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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 FINAL APPROVAL OF CLASS
ACTION SETTLEMENT; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT**

Date: February 6, 2025

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 February 6, 2025, 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 seek an Order:

1. granting final approval to the Joint Stipulation of Class and PAGA Settlement ("Agreement" or "Settlement Agreement") in this action;
2. approving distribution of the settlement funds to Class Members pursuant to the terms of the Settlement Agreement;
3. approving Plaintiff's request for an award of the Class Representative Incentive Payment of \$10,000.00 to Plaintiff, pursuant to the terms of the Settlement Agreement;
4. approving Class Counsel's request for an award of attorneys' fees of one-third of the Gross Settlement Amount, or \$214,166.67, and reimbursement of actual litigation costs of \$30,820.64, pursuant to the terms of the Settlement Agreement;
5. approving Plaintiff's request for payment of the settlement administration costs to Phoenix Settlement Administrators in the amount of \$8,250.00, pursuant to the terms of the Settlement Agreement;
6. approving Plaintiff's request for payment to the California Labor & Workforce Development Agency ("LWDA") of \$45,000.00, pursuant to the Private Attorneys General Act and pursuant to the terms of the Settlement Agreement; and
7. entering final judgment as to all Class Members in this action.

This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which provides for court approval of the settlement of a purported class action and allows the Court to grant final certification of a class for settlement purposes. In light of the overwhelmingly positive response, as shown by the lack of opt-outs and objections to the settlement, there is no question that the settlement is fair, reasonable and adequate and thus should be granted final approval.

This Motion will be based on the attached Memorandum of Points and Authorities and the supporting Declarations of Larry W. Lee, Max W. Gavron, Plaintiff James Abernathy and

Kevin Lee of Phoenix Settlement Administrators, upon the oral arguments of counsel (should there be any), and on the complete records and file herein.

DATED: January 14, 2025

DIVERSITY LAW GROUP, P.C.

By: 
Larry W. Lee
Max W. Gavron
Attorneys for Plaintiff and Class Members

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1 **I. INTRODUCTION**

2 Plaintiff James Abernathy ("Plaintiff") now seeks the Court's final approval of the Joint
3 Stipulation of Class and PAGA Settlement ("Agreement" or "Settlement Agreement") with
4 Defendant Deacon Construction, LLC ("Defendant") (together with Plaintiff, the "Parties"). The
5 Agreement provides for a \$650,000.00 **non-reversionary** fund to be created for the benefit of
6 Class Members,¹ from which attorneys' fees, litigation costs, incentive payment to the named
7 Plaintiff, payment to the California Labor and Workforce Development Agency ("LWDA"),
8 payment of penalties to aggrieved employees,² and costs of settlement administration are to be
9 paid. The entire Net Settlement Amount after these deductions will be paid to all Class Members
10 who did not opt-out of the settlement.

11 The history of this litigation was previously detailed in Plaintiff's Motion for Preliminary
12 Approval of Class Action Settlement. The Court preliminary approved this settlement on July 26,
13 2024, directing distribution of the Notice of Class Action Settlement and scheduling the hearing
14 for final approval of the settlement (the "Preliminary Approval Order").

15 As directed by the Court, the Settlement Administrator selected by the Parties – Phoenix
16 Settlement Administrators – distributed the Notice of Settlement to 256 Class Members.
17 Declaration of Kevin Lee with Respect to Notice and Settlement Administration ("Admin.
18 Decl.") ¶ 5. To date, **there have been no Requests for Exclusions and/or Notices of Objection**
19 **to the settlement submitted by any Class Members.** *Id.* ¶¶ 8-9. As such, there is a 100%
20 participation rate. Thus, in light of the lack of objections and opt-outs, an inference can be made
21
22

23 ¹ As used herein, the Class Members consist of "all current and former non-exempt employees of
24 Defendants who were employed in the State of California at any time during the Class Period
25 and who worked more than five hours in any shift (the "Class")" and "all current and former
26 exempt employees of Defendants who were employed in the State of California at any time
27 between April 6, 2019, through June 21, 2020 (the "Exempt Class")".

28 ² 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 (the "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" (the "Exempt PAGA
Members").

