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

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

Plaintiff,

vs.

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

Defendants.

Case No.: 20CV367327

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

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: July 25, 2024

Time: 1:30 P.M.

Dept.: 7

Action Filed: June 17, 2020

Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 25, 2024, at 1: 30 p.m., or as soon thereafter as
the matter may be heard, before the Honorable Charles F. Adams, judge presiding, in
Department 7 of the above referenced Court located at 161 North First Street, San Jose,
California 95113, Plaintiff James Abernathy ("Plaintiff") will and hereby does move this Court

1 for the following relief with respect to the Joint Stipulation of Class and PAGA Settlement
2 (“Agreement” or “Settlement Agreement”) entered into by Plaintiff and Defendant Deacon
3 Construction, LLC (“Defendant”) (together with Plaintiff, the “Parties”):

4 1. That the Court approve the Agreement referenced above;

5 2. That the Court conditionally certify the following classes for settlement purposes
6 only:

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

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

12 (the Class and Exempt Class together, “Class Members”);

13 3. That Plaintiff James Abernathy be appointed as the Class Representative and
14 Larry W. Lee and Max W. Gavron of Diversity Law Group, P.C. be appointed as Class Counsel;

15 4. That the Court preliminarily approve the Agreement and the total Gross
16 Settlement Amount in the amount of Six Hundred Fifty Thousand Dollars (\$650,000.00);

17 5. That the Court finds on a preliminary basis that the Agreement appears to be
18 within the range of reasonableness of a settlement, including the amount of the PAGA penalties,
19 the service award to the Class Representative, Class Counsel award of attorneys’ fees and costs,
20 settlement administration costs, and the allocation of individual payments to Class Members, that
21 could ultimately be given final approval by this Court;

22 6. That the Court approve the mailing of the proposed Notice of Class Action
23 Settlement (“Class Notice”) to be sent to Class Members;

24 7. That the Court appoint Phoenix Settlement Administrators as the Settlement
25 Administrator; and

26 8. That the Court schedule the matter for a Final Fairness and Final Approval
27 hearing.

28 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which

1 provides for court approval of the settlement of a purported class action and allows the Court to
2 preliminarily certify a class for settlement purposes.

3 The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and
4 reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of
5 Class Members to participate in, opt-out of, or object to the settlement. This Motion is based on
6 the attached Memorandum of Points and Authorities, the Agreement and the proposed Class
7 Notice, and the supporting Declarations of Larry W. Lee, Max W. Gavron, and Plaintiff James
8 Abernathy, upon the oral arguments of counsel (should there be any), and on the complete
9 records and file herein.

10
11 DATED: July 2, 2024

DIVERSITY LAW GROUP, P.C.

12
13 By: 
14 Larry W. Lee
15 Max W. Gavron
16 Attorneys for Plaintiff and Class Members
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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative Private Attorneys General Act
3 (“PAGA”) action seeking statutory and civil penalties under the California Labor Code. Plaintiff
4 James Abernathy (“Plaintiff”) alleges that Defendant Deacon Construction, LLC (“Defendant”)
5 failed to provide timely off-duty meal periods, reimburse business expenses, and provide and
6 maintain accurate payroll records for its employees in violation of Labor Code §§ 226, 226.7,
7 512, 1174, 1198, 1199, 2802, and 2698, *et seq.* Based on these violations, Plaintiff asserts class
8 and PAGA claims for violation of Labor Code §§ 226, 226.7, 512, 1174, 1198, 1199, 2802, and
9 2698, *et seq.*, and the Unfair Competition Law (“UCL”). The Parties have reached a class and
10 PAGA action settlement, the terms of which are reflected in the Parties’ Joint Stipulation of
11 Class Action and PAGA Settlement (“Agreement” or “Settlement Agreement”).

12 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating
13 to the class and PAGA claims alleged in this lawsuit and engaged in a thorough study of the legal
14 principles applicable to the claims asserted against Defendant. Through the exchange of formal
15 and informal discovery in connection with mediation, Defendant provided necessary data
16 pertaining to the number of putative class members and wage statements issued, as well as
17 Plaintiff’s personnel file, employee handbook, meal period policies, and copies of wage
18 statements. The information provided by Defendant allowed Plaintiff to review and analyze the
19 liability and potential exposure. The Parties attended a full day mediation with Retired Judge
20 Richard M. Silver in June 2021, and a second full day mediation with Retired Judge Ronald M.
21 Sabraw in December 2023 following the Court certifying two of Plaintiff’s proposed subclasses.
22 With the assistance of Judge Sabraw, the Parties ultimately reached the current settlement.

