9 the liability and potential exposure.

10 6. On June 2, 2021, the Parties engaged in a full-day mediation with the Honorable
11 Richard M. Silver (Ret.). The Parties did not reach an agreement at mediation and continued
12 litigation of the Action.

13 7. The Parties engaged in further discovery, including the exchange of written
14 discovery and production of documents, as well as participating in informal discovery
15 conferences, and numerous depositions, including the deposition of Plaintiff, Defendant's and
16 Persons Most Qualified on various topics. The Parties also negotiated the distribution of a
17 *Belaire-West* notice.

18 8. On September 26, 2022, Plaintiff filed a motion for class certification. In
19 conjunction with briefing Plaintiff's motion for class certification, the Parties deposed several
20 putative class members. Following briefing and oral argument, on December 16, 2022, the Court
21 certified a Meal Period Class consisting of "All current and former non-exempt employees of
22 Defendant in the State of California who worked at any time during the period of April 6, 2016
23 through the date of class certification and who worked more than five hours in any shift" and a
24 Wage Statement Class consisting of "All current and former employees of Defendant in the
25 State of California who were paid wages at any time during the period of April 6, 2019 through
26 June 21, 2020." The Court declined to certify Plaintiff's reimbursement theory of liability.

27 9. After additional discovery and the distribution of class notice, the Parties agreed
28 to engage in a second mediation. On December 18, 2023, the Parties engaged in an all-day

mediation with the Honorable Ronald M. Sabraw (Ret.). The Parties ultimately reached the current settlement. Attached as **Exhibit A** is a true and correct copy of the Parties' Joint Stipulation of Class Action and PAGA Settlement ("Agreement" or "Settlement Agreement").

10. The Parties recognize the risk, expense, and delay in continuing litigation with the class and PAGA claims, and believe the settlement to be fair, reasonable, and adequate.

11. Each side has apprised the other of their respective factual contentions, legal theories, and defenses, resulting in negotiations taking place between the Parties.

POTENTIAL DAMAGES AND PENALTIES

12. Based on the class data provided by Defendant, Plaintiff estimated that Defendant would face potential liability ranging between \$7.39 million to \$5.77 million, without discounting for potentially losing on any of the causes of action, for Plaintiff's meal period, reimbursement, and wage statement class and PAGA claims if Plaintiff succeeded at trial. Plaintiff was able to estimate the potential penalties based on data provided by Defendant, including the number of employees in the class, the number of pay periods at issue, and the estimated average hourly rate of pay.

13. Plaintiff estimated Defendant's maximum exposure as follows based on the information exchanged in advance of mediation. Because many of Plaintiff's theories of liability are overlapping—for example, the derivative and direct violations of Labor Code § 226—the amounts detailed below overestimate the realistic potential recovery, which Plaintiff discusses further below:

Claim	Estimated Exposure	Calculations/Formula
Meal Period	\$2.5 million @ 100% violation \$1.26 @ 50% violation	Assuming 100% violation rate, approximately 77,281 shifts and \$32.66 average hourly rate = \$2.5 million vs 50% violation rate, approximately 38,641 shifts x \$32.66 = \$1.26 million
Labor Code § 203	\$1.38 million	176 former employees, \$32.66 average hourly rate
Labor Code § 2802	\$85,450	\$5 per pay period for cell phone use x 17,090

Labor Code § 226	\$1.36 million	139 employees and 13,702 wage statements
Alleged Direct Violation of Labor Code § 226	\$909,050	187 employees and 9,184 wage statements
PAGA	\$1.37 million	13,702 pay periods x \$100 per pay period
Total Estimated Maximum Exposure Ranging from: \$7.39 million to \$5.77 million		

14. The estimated exposure above likely significantly overestimates the potential liability in this action for a number of reasons. For example, for the meal period claim, as discussed at length in the Parties' briefing on class certification, Plaintiff's theory of liability depended on the presumption that Plaintiff contended arose from Defendant's alleged failure to properly track the start and stop of meal periods. *See Donohue v AMN Services, LLC*, 11 Cal.5th 58, 77 (2021) ("The presumption derives from an employer's duty to maintain accurate records of meal periods."). However, as argued by Defendant, this is a rebuttable presumption that could have been refuted during post-certification discovery and which could have resulted in a subsequent decertification motion—to which Defendant was entitled to file up until entry of judgment. *See, e.g. Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014) (reversing certification ruling at California Supreme Court after extended litigation history). Accordingly, while Plaintiff was confident in prevailing on this claim his estimated 100% or 50% violation rate may not have ultimately been subject to class proof. *See Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012) ("On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed."). Defendant contended that it had compliant policies and therefore met its burden and did not have liability for this claim. Defendant further argued that even if Plaintiff could demonstrate liability, Plaintiff could not maintain this claim as certified for class treatment because each employee's experience was unique.

15. Plaintiff argued that employees were required to use their cell phones for work-related tasks. Defendant vehemently denied this contention and the Court denied certification on this theory of liability. Defendant disputes the existence of a common policy that requires

employees to use personal cell phones for work-related purposes because it maintained compliant written reimbursement policies. Given the Court’s prior order denying certification of this claim, the risk associated with proceeding is evident. Accordingly, the proposed exposure and settlement of this claim is fair, adequate, and reasonable.

16. Regarding Plaintiff’s wage statement claim, Plaintiff would face the burden of demonstrating that any alleged omission of information from the wage statements was a “knowing and intentional failure” by Defendant to comply with Labor Code § 226. *See Harris v. Vector Mktg. Corp.*, 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009) (granting summary judgment in favor of employer and finding its conduct was not “knowing and intentional”); Defendant also would have argued that penalties under Section 226 are subject to a similar “good faith” defense. *See, e.g., Apodaca v. Costco Wholesale Corp.*, 2014 WL 2533427, at *3 (C.D. Cal. June 5, 2014) (“Where an employer has a good faith belief that it is not in violation of Section 226, any violation is not knowing and intentional.”). The California Supreme Court also recently approved a good faith defense to the imposition of Section 226 penalties, which further undermines the certainty of recovering these damages even if Plaintiff prevailed on liability. *Naranjo v. Spectrum Sec. Servs., Inc.*, No. S279397, 2024 WL 1979980, at *1 (Cal. May 6, 2024).

17. Finally, with respect to potential liability of Plaintiff’s PAGA claim, Plaintiff estimated that Defendant could face civil penalties of up to a maximum of \$1.37 million if Plaintiff were successful at trial. This amount was calculated based on approximately 13,702 pay periods during the relevant time period and a \$100 penalty per violation, which assumes that the Court would not “stack” PAGA penalties for distinct violations of the Labor Code. Courts are hesitant to award a higher PAGA penalty for “subsequent” violations where there is no prior citation by the Labor Commissioner, which renders the evaluation of the potential PAGA penalties without “stacking” reasonable. *C.f. Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1144 (9th Cir. 2021) (“Virgin was not notified by the Labor Commissioner or any court that it was subject to the California Labor Code until the district court partially granted Plaintiffs’ motion for summary judgment. On this basis, we reverse the district court’s holding that Virgin is

1 subject to heightened penalties for any labor code violation that occurred prior to that point.”).

2 While *Bernstein* addresses whether the higher subsequent penalty should be applied, defendants

3 often argue that this decision supports their position that the court should not award multiple

4 penalties for different predicate violations of the Labor Code during the same pay period.

5 Accordingly, evaluating the settlement compared to a potential penalty of \$100 per pay period is

6 fair, adequate, and reasonable.

7 18. Here, the total amount of class and PAGA penalties ranges between \$7.39 million

8 to \$5.77 million, without discounting for potentially losing on any of the causes of action. The

9 Gross Settlement Amount is \$650,000, which is between approximately 8.8% and 11.2% of the

10 maximum class and PAGA penalties. The high settlement percentage-to-recovery further

11 supports that the settlement is fair and reasonable.

12 19. Although Plaintiff believes in the merits of the alleged claims and maintains that

13 there is no reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise

14 defenses to the claims and further with respect to the reduction of PAGA penalties and that it

15 could be persuasive to the Court. Thus, even if Plaintiff were to successfully prove his claims at

16 trial, there is a possibility that the Court may only award a small percentage of PAGA penalties,

17 as the Court has discretion to do so. The Gross Settlement Amount was premised with this risk in

18 mind, associated with the possibility of the Court significantly reducing Plaintiff’s PAGA

19 penalties, along with other attendant risks, even if Plaintiff was to prevail at trial.

20 20. Plaintiff also believes in the fairness of the settlement given the inherent risks of

21 litigation, including the uncertainty and risks to Plaintiff involved in not prevailing on one or

22 more of the causes of action or theories alleged in the operative Complaint, the possibility of

23 decertification, and the potential for appeals.

24 21. Defendant has represented that there are approximately 166 individuals who are

25 Class Members and 101 individuals who are Exempt Class Members, totaling 267 individuals

26 included in the Settlement.

27 22. The Net Settlement Amount, calculated after deduction of attorneys’ fees,

28 litigation costs, the incentive award to the Class Representative, payment of PAGA penalties to

the LWDA and aggrieved employees, and settlement administration costs, is estimated to be approximately \$320,083.33. *See* Agreement ¶¶ 7, 12, 21, 25, 39.

23. As explained in the Agreement, the Net Settlement Amount will be allocated 95% to the Class, which consists of non-exempt employees, and 5% to the Exempt Class, which consists of exempt employees with a singular and temporally limited claim under Section 226. Assuming an even distribution of workweeks, a raw average of approximately \$1,831.80 per Class Member ($(\$320,083.33 * 0.95 = \$304,079.17) / \sim 166$ Class Members), and \$158.46 per Exempt Class Member ($(\$320,083.33 * 0.05 = \$16,004.17) / \sim 101$ Exempt Class Members)) is anticipated for distribution. The amount actually paid to each Class Member may increase or decrease depending on the actual number of pay periods worked by each Class Member during the Class Period.

24. The Settlement Agreement also provides for Fifteen Thousand Dollars (\$15,000.00) to be distributed to aggrieved employees in settlement of their claims for civil penalties under PAGA. *Id.* ¶ 25. The aggrieved employees 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, through June 21, 2020” (“Exempt PAGA Members”). *Id.* ¶¶ 23, 24. The PAGA Period is the period commencing on April 6, 2019, ending December 18, 2023. *Id.* ¶ 26.

25. Any remaining monies from uncashed settlement checks will be transmitted to the California State Controller’s Unclaimed Property Fund in the name of the individual(s) to whom the funds relate. *See* Agreement ¶ 74.

26. Class Members are advised of their right to opt out of or object to the settlement, and seek further information about the settlement, in the Notice of Class Action Settlement (“Class Notice”). A true and correct copy of the Class Notice is attached as Exhibit A to the Settlement Agreement.

27. From the inception of the case, Class Counsel has zealously represented the

1 interests of Class Members. Class Counsel has exchanged written discovery, taken the
2 depositions of Defendant's Persons Most Knowledgeable and other witnesses, and engaged in
3 significant meet and confer discussions with opposing counsel to obtain informal data and
4 documents on behalf of the Class Members. The settlement was obtained for the benefit of the
5 Class Members, as opposed to the individual Class Representative. Further, Class Counsel has
6 been approved as class counsel on a number of prior cases, have litigated numerous other class
7 action cases, and are competent to represent the Class Members.