1 that the Class Members support the Court's Preliminary Approval Order finding that the
2 Agreement is fair and reasonable.

3 In addition to the results of the notice process, for the same reasons as set forth earlier in
4 Plaintiff's Motion for Preliminary Approval of Class Action Settlement, the following represents
5 the basic points supporting final approval of the settlement:

6 ▪ The settlement provides a total settlement sum of \$650,000.00, which is non-
7 reversionary;

8 ▪ The settlement is fair given that Participating Class Members will receive (*after*
9 *deductions for fees, costs, etc.*) a substantial amount of money – on average, approximately
10 \$1,957.32 to each Participating Class Member in a non-exempt position, with the estimated
11 highest individual settlement payment being \$7,485.60, and the lowest being \$18.57 (*See Admin.*
12 *Decl. ¶ 14*) For the Exempt Employee Individual Settlement Amounts, the highest amount paid
13 is approximately \$238.39, the lowest Exempt Employee Individual Settlement Payment to be
14 paid is approximately \$3.72, while the average Exempt Employee Individual Settlement to be
15 paid is approximately \$171.34;

16 ▪ Class Members did not need to submit claim forms to participate in the
17 settlement, but are being paid automatically;

18 ▪ The allocation reflects that payment of Individual Settlement Payment amounts
19 will be paid to Class Members on a *pro rata* basis, in proportion to the number of pay periods
20 worked by each Class Member during the Class Period;

21 ▪ Class Counsel conducted significant investigation in this case, including
22 conducting formal and informal discovery and significant exchanges of information regarding
23 class data for the entire class and policy documents pertaining to Defendant's meal period and
24 reimbursement policies and the issuance of wage statements necessary for Plaintiff to fully
25 evaluate this case;

26 ▪ A highly regarded settlement administrator, Phoenix Settlement Administrators,
27 was retained to administer the settlement for approximately \$8,250.00 (*See Admin. Decl. ¶ 18*);
28 and

1 ▪ The State of California’s LWDA and aggrieved employees will also be
2 beneficiaries of this settlement, as the LWDA will receive \$45,000.00 and aggrieved employees
3 will receive \$15,000.00 pursuant to the PAGA, should this settlement be granted final approval.

4 Accordingly, the Court should grant Final Approval consistent with the Preliminary
5 Approval Order.

6 **IL CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE SETTLEMENT**

7 The notice procedures required by the Preliminary Approval Order have been followed
8 and satisfy all due process rights of Class Members. Specifically, the Preliminary Approval
9 Order contemplated that the Notice of Class Action Settlement (“Class Notice”), as approved in
10 the Preliminary Approval Order, be sent to all Class Members by first class mail, as specified in
11 the Settlement Agreement. The Preliminary Approval Order contemplated, further, that Phoenix
12 Settlement Administrators would serve as the Settlement Administrator.

13 As clearly stated in the Declaration of Kevin Lee, notice was provided to Class Members,
14 as required by the Preliminary Approval Order. On August 16, 2024, the Settlement
15 Administrator received a Class Member mailing list from Defendant’s counsel that included 256
16 Class Members. Admin. Decl. ¶ 3. Prior to mailing the Class Notice, the Settlement
17 Administrator conducted a National Change of Address (NCOA) search to correct and/or update
18 the class list in case of any address changes. *Id.* ¶ 4. On August 26, 2024, the Settlement
19 Administrator mailed the Class Notice to all Class Members on the mailing list via U.S. first
20 class mail. *Id.* ¶ 5. From the date of mailing, twenty-two (22) Class Notice packets were returned
21 to the Settlement Administrator due to incorrect addresses. *Id.* ¶ 6. The Settlement Administrator
22 conducted skip tracing to identify updated addresses for the twenty-two Class Notice packets,
23 and subsequently re-mailed them via U.S. first class mail. *Id.* As of the date of this filing, zero
24 (0) Class Notices remain undeliverable. *Id.* ¶ 7. Further, the Class Notice provided Class
25 Members with Class Counsel’s and the Settlement Administrator’s contact information and
26 website, where they could further seek information regarding the settlement, ask questions,
27 review pleadings in the case, and update their address.