23 The terms of the Agreement provide that Defendant pay the Gross Settlement Amount of
24 Six Hundred Fifty Thousand Dollars (\$650,000.00) to resolve the class and PAGA claims.
25 Significantly, the entire Gross Settlement Amount will be distributed to the class on a **non-**
26 **reversionary** basis, such that no remaining monies will revert to Defendant. Further, no
27 claim forms are required. The following represents the key terms of the settlement:

- 28 • Gross Settlement Amount of \$650,000.00;

- Estimated class size of 267 individuals;
- Incentive Award to the Class Representative of up to \$10,000.00 in exchange for a general release, and his service as a class representative including sitting for deposition, among other tasks;
- Class Counsel’s attorneys’ fees of one-third of the Gross Settlement Amount, up to \$216,666.67;
- Class Counsel’s costs of up to \$35,000.00;
- Settlement administration costs of up to \$8,250.00;
- Payment to the California Labor & Workforce Development Agency (“LWDA”) of \$45,000.00, representing 75% of the total PAGA penalties payment of \$60,000.00, and payment of \$15,000.00 to aggrieved employees representing the remaining 25%;
- Net Settlement Amount of approximately \$320,083.33, which will be allocated predominantly (95%) to the Class, which consists of non-exempt employees, and partially to the Exempt Class (5%), which consists of exempt employees and encompasses a more narrow claim and time period; Within each of these groups, the Class and Exempt Class will receive a pro rata amount of the settlement based on the number of pay periods they worked in the relevant time period; and
- 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).

The Parties and their respective counsel believe that the settlement for the consideration and on the terms set forth in the Agreement is fair, reasonable, and adequate, in light of all known circumstances and the expenses and risks inherent in litigation. Although Plaintiff and his counsel are confident that they can prevail on the merits, they recognize the inherent risks in drawn-out litigation and the risks of decertification and/or that Plaintiff could fail to establish liability.

1 Therefore, the Parties respectfully request that the Court grant this Motion for
2 Preliminary Approval of Class Action Settlement.

3 **II. PROCEDURAL HISTORY**

4 On June 10, 2020, Plaintiff filed his written notice with the California Labor &
5 Workforce Development Agency, alleging violations of Labor Code §§ 226, 226.7, 512, 1174,
6 1198, 1199, and 2802, pursuant to the Private Attorneys General Act, Labor Code § 2699
7 (“PAGA”). Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 2. Thereafter, on June 17, 2020,
8 Plaintiff filed a class and PAGA complaint (“Complaint”) against Defendant in the Superior
9 Court of California, County of Santa Clara. *Id.* ¶ 3. The Complaint alleges causes of action for:
10 (1) violation of Labor Code §§ 226.7 and 512; (2) violation of Labor Code § 2802; (3) violation
11 of Labor Code § 226; (4) violation of Business and Professions Code § 17200, *et seq.*; and (5)
12 violation of Labor Code § 2698, *et seq.* *Id.* ¶ 3.

13 Plaintiff’s class and PAGA claims as pled in the Complaint are predicated upon the
14 following allegations. With respect to Plaintiff’s meal period claim, Plaintiff contends that
15 Defendant failed to provide timely, off-duty meal breaks to employees working shifts of five
16 hours or longer. Meal breaks were regularly provided to employees after the fifth hour of work.
17 In addition, employees were not allowed to accurately record their hours worked, including start
18 and stop times of the work shift and meal periods. Employees were not paid premium
19 compensation in lieu of missed, late, or improper breaks. With respect to Plaintiff’s
20 reimbursement claim, Plaintiff contends that employees were required to use their personal cell
21 phones for work purposes but were not reimbursed for the costs of such use. Finally, Plaintiff
22 contends that Defendant issued deficient wage statements to employees. The wage statements
23 issued to Plaintiff failed to identify the pay period start date and legal name of the employer. As
24 a result of the above, Plaintiff seeks damages, penalties, attorneys’ fees, and costs. Gavron Decl.
25 ¶ 4.

26 After the filing of the Complaint, the Parties met and conferred and agreed to participate
27 in private mediation. Gavron Decl. ¶ 5. In connection with mediation, the Parties engaged in
28 informal discovery to allow Plaintiff to assess the claims and liability, as well as analyze the

1 maximum exposure of damages and penalties. *Id.* Defendant provided Plaintiff's counsel with
2 data relating to the number of Class Members and wage statements issued to each Class Member,
3 as well as Plaintiff's personnel file, employee handbook, meal period policies, and copies of
4 wage statements to putative Class Members. *Id.* The information allowed Plaintiff to review and
5 analyze the liability and potential exposure. *Id.*

6 On June 2, 2021, the Parties engaged in a full-day mediation with the Honorable Richard
7 M. Silver (Ret.). Gavron Decl. ¶ 6. The Parties did not reach an agreement at mediation and
8 continued litigation of the Action. The Parties engaged in further discovery, including the
9 exchange of written discovery and production of documents, as well as participating in informal
10 discovery conferences, and numerous depositions, including the deposition of Plaintiff,
11 Defendant's and Persons Most Qualified on various topics. The Parties also negotiated the
12 distribution of a *Belaire-West* notice. *Id.* ¶ 7.

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

23 After additional discovery and the distribution of class notice, the Parties agreed to
24 engage in a second mediation. On December 18, 2023, the Parties engaged in an all-day
25 mediation with the Honorable Ronald M. Sabraw (Ret.). The Parties ultimately reached the
26 current settlement. *Id.* ¶ 9. In resolution of Plaintiff's class and PAGA claims, the Parties entered
27 the Joint Stipulation of Class Action and PAGA Settlement, a true and correct copy of which is
28 attached as **Exhibit A** to the Declaration of Max W. Gavron. *Id.* ¶ 9.