8 28. I have spent significant time researching and pursuing the claims that have been
9 alleged in this action. The Parties engaged in formal discovery, as well as informal discovery in
10 connection with mediation, and participated in the exchange of class data and Defendant's
11 pertinent policies and practices. Based on my review of all the documents and information, and
12 based on my experience in class action litigation, I believe this settlement to be fair, adequate,
13 and reasonable.

14 29. I was retained based upon a contingency fee arrangement wherein Plaintiff's
15 counsel agreed to advance all costs and receive no fee unless a recovery was accomplished.
16 Specifically, had Plaintiff failed to prevail in this case, counsel for Plaintiff would have spent a
17 significant amount of time, money and other resources without any benefit or return. In addition,
18 had Plaintiff also failed to prevail in the present case, Defendant would have been able to seek
19 costs in connection with their defense of the case.

20 **ATTORNEY EXPERIENCE**

21 30. I am one of the primary attorneys on this matter. My qualifications are as follows:
22 I received a full-tuition scholarship, and graduated from Southwestern Law School in 2013,
23 magna cum laude. I was in the top 5% of my class. During my time at Southwestern, I was a
24 Notes and Comments Editor on the Southwestern Law Review. I also received awards for
25 achieving the highest grade in my class in several courses. In 2012, I was a full-time extern, at
26 the United States District Court for the Central District. Immediately after law school, I taught
27 several courses at Southwestern, including Principles of Legal Analysis and Legal Methods. I
28 taught those courses for approximately four years.

1 31. I practiced civil litigation at Haight Brown & Bonesteel LLP from approximately
2 September 2013, through January 2016. I was third chair in a federal court jury trial that resulted
3 in a defense verdict in our client's favor on a \$21 million commercial breach of contract dispute.

4 I also regularly litigated cases across the civil litigation spectrum, including employment matters.

5 32. From February 2016, through Fall 2017, I practiced at the international law firm
6 of Arnold & Porter, which had recently merged with Kaye Scholer, LLP. I defended Fortune 50
7 companies in Multi-District Litigation primarily in the product liability sphere. I also
8 successfully drafted an appellate brief in the Ninth Circuit resulting in the reversal of a summary
9 judgment decision regarding trade secret issues, in addition to working in several other practice
10 groups.

11 33. From September 2017, through September 2018, I served as a law clerk to a
12 Judge sitting on the United States District Court, Central District of California. I regularly
13 prepared bench memoranda, on cases involving all types of civil litigation, including regularly
14 working on wage and hour class actions.

15 34. I am currently an attorney at the law firm Diversity Law Group, P.C., an
16 employment law firm that has handled numerous wage and hour class and individual actions, on
17 both plaintiff and defense sides. My current practice focuses on employment matters involving
18 both class actions, and single plaintiffs. The firm currently has cases in the Los Angeles Superior
19 Courts, the Orange County Superior Courts, the San Diego County Superior Courts, and the
20 United States District Courts for the Central, Northern, and Eastern Districts of California. I am
21 currently handling, or have handled, numerous wage and hour class action lawsuits with the firm,
22 including, but not limited to: *Weybrew v. BEI Construction*, Solano County Superior Court Case
23 No. FCS055658 (January 14, 2022), *In re See's Candies Wage and Hour Cases*, Case No.
24 JCCP5004 (March 30, 2022), Los Angeles Superior Court, *Pevey v. Lumber City Corp*, San
25 Bernardino County Superior Court Case No. CIVDS2010240 (May 2, 2022), *Ross v Stater Bros.*
26 *Markets*, San Bernardino County Superior Court Case No. CIVDS1902518 (September 8, 2022),
27 and *Schneider v. Amazon Retail LLC*, Los Angeles County Superior Court Case No.
28 21STCV26226 (December 1, 2022); *James v RADC Enterprises, Inc.*, San Bernardino County

1 Superior Court, Case No. CIV-DS1933035 (September 29, 2020), *Hector Luna v. Triple Canopy,*
2 *Inc.*, Santa Clara County Superior Court, Case No. 19CV345169 (October 22, 2020), *Melbert*
3 *Magpugay v. Harbor Electronics, Inc.*, Santa Clara County Superior Court Case No.
4 19CV352547 (January 27, 2021), *Foster v. Schindler Elevator Corp.*, Alameda County Superior
5 Court Case no. RG19029640 (March 2, 2021), *Martin v. Streetplus Company, LLC, et al*, Los
6 Angeles Superior Court Case No. 19STCV15522 (July 13, 2021), *Morris v. Blue Mountain*
7 *Enterprises, LLC*, Solano County Superior Court, Case No. FCS05.858 (August 4, 2021).

8 35. On June 14, 2019, I argued two related cases in front of the Ninth Circuit Court of
9 Appeals. One of them was *Rodriguez v Nike Retail Service Inc.*, Case No. 17-16866. On June 28,
10 2019, the Ninth Circuit issued a published decision, reversing and remanding in favor of our
11 clients. *Rodriguez v. Nike Retail Servs., Inc.*, 928 F.3d 810 (9th Cir. 2019).

12 36. I have also assisted the firm in numerous wage and hour class action mediations.

13 37. My co-counsel and I will adequately represent the Class Members in this action.
14 Class Counsel has and will zealously represent Plaintiff and the Class Members and pursue this
15 lawsuit to its conclusion.

16 38. I have no conflicts with the Class Members and will adequately represent the
17 Class Members.

18 39. Based on my experience, I believe the estimated Settlement Administration costs
19 of \$8,250.00 are reasonable and necessary to effectuate the Settlement and are in line with the
20 typical cost for administering this type of Settlement.

21 **NOTICE TO THE LWDA**

22 40. Concurrent with the filing of the Motion for Preliminary Approval of Class
23 Action Settlement, my office uploaded the Motion and Settlement Agreement to the LWDA's
24 website.

25 ///

26 ///

27 ///

28 ///

1 I declare under penalty of perjury under the laws of the State of California that the
2 foregoing is true and correct.

3 Executed on this 1st day of July 2024, at Los Angeles, California.

4 

5 _____
6 Max W. Gavron
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

Larry W. Lee (State Bar No. 228175)
Max W. Gavron (State Bar No. 291697)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile
lwlee@diversitylaw.com
mgavron@diversitylaw.com

Attorneys for Plaintiff and the Class

HANSON BRIDGETT LLP
WARREN HODGES SBN 287162
whodges@hansonbridgett.com
BREANA L. BURGOS, SBN 335077
bburgos@hansonbridgett.com
ALEXA F. GALLOWAY, SBN 322080
agalloway@hansonbridgett.com
425 Market Street, 26th Floor
San Francisco, California 94105
Telephone: (415) 777-3200
Facsimile: (415) 541-9366

Attorneys for Defendant
DEACON CONSTRUCTION, LLC

**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 to the Hon. Charles F. Adams, Dept. 7]

**JOINT STIPUATION OF CLASS ACTION
AND PAGA SETTLEMENT**

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

1 **JOINT STIPULATION OF CLASS ACTION AND PAGA SETTLEMENT**

2 This Joint Stipulation of Class Action and PAGA Settlement is made and entered into by
3 and between Plaintiff James Abernathy ("Plaintiff") as an individual and on behalf of all others
4 similarly situated and Defendant Deacon Construction, LLC's ("Defendant") (together with
5 Plaintiff, the "Parties").

6 **DEFINITIONS**

7 The following definitions are applicable to this Agreement. Definitions contained elsewhere
8 in this Agreement shall also be effective:

9 1. "Action" means *James Abernathy v. Deacon Construction, LLC*, Superior Court of
10 Santa Clara Case No. 20CV367327 (filed on June 17, 2020).

11 2. "Agreement," "Stipulation," or "Settlement Agreement" means this Joint Stipulation
12 of Class Action and PAGA Settlement.

13 3. "Class" means all current and former non-exempt employees of Defendants who
14 were employed in the State of California at any time during the Class Period and who worked more
15 than five hours in any shift.

16 4. "Exempt Class" means all current and former exempt employees of Defendants who
17 were employed in the State of California at any time between April 6, 2019, through June 21, 2020.
18 The period of April 6, 2019, through June 21, 2020 is referred to as the "Exempt Class Period."

19 5. "Class Members" means the Class and Exempt Class, collectively, as defined above.

20 6. "Class Counsel" means Larry W. Lee and Max W. Gavron of Diversity Law Group,
21 P.C.

22 7. "Class Counsel Award" means such award of fees and costs and expenses as the
23 Court may authorize to be paid to Class Counsel for the services they have rendered and will render
24 to Plaintiff and the Class in the Action. Defendant agrees not to oppose Class Counsel Award of up
25 to one-third (1/3) of the Gross Settlement Amount (\$650,000.00), *i.e.*, the sum of Two Hundred
26 Sixteen Thousand Six Hundred Sixty-Six Dollars and Sixty-Seven Cents (\$216,166.67), and costs
27 in the amount of up to Thirty-Five Thousand Dollars (\$35,000.00), subject to the Court finally
28 approving this Settlement. Any portion of the Class Counsel Award not awarded to Class Counsel

1 shall be added to the Net Settlement Amount.

2 8. "Class List" means information regarding all Class Members that Defendant will
3 diligently and in good faith compile from its records and provide to the Settlement Administrator
4 after Preliminary Approval of this Settlement. The Class List shall be formatted as a Microsoft
5 Excel spreadsheet or equivalent and shall include each Class Member's: (1) full name; (2) last
6 known home address; (3) last known telephone number; (4) Social Security number; (5) total
7 number of pay periods worked during the Class Period and PAGA Period; and (6) any other
8 information required by the Settlement Administrator in order to effectuate the terms of the
9 Settlement ("Class List").

10 9. "Class Notice" means the Notice of Class Action Settlement, substantially in the
11 form attached as **Exhibit A**.

12 10. "Class Period" means the period commencing on April 6, 2016, and ending
13 December 18, 2023.

14 11. "Class Representative" or "Plaintiff" means Plaintiff James Abernathy.

15 12. "Class Representative Incentive Payment" or "Incentive Payment" means the
16 amount that the Court authorizes to be paid to Plaintiff, in recognition of his efforts and risks in
17 assisting with the prosecution of the Action. Subject to the Court granting final approval, the Parties
18 agree that Plaintiff shall be paid up to Ten Thousand Dollars (\$10,000.00) from the Gross
19 Settlement Amount. Any portion of the Class Representative Incentive Payment not awarded to the
20 named Plaintiff shall be added to the Net Settlement Amount.

21 13. "Complaint" means the operative Class and Representative Action Complaint filed
22 by Plaintiff James Abernathy in this Action.

23 14. "Counsel for Defendant" or "Defense Counsel" means Tyson M. Shower, Warren
24 Hodges, Breana L. Burgos, and Alexa F. Galloway of the law firm Hanson Bridgett LLP.

25 15. "Court" means the Superior Court of the State of California, County of Santa Clara,
26 or any other court taking jurisdiction of the Action.