28 The provision of sending the notice to class members as described above meets the

requirements for the “best notice practicable” in this case as necessary to protect the due process rights of class members. *See, Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (provision of “best notice practicable” with description of the litigation and explanation of opt-out rights satisfies due process); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974) (individual notice must be sent to class members who can be identified through reasonable means); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (best practicable notice is that which is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”).

Here, Class Members were provided with a mailing that explained the settlement and allowed Class Members to seek information, ask questions, and exclude themselves and/or object to the settlement, if so desired. As such, proper notice has been given to the Class Members. Thus, the Court may determine the fairness and adequacy of the settlement and enter its Order granting final approval, secure in the knowledge that all absent Class Members have been given the opportunity to participate fully in the settlement, exclusion, and the approval process.

III. THE SETTLEMENT TERMS ARE FAIR, ADEQUATE, AND REASONABLE, AND THE SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL

A. Strength of Plaintiff’s Case and Likelihood of Certifying the Class

The Court already addressed the requirements for certifying a class for settlement purposes in its Order granting preliminary approval. Plaintiff briefly addresses the requirements again here.

1. The Class is Ascertainable

Whether a class is “ascertainable” within the meaning of Code of Civil Procedure section 382 “is determined by examining (1) class definition, (2) the size of the class, and (3) the means available for identifying the class members.” *Reyes v. San Diego County Board of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987).

Here, the Class Members are comprised of “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

1 and former exempt employees of Defendants who were employed in the State of California at
2 any time between April 6, 2019, through June 21, 2020 (the “Exempt Class”).” There are 256
3 individuals that comprise the Class Members. Admin. Decl. ¶ 11. This is more than the minimum
4 required to certify a class.

5 Within the context of manageability, the issue is whether there exists sufficient means for
6 identifying class members at the remedial stage. *Reyes*, 196 Cal. App. 3d at pp. 1274-75. Class
7 Members have already been identified by Defendant and notice was provided to all of the above
8 Class Members.

9 **2. There is a Community of Interest**

10 The “community of interest” requirement embodies three separate factors: (1)
11 predominant common questions of law or fact; (2) class representatives whose claims are typical
12 of the class; and (3) class representatives who can adequately represent the class. *Richmond v.*
13 *Dart Industries*, 29 Cal. 3d 462, 470 (1981); *Reese v. Wal-Mart Stores, Inc.*, 73 Cal. App. 4th
14 1225, 1234 (1999).

15 **a. There are Predominant Common Questions of Law and Fact**

16 “The ultimate question in every case of this type [class actions] is whether...the issues
17 which may be jointly tried, when compared with those requiring separate adjudication, are so
18 numerous and substantial that the maintenance of a class action would be advantageous to the
19 judicial process and to the litigants.” *Lockheed Martin Corp. v. Superior Court*, 29 Cal.4th 1096,
20 1104-05 (2003).

21 Plaintiff alleged that Defendant, as a matter of its corporate policy, practice, or procedure,
22 violated the California Labor Code by failing to provide off-duty meal breaks, reimburse
23 business expenses, and provide and maintain accurate payroll records.

24 Defendant denies that liability could be established on a class-wide basis and contends
25 instead that liability and damages would need to be conducted on a case-by-case basis. With
26 respect to Plaintiff’s meal period and reimbursement claims, Defendant argues that it had
27 compliant policies and certification on these claims would be difficult due to varying practices.
28 Defendant also disputes the existence of a common policy requiring employees to use their

1 personal cell phones for work purposes. With respect to Plaintiff's claims for deficient wage
2 statements, it is Defendant's position that any issuance of deficient wage statements was not
3 willful and that Plaintiff's claims fail as a matter of law.

4 **b. Plaintiff's Claims are Typical of the Class Claims**

5 The purported class representative's claim must be "typical" but not necessarily identical
6 to the claims of other class members; it is sufficient that the representative is similarly situated so
7 that he or she will have the motive to litigate on behalf of the class. *Classen v. Weller*, 145 Cal.
8 App. 3d 27, 45 (1983). Courts look to whether class members have similar injuries, "whether the
9 action is based on conduct which is not unique to the named Plaintiff," and whether other class
10 members were injured by the same conduct. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508
11 (9th Cir. 1992). The purpose of the typicality requirement "is to assure that the interest of the
12 named representative aligns with the interests of the class." *Id.* at p. 508.