1 The Parties recognize the risk, expense, and delay in continuing litigation with the class
2 and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. Gavron Decl.
3 ¶ 10. Accordingly, the Parties desire to settle, compromise, and discharge all disputes and claims
4 arising from or relating to the class and PAGA claims as set forth in the Agreement.

5 **III. DISCUSSION**

6 Any settlement of a class action lawsuit must be reviewed and approved by the Court.
7 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final
8 review after notice has been distributed to the class members for their comment or objections.
9 The *Manual for Complex Litigation, Third* § 30.41 states:

10 Approval of class action settlements involves a two-step process. First, counsel
11 submits the proposed terms of settlement and the court makes a preliminary fairness
12 evaluation. If the preliminary evaluation of the proposed settlement does not
13 disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly
14 preferential treatment of class representatives or of segments of the class, or
15 excessive compensation for attorneys, and appears to fall within the range of
possible approval, the court should direct that notice...be given to the class
members of a formal fairness hearing, at which arguments and evidence may be
presented in support of and in opposition to the settlement.

16 (Fed. Jud. Ctr., 3rd ed. 1995).

17 Thus, the preliminary approval by the trial court is simply a conditional finding that the
18 settlement appears to be within the range of acceptable settlements. As Professor Newberg
19 comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference
20 concerning a tentative settlement proposal may vary. The court may find that the settlement
21 proposal contains some merit, is within the range of reasonableness required for a settlement
22 offer, or is presumptively valid subject only to any objections that may be raised at a final
23 hearing.” Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.26 (4th ed.
24 2002).

25 The procedures for the parties’ submission of a proposed settlement for preliminary
26 approval by the court also are discussed in *4 Newberg on Class Actions*:

27 When the parties to an action reach a monetary settlement, they will usually prepare
28 and execute a joint stipulation of settlement, which is submitted to the court for
preliminary approval. The stipulation should set forth the central terms of the

1 agreement, including but not limited to, the amount of settlement, form of payment,
2 manner of determining the effective date of settlement and any recapture clause.

3 *Id.* § 11.24.

4 Here, the Parties have reached such an agreement and have submitted to this Court in
5 connection with this Motion a copy of the Settlement Agreement fully setting forth the
6 agreement reached by the Parties. The Settlement Agreement sets forth all terms of the
7 agreement reached by the Parties as to settlement of the class and PAGA claims. Said terms in
8 the Settlement Agreement include, among other things, the method for calculating the Class
9 Members' individual portions of the settlement payment.

10 **A. Class Definition**

11 The current settlement is being settled on behalf of a class of "all current and former non-
12 exempt employees of Defendants who were employed in the State of California at any time
13 during the Class Period and who worked more than five hours in any shift" (the "Class") and a
14 class of "all current and former exempt employees of Defendants who were employed in the
15 State of California at any time between April 6, 2019, through June 21, 2020" (the "Exempt
16 Class") (the Class and Exempt Class collectively, "Class Members"). *See* Agreement ¶¶ 3, 4, 5.
17 The Class Period is defined as "the period commencing on April 6, 2016, and ending December
18 18, 2023." *Id.* ¶ 10. The Exempt Class Period runs from April 6, 2019, through June 21, 2020.
19 Defendant has represented that there are approximately 166 individuals who are Class Members
20 and 101 individuals who are Exempt Class Members. Gavron Decl. ¶¶ 21, 24.

21 The Exempt Class Period is truncated because the only claim alleged that arguably
22 includes exempt employees is Plaintiff's claim pursuant to Labor Code § 226 for Defendant's
23 alleged failure to include the correct legal entity name and/or the full pay period on its wage
24 statements. Defendant remedied the defects alleged in its wage statements as of the pay period
25 following the end of the Exempt Class Period, as previously addressed in the briefing on class
26 certification. The Class members' wage statement claims, however, would arguably continue
27 through the Class Period as derivative violations and thus the Class Period extends further.

28 **B. Settlement Terms and Evaluation**

Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980).) Courts do not substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

While the recommendations of counsel proposing the settlement are not conclusive, the Court can properly take them into account, particularly where, as here, they have been involved in informal discovery and negotiations for some period of time, appear to be competent, have experience with this type of litigation, and have exchanged substantial evidence from the opposing party. *See Newberg on Class Actions*, *supra* § 11.47; *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at p. 528 (“[s]o long as the integrity of the arm’s length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement...[citations] and ‘great weight’ is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation”).

Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a number of wage and hour class actions and has extensive litigation experience. Declaration of Larry W. Lee (“Lee Decl.”) ¶¶ 6-8; Gavron Decl. ¶¶ 30-35. Each side has apprised the other of their respective factual contentions, legal theories and defenses, resulting in negotiations taking place between the Parties. Gavron Decl. ¶ 11.

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. Gavron Decl. ¶ 12.

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. *Id.* ¶ 12.

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		

Gavron Decl. ¶ 13.