27 16. "Defendant" means Defendant Deacon Construction, LLC.

28 17. "Effective Date" means the latter of the following: (1) the date the Court grants

1 Final Approval if no valid objections have been filed; (2) if one or more valid objections have
2 been filed but no appellate proceedings have been initiated, thirty (30) days after the date the
3 Court enters an order granting final approval of the Settlement; or (3) if one or more valid
4 objections have been filed, and an appeal, writ, or other appellate proceeding has been initiated,
5 the date on which any appeal, writ, or other appellate proceedings has been finally and
6 conclusively dismissed with no right to pursue further remedies or relief.

7 18. "Final Approval" means that the Final Approval Order has been entered by the
8 Court.

9 19. "Gross Settlement Amount" means the maximum settlement amount of Six
10 Hundred Fifty Thousand Dollars (\$650,000.00) to be paid by Defendant as a result of this
11 Agreement. The Gross Settlement Amount includes all Individual Settlement Payments to
12 Participating Class Members, the Class Representative Incentive Payment to Plaintiff, Settlement
13 Administration Costs to the Settlement Administrator, PAGA Payment (including LWDA
14 payment), interest, and Class Counsel Award. Employer-owed taxes on the wage portion of the
15 Settlement shall be funded by Defendant separately from the Gross Settlement Amount, and
16 calculated and distributed by the Settlement Administrator.

17 20. "Individual Settlement Payment" means the amount payable from the Net
18 Settlement Amount to each Participating Class Member, as well as the amount payable from the
19 PAGA Payment to PAGA Members and/or Exempt PAGA Members.

20 21. "Net Settlement Amount" means the balance of the Gross Settlement Amount
21 remaining after deduction of the approved Class Representative Incentive Payment, Settlement
22 Administration Costs, PAGA Payment, and Class Counsel Award. The entire Net Settlement
23 Amount is the maximum amount that will be available for distribution to Participating Class
24 Members.

25 22. "Notice of Objection" means a Class Member's written objection to the Settlement.
26 A valid Notice of Objection should include: (a) the objector's full name, address, and telephone
27 number, and signature; (b) a written statement of basis for the objection; and (c) any copies of
28 papers, briefs, or documents upon which the objection is based. The Notice of Objection must be

1 returned by mail to the Settlement Administrator at the specified address indicated in the Class
2 Notice and should be postmarked on or before the Response Deadline.

3 23. "PAGA Members" means all current and former non-exempt employees of
4 Defendants who were employed in the State of California at any time during the PAGA Period and
5 who worked more than five hours in any shift PAGA Period.

6 24. "Exempt PAGA Members" means all current and former exempt employees of
7 Defendants who were employed in the State of California at any time between April 6, 2019,
8 through June 21, 2020.

9 25. "PAGA Payment" means the portion of the Gross Settlement Amount that the
10 Parties have agreed will be allocated to resolve all claims, penalties, and remedies under the Private
11 Attorneys General Act of 2004 (Cal. Lab. Code section 2698, *et seq.*, "PAGA"). The amount of the
12 PAGA Payment is subject to Court approval pursuant to California Labor Code section 2699(l).
13 The Parties have agreed that Sixty Thousand Dollars (\$60,000.00) of the Gross Settlement Amount
14 shall be allocated to the resolution of any Class Members' claims arising under PAGA. Pursuant to
15 the PAGA, seventy-five percent (75%), *i.e.*, the sum of Forty-Five Thousand Dollars (\$45,000.00),
16 of the PAGA Payment shall be paid to the California Labor and Workforce Development Agency
17 ("LWDA"), and 25%, *i.e.*, the sum of Fifteen Thousand Dollars (\$15,000.00), of the PAGA
18 Payment shall be distributed to PAGA Members and Exempt PAGA Members. This settlement will
19 be forwarded to the LWDA by Class Counsel or the Settlement Administrator and any reallocation
20 of settlement proceeds to increase the PAGA payment will not constitute grounds by either party to
21 void this Agreement, so long as the Gross Settlement Amount remains the same.

22 26. "PAGA Period" means the period commencing on April 6, 2019, ending December
23 18, 2023.

24 27. "Parties" means Plaintiff, on behalf of himself and Participating Class Members, and
25 Defendant, collectively.

26 28. "Participating Class Members" means all Class Members who do not submit a valid
27 and timely Request for Exclusion.

28 29. "Preliminary Approval" means the Court's order granting preliminary approval of

1 the Settlement.

2 30. “Released Claims” means all claims pled or which could have reasonably been pled
3 based on the factual allegations contained in the operative complaint or any amendments thereto,
4 including claims for: (i) violation of Labor Code §§ 226.7 and 512; (ii) violation of Labor Code §§
5 201, 202, 203; (iii) violation of Labor Code § 226; (iv) violation of Labor Code § 2802; and (vi)
6 violation of Business & Professions Code §§ 17200, which are premised on the violations described
7 above, that accrued during the Class Period.

8 31. “Exempt Released Claims” means all claims pled or which could have reasonably
9 been pled based on the factual allegations contained in the operative complaint or any amendments
10 thereto, including claims for: (i) violation of Labor Code § 226, that accrued during the period of
11 April 6, 2019, through June 21, 2020.

12 32. “PAGA Released Claims” means all claims pled or which could have reasonably
13 been pled based on the factual allegations contained in the operative complaint or any amendments
14 thereto, for civil penalties under the PAGA including claims premised on alleged violations of
15 Labor Code §§ 201, 202, 203, 226.7, 512, 1174, 1198, 1199, and 2802, that accrued during the
16 PAGA Period.

17 33. “Exempt PAGA Released Claims” means all claims pled or which could have
18 reasonably been pled based on the factual allegations contained in the operative complaint or any
19 amendments thereto, for civil penalties under the PAGA including claims premised on alleged
20 violations of Labor Code §§ 226, 226.3, that accrued during the period of April 6, 2019, through
21 June 21, 2020.

22 34. “Released Parties” means Defendant Deacon Construction, LLC as named by
23 Plaintiff in the operative complaint, and its past, present and/or future, direct and/or indirect,
24 stockholders, shareholders, members, directors, managers, officers, employees, agents,
25 representatives, attorneys, insurers, reinsurers, partners, investors, lenders, administrators, parent
26 companies, subsidiaries, affiliates, divisions, predecessors, successors, assigns, and joint venturers.

27 35. “Request for Exclusion” means a valid, timely, written request by a Class Member
28 indicating a request to be excluded from the Settlement. The Request for Exclusion must: (a) clearly

1 state that the Class Member does not wish to be included in the Settlement; (b) set forth the name,
2 address, telephone number and last four digits of the Social Security Number of the Class Member
3 requesting exclusion; (c) be signed by the Class Member; (d) be returned by mail to the Settlement
4 Administrator at the specified address indicated in the Class Notice; and (e) be postmarked on or
5 before the Response Deadline.

6 36. "Response Deadline" means forty-five (45) days after the Settlement Administrator
7 initially mails the Class Notice to Class Members, and the last date on which Class Members may
8 submit a Request for Exclusion.

9 37. "Settlement" means the agreement among the Parties to resolve the Action, as set
10 forth in this Agreement.

11 38. "Settlement Administrator" means Phoenix Settlement Administrators. The Parties
12 each represent that they do not have any financial interest in the Settlement Administrator or
13 otherwise have a relationship with the Settlement Administrator that could create a conflict of
14 interest.

15 39. "Settlement Administration Costs" means the fees and expenses reasonably incurred
16 by the Settlement Administrator as a result of the procedures and processes expressly required by
17 this Agreement, which are estimated at Eight Thousand Two Hundred and Fifty Dollars
18 (\$8,250.00). Any portion of the Settlement Administration Costs not used or approved by the Court
19 shall be added to the Net Settlement Amount.

20 40. "Settlement Payment Check" means the payment to Participating Class Members
21 pursuant to this Settlement who do not submit a valid Request for Exclusion from the Settlement,
22 PAGA Members, and/or Exempt PAGA Members, which shall be mailed seven (7) calendar days
23 after receipt of funds from Defendant as set forth in this Agreement.

24 **RECITALS**

25 41. This Settlement is made and entered into by and between Plaintiff and Defendant,
26 and is subject to the terms and conditions hereof, and to the Court's approval. The Parties expressly
27 acknowledge that this Agreement is entered into solely for the purpose of compromising
28 significantly disputed claims and that nothing herein is an admission of liability or wrongdoing by

1 Defendant. Defendant denies that it is liable to Plaintiff or the Class Members and denies that it has
2 violated any law.

3 42. On June 5, 2020, Plaintiff filed a notice with the LWDA alleging that Defendant
4 violated Labor Code §§ 226, 226.7, 512, 1174, 1198, 1199, and 2802, pursuant to Labor Code §
5 2699 (“PAGA Notice”). The PAGA Notice alleged that Defendant failed to provide timely off-
6 duty meal periods, reimburse employees for the costs of using personal cell phones, provide and
7 maintain accurate payroll records, and identify the pay period start date and legal employer name
8 on wage statements issued to employees.

9 43. On June 17, 2020, Plaintiff filed a class and representative action complaint in the
10 Superior Court of the State of California, County of Santa Clara. The Complaint alleges causes of
11 action for (1) violation of Labor Code §§ 226.7 and 512; (2) violation of Labor Code § 2802; (3)
12 violation of Labor Code § 226; (4) violation of Business and Professions Code § 17200, *et seq.*; and
13 (5) violation of Labor Code § 2698, *et seq.* As alleged in the Complaint, Plaintiff seeks to
14 represent the Class Members and other aggrieved employees. Plaintiff further seeks damages,
15 penalties, attorneys’ fees, and costs.

16 44. Plaintiff’s counsel diligently investigated the proposed Class Members’ claims
17 against Defendant, including any and all applicable defenses and the applicable law, through the
18 exchange of formal and informal discovery.

19 45. On June 2, 2021, the Parties engaged in an all-day mediation session with the
20 Honorable Richard M. Silver (Ret.). In connection with the mediation and through formal
21 discovery responses, Defendant produced documents for Plaintiff’s review, including Plaintiff’s
22 personnel file, employee handbook, meal period policies, and copies of wage statements to putative
23 Class Members. Defendant also produced data relating to the number of Class Members and wage
24 statements issued to each Class Member, which allowed Plaintiff to conduct a full damage analysis
25 The Parties did not reach an agreement during the session and resumed litigation and discovery.

26 46. On September 26, 2022, Plaintiff filed a motion for class certification. After
27 briefing and oral arguments, on December 16, 2022, the Court issued an order certifying a Meal
28 Period Class consisting of “All current and former non-exempt employees of Defendant in the

1 State of California who worked at any time during the period of April 6, 2016 through the date of
2 class certification and who worked more than five hours in any shift” and a Wage Statement Class
3 consisting of “All current and former employees of Defendant in the State of California who were
4 paid wages at any time during the period of April 6, 2019 through June 21, 2020.”

5 47. After the exchange of further discovery, including taking the depositions of Plaintiff,
6 Defendant’s Persons Most Knowledgeable, and several witnesses, the Parties agreed to engage in a
7 second mediation.