13 Plaintiff was subjected to the same payroll policies as all other Class Members. In this
14 regard, Plaintiff was employed by Defendant as a non-exempt employee from about December
15 2019, until about April 7, 2020. Declaration of James Abernathy ("Abernathy Decl.") ¶ 2. Like
16 other members of the Class, Defendant did not allow Plaintiff to keep accurate track of his hours
17 worked, such as the start and stop times of each shift and meal break. As a result, Plaintiff
18 regularly received meal breaks after the fifth hour of work. *Id.* ¶ 3. In addition, Plaintiff was
19 required to use his personal cell phone for work purposes but was not reimbursed for the costs of
20 such use. *Id.* ¶ 4. Furthermore, Plaintiff did not receive accurate itemized wage statements.
21 Instead, the wage statements issued to Plaintiff identified only the pay period end date and his
22 employer as "DC LLC – SAC GC." *Id.* ¶ 5.

23 In other words, Plaintiff was subjected to the same policies and practices as other Class
24 Members. Accordingly, Plaintiff's claims are aligned with the interests of the Class Members
25 and typicality is satisfied.

26 **c. Plaintiff Adequately Represented the Class**

27 The class representative, through qualified counsel, must be capable of "vigorously and
28 tenaciously" protecting the interests of the class members. *Simons v. Horowitz*, 151 Cal. App. 3d

834, 846 (1984).

Here, Plaintiff does not have any interests adverse to the Class, nor have any such issues been raised or presented. Abernathy Decl. ¶ 7. Plaintiff has taken all necessary steps to represent the interests of the Class Members, including meeting and conferring with his counsel, providing information and documents to his counsel, sitting for deposition, and reviewing pleadings and the settlement agreement in this case. *Id.* ¶ 6. For such reasons, Plaintiff has adequately represented the Class Members and will continue to do so.

B. Risks, Expenses, and Complexity of Further Litigation

Here, Plaintiff certified certain of the putative classes; however, Plaintiff also believes in the fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff involved in not prevailing on one or more of the causes of action or theories alleged in the Complaint, the possibility of decertification, and potential for appeals. These risks on class certification are compounded by the California Supreme Court's holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014).

As stated above, Defendant alleges that the class could would be decertified, given its position that its policies are compliant and any liability would need to be determined on a case-by-case basis. Based on the foregoing, there were risks that Plaintiff would not have obtained the total amount of damages and penalties alleged, and a substantial number of complex issues that would have necessitated significant expenditure of time and expenses. Therefore, the risks, expenses, and complexity of further litigation warrant granting of this Motion.

C. The Terms of the Settlement, Negotiation of Settlement, and Reception of the Settlement by Class Members All Strongly Support the Conclusion that the Settlement is Fair, Adequate, and Reasonable

Without reiterating the Parties' showing that the Settlement Agreement and the negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for Preliminary Approval of Class Action Settlement, the Parties highlight the following facts. The Settlement Agreement was the product of negotiations between highly able and experienced attorneys on both sides who possessed the relevant data and extensive legal research which they had carefully analyzed. Declaration of Max W. Gavron ("Gavron Decl.") ¶ 3. The Parties

engaged in arm's length negotiations during two separate mediations with the Honorable Richard M. Silver (Ret.) and the Honorable Ronald M. Sabraw (Ret.). *Id.*

The results after mailing of the Class Notice support confirmation of the Court's preliminary approval of the settlement with final approval of the settlement, as evidenced by the fact that **no Class Members opted out and/or submitted any written objections to the settlement.** Admin. Decl. ¶¶ 8-9. The Court may appropriately infer that the class action settlement is fair, adequate, and reasonable, given that not a single Class Member has submitted a Request for Exclusion and/or Notice of Objection. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992).