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)

1 (“The presumption derives from an employer's duty to maintain accurate records of meal
2 periods.”). However, as argued by Defendant, this is a rebuttable presumption that could have
3 been refuted during post-certification discovery and which could have resulted in a subsequent
4 decertification motion—to which Defendant was entitled to file up until entry of judgment. *See,*
5 *e.g. Duran v. U.S. Bank Nat’l Ass’n*, 59 Cal. 4th 1 (2014) (reversing certification ruling at
6 California Supreme Court after extended litigation history). Accordingly, while Plaintiff was
7 confident in prevailing on this claim his estimated 100% or 50% violation rate may not have
8 ultimately been subject to class proof. *See Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004,
9 1040, 273 P.3d 513, 537 (2012) (“On the other hand, the employer is not obligated to police
10 meal breaks and ensure no work thereafter is performed.”). Defendant contended that it had
11 compliant policies and therefore met its burden and did not have liability for this claim.
12 Defendant further argued that even if Plaintiff could demonstrate liability, Plaintiff could not
13 maintain this claim as certified for class treatment because each employee’s experience was
14 unique. Gavron Decl. ¶ 14.

15 Plaintiff argued that employees were required to use their cell phones for work-related
16 tasks. Defendant vehemently denied this contention and the Court denied certification on this
17 theory of liability. Defendant disputes the existence of a common policy that requires employees
18 to use personal cell phones for work-related purposes because it maintained compliant written
19 reimbursement policies. Gavron Decl. ¶ 15. Given the Court’s prior order denying certification
20 of this claim, the risk associated with proceeding is evident. Accordingly, the proposed exposure
21 and settlement of this claim is fair, adequate, and reasonable.

22 Regarding Plaintiff’s wage statement claim, Plaintiff would face the burden of
23 demonstrating that any alleged omission of information from the wage statements was a
24 “knowing and intentional failure” by Defendant to comply with Labor Code § 226. *See Harris v.*
25 *Vector Mktg. Corp.*, 656 F. Supp. 2d 1128, 1145-46 (N.D. Cal. 2009) (granting summary
26 judgment in favor of employer and finding its conduct was not “knowing and intentional”);
27 Defendant also would have argued that penalties under Section 226 are subject to a similar “good
28 faith” defense. *See, e.g., Apodaca v. Costco Wholesale Corp.*, 2014 WL 2533427, at *3 (C.D.

1 Cal. June 5, 2014) (“Where an employer has a good faith belief that it is not in violation of
2 Section 226, any violation is not knowing and intentional.”). The California Supreme Court also
3 recently approved a good faith defense to the imposition of Section 226 penalties, which further
4 undermines the certainty of recovering these damages even if Plaintiff prevailed on liability.
5 *Naranjo v. Spectrum Sec. Servs., Inc.*, No. S279397, 2024 WL 1979980, at *1 (Cal. May 6,
6 2024). Gavron Decl. ¶ 16.

7 Finally, with respect to potential liability of Plaintiff’s PAGA claim, Plaintiff estimated
8 that Defendant could face civil penalties of up to a maximum of \$1.37 million if Plaintiff were
9 successful at trial. Gavron Decl. ¶ 17. This amount was calculated based on approximately
10 13,702 pay periods during the relevant time period and a \$100 penalty per violation, which
11 assumes that the Court would not “stack” PAGA penalties for distinct violations of the Labor
12 Code. *Id.* ¶ 17. Courts are hesitant to award a higher PAGA penalty for “subsequent” violations
13 where there is no prior citation by the Labor Commissioner, which renders the evaluation of the
14 potential PAGA penalties without “stacking” reasonable. *C.f. Bernstein v. Virgin Am., Inc.*, 3
15 F.4th 1127, 1144 (9th Cir. 2021) (“Virgin was not notified by the Labor Commissioner or any
16 court that it was subject to the California Labor Code until the district court partially granted
17 Plaintiffs’ motion for summary judgment. On this basis, we reverse the district court’s holding
18 that Virgin is subject to heightened penalties for any labor code violation that occurred prior to
19 that point.”). While *Bernstein* addresses whether the higher subsequent penalty should be
20 applied, defendants often argue that this decision supports their position that the court should not
21 award multiple penalties for different predicate violations of the Labor Code during the same pay
22 period. Accordingly, evaluating the settlement compared to a potential penalty of \$100 per pay
23 period is fair, adequate, and reasonable.

24 Even assuming Plaintiff ultimately prevails on his PAGA claims, the Court still has
25 discretion to reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court can
26 decline to award PAGA penalties where “if, based on the facts and circumstances of the
27 particular case, to do otherwise, would result in an award that is unjust, arbitrary and oppressive,
28 or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks*

1 *Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his PAGA claim upon trial,
2 the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer’s good
3 faith attempt at complying with the law. *Id.* at p. 517. Upon review, the Court of Appeal found
4 such reduction to be proper. *Id.* at p. 539.