8 48. On December 18, 2023, the Parties engaged in an all-day mediation with the
9 Honorable Ronald M. Sabraw (Ret.). After extended negotiations with the assistance of Retired
10 Judge Sabraw, the Parties reached a settlement in principle and entered into a Memorandum of
11 Understanding.

12 49. The Parties recognize the risk, expense, and delay in continuing the Action, and
13 therefore believe the Settlement to be fair, reasonable, and adequate. Accordingly, the Parties desire
14 to settle, compromise, and discharge all disputes and claims arising from or relating to the Action.

15 **TERMS OF AGREEMENT**

16 50. Settlement Consideration. Defendant shall pay the sum of the Gross Settlement
17 Amount of Six Hundred Fifty Thousand Dollars (\$650,000.00) as specified in this Agreement in
18 full satisfaction of all claims arising from the Action, which shall be used to pay: (1) Individual
19 Settlement Payments; (2) Class Counsel Award; (3) Class Representative Incentive Payment; (4)
20 Settlement Administration Costs to the Settlement Administrator; and (5) the PAGA Payment
21 (including LWDA payment). The Parties agree that this is a non-reversionary Settlement and that
22 no portion of the Gross Settlement Amount shall revert to Defendant.

23 51. Funding of the Gross Settlement Amount. Within fourteen (14) business days after
24 the Effective Date, Defendant shall fund the Gross Settlement Amount into a Qualified Settlement
25 Fund (“QSF”) to be established by the Settlement Administrator. The QSF shall be an interest-
26 bearing account at a federally insured bank. The Parties agree that the QSF is intended to be a
27 “Qualified Settlement Fund” under Section 468B of the Internal Revenue Code and Treas. Reg. §
28 1.468B-1, 26 C.F.R. § 1.468B-1, *et seq.*, and will be administered by the Settlement Administrator

as such. The Parties agree to cooperate with the Settlement Administrator and one another to the extent reasonably necessary to carry out the provisions of this paragraph.

52. Class Counsel Award. Defendant agrees not to oppose or impede any application or motion by Class Counsel for attorneys' fees of up to one-third (1/3) of the Gross Settlement Amount, *i.e.*, the sum of Two Hundred Sixteen Thousand Six Hundred Sixty-Six Dollars and Sixty-Seven Cents (\$216,666.67), and costs in the amount of up to Thirty-Five Thousand Dollars (\$35,000.00), which shall be paid from the Gross Settlement Amount. The Settlement Administrator shall issue an IRS Form 1099 to Class Counsel reflecting the awarded attorneys' fees, costs, and expenses. Any portion of the Class Counsel Award not awarded to Class Counsel shall be added to the Net Settlement Amount and shall be distributed to Class Members as provided in this Agreement.

53. Class Representative Incentive Payment. Defendant agrees not to oppose or impede any application or motion by Plaintiff for an Incentive Payment of up to Ten Thousand Dollars (\$10,000.00) to Plaintiff. The Class Representative Incentive Payment shall be paid from the Gross Settlement Amount and shall be paid in addition to Plaintiff's Individual Settlement Payment as a Participating Class Member. The Settlement Administrator shall issue an IRS Form 1099 to Plaintiff reflecting the Class Representative Incentive Payment. Plaintiff shall be solely and legally responsible to pay any and all applicable taxes on his Incentive Payment and shall hold harmless Defendant, Class Counsel, and Defense Counsel from any claim or liability for taxes, penalties, or interest arising as a result of the Class Representative Incentive Payment. Any portion of the Class Representative Incentive Payment not awarded to Plaintiff shall be added to the Net Settlement Amount and shall be distributed to Class Members as provided in this Agreement.

54. Settlement Administration Costs. The Settlement Administrator shall be paid for the reasonable costs of administration of the Settlement from the Gross Settlement Amount, currently estimated at Eight Thousand Two Hundred and Fifty Dollars (\$8,250.00). These costs, which shall be paid from the Gross Settlement Amount, shall include, *inter alia*, the required tax reporting on the Individual Settlement Payments, the issuing of W-2 and 1099 IRS Forms, establishing a Qualified Settlement Fund, administering and distributing the Gross Settlement Amount, Class

Counsel Award, Incentive Payment, and PAGA Payment, and providing necessary reports and declarations. Any portion of the Settlement Administration Costs not allowed shall be added to the Net Settlement Amount and shall be distributed to Class Members as provided in this Agreement.

55. PAGA Payment. Subject to Court approval, the Parties agree that the amount of Sixty Thousand Dollars (\$60,000.00) of the Gross Settlement Amount shall be designated for satisfaction of claims for civil penalties under the PAGA. The Settlement Administration shall pay seventy-five percent (75%) of the PAGA Payment, *i.e.*, the sum of Forty-Five Thousand Dollars (\$45,000.00), to the LWDA. The remaining twenty-five percent (25%), *i.e.*, the sum of Fifteen Thousand Dollars (\$15,000.00) (the “Collective PAGA Members Payment”), shall be distributed to PAGA Members and Exempt PAGA Members as follows:

a. Exempt PAGA Members: The Settlement Administrator shall allocate five percent (5%) of the Collective PAGA Members Payment to the Exempt PAGA Members. This will be called the Exempt PAGA Member Payment. The Exempt PAGA Member Payment will be divided by the total number of pay periods worked by the Exempt PAGA Members between April 6, 2019, and June 21, 2020, which result in a “Pay Period Value.” The Pay Period Value will be multiplied by the number of pay periods each Exempt PAGA Member worked between April 6, 2019, and June 21, 2020 to arrive at the amount to be paid to that individual.

b. PAGA Members: The Settlement Administrator shall allocate ninety-five percent (95%) of the Collective PAGA Members Payment to the PAGA Members. This will be called the PAGA Member Payment. The PAGA Member Payment will be divided by the total number of pay periods worked by the PAGA Members during the PAGA Period, which result in a “Pay Period Value.” The Pay Period Value will be multiplied by the number of pay periods each PAGA Member worked during the PAGA Period to arrive at the amount to be paid to that individual.

56. Calculation of Individual Settlement Payments. The Net Settlement Amount shall be

used to satisfy Individual Settlement Payments to Participating Class Members in accordance with the terms of this Agreement. The Settlement Administrator will allocate the Individual Settlement Payments by distributing the Net Settlement Amount to the Class and Exempt Class on a pro-rata basis from two funds. The Net Settlement Amount will be divided into a Net Settlement Class Amount and a Net Settlement Exempt Class Amount. The Net Settlement Class amount will be 95% of the Net Settlement Amount. The Net Settlement Exempt Class Amount will be 5% of the remaining Net Settlement Amount.

- a. The Net Settlement Class Amount will be divided by the total number of pay periods worked by the Class during the Class Period, as limited to those individuals who did not request to be excluded, which will result in the “Pay Period Value.” The Pay Period Value will be multiplied by the number of pay periods each member of the Class worked during the Class Period, as limited to those individuals who did not request to be excluded, to arrive at the amount to be paid to that individual.
- b. The Net Settlement Exempt Class Amount will be divided by the total number of pay periods worked by the Exempt Class, as limited to those individuals who did not request to be excluded, between April 6, 2019, through June 21, 2020, which will result in the “Pay Period Value.” The Pay Period Value will be multiplied by the number of pay periods each member of the Exempt Class worked during the Class Period, as limited to those individuals who did not request to be excluded, to arrive at the amount to be paid to that individual.
- c. Participating Class Members are entitled to 100% of the Net Settlement Amount. Defendant maintains no reversionary right to any portion of the Net Settlement Amount. If there are any timely submitted Requests for Exclusion, the Settlement Administrator shall proportionately increase the Individual Settlement Payments for each Participating Class Member so that the amount actually distributed to Participating Class Members equals

100% of the Net Settlement Amount.

57. Tax Treatment. Twenty percent (20%) of each Individual Settlement Payment derived from the Net Settlement Amount for the Class shall be allocated as payment for alleged unpaid wages and reported on an IRS W-2 Form. Eighty percent (80%) of each Individual Settlement Payment derived from the Net Settlement Amount for the Class shall be allocated as payment for penalties and interest. One hundred percent (100%) of each Individual Settlement Payment derived from the Net Settlement Amount for the Exempt Class shall be allocated as payment for penalties and interest. One hundred percent (100%) of the Individual Settlement Payment derived from the PAGA Payment shall be allocated as payment for civil penalties. The portions allocated to interest and penalties shall be reported on an IRS Form 1099. The Class Representative Incentive Payment shall be reported on an IRS Form 1099. Defendant makes no representation as to the tax treatment or legal effect of the payments called for in this Agreement, and Plaintiff, Participating Class Members, PAGA Members, and Exempt PAGA Members are not relying on any statement, representation, or calculation by Defendant. Plaintiff, Participating Class Members, PAGA Members, and Exempt PAGA Members understand and agree that they will be solely responsible for the payment of any taxes and penalties assessed on the payments described herein. Plaintiff, Class Counsel, Participating Class Members, PAGA Members, and Exempt PAGA Members shall be solely and legally responsible for correctly characterizing the payments they receive pursuant to this Agreement for tax purposes and for paying any taxes on the amounts received. Employer-owed taxes on the wage portion of the Settlement shall be funded by Defendant separately from the Gross Settlement Amount and shall be calculated and distributed by the Settlement Administrator.

58. Circular 230 Disclaimer. EACH PARTY TO THIS AGREEMENT (FOR PURPOSES OF THIS SECTION, THE “ACKNOWLEDGING PARTY” AND EACH PARTY TO THIS AGREEMENT OTHER THAN THE ACKNOWLEDGING PARTY, AN “OTHER PARTY”) ACKNOWLEDGES AND AGREES THAT (1) NO PROVISION OF THIS AGREEMENT, AND NO WRITTEN COMMUNICATION OR DISCLOSURE BETWEEN OR AMONG THE PARTIES OR THEIR ATTORNEYS AND OTHER ADVISERS, IS OR WAS

1 INTENDED TO BE, NOR SHALL ANY SUCH COMMUNICATION OR DISCLOSURE
2 CONSTITUTE OR BE CONSTRUED OR BE RELIED UPON AS, TAX ADVICE WITHIN THE
3 MEANING OF UNITED STATES TREASURY DEPARTMENT CIRCULAR 230 (31 CFR
4 PART 10, AS AMENDED); (2) THE ACKNOWLEDGING PARTY (A) HAS RELIED
5 EXCLUSIVELY UPON HIS OR HER OR ITS OWN, INDEPENDENT LEGAL AND TAX
6 COUNSEL FOR ADVICE (INCLUDING TAX ADVICE) IN CONNECTION WITH THIS
7 AGREEMENT, (B) HAS NOT ENTERED INTO THIS AGREEMENT BASED UPON THE
8 RECOMMENDATION OF ANY OTHER PARTY OR ANY ATTORNEY OR ADVISOR TO
9 ANY OTHER PARTY, AND (C) IS NOT ENTITLED TO RELY UPON ANY
10 COMMUNICATION OR DISCLOSURE BY ANY ATTORNEY OR ADVISER TO ANY
11 OTHER PARTY TO AVOID ANY TAX PENALTY THAT MAY BE IMPOSED ON THE
12 ACKNOWLEDGING PARTY; AND (3) NO ATTORNEY OR ADVISER TO ANY OTHER
13 PARTY HAS IMPOSED ANY LIMITATION THAT PROTECTS THE CONFIDENTIALITY OF
14 ANY SUCH ATTORNEY'S OR ADVISER'S TAX STRATEGIES (REGARDLESS OF
15 WHETHER SUCH LIMITATION IS LEGALLY BINDING) UPON DISCLOSURE BY THE
16 ACKNOWLEDGING PARTY OF THE TAX TREATMENT OR TAX STRUCTURE OF ANY
17 TRANSACTION, INCLUDING ANY TRANSACTION CONTEMPLATED BY THIS
18 AGREEMENT.