D. Under Well-Established Legal Principles, the Court Should Grant Final Approval of the Settlement

1. Standard of Review

On a motion for final approval of a class action settlement under California Code of Civil Procedure Section 382 and California Rule of Court 3.769, a court's inquiry is whether the settlement is "fair, adequate and reasonable." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied subnom.*, *Byrd v. Civil Serv. Comm'n*, 459 U.S. 1217 (1983). A settlement is fair, adequate, and reasonable, and therefore merits final approval, when "the interests of the class are better served by the settlement than by further litigation." *See Manual for Complex Litigation, Fourth* § 21.6 at 309 (Fed. Jud. Ctr., 4th ed. 2004) ("MCL"). The law favors settlement, particularly in class actions and other complex cases, where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *See Alba Conte & Herbert B. Newberg, 4 Newberg on Class Actions* § 11.41 (4th ed. 2002); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

Although the court possesses "broad discretion" in determining that a proposed class action settlement is fair, the court's role must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned. *See Officers for Justice*, 688 F.2d at p. 625. Accordingly, the court

1 should give due regard to what is otherwise a “private consensual agreement” between the
2 parties. *Id.*; see also *Church v. Consolidated Freightways, Inc.*, 1993 WL 149840 (N.D. Cal.
3 1993); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379 (D. Ariz. 1989), *aff’d*
4 *sub nom.*; *City of Seattle*, 955 F.2d 1268; MCL § 21.6 at 309 (“The judicial role in reviewing a
5 proposed settlement is critical, but limited to approving the proposed settlement, disapproving it,
6 or imposing conditions on it. The judge cannot rewrite the agreement”).

7 A court’s approval of a class action settlement will only be reversed for a clear abuse of
8 discretion. See *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Officers for*
9 *Justice*, 688 F.2d at p. 626 (“reverse only upon a strong showing that the district court’s decision
10 was a clear abuse of discretion”); *City of Seattle*, 955 F.2d at p. 1276; *Ackerman v. Kassar*, 1993
11 WL 326453 (9th Cir. 1993); *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1238 (9th Cir.
12 1998).

13 As the court cautioned in *7-Eleven Owners for Fair Franchising v. Southland Corp.*:

14 It cannot be overemphasized that neither the trial court in approving
15 the settlement nor this Court in reviewing that approval have the
16 right or duty to reach any ultimate conclusions on the issues of fact
17 and law which underlie the merits of the dispute. It is well settled
18 that in the judicial consideration of proposed settlements, ‘the [trial]
19 judge does not try out or attempt to decide the merits of the
20 controversy,’ [citation] and the appellate court ‘need not and should
21 not reach any dispositive conclusions on the admittedly unsettled
22 legal issue.

23 85 Cal. App. 4th 1135, 1146 (2000).

24 2. The Settlement is Presumed to Be Fair

25 The Court should begin its analysis with the presumption that the settlement is fair and
26 should be approved:

27 [A] presumption of fairness exists where: (1) the settlement is
28 reached through arm’s-length bargaining; (2) investigation and
discovery are sufficient to allow counsel and the court to act
intelligently; (3) counsel is experienced in similar litigation; and (4)
the percentage of objectors is small.

Dunk, 48 Cal. App. 4th at p. 1802; accord, *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18
(N.D. Cal. 1980); *In re Wash. Pub Power Supply*, 720 F. Supp. at p. 1387.

The settlement in the case at bar warrants approval and carries a presumption of fairness.

1 As previously noted in the application for Preliminary Approval, this current settlement was
2 negotiated at arm's length after two full days of mediation with the Honorable Richard M. Silver
3 (Ret.) and the Honorable Ronald M. Sabraw (Ret.). Gavron Decl. ¶ 3. Additionally, Class
4 Counsel engaged in formal and informal discovery prior to mediation, including reviewing the
5 production of class data, as well as reviewing Plaintiff's personnel file, employee handbook,
6 meal period policies, and copies of wage statements. *Id.* The exchange of information allowed
7 Class Counsel to conduct a full analysis of exposure. *Id.*

8 Further, Class Counsel is highly experienced in this type of litigation. As shown in the
9 supporting declarations, Class Counsel has significant experience in class actions and
10 employment wage and hour matters. Declaration of Larry W. Lee ("Lee Decl.") ¶¶ 6-9; Gavron
11 Decl. ¶¶ 8-14.