5 Although Plaintiff believes in the merits of the alleged claims and maintains that there is
6 no reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise defenses to
7 the claims and further with respect to the reduction of PAGA penalties and that it could be
8 persuasive to the Court. Gavron Decl. ¶ 19. Thus, even if Plaintiff were to successfully prove his
9 claims at trial, there is a possibility that the Court may only award a small percentage of PAGA
10 penalties, as the Court has discretion to do so. The Gross Settlement Amount was premised with
11 this risk in mind, associated with the possibility of the Court significantly reducing Plaintiff’s
12 PAGA penalties, along with other attendant risks, even if Plaintiff was to prevail at trial. *Id.*

13 Thus, the settlement for each Class Member is fair, reasonable, and adequate, given the
14 inherent risks of litigation, including the uncertainty and risks to Plaintiff involved in not
15 prevailing on one or more of the causes of action or theories alleged in the operative Complaint,
16 the possibility of decertification, and the potential for appeals. Gavron Decl. ¶ 20. The settlement
17 is the result of extensive arm’s length negotiations between the Parties and their counsel and was
18 facilitated by experienced and neutral mediators.

19 Numerous courts have held that **gross** settlements approximating between only 8 and
20 25% of the defendant’s potential exposure are fair and reasonable. *See, e.g., In re Mego Fin.*
21 *Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action settlement
22 recovering 16% of potential exposure was fair and reasonable; “[i]t is well-settled law that a cash
23 settlement amounting to only a fraction of the potential recovery does not per se render the
24 settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be
25 assessed relative to risks of pursuing the litigation to judgment”; noting that whether the
26 settlement is fair and adequate depends on the “the difficulties in proving the case”);
27 *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at p.*6 (N.D.
28 Cal. Mar. 20, 2015) (holding that class action settlement recovering between **8.5% and 25%** of

the defendant’s potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (granting preliminary approval of wage and hour class settlement which obtained **only 9.1%** of projected damages, given the risks of continued litigation); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL 5878390, at p.*6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement of approximately 15% of the potential recovery was fair and reasonable).

Here, the total amount of class and PAGA penalties ranges between \$7.39 million to \$5.77 million, without discounting for potentially losing on any of the causes of action. Gavron Decl. ¶ 18. The Gross Settlement Amount is \$650,000, which is between approximately 8.8% and 11.2% of the maximum class and PAGA penalties. *Id.* The high settlement percentage-to-recovery further supports that the settlement is fair and reasonable.

Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class Action Settlement (“Class Notice”), should any Class Member wish to pursue his or her own case for the claims being released herein, each Class Member has the right to submit a Request for Exclusion (*i.e.*, opt-out) from the settlement. *See* Class Notice, attached as **Exhibit A** to the Settlement Agreement. Moreover, as set forth in the Class Notice, Class Members are advised of their right to object to any of the terms contained in the Agreement and attend the final approval hearing. *Id.*

1. Amount and Manner of Distribution of the Compensation to be Provided to Class Members Including the Amount, or an Estimate, of What Each Class Member Will Receive

The Agreement provides for Six Hundred Fifty Thousand Dollars (\$650,000.00) as the Gross Settlement Amount. *See* Agreement ¶ 19. The Net Settlement Amount, calculated after deduction of attorneys’ fees (up to \$216,666.67), litigation costs (up to \$35,000.00), the incentive award to the Class Representative (up to \$10,000.00), payment of PAGA penalties to the LWDA (\$45,000.00) and aggrieved employees (\$15,000.00), and settlement administration costs (up to \$8,250.00), is estimated to be approximately \$320,083.33. *Id.* ¶¶ 7, 12, 21, 25, 39.

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

1 exempt employees with a singular and temporally limited claim under Section 226. *Id.* ¶ 56.
2 Assuming an even distribution of workweeks, a raw average of approximately \$1,831.80 per
3 Class Member ($(\$320,083.33 * 0.95 = \$304,079.17) / \sim 166$ Class Members), and \$158.46 per
4 Exempt Class Member ($(\$320,083.33 * 0.05 = \$16,004.17) / \sim 101$ Exempt Class Members)) is
5 anticipated for distribution. Gavron Decl. ¶ 23. The amount actually paid to each Class Member
6 may increase or decrease depending on the actual number of pay periods worked by each Class
7 Member during the Class Period. Agreement ¶ 56.

8 The Agreement also provides for Fifteen Thousand Dollars (\$15,000.00) to be distributed
9 to aggrieved employees in settlement of their claims for civil penalties under PAGA. *Id.* ¶ 25.
10 The aggrieved employees are defined as “all current and former non-exempt employees of
11 Defendants who were employed in the State of California at any time during the PAGA Period
12 and who worked more than five hours in any shift PAGA Period” (“PAGA Members”) and “all
13 current and former exempt employees of Defendants who were employed in the State of
14 California at any time between April 6, 2019, through June 21, 2020” (“Exempt PAGA
15 Members”). *Id.* ¶¶ 23, 24. The PAGA Period is “the period commencing on April 6, 2019,
16 ending December 18, 2023.” *Id.* ¶ 26.

17 Finally, the terms of the settlement provide that funds from uncashed checks (upon the
18 expiration date) shall be transmitted to the California State Controller’s Unclaimed Property
19 Fund in the name of the individual(s) to whom the funds relate. *See* Agreement ¶ 74; *see* Gavron
20 Decl. ¶ 25.