19 59. Issuance of Tax Forms. The Settlement Administrator shall be responsible for
20 issuing to Plaintiff, Participating Class Members, PAGA Members, Exempt PAGA Members, and
21 Class Counsel any 1099, W-2, or other tax forms as may be required by law for all amounts paid
22 pursuant to this Agreement. All expenses and costs incurred by, or at the direction of, the
23 Settlement Administrator in connection with the operation and implementation of this Settlement
24 Agreement (including, without limitation, expenses of tax attorneys and/or accountants and mailing
25 and distribution costs and expenses relating to filing or failing to file the informational and other tax
26 returns described in this Agreement) shall be treated as, and considered to be, costs of
27 administration of this Settlement and thus part of the Settlement Administration Costs.

28 60. Calculation of Gross Settlement Amount. The Gross Settlement Amount was

1 calculated with, and is premised on, Defendant's representation that the Class worked 17,090 pay
2 periods during the Class Period. If the total number of Class Member pay periods during the Class
3 Period is revealed to be more than 10% higher than the estimated amount (*i.e.*, 18,799), the Gross
4 Settlement Amount shall be proportionally increased by the same percentage over 10%.

5 Defendant represented that the Exempt Class worked 5,617 pay periods during the Exempt Class
6 Period. For example, if the number of pay periods worked during the Class Period by the Class is
7 12% higher than 17,090, then the Gross Settlement Amount shall increase by 2%. If the number
8 of pay periods worked during the Exempt Class Period by the Exempt Class is higher than 5,617,
9 the Parties agree to meet and confer in good faith to address a reasonable resolution.

10 61. No Credit Toward Benefit Plans. The Individual Settlement Payments made to
11 Participating Class Members, PAGA Members, and Exempt PAGA Members, and the Incentive
12 Payment made to Plaintiff, as well as any other payments made pursuant to this Agreement, shall
13 not be utilized to calculate any additional benefits under any benefit plans to which Plaintiff, Class
14 Members, PAGA Members, or Exempt PAGA Members may be eligible, including, but not limited
15 to: profit-sharing plans, bonus plans, 401(k) plans, stock purchase plans, vacation plans, sick leave
16 plans, PTO plans, and any other benefit plans. Rather, it is the Parties' intention that this Settlement
17 will not affect any rights, contributions, or amounts to which any Class Members, PAGA Members,
18 or Exempt PAGA Members may be entitled under any benefit plans. The Parties agree that any
19 Individual Settlement Payment, settlement payment, or Incentive Payment paid to Participating
20 Class Members, PAGA Members, Exempt PAGA Members, or Plaintiff under the terms of this
21 Agreement do not represent any modification of Participating Class Members', PAGA Members',
22 Exempt PAGA Members', or Plaintiff's previously credited hours of service or other eligibility
23 criteria under any employee pension benefit plan, employee welfare benefit plan, or any other plan
24 or program, sponsored by Defendant. Further, any Individual Settlement Payments, settlement
25 payments, or Incentive Payment paid hereunder shall not be considered "compensation" in any year
26 for purposes of determining eligibility for, or benefit accrual within, an employee pension benefit
27 plan, employee welfare benefit plan, or any other plan or program sponsored by Defendant.

28 62. Settlement Administration Process. The Parties agree to cooperate in the

1 administration of the Settlement and to make all reasonable efforts to control and minimize the
2 costs and expenses incurred in the administration of the Settlement. The Settlement Administrator
3 shall provide the following services: (a) calculate each Class Member's, PAGA Member's, and/or
4 Exempt PAGA Member's potential Individual Settlement Payment from the Net Settlement
5 Amount and applicable withholdings, if any; (b) prepare, translate (if necessary), and mail the
6 Class Notice; (c) take appropriate steps to trace, update, and locate any Class Member whose
7 address or contact information as provided to the Settlement Administrator is inaccurate or
8 outdated; (d) provide to Class Counsel and Defense Counsel a weekly report of the progress and
9 completion of tasks identified in this Agreement; (e) establish and maintain prior to disbursement
10 all settlement funds in a qualified settlement fund; (f) issue and distribute all payments provided
11 for in this Agreement, including the Individual Settlement Payments; (g) report the payments
12 made pursuant to this Agreement as required on a Form 1099 or other applicable forms; and (h)
13 calculate the employer-owned taxes on the wage portion of the settlement, which shall be funded
14 by Defendant separately from the Gross Settlement Amount, and distributed by the Settlement
15 Administrator.

16 63. Delivery of the Class List. Within fifteen (15) business days of Preliminary
17 Approval, Defendant shall provide the Class List to the Settlement Administrator.

18 64. Notice by First-Class U.S. Mail. Within ten (10) calendar days after receiving the
19 Class List from Defendant, the Settlement Administrator shall mail a Class Notice to all Class
20 Members via regular First-Class U.S. Mail, using the most current, known mailing addresses
21 identified in the Class List.

22 65. Confirmation of Contact Information in the Class List. Prior to mailing, the
23 Settlement Administrator shall perform a search based on the National Change of Address Database
24 for information to update and correct for any known or identifiable address changes.

25 66. Class Notice. All Class Members will be mailed a Class Notice. Each Class Notice
26 will provide: (1) information regarding the nature of the Action; (2) a summary of the Settlement's
27 principal terms; (3) the Class and Exempt Class definitions; (4) each Class Member's estimated
28 Individual Settlement Payment and the formula for calculating Individual Settlement Payments, if

1 they do not request to be excluded; and if they do request to be excluded (5) the dates that comprise
2 the Class Period and Exempt Class Period; (6) instructions on how to submit valid Requests for
3 Exclusion or objections; (7) the deadlines by which the Class Member must submit a Request for
4 Exclusion or Notice of Objection to the Settlement; (8) the date for the final approval hearing; and
5 (9) the claims to be released. The Class Notice will also inform Class Members that, in order to
6 receive the Individual Settlement Payment, they do not need to do anything except keep the
7 Settlement Administrator apprised of their current mailing addresses.

8 67. Re-Mailing of Returned Notices. Any Class Notice returned to the Settlement
9 Administrator as non-deliverable on or before the Response Deadline shall be re-sent promptly via
10 regular First-Class U.S. Mail to the forwarding address affixed thereto and the Settlement
11 Administrator shall indicate the date of such re-mailing on the Class Notice. If no forwarding
12 address is provided, the Settlement Administrator shall promptly attempt to determine the correct
13 address using a skip-trace, or other search using the name, address and/or Social Security Number
14 of the Class Member involved, and shall then perform a re-mailing. If the Class Notice is remailed,
15 the deadline to Request Exclusion shall be extended by fifteen (15) calendar days.

16 68. Request for Exclusion Procedures. Any Class Member may opt-out from the
17 Settlement by submitting a written Request for Exclusion to the Settlement Administrator
18 postmarked by the Response Deadline. A Request for Exclusion must: (1) contain the name,
19 address, telephone number, and the last four digits of the Social Security Number of the person
20 requesting exclusion; (2) clearly state that the Class Member does not wish to be included in the
21 Settlement; (3) be signed by the Class Member; (4) be returned by mail to the Settlement
22 Administrator at the specified address; and (5) be postmarked on or before the Response Deadline.
23 The date of the postmark shall be the exclusive means to determine whether a Request for
24 Exclusion is timely. Except as stated herein, by submitting such a Request for Exclusion a Class
25 Member shall be deemed to have exercised his or her option to opt out of the Action and not be
26 bound by this Agreement. In light of the binding nature of a PAGA judgment on non-party
27 employees, a Class Member who is also a PAGA Member or an Exempt PAGA Member will
28 receive his or her portion of the PAGA Payment and be bound by the PAGA Released Claims

1 and/or Exempt PAGA Released Claims, as applicable, regardless of whether a timely Request for
2 Exclusion is submitted. Any Class Member who fails to submit a valid and timely Request for
3 Exclusion on or before the Response Deadline shall be deemed a Participating Class Member and
4 will be bound by all terms of the Settlement to the fullest possible extent, if the Settlement is
5 granted final approval by the Court. At no time shall any of the Parties or their counsel seek to
6 solicit or otherwise encourage Class Members to opt out of the Settlement. Upon request, the
7 Settlement Administrator shall provide counsel with a complete list of all Class Members who have
8 timely submitted a Request for Exclusion.

9 69. Settlement Terms Bind All Class Members Who Do Not Opt-Out. Any Class
10 Member who does not affirmatively opt-out of the Settlement by submitting a valid and timely
11 Request for Exclusion shall be bound by all terms of the Settlement to the fullest possible extent,
12 including those pertaining to the Released Claims and Exempt Released Claims, as well as any
13 Judgment that may be entered by the Court.

14 70. Objection Procedures. Any Class Member who does not opt-out of this Settlement
15 shall be entitled to object to the Settlement. To object to the Settlement, a Class Member should
16 return by mail a written statement of objection to the Settlement Administrator at the specified
17 address by the Response Deadline. The Notice of Objection should include: (a) the objector's full
18 name, address, telephone number, and signature; (b) a written statement of the basis for the
19 objection; and (c) any copies of papers, briefs, or documents upon which the objection is based.
20 Any Class Member who does not submit a Notice of Objection in compliance with this paragraph,
21 or who does not appear at the final approval hearing and present an oral objection to the Settlement,
22 shall be deemed to have waived any objection(s), shall be conclusively deemed a Participating
23 Class Member, and shall be precluded from making any objection (including by appeal or
24 otherwise) to the Settlement. At no time shall any of the Parties or their counsel seek to solicit or
25 otherwise encourage Class Members to submit written objections to the Settlement or appeal from
26 the Order and Judgment. Class Counsel shall not represent any Class Members with respect to any
27 such objections to this Settlement. Any Class Member who submits a valid Request for Exclusion
28 shall not be allowed to object to this Settlement.

71. Defendant's Right to Rescind. If more than ten percent (10%) of the Class Members opt out of the Settlement by submitting valid and timely Requests for Exclusion, Defendant has the unilateral right in its sole discretion to rescind the Settlement Agreement. The Parties agree that they will not encourage any Class Member to object to the Settlement or to opt out. If Defendant exercises its option to rescind, Defendant shall: (a) provide written notice to Class Counsel at least twenty-one (21) calendar days prior to the final approval hearing, provided Defendant has been provided notice of all such opt outs, and (b) pay all Settlement Administration Costs incurred by the Settlement Administrator up to the date of Defendant's notice to rescind. Defendant shall meet and confer with Class Counsel prior to exercising its right to rescind. In the event the Settlement is terminated, the Parties shall proceed in all respects as if this Agreement had not been executed.