12 **3. Two-Way Costs and Other Risks Inherent in Continued Litigation** 13 **Favor Final Approval**

14 To assess the fairness, adequacy, and reasonableness of a class action settlement, the
15 Court also should weigh the immediacy and certainty of substantial settlement proceeds against
16 the risks inherent in continued litigation. *See also In re General Motors Corp.*, 55 F.3d 768, 806
17 (3d Cir. 1995) ("present value of the damages plaintiffs would likely recover if successful,
18 appropriately discounted for the risk of not prevailing, should be compared with the amount of
19 the proposed settlement") (internal citations omitted); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d
20 Cir. 1975); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979).

21 If Plaintiff pursued this case without settlement and failed to prevail, Plaintiff would have
22 been potentially responsible for Defendant's costs. Abernathy Decl. ¶ 10. As such, should
23 individual current or former employees of Defendant bring individual claims on the same causes
24 of action, they would each face the uncertainty of prevailing and the possibility of paying costs
25 to Defendant. Accordingly, such claims likely would not be brought by many of these current
26 and former employees – thus, this lawsuit achieves a true benefit for the Class Members that they
27 might not otherwise get or seek as individuals. Here, given that a fair and reasonable settlement
28 has been reached, neither Plaintiff nor any of the Class Members will be required to pay for
Defendant's litigation costs.

1 The risks of this case were weighed by Class Counsel and should be considered a
2 significant factor by the Court in its determination of final approval. Class Counsel obtained a
3 significant settlement for Class Members that resulted in a fair recovery which at the same time
4 provides for finality and no risk of costs by the Class Members or Class Representative.

5 The Settlement Agreement also affords Class Members prompt, fair relief while avoiding
6 significant legal and factual battles that otherwise may have prevented Class Members from
7 obtaining any recovery at all. While Class Counsel believe the Class Members' claims are
8 meritorious and can be successfully litigated, they are experienced and fully understand the
9 inherent risks and uncertainty involved with such matters as the resolution of class certification,
10 the outcome of a potential trial, and the outcome of any appeals that would inevitably follow
11 should the Class Members prevail at trial. Class Counsel has also assessed the same risks in
12 connection with the current settlement. Because the settlement provides immediate and
13 substantial relief, without the attendant risks and delay of continued litigation – not to mention
14 the threat of litigation fees and costs – Class Counsel believe that the settlement warrants the
15 Court's final approval.

16 **4. The Complexity, Expense, and Likely Duration of Continued**
17 **Litigation Against Defendant Favor Final Approval**

18 Another factor considered by courts in approving a settlement is the complexity, expense,
19 and likely duration of the litigation. *See Officers for Justice*, 688 F.2d at p. 625; *Girsh*, 521 F.2d
20 at p. 157. In applying this factor, the Court must weigh the benefits of the settlement against the
21 expense and delay involved in achieving an equivalent or more favorable result at trial. *Young v.*
22 *Katz*, 447 F.2d 431, 433-34 (5th Cir. 1971).

23 As noted above, continued litigation could have led to appeals on several issues. On the
24 other hand, the settlement that was reached provides to all Class Members – regardless of their
25 means – fair relief in a prompt and efficient manner. Were the Court to deny final approval, the
26 Class Members would be left without a remedy as a practical matter and courts across the State
27 would have to address the issues presented here in a piecemeal, costly, and time-consuming
28 manner. The settlement in this case is therefore consistent with the “overriding public interest in
settling and quieting litigation” that is “particularly true in class action suits.” *See Van*

1 *Bronkhorst*, 529 F.2d at p. 950 (footnote omitted); *see also* 4 *Newberg* at § 11.41. Here, this case
2 could have involved years of further litigation, in addition to the three years that have already
3 elapsed.

4 **5. The Opinion of Experienced Counsel Favors Final Approval**

5 Class Counsel supports the settlement as fair, reasonable, and adequate, and in the best
6 interest of the Class Members as a whole. Lee Decl. ¶ 4; Gavron Decl. ¶ 2. Similarly, counsel for
7 Defendant is in favor of this settlement. The endorsement of qualified and well-informed counsel
8 of a settlement as fair, reasonable, and adequate is entitled to significant weight by the Court in
9 its final approval determination. *See Officers for Justice*, 688 F.2d at p. 625; *Ellis*, 87 F.R.D. at p.
10 18; *Boyd*, 485 F. Supp. at p. 617; *Linney*, 151 F.3d at p. 1242.