21 **2. Whether, and Under What Circumstances, Amounts Available for**
22 **Payment in Settlement Might Not Be Paid to Class Members or Might**
23 **Revert to the Defendant**

24 This settlement is non-reversionary, meaning that none of the settlement funds will revert
25 to Defendant.

26 **3. Scope of the Release of Class Members’ Claims**

27 As a condition of participating in this settlement, Class Members who do not submit a
28 Request for Exclusion (“Participating Class Members”) will release the following claims:

- Members of the Class will release “all claims pled or which could have

1 reasonably been pled based on the factual allegations contained in the operative
2 complaint or any amendments thereto, including claims for: (i) violation of Labor
3 Code §§ 226.7 and 512; (ii) violation of Labor Code §§ 201, 202, 203; (iii)
4 violation of Labor Code § 226; (iv) violation of Labor Code § 2802; and (vi)
5 violation of Business & Professions Code §§ 17200, which are premised on the
6 violations described above, that accrued during the Class Period” (“Released
7 Claims”). *See* Agreement ¶¶ 30, 79.a.

- 8 • Members of the Exempt Class will release “all claims pled or which could have
9 reasonably been pled based on the factual allegations contained in the operative
10 complaint or any amendments thereto, including claims for: (i) violation of Labor
11 Code § 226, that accrued during the period of April 6, 2019, through June 21,
12 2020” (“Exempt Released Claims”). Agreement ¶¶ 31, 79.b.

13 Regardless of whether they are eligible to opt out of the class portion of the settlement,
14 PAGA Members and Exempt PAGA Members will release the following claims:

- 15 • PAGA Members will release “all claims pled or which could have reasonably
16 been pled based on the factual allegations contained in the operative complaint or
17 any amendments thereto, for civil penalties under the PAGA including claims
18 premised on alleged violations of Labor Code §§ 201, 202, 203, 226.7, 512, 1174,
19 1198, 1199, and 2802, that accrued during the PAGA Period” (“PAGA Released
20 Claims”). Agreement ¶¶ 32, 80.
- 21 • Exempt PAGA Members will release “all claims pled or which could have
22 reasonably been pled based on the factual allegations contained in the operative
23 complaint or any amendments thereto, for civil penalties under the PAGA
24 including claims premised on alleged violations of Labor Code §§ 226, 226.3, that
25 accrued during the period of April 6, 2019, through June 21, 2020” (“Exempt
26 PAGA Released Claims”). Agreement ¶¶ 33, 81.

27 Given that the releases are tailored to only the applicable claims pled in the operative
28 Complaint, the releases are appropriately limited.

1 **4. Tax Treatment of Settlement Amounts**

2 As this lawsuit seeks damages and penalties as recovery, the Parties have agreed that
3 payments to members of the Class shall be characterized as 20% unpaid wages and 80%
4 penalties and interest. *See* Agreement ¶ 57. Payments to members of the Exempt Class shall be
5 characterized as 100% penalties and interest. *Id.* Payments to PAGA Members and Exempt
6 PAGA Members shall be characterized as 100% civil penalties. *Id.* Amounts deemed wages shall
7 be reported on an IRS Form W-2 and amounts deemed penalties and interest shall be reported on
8 an IRS Form 1099, as applicable. *Id.*

9 **5. Affirmative Obligations to be Undertaken by Class Members or Class**
10 **Counsel and the Reasons for Any Such Obligations**

11 As stated above, Class Members do **not** need to do anything should they wish to receive
12 their share of the settlement funds. In other words, because this is not a claims-made settlement,
13 Class Members will not be required to make a submission to participate in the settlement. No
14 claim forms are required. Thus, this substantially decreases the amount of burden each Class
15 Member must bear in order to receive their share of the settlement funds.

16 If a Class Member does not wish to take part in this settlement or be bound by the
17 Released Claims or Exempt Released Claims, as applicable, the Class Member must submit a
18 Request for Exclusion. *See* Agreement ¶¶ 35, 68.

19 **C. Notice to Class Members**

20 Should the Court grant the instant motion, Defendant will provide the Settlement
21 Administrator with a list containing each Class Member’s full name, last known home address,
22 last known telephone number, Social Security number, total number of pay periods worked
23 during the Class Period and PAGA Period, and any other information required by the Settlement
24 Administrator in order to effectuate the terms of the Settlement (“Class List”). *See* Agreement ¶¶
25 8, 63. Pursuant to the Agreement, Defendant will provide said Confidential Data within fifteen
26 (15) business days of preliminary approval. *Id.* ¶ 63. Upon receipt of the information and prior to
27 mailing the Class Notice to Class Members, the Settlement Administrator shall perform a search
28 based on the National Change of Address Database for information to update and correct for any

1 known or identifiable address changes. *Id.* ¶ 65.