72. Settlement Administrator's Reports of Information. The Settlement Administrator shall provide Defense Counsel and Class Counsel a weekly report which certifies the number of Class Members who have submitted valid Requests for Exclusion. Additionally, the Settlement Administrator will provide to counsel for both Parties any updated reports regarding the administration of the Settlement as needed or requested. The Settlement Administrator shall also forward to Parties' counsel and file with the Court any Notices of Objection received immediately upon receipt. Further, if requested by Parties' counsel, the Settlement Administrator shall forward any Request for Exclusion to the Parties' counsel so that they can determine whether the Request for Exclusion is valid and timely.

73. Distribution Timing of Individual Settlement Payments. Within seven (7) calendar days of Defendant funding the Gross Settlement Amount, the Settlement Administrator shall issue payments to (1) Participating Class Members; (2) PAGA Members and Exempt PAGA Members; (3) the Labor and Workforce Development Agency; (3) Plaintiff; and (5) Class Counsel. The Settlement Administrator shall also issue a payment to itself for services performed in connection with the Settlement.

74. Uncashed Settlement Payment Checks. Any checks issued by the Settlement Administrator to Participating Class Members, PAGA Members, and/or Exempt PAGA Members shall be negotiable for not less than one hundred and eighty (180) days from the date of their

1 issuance. This is a non-reversionary settlement. All Settlement Payment Checks to Participating
2 Class Members, PAGA Members, and/or Exempt PAGA Members that remain un-cashed within
3 one hundred eighty (180) days of the mailing by the Settlement Administrator shall be sent to the
4 California State Controller's Unclaimed Property Fund in the names of the respective individuals to
5 whom the funds were issued.

6 75. Certification of Completion. Upon completion of administration of the Settlement,
7 the Settlement Administrator shall provide a written declaration under oath to certify such
8 completion to the Court and counsel for all Parties.

9 76. Settlement Administration Costs if Settlement Fails or is Delayed. If an objection to
10 the Settlement is filed with the Court, regardless of the ultimate outcome of any appeals taken, or if
11 the Settlement is voided or rescinded, any costs incurred by the Settlement Administrator shall be
12 borne equally by Defendant and Plaintiff, unless otherwise specified in this Agreement.

13 77. No Prior Assignments. The Parties and their counsel represent, covenant, and
14 warrant that they have not directly or indirectly assigned, transferred, encumbered, or purported to
15 assign, transfer, or encumber to any person or entity any portion of any liability, claim, demand,
16 action, cause of action, or right herein released and discharged.

17 78. General Release and Waiver of Civil Code § 1542 by Plaintiff. Upon the Effective
18 Date and complete funding of the Gross Settlement Amount, and as a condition to obtaining the
19 Class Representative Incentive Payment provided for herein, Plaintiff does hereby fully, finally,
20 and forever release and discharge the Released Parties from the Released Claims, PAGA Released
21 Claims, and also agrees to a general release of any and all claims against the Released Parties,
22 which shall include without limitation any and all claims which in any way relate to his
23 employment with Defendant, under State or Federal law, in tort, common law, statute, contract, or
24 equity, whether pled in the Complaint or not, including but not limited to any claims under the
25 FLSA, Title VII, ADA, FEHA, ADEA, PAGA, California Labor Code, or any Industrial Welfare
26 Commission Wage Order, now existing or arising in the future, based on any act, omission, event,
27 occurrence, or non-occurrence until execution of this Agreement. Plaintiff further expressly waives
28 and relinquishes, to the fullest extent permitted by law, the provisions, rights, and benefits of

Section 1542 of the California Civil Code, which provides:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

79. Release of Claims by Participating Class Members. Upon the Effective Date and complete funding of the Gross Settlement Amount, for and in consideration of the mutual promises, terms, and conditions by and between the Participating Class Members and Defendant set forth herein, the sufficiency of which consideration is expressly acknowledged, the Participating Class Members do hereby fully, finally, and forever release and discharge the Released Parties, as follows:

- a. The members of the Class who do not submit a valid and timely Request for Exclusion release the Released Parties from any and all Released Claims.
- b. The members of the Exempt Class who do not submit a valid and timely Request for Exclusion release the Released Parties from any and all Exempt Released Claims.
- c. Nothing in this Agreement shall be construed to require Participating Class Members to waive or release rights which may not be waived or released as a matter of applicable law. This release is final and binding on all Participating Class Members.

80. Release of Claims by PAGA Members. Upon the Effective Date and complete funding of the Gross Settlement Amount, the PAGA Members do hereby fully, finally, and forever release and discharge the Released Parties from the PAGA Released Claims.

81. Release of Claims by Exempt PAGA Members. Upon the Effective Date and complete funding of the Gross Settlement Amount, the Exempt PAGA Members do hereby fully, finally, and forever release and discharge the Released Parties from the Exempt PAGA Released Claims.

82. Nullification of Settlement. In the event that the Settlement does not become final

1 for any reason, then this Agreement, and any documents generated to bring it into effect, shall be
2 null and void. Any order or judgment entered by the Court in furtherance of this Agreement shall
3 likewise be treated as void from the beginning.

4 83. Disputes Regarding Individual Settlement Payments. In the event that Class
5 Members have a dispute as to the data provided by the Defendant, Class Members will have the
6 opportunity to provide documentation and/or an explanation. If there is a dispute, the Settlement
7 Administrator will consult with the Parties to determine whether an adjustment is warranted. The
8 Settlement Administrator shall determine the eligibility for, and the amounts of, any Individual
9 Settlement Payments under the terms of this Agreement, and that determination shall be binding.

10 84. Disputes Regarding Administration of Settlement. Any disputes not resolved by the
11 Settlement Administrator concerning the administration of the Settlement will be resolved by the
12 Court under the laws of the State of California. Prior to any such involvement of the Court, counsel
13 for the Parties will confer in good faith to resolve the disputes without the necessity of involving the
14 Court.

15 85. Preliminary Approval Hearing. Plaintiff shall obtain a hearing before the Court to
16 request the Preliminary Approval of the Settlement, and the entry of a Preliminary Approval Order:
17 (i) approving of the proposed Settlement, and (ii) setting a date for a Final Approval/Settlement
18 Fairness Hearing. Class Counsel shall be responsible for drafting all documents necessary to obtain
19 Preliminary Approval and will notify the LWDA of the Settlement. The Preliminary Approval
20 Order shall provide for the Class Notice to be sent to all Class Members as specified herein. In
21 conjunction with the Preliminary Approval hearing, Plaintiff shall submit this Agreement, which
22 sets forth the terms of this Settlement, and will include the proposed Class Notice, attached to this
23 Agreement as **Exhibit A**. If the Court declines to approve the Settlement or approves it conditional
24 on modifications to the settlement terms, the Parties shall work in good faith to modify the
25 settlement terms to obtain approval, provided that the material terms of the Settlement are not
26 affected.

27 86. Final Settlement Approval Hearing. Upon expiration of the deadlines to submit
28 Requests for Exclusion or Notices of Objections to the Settlement, and with the Court's permission,

1 a Final Approval/Settlement Fairness Hearing shall be conducted to determine the Final Approval
2 of the Settlement along with the amounts properly payable for: (i) Individual Settlement Payments;
3 (ii) the PAGA Payment (including the payment to the LWDA); (ii) the Class Counsel Award; (iii)
4 the Class Representative Incentive Payment; and (iv) Settlement Administration Costs. Class
5 Counsel will be responsible for drafting all documents necessary to obtain final approval. Class
6 Counsel will also be responsible for drafting the attorneys' fees and costs application to be heard at
7 the Final Approval Hearing.

8 87. If the Court fails to approve this Settlement for any reason and the Parties cannot
9 resolve the issues independently, the Parties agree to attend mediation again in an effort to reach a
10 settlement that would be approved by the Court.

11 88. Entry of Judgment and Continued Jurisdiction of the Court. Concurrent with the
12 Motion for Final Approval, the Parties shall also jointly seek the entry of Judgment consistent with
13 the terms of this Agreement. After entry of the Judgment, the Court shall have continuing
14 jurisdiction solely for purposes of addressing: (i) the interpretation and enforcement of the terms of
15 the Settlement; (ii) Settlement administration matters; and (iii) such post-Judgment matters as may
16 be appropriate under Court rules or as set forth in this Agreement.

17 89. Exhibits Incorporated by Reference. The terms of this Agreement include the terms
18 set forth in any attached Exhibits, which are incorporated by this reference as though fully set forth
19 herein. Any Exhibits to this Agreement are an integral part of the Settlement.

20 90. Confidentiality. The Parties and their counsel agree that they will not issue any
21 press releases or initiate any contact with the press about the fact, amount, or terms of the
22 Settlement. Plaintiff and Class Counsel further agree that if contacted by press regarding this case,
23 they will only state that the lawsuit exists and has been resolved. This provision shall not prohibit
24 Class Counsel from communicating with Class Members after preliminary approval is granted or if
25 contacted by such Class Members. Notwithstanding anything to the contrary in this paragraph or
26 elsewhere in this Agreement, Defendant shall be permitted to make such disclosures regarding this
27 case and settlement as it deems necessary or appropriate for purposes of corporate reporting, and/or
28 complying with applicable securities laws or as otherwise required by law.

1 91. Entire Agreement. This Agreement and any attached Exhibits constitute the entirety
2 of the Parties' Settlement terms. No other prior or contemporaneous written or oral negotiations or
3 agreements may be deemed binding on the Parties.

4 92. Disputes Regarding Language of Final Settlement Agreement. If the Parties have a
5 dispute with regard to the language of the Agreement, the Parties agree to first informally resolve
6 the dispute by engaging the Honorable Ronald M. Sabraw (Ret.) to mediate such dispute. The
7 Parties also intend this Agreement to be binding and enforceable, pursuant to Code of Civil
8 Procedure § 664.6.

9 93. Amendment or Modification. This Agreement may be amended or modified only by
10 a written instrument signed by the Parties, the Parties counsel, or their successors-in-interest.

11 94. Authorization to Enter Into Agreement. Counsel for all Parties warrant and
12 represent they are expressly authorized by the Parties whom they represent to negotiate this
13 Agreement and to take all appropriate actions required or permitted to be taken by the Parties
14 pursuant to this Agreement to effectuate its terms and to execute any other documents required to
15 effectuate the terms of this Agreement. The Parties and their counsel will cooperate with each other
16 and use their best and good-faith efforts to effect the implementation of the Settlement. If the
17 Parties are unable to reach agreement on the form or content of any document needed to implement
18 the Settlement, or on any supplemental provisions that may become necessary to effectuate the
19 terms of this Settlement, the Parties may seek the assistance of the Court to resolve such
20 disagreement.

21 95. Binding on Successors and Assigns. This Agreement shall be binding upon, and
22 inure to the benefit of, the successors, heirs, or assigns of the Parties hereto, as previously defined.

23 96. California Law Governs. All terms of this Agreement and Exhibits hereto shall be
24 governed by and interpreted according to the laws of the State of California.