11 **IV. THE PROPOSED PROCEDURE FOR UNCASHED SETTLEMENT CHECKS** 12 **SHOULD BE APPROVED**

13 As referenced in the Motion for Preliminary Approval, to the extent any uncashed
14 settlement funds remain after 180 days of the mailing of the individual settlement checks, the
15 Parties have agreed that all such uncashed settlement funds shall be sent to the California State
16 Controller's Unclaimed Property Fund in the names of the respective individuals to whom the
17 funds were issued.

18 **V. THE REQUESTED CLASS REPRESENTATIVE INCENTIVE PAYMENT** 19 **SHOULD BE APPROVED**

20 Class Representative James Abernathy requests a total service award of \$10,000.00.
21 Plaintiff met with Class Counsel, had numerous discussions with Class Counsel, and provided
22 substantive information regarding Defendant's policies and practices at issue in this case.
23 Abernathy Decl. ¶ 6, 8. Plaintiff also sat for his deposition in person and was subjected to a full
24 day of cross-examination. A large part of Defendant's cross-examination focused on Plaintiff's
25 prior convictions for which he served his time. Defendant's arguments regarding Plaintiff's
26 adequacy to serve as the class representative were ultimately dismissed by the Court. This type
27 of intense cross-examination further supports Plaintiff's request for the enhancement. Plaintiff
28 also assisted in preparing his declaration in support of class certification and was an integral part
of the prosecution and settlement of this case. Accordingly, Plaintiff provided invaluable
information, evidence, and documents that resulted in this settlement.

1 In addition to the invaluable services that he provided, Plaintiff also took significant
2 risks, both professionally and monetarily, in acting as Class Representative, seeking benefits on
3 behalf of the Class Members. Abernathy Decl. ¶ 10-11. Because the claims alleged by the Class
4 Representative involved the payment of costs to the prevailing party, Plaintiff could have
5 possibly faced paying the costs of Defendant, had he not prevailed in this action. *Id.* Despite this,
6 however, Plaintiff agreed to pursue this case on behalf of the Class Members.

7 Also, given that future employers are much less likely to hire individuals who have filed
8 employment-related lawsuits, particularly cases of this nature, the Class Representative also
9 faced significant risk in not being able to find suitable employment and/or retaliation from
10 prospective employers as a result of filing of this case against Defendant. Plaintiff took these
11 risks upon himself to the benefit of the Class Members. Abernathy Decl. ¶ 10. Class Members
12 did not have to file individual lawsuits and bear the risks of payment of costs if they did not
13 prevail, nor did they have to face the potential for retaliation and not getting future employment
14 had they filed a lawsuit which is a public record. These are significant benefits that weigh in
15 favor of granting the requested enhancement. Moreover, this litigation has resulted in a
16 significantly valuable benefit to the Class, *i.e.*, an average award to Class Members in the
17 amount of \$1,957.32, and Plaintiff took on substantial risks in helping to get this financial benefit
18 to the Class Members. As such, the incentive payment should be awarded to Plaintiff for his
19 commitment, dedication, and risks taken for this litigation.

20 Finally, Plaintiff provided a general release and waiver of the protections of Civil Code §
21 1542, which other Class Members did not have to do. Agreement ¶ 78; Abernathy Decl. ¶ 11.
22 This is a more extensive release than that provided by the Class Members at large, also
23 supporting the request for the enhancement.

24 Courts have routinely granted approval of settlements containing such enhancements. *See*
25 *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive
26 award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374
27 (S.D. Ohio 1990) (two incentive awards of \$ 55,000, and three incentive awards of \$35,000);
28 *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000

incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.* No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 incentive award to class representative in ERISA case).

VI. THE REQUESTED ATTORNEYS' FEES SHOULD BE APPROVED

Class Counsel seeks a fee award calculated at approximately one-third of the Gross Settlement Amount, or \$214,166.67. California state and federal courts have recognized that an appropriate method for determining award of attorneys' fees is based on a percentage of the total value of benefits to class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) [*Serrano III*]; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment to the class and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent v. Hughes Air West, Inc.*, *supra*, 557 F.2d at p. 769.