2 Within ten (10) calendar days of receipt of the Class List from Defendant, the Settlement
3 Administrator will mail the Class Notice to Class Members using the last-known mailing
4 address. *See* Agreement ¶ 64. Any Class Notice returned to the Settlement Administrator as non-
5 deliverable on or before the response deadline shall be re-sent via regular First-Class U.S. Mail
6 to the forwarding address affixed thereto. *Id.* ¶ 67. If no forwarding address is provided, the
7 Settlement Administrator will attempt to find the correct address using a skip-trace or other
8 comparable search to locate the most current address to re-mail the Notice. *Id.*

9 The Class Notice will advise Class Members of what the litigation is about, their rights
10 under the settlement, the total settlement amount and other terms of the settlement, their expected
11 settlement payment share, their opportunity to and procedures to opt out or to object to the
12 settlement, and the release of claims. *See* Class Notice. As set forth in the Class Notice, Class
13 Members will be allowed to opt out of or object to the settlement by a certain deadline, which is
14 45 calendar days after the initial mailing of the Class Notice. *See* Agreement ¶¶ 36, 68, 70. With
15 respect to objections, Class Members are also informed in the Class Notice that they may object
16 in writing or appear at the final approval hearing to present their objections to the Court. *Id.* ¶ 70;
17 *see* Class Notice.

18 If Class Members need further information about the settlement and/or the lawsuit, Class
19 Counsel's contact information is provided in the Class Notice. *See* Class Notice, at pp. 6-7.

20 **D. Typicality and Adequacy of Representation**

21 **1. Class Representative's Claims are Typical of the Class**

22 The commonality requirement is met when there are questions of law and fact common to
23 the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) ("The existence of shared
24 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient
25 facts couple with disparate legal remedies within the class"). Commonality requires only that
26 some common legal or factual questions exist; the plaintiffs need not show that all issues in the
27 litigation are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 473 (1981).
28 Defendant's conduct is central to the commonality inquiry. *See City of San Jose v. Superior*

1 *Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971).

2 Where the employer's conduct is uniformly directed at a class of employees, as Plaintiff alleges
3 here, the class-wide impact of the Defendant's policies satisfies the commonality requirement.

4 *See Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

5 In the present case, Plaintiff alleges that Defendant is liable to Class Members for failure
6 to provide timely off-duty meal periods, reimburse business expenses, and provide and maintain
7 accurate payroll records for its employees, in violation of Labor Code §§ 226, 226.7, 512, 1174,
8 1198, 1199, 2802, and 2698, *et seq.* Like all Class Members, Plaintiff was subjected to these
9 same policies and practices. Declaration of James Abernathy ("Abernathy Decl.") ¶¶ 2-5.

10 Plaintiff was not provided proper and timely off-duty meal breaks and was not paid meal period
11 premium compensation in lieu of receiving proper meal breaks. In addition, Plaintiff was not
12 reimbursed for the costs of using his personal cell phone for work purposes. Plaintiff was also
13 not provided with proper and accurate itemized wage statements that complied with Labor Code
14 § 226(a). *Id.* ¶ 5. In other words, Plaintiff contends that he was subjected to the same policies and
15 practices as other Class Members and thus, the typicality requirement is met.

16 Moreover, Plaintiff does not have any interests adverse to the Class Members, nor have
17 any such issues been raised or presented. *Id.* ¶ 6. Plaintiff has taken all necessary steps to
18 represent the interests of the Class Members, including by providing information and documents
19 to Plaintiff's counsel and preparing for and having his deposition taken for a full day. *Id.* ¶¶ 6-9.
20 For such reasons, Plaintiff has adequately represented the Class Members and will continue to do
21 so.

22 **2. Class Counsel Has Adequately Represented the Class Members and**
23 **Has Experience with Wage and Hour Class Action**

24 From the inception of the case, Class Counsel has zealously represented the interests of
25 Class Members. Class Counsel has exchanged written discovery, taken the depositions of
26 Defendant's Persons Most Knowledgeable and other witnesses, obtained class certification, and
27 engaged in significant meet and confer discussions with opposing counsel to obtain informal data
28 and documents on behalf of the Class Members. Gavron Decl. ¶ 27. The settlement was obtained

1 for the benefit of the Class Members, as opposed to the individual Class Representative. Further,
2 Class Counsel has been approved as class counsel on a number of prior cases, have litigated
3 numerous other class action cases, and are competent to represent the Class Members. Lee Decl.
4 ¶¶ 6-8; Gavron Decl. ¶¶ 30-35.

5 **E. Costs and Fees**

6 **1. Attorneys' Fees and Costs**

7 California state and federal courts have recognized that an appropriate method for
8 determining award of attorneys' fees is based on a percentage of the total value of benefits to
9 class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254
10 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472,
11 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of
12 this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs
13 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
14 burden alone." *Vincent*, 557 F.2d at p. 769.

15 The common fund doctrine is predicated on the principle of preventing unjust
16 enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits,
17 she may require the passive beneficiaries to compensate those who created the fund. Both
18 California state and federal courts have embraced this doctrine. *Serrano v. Priest*, 20 Cal. 3d at p.
19 35; *Vincent*, 557 F.2d at p. 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal.
20 4th 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine
21 has been applied "consistently in California when an action brought by one party creates a fund
22 in which other persons are entitled to share." The reasons for applying the common fund doctrine
23 include:

24 Fairness to the successful litigant, who might otherwise receive no benefit because
25 his recovery might be consumed by the expenses; correlative prevention of an
26 unfair advantage to the others who are entitled to share in the fund and who should
27 bear their share of the burden of its recovery; encouragement of the attorney for the
28 successful litigant who will be more willing to undertake and diligently prosecute
proper litigation for the protection or recovery of the fund if he is assured that he
will be properly and directly compensated should his efforts be successful.