25 97. Execution and Counterparts. This Agreement is subject only to the execution of all
26 Parties. However, the Agreement may be executed in one or more counterparts. All executed
27 counterparts and each of them, including facsimile and scanned copies of the signature page, shall
28 be deemed to be one and the same instrument provided that counsel for the Parties shall exchange

among themselves original signed counterparts.

98. Acknowledgement that the Settlement is Fair and Reasonable. The Parties believe this Agreement is a fair, adequate, and reasonable settlement of the Action and have arrived at this Settlement after arm's-length negotiations, mediation, and in the context of adversarial litigation, taking into account all relevant factors, present and potential. The Parties further acknowledge that they are each represented by competent counsel and that they have had an opportunity to consult with their counsel regarding the fairness and reasonableness of this Agreement.

99. Invalidity of Any Provision. Before declaring any provision of this Agreement invalid, the Court shall first attempt to construe the provision as valid to the fullest extent possible consistent with applicable precedents so as to define all provisions of this Agreement valid and enforceable. Any invalid, illegal, or unenforceable provision determined by the Court shall in no way affect any other provision if Defendant and Class Counsel, on behalf of the Parties and the Class, mutually elect in writing to proceed as if such invalid, illegal, or unenforceable provision had never been included in this Agreement.

100. Waiver of Certain Appeals. The Parties agree to waive appeals; except, however, that Plaintiff or Class Counsel may appeal any reduction in the Class Counsel Award below the amount Class Counsel requests, and either Party may appeal any order that materially alters the Agreement's terms.

101. Plaintiff's Waiver of Right to Be Excluded. Plaintiff agrees to sign this Settlement Agreement and, by signing this Settlement Agreement, is hereby bound by the terms herein. For good and valuable consideration, Plaintiff further agrees that he shall not request to be excluded from the Settlement Agreement. Any such request for exclusion by Plaintiff shall be void and of no force or effect. Efforts by Plaintiff to circumvent the terms of this paragraph shall be void and of no force or effect.

102. Non-Admission of Liability. The Parties enter into this Agreement to resolve the dispute that has arisen between them and to avoid the burden, expense, and risk of continued litigation. In entering into this Agreement, Defendant does not admit, and specifically denies, that it has violated any federal, state, or local law; violated any regulations or guidelines promulgated

pursuant to any statute or any other applicable laws, regulations, or legal requirements; breached any contract; violated or breached any duty; engaged in any misrepresentation or deception; or engaged in any other unlawful conduct with respect to its employees. Neither this Agreement, nor any of its terms or provisions, nor any of the negotiations connected with it, shall be construed as an admission or concession by Defendant of any such violations or failures to comply with any applicable law, regulation, or legal requirement. Except as necessary in a proceeding to enforce the terms of this Agreement, this Agreement and its terms and provisions shall not be offered or received as evidence in any action or proceeding to establish any liability or admission of any nature on the part of Defendant, or to establish the existence of any condition constituting a violation of, or a non-compliance with, federal, state, local or other applicable law.

103. Captions. The captions and paragraph and section numbers in this Agreement are inserted for the reader's convenience, and in no way define, limit, construe, or describe the scope or intent of the provisions of this Agreement.

104. Waiver. No waiver of any condition or covenant contained in this Agreement or failure to exercise a right or remedy by any of the Parties hereto shall be considered to imply or constitute a further waiver by such party of the same or any other condition, covenant, right, or remedy.

105. Enforcement Actions. In the event that one or more of the Parties institutes any legal action or other proceeding against any other Party or Parties to enforce the provisions of this Settlement, or to declare rights and/or obligations under this Settlement, the prevailing Party or Parties shall be entitled to recover from the non-prevailing Party or Parties reasonable attorneys' fees and costs, including expert witness fees incurred in connection with any enforcement actions.

106. Mutual Preparation. The Parties have had a full opportunity to negotiate the terms and conditions of this Agreement. Accordingly, this Agreement shall not be construed more strictly against one Party than another merely by virtue of the fact that it may have been prepared by counsel for one of the Parties, it being recognized that, because of the arm's-length negotiations between the Parties, all Parties have contributed to the preparation of this Agreement.

107. Representation by Counsel. The Parties acknowledge that they have been

represented by counsel throughout all negotiations that preceded the execution of this Agreement, and that this Agreement has been executed with the consent and advice of counsel. Further, Plaintiff and Class Counsel warrant and represent that there are no liens on the Agreement.

108. Cooperation and Execution of Necessary Documents. All Parties shall cooperate in good faith and execute all documents to the extent reasonably necessary to effectuate the terms of this Agreement.

109. Binding Agreement. The Parties warrant that they understand and have full authority to enter into this Agreement, and further intend that this Agreement shall be fully enforceable and binding on all Parties and agree that it shall be admissible and subject to disclosure in any proceeding to enforce its terms.

IN WITNESS WHEREOF, the Parties hereto knowingly and voluntarily executed this Joint Stipulation of Class Action and PAGA Settlement between Plaintiff and Defendant as of the date(s) set forth below:

READ CAREFULLY BEFORE SIGNING.

PLAINTIFF JAMES ABERNATHY

Dated: 07/01/2024

DocuSigned by:

 04EB81E307BE47F...
 James Abernathy

DEFENDANT DEACON CONSTRUCTION, LLC

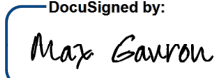
Dated: _____

By: _____
 Its: _____

1 **APPROVED AS TO FORM AND CONTENT**

2
3 Dated: July 1, 2024

DIVERSITY LAW GROUP, P.C.

4 DocuSigned by:
5 By:  57F8B43F4DCE4BB...

6 Larry W. Lee
7 Max W. Gavron
8 Attorneys for Plaintiff James Abernathy and the
9 Class

10 Dated:

HANSON BRIDGETT LLP

11 By:

12 Warren Hodges
13 Breana L. Burgos
14 Alexa F. Galloway
15 Attorneys for Defendant Deacon Construction, LLC
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

James Abernathy v. Deacon Construction, LLC
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
(CASE NO. 20CV367327)

NOTICE OF CLASS ACTION SETTLEMENT (“NOTICE”)

IF YOU ARE A:

- CURRENT OR FORMER NON-EXEMPT EMPLOYEE OF DEACON CONSTRUCTION, LLC (“DEACON CONSTRUCTION”) WHO WAS EMPLOYED IN THE STATE OF CALIFORNIA AT ANY TIME FROM APRIL 6, 2016, THROUGH DECEMBER 18, 2023, AND YOU WORKED MORE THAN FIVE HOURS DURING A SHIFT (the “Class”); or
- CURRENT OR FORMER EXEMPT EMPLOYEE OF DEACON CONSTRUCTION WHO WAS EMPLOYED IN THE STATE OF CALIFORNIA AT ANY TIME BETWEEN APRIL 6, 2019, THROUGH JUNE 21, 2020 (the “Exempt Class”);

YOU MAY BE ELIGIBLE TO RECEIVE MONEY AS PART OF A SETTLEMENT

The Santa Clara County Superior Court (“Court”) authorized this Notice to be sent by Phoenix Settlement Administrators (“Settlement Administrator”). This is not an advertisement. This is not a solicitation from a lawyer.

«BarcodeString»

SIMID «SIMID»

ATTN: «FirstName» «LastName»

«Address1» «Address2»

«City» «Abbrev» «Zip»

**YOU ARE ESTIMATED TO RECEIVE
APPROXIMATELY**

\$«MERGED_EstSettAmnt_CALC»

**THROUGH THIS CLASS ACTION
SETTLEMENT**

YOUR LEGAL RIGHTS AND OPTIONS IN THIS LAWSUIT

You Can DO NOTHING

You will receive a payment from the settlement. If you do nothing, you continue your participation in this lawsuit, and you will be impacted by the outcome of this case. You will receive a settlement payment; however, you will **lose** any rights to sue DEACON CONSTRUCTION separately for the same legal claims made in the lawsuit. The estimated amount of your settlement payment is shown above. To receive your settlement payment, all you need to do is keep the Settlement Administrator informed of your current mailing address. Once the Court grants final approval of the settlement, the Settlement Administrator will mail your check to the address on file for you.

**You Can ASK TO BE
EXCLUDED FROM THE
SETTLEMENT**

(Deadline: _____, 2024)

If you ask to be excluded from the settlement, you will get no payment from the settlement, aside from a portion of the “PAGA Payment” (described below), if applicable, but you will keep any rights to sue DEACON CONSTRUCTION separately for the same legal claims made in this lawsuit other than penalty claims premised on California’s Private Attorney General Act, Labor Code § 2698, *et seq.*

You Can OBJECT TO THE SETTLEMENT

(Deadline: _____, 2024)

If you do not like the settlement, you can send a written objection to the Settlement Administrator by the deadline or personally appear at the final approval hearing. If your objection is overruled by the Court, you will still be bound by the terms of the settlement and will receive a settlement payment. **Important: If you object to the settlement, you cannot also ask to be excluded.**

THESE RIGHTS AND OPTIONS—AND THE DEADLINES TO EXERCISE THEM—ARE EXPLAINED IN THIS NOTICE.

The Court is in charge of this lawsuit and still has to decide whether to approve the settlement. Payments will be made if the Court approves the settlement and after appeals, if any, are resolved. **Please be patient.**

1. Why Should You Read this Notice?

You should read this Notice because you may be entitled to money from a class action settlement.

2. What is this Lawsuit About?

In the lawsuit, the Plaintiff alleges that DEACON CONSTRUCTION failed to provide timely off-duty meal periods, reimburse employees for the costs of using personal cell phones for work purposes, maintain accurate payroll records, and identify the pay period start date and legal employer name on wage statements issued to employees, in violation of California Labor Code sections 226, 226.7, 512, 1174, 1198, 1199, 2802, and 2698, *et seq.*, and engaged in unfair business practices in violation of Business and Professions Code section 17200, *et seq.* DEACON CONSTRUCTION denies the allegations in the lawsuit and denies it has engaged in any wrongdoing. DEACON CONSTRUCTION asserts that it complied with all legal requirements, but is resolving this action in order to avoid the risk and costs of further legal proceedings.

3. Why is this a Class Action?

This lawsuit is a class action. In a class action, one or more persons, called a class representative (in this case, James Abernathy), sues on behalf of people who allegedly have similar claims. All these people are a class or class members. One case resolves the issues for all class members, except for those who exclude themselves. The Santa Clara County Superior Court is in charge of the case. The lawsuit is known as *James Abernathy v. Deacon Construction, LLC*, Case No. 20CV367327.

4. Why is There a Settlement?

The Court did not decide in favor of Plaintiff or DEACON CONSTRUCTION. Plaintiff thinks he could have won at trial. DEACON CONSTRUCTION thinks that it would have won at trial. But there was no trial. Instead, both parties agreed to a settlement. That way, they avoid the risks and cost of litigation, and the individuals potentially affected will get compensation. The class representative and the attorneys think the settlement is best for Class Members.

5. How Do I Know If I Am Part of the Settlement?

The Court has decided that the following individuals are Class Members: 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 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 Period is the period starting on April 6, 2016, and ending December 18, 2023. The Exempt Class Period is the period starting on April 6, 2019, and ending on June 21, 2020. If you received this Notice you are a member of the Class or Exempt Class.

6. What Does the Settlement Provide?

The proposed settlement provides for a cash payment by DEACON CONSTRUCTION in the amount of \$650,000.00 to fully and finally resolve all claims in the lawsuit (referred to as the “Gross Settlement Amount”). The total amount to be distributed to class members who can be located, and who do not exclude themselves from the settlement, will be the Gross Settlement Amount minus the following (the “Net Settlement Amount”): (a) settlement administration costs not to exceed \$8,250.00; (b) class representative incentive payment to Plaintiff not to exceed \$10,000.00 for his work and efforts in prosecuting this cases, and for undertaking the risks of costs (in the event the outcome was not favorable); (c) Class Counsel’s attorneys’ fees not to exceed \$216,666.67; (d) Class Counsel’s actual litigation costs and expenses as supported by declaration not to exceed \$35,000.00; and (e) PAGA Payment of \$60,000.00 for alleged civil penalties owed pursuant to the California Private Attorneys General Act. **Class Counsel’s attorneys’ fees and costs remain subject to Court approval.**

By statute, the California Labor and Workforce Development Agency (“LWDA”) will receive seventy-five percent (75%) of the PAGA Payment – *i.e.*, the amount of \$45,000.00. PAGA Members and Exempt PAGA Members will receive an equal share of the remaining twenty-five percent (25%) of the PAGA Payment – *i.e.*, the amount of \$15,000.00.

PAGA Members are “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.” The PAGA Period is defined as the period starting on April 6, 2019, ending December 18, 2023.

Exempt PAGA Members are “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.”

No portion of the Net Settlement Amount will be returned to DEACON CONSTRUCTION under any circumstances. Instead any unclaimed portions will be transferred the California State Controller’s Unclaimed Property Fund under the unclaimed property laws in the name of the individuals who did not cash their checks.

7. How Much Will My Payment Be?

Your estimated share of the settlement is shown on the first page of this notice. The amount you are to receive is based on the number of applicable workweeks you worked during the period of April 6, 2016, through December 18, 2023, if you are part of the Class, and the period of April 6, 2019, through June 21, 2020, if you a part of the Exempt Class. If you are also a PAGA Member or Exempt PAGA Member, your share of the PAGA Payment is included in the amount shown.

Based upon DEACON CONSTRUCTION’s records, you are a member of the [Class/Exempt Class]. Based thereon, the number of workweek you worked during the relevant time period is determined to be **. If this information appears correct, you do not need to do anything further to receive your settlement payment. If you disagree with the number of workweeks, see below (Question 9).

8. How Do I Receive a Payment?

To qualify for payment, you need not do anything. The Settlement Administrator will mail you a check after the Court enters a judgment based on this settlement, but possibly later depending on whether there is any appeal of the judgment entered by the Court.

9. What If I Believe the Information is Inaccurate?

If you believe the number of workweeks you worked is inaccurate, you may dispute it by sending a letter to [Settlement Administrator] [ADMINISTRATOR'S ADDRESS] no later than [redacted], 2024. Be sure to include your name, address, telephone number, last four digits of your Social Security Number, and a statement as to what and why you are disputing. Also attach a copy of any documentation you want to include to support your dispute.

10. What Am I Giving Up to Receive a Settlement Payment?

Unless you request to be excluded from the settlement, you remain a Class Member, and that means you cannot sue, continue to sue, or be part of any other lawsuit against DEACON CONSTRUCTION or the other Released Parties for any legal claims based on the subject matter of this settlement. Specifically, you will be giving up or “releasing” the claims summarized below, as fully defined within the Parties’ Settlement Agreement.

Class

- All claims pled or which could have reasonably been pled based on the factual allegations contained in the operative complaint or any amendments thereto, including claims for: (i) violation of Labor Code §§ 226.7 and 512; (ii) violation of Labor Code §§ 201, 202, 203; (iii) violation of Labor Code § 226; (iv) violation of Labor Code § 2802; and (vi) violation of Business & Professions Code §§ 17200, which are premised on the violations described above, that accrued during the period of April 6, 2016, through December 18, 2023 (the “Released Claims”).

Exempt Class

- All claims pled or which could have reasonably been pled based on the factual allegations contained in the operative complaint or any amendments thereto, including claims for: (i) violation of Labor Code § 226, that accrued during the period of April 6, 2019, through June 21, 2020 (the “Exempt Released Claims”).

In light of the binding nature of a PAGA judgment on non-party employees, if you are a PAGA Member or an Exempt PAGA Member, you will receive your portion of the PAGA Payment and be bound by the PAGA Released Claims and/or Exempt PAGA Released Claims, as applicable, regardless of whether you submit a timely Request for Exclusion.

PAGA Members

- All claims pled or which could have reasonably been pled based on the factual allegations contained in the operative complaint or any amendments thereto, for civil penalties under the PAGA including claims premised on alleged violations of Labor Code §§ 201, 202, 203, 226.7, 512, 1174, 1198, 1199, and 2802, that accrued during the period of April 6, 2019, through December 18, 2023 (the “PAGA Released Claims”).

Exempt PAGA Members

- All claims pled or which could have reasonably been pled based on the factual allegations contained in the operative complaint or any amendments thereto, for civil penalties under the PAGA including claims premised on alleged violations of Labor Code §§ 226, 226.3, that accrued during the period of April 6, 2019, through June 21, 2020 (the “Exempt PAGA Released Claims”).

11. How Do I Exclude Myself from the Settlement?

To exclude yourself from the settlement (also referred to as “opt-out”), you must mail a letter to the Settlement Administrator saying that you want to be excluded from the *James Abernathy v. Deacon Construction, LLC* settlement.

Be sure to include your name, address, telephone number, last four digits of your Social Security Number, and your signature. You must mail your exclusion letter postmarked no later than [REDACTED], 2024, to the Settlement Administrator at [REDACTED].

If you submit a timely and valid “opt-out” request, you will no longer be a member of the Class or Exempt Class and you will not receive any money from the settlement (except for the portion of the PAGA Payment, if applicable), or be able to object to the settlement, but you will not be legally bound by anything that happens in this lawsuit. You will keep any rights to sue (or continue to sue) DEACON CONSTRUCTION in the future for the same legal claims made in this lawsuit, at your own expense, with the exception of the PAGA Released Claims and Exempt PAGA Released Claims.

12. How Do I Tell the Court that I Don’t Believe that the Settlement is Fair?

As a Class Member, you can object to the settlement if you believe that the settlement is unfair or inadequate. You can give reasons why you think the Court should not approve the settlement. If you object and follow the procedures set out in this section, your objection will be considered.

If you decide to object to the proposed settlement, you may do so in writing to the Settlement Administrator. Upon the submission of your objection, you may then also appear at the final approval hearing for the settlement, either in person or through an attorney at your own expense. (See Question 14.) Regardless of whether you submitted a timely written objection to the Settlement Administrator, you may appear in person at the final approval hearing in order to object.

All written objections should be signed by you and should include: (1) your full name, address, and telephone number; (2) a written statement of the basis for your objection; and (3) any copies of papers, briefs, or documents upon which the objection is based. You must mail your objection postmarked no later than [REDACTED], 2024, to the Settlement Administrator at Settlement Administrator at [REDACTED].

13. What is the Difference Between Objecting and Excluding?

Objecting is simply telling the Court that you don’t like something about the settlement. You can object only if you stay in the Class or Exempt Class. Excluding yourself, on the other hand, is telling the Court that you don’t want to be part of the Class or Exempt Class. If you exclude yourself, you have no basis to object because the case no longer affects you. However, if you file an objection, you will still receive settlement benefits under the settlement if it is approved by the Court. If the Court approves the settlement and you are a PAGA Member or Exempt PAGA Member, you will receive your portion of the PAGA Payment regardless of whether you object

or exclude yourself.

14. Do I Have a Lawyer in this Case?

The Court decided that the law firm of Diversity Law Group, P.C., which represents the Plaintiff, is also qualified to represent you and all Class Members. You will not be charged for these lawyers. This law firm is referred to as “Class Counsel.” If you want to be represented by your own lawyer, you may hire one at your own expense.

15. How Will the Attorneys for the Class and the Class Representative be Paid?

The attorneys for the Plaintiff and Class Members will be paid from the Gross Settlement Amount. Class Counsel will ask for up to \$216,666.67 in attorneys’ fees and for actual litigation costs incurred up to a maximum of \$35,000.00, the actual amount of which will be determined by the Court at the final approval hearing (see Question 16 below for details as to when this hearing will take place). Class Members (like you) do not have to pay the fees and costs of Class Counsel. If you want to be represented by your own lawyer, you may hire one at your own expense.

If approved by the Court, an incentive payment for the Plaintiff of an amount up to \$10,000.00, will be paid from the Gross Settlement Amount for his work and efforts in prosecuting this case, and for undertaking the risks of costs (in the event the outcome of this lawsuit was not favorable).

16. Notice of Hearing on Final Approval and Objections to Class Action Settlement.

The Court has preliminarily approved the settlement and will hold a final approval hearing to decide whether to give final approval to the settlement. This hearing will be held before the Honorable Charles F. Adams on , 2024, at a.m., in Department 7 of the Superior Court of California for the County of Santa Clara, located at 191 N. First Street, San Jose, CA 95113, to determine whether the proposed settlement is fair, reasonable, and adequate, and whether it should be finally approved by the Court. If there are objections, the Court will consider them. After the hearing, the Court will decide whether to approve the settlement. We do not know how long this decision will take. The final approval hearing may be continued without further notice. The Court may adjourn or continue the hearing from time to time, without further notification, as the Court may direct.

Once final approval is granted by the Court, the Court will enter a Joint Stipulation of Class Action and PAGA Settlement, and all Class Members who have not requested exclusion will be deemed to have waived the Released Claims and/or Exempt Released Claims set forth above.

17. How Do I Receive More Information?

This Notice summarizes the proposed settlement. More details are in the Settlement Agreement. You can get a copy of the Settlement Agreement by contacting Class Counsel.

18. What is the Contact Information for Class Counsel?

The addresses for Class Counsel are as follows:

DIVERSITY LAW GROUP, P.C.
Larry W. Lee
Max W. Gavron
515 S. Figueroa Street, Suite 1250

Los Angeles, CA 90071
Telephone: (213) 488-6555
Fax: (213) 488-6554

WHAT IF I HAVE QUESTIONS?

If you have any questions about the settlement, you may contact the Settlement Administrator:

James Abernathy v. Deacon Construction, LLC
c/o Phoenix Settlement Administrators
Address
City, CA, Zip
Toll-Free Phone Number: [insert]

PLEASE DO NOT TELEPHONE THE COURT OR THE OFFICE OF THE COURT CLERK FOR INFORMATION ABOUT THIS SETTLEMENT OR THE SETTLEMENT PROCESS.

PLEASE DO NOT CONTACT DEACON CONSTRUCTION, ITS MANAGERS, OR ATTORNEYS FOR INFORMATION ABOUT THIS SETTLEMENT OR THE SETTLEMENT PROCESS.