1 *Id.*

2 Indeed, in 2016, the California Supreme Court has also now held that the award of
3 attorneys' fees in common fund wage and hour class action settlements should start with the
4 percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the
5 overwhelming majority of federal and state courts in holding that when class action litigation
6 establishes a monetary fund for the benefit of the class members, and the trial court in its
7 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
8 of a reasonable fee by choosing an appropriate percentage of the fund created").

9 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
10 percent of the fund. *Laffitte*, 1 Cal. 5th at p. 506. And this was based on a lodestar amount that
11 required a multiplier of 2.13. *Id.* at p. 487. As the Court held, only when the multiplier is
12 "extraordinarily high or low [should] the trial court [] consider whether the percentage method
13 should be adjusted so as to bring the imputed multiplier within a justifiable range." *Id.* at p.
14 505.)

15 The Parties have agreed to a payment of a maximum of one-third of the Gross
16 Settlement Amount, or \$216,666.67, for payment to Class Counsel as attorneys' fees. *See*
17 Agreement ¶ 52. The Parties have agreed to a payment of the foregoing attorneys' fees and,
18 thus, this payment should be presumed to be fair. Further, the Parties have agreed to
19 reimbursement of Class Counsel's litigation costs up to \$35,000.00. *Id.* Class Counsel has, at
20 its own risk, expended costs, for example, to file this instant action and other pleadings in the
21 case, effect service of process, participate in mediation, and advance other litigation-related
22 costs. If Class Counsel's actual costs total less than \$35,000.00, the remainder will be added to
23 the Net Settlement Amount for distribution to Class Members.

24 Based on the foregoing, the Court should preliminarily approve the attorney's fees and
25 costs as requested by the Parties.

26 **2. Proposed Payment to the Class Representative**

27 Class Representative James Abernathy requests a modest enhancement of \$10,000.00.
28 *See* Agreement ¶ 53. The Class Representative met and conferred with his counsel on a number

1 of occasions to discuss the case, provided documents and information to his counsel, prepared
2 for and had his deposition taken, and reviewed pleadings and documents, including the
3 Settlement Agreement. Abernathy Decl. ¶¶ 6-9. As part of his duties as the Class Representative,
4 Plaintiff provided invaluable information, evidence, and documents that resulted in this
5 settlement. Plaintiff expended significant time and resources supporting the prosecution of this
6 action and suffered ad hominem attacks because of a prior criminal record that Defendant
7 contended disqualified him from being an adequate class representative. Furthermore, in
8 consideration for his incentive payment, Plaintiff also executed an individual general release of
9 all claims under California Civil Code § 1542, which other Class Members did not have to do.
10 *See* Agreement ¶ 78.

11 In addition to the invaluable services that he provided, Plaintiff also took a significant
12 risk, both professionally and monetarily, in acting as the Class Representative and seeking
13 benefits on behalf of Class Members. Because the claims alleged by the Class Representative
14 involved the payment of costs to the prevailing party, Plaintiff could have possibly faced paying
15 the costs of Defendant, had he not prevailed in this action.

16 Furthermore, given that future employers are much less likely to hire individuals who
17 have filed suit against their prior employer, particularly cases of this nature, Plaintiff may face
18 prejudice in the future from other potential employers. Plaintiff took this risk upon himself and
19 the whole class benefited from these risks taken by Plaintiff. Class Members did not have to file
20 individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they
21 have to face the potential for retaliation and not getting future employment had they filed a
22 public lawsuit.

23 **3. Settlement Administration Costs**

24 The Parties have agreed to an estimated payment of no more than \$8,250.00 to the
25 Settlement Administrator, Phoenix Settlement Administrators, to send notices and to administer
26 this settlement. *See* Agreement ¶¶ 38, 54. Phoenix Settlement Administrators is a well-
27 recognized class action settlement administrator. The Parties believe that the administration fee
28 is reasonable and should be approved. Gavron Decl. ¶ 39.

1 **IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
2 **PRELIMINARY APPROVAL**

3 The settlement presented here is fair, adequate, and reasonable. The settlement will result
4 in both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved
5 as the result of informed, extensive, and arm's-length negotiations conducted by counsel for the
6 respective Parties who are experienced in wage and hour class action litigation and facilitated by
7 an experienced and neutral mediator.

8 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
9 approval of the proposed settlement, sign the proposed Order, approve and authorize mailing of
10 the proposed Class Notice, and set a date for a final approval hearing.

11
12 DATED: July 2, 2024

DIVERSITY LAW GROUP, P.C.

13
14 By: 
15 Larry W. Lee
16 Max W. Gavron
17 Attorneys for Plaintiff and Class Members
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