The California Supreme Court issued its ruling regarding the award of attorney's fees in wage and hour class action settlements in *Laffitte*. Under California law, the award of attorneys' fees in common fund wage and hour class action settlements is proper under the percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created"). Under the percentage of the fund method, the Court's objective remains to "mimic the market" in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (J. Posner) ("When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market will

1 set.... The judge, in other words, is trying to mimic the market in legal services.”).

2 Here, the fee award representing approximately one-third of the fund clearly falls within
3 that range and is consistent with other rulings of other courts and comprehensive surveys of class
4 action settlements and fee awards. *See Martin v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS
5 61796, 23 (S.D. Cal. 2011) (recognizing that “courts may award attorney’s fees in the 30-40%
6 range in wage and hour class actions that result in recovery of a common fund under \$10
7 million”); *see also* Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical*
8 *Study: 1993-2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn. 16 (2010) (independent studies of
9 class action litigation nationwide conclude that fees in the range sought here are consistent with
10 market rates).

11 The results delivered by Class Counsel also support the requested percentage of the fund.
12 Here, Plaintiff and his counsel secured a \$650,000.00 non-reversionary common fund settlement.

13 Finally, “the response of the class members to attorneys’ fee notice, though not decisive,
14 is relevant to the...reasonable determination” regarding fees. *Swedish Hospital v. Shalala*, 1 F.3d
15 1261, 1272 (D.C. Cir. 1993). A positive response rate tends to suggest that the court’s
16 “approximation of the market” for fees is well supported. *Id.* at p. 1269. In this case, the Class
17 Notice specifically notified Class Members that Class Counsel would be seeking up to one-third
18 of the Gross Settlement Amount. To date, no Class Member has objected to, or opted not to
19 participate in, the settlement. This strong favorable response also supports the requested fees.

20 In addition, it is recognized that one of the primary factors justifying an enhanced
21 attorney’s fees reward is the attendant risks inherent in the litigation. As observed in *City of*
22 *Detroit v. Grinnell Corp.*:

23 No one expects a lawyer whose compensation is contingent upon his
24 success to charge, when successful, as little as he would charge a
25 client who had agreed to pay for his services, regardless of success.
26 Nor, particularly in complicated cases producing large recoveries, is
it just to make a fee depend solely on the reasonable amount of time
expended.

27 *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974). Here, it is clear that a
28 settlement fund of \$650,000.00 has been created as the entire amount is to be paid out without

1 any reversions. For Class Counsel, the fees here were wholly contingent in nature and the case
2 presented far more risk than the usual contingent fee case. Among the risks was the cost inherent
3 in class action litigation, as well as a potentially drawn-out battle with a corporate Defendant.

4 As secondary support for the percentage of the fund method, courts have discretion to
5 “cross-check” the fees awarded through the lodestar method. However, the *Laffitte* Court
6 “emphasize[d] [that] the lodestar calculation, when used in this manner, does not override the
7 trial court’s primary determination of the fee as a percentage of the common fund and thus does
8 not impose an absolute maximum or minimum on the potential fee award.” *Laffitte*, 1 Cal.5th at
9 p. 505; *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005) (“[The lodestar
10 cross-check does not trump the primary reliance on the percentage of common fund method”).

11 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar
12 cross-check is extraordinarily high or low, the trial court should consider whether the percentage
13 used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the
14 court is not necessarily required to make such an adjustment.” *Id.* Thus, a lodestar cross-check is
15 aimed at astronomical multipliers. Indeed, cross-checks are not required; in many cases,
16 performing a cross-check “undermines” one of the primary reasons for using the percentage
17 method: aligning counsel’s incentives with the benefits delivered to the class and discouraging
18 protracted litigation. *Id.* at p. 506 (finding trial courts “retain the discretion to forgo a lodestar
19 cross-check”); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees*, 108
20 F.R.D. 237, 258 (1985); *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 29-30 (2000)
21 (citing the recommendations of the Third Circuit Task Force with approval and observing that
22 “[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many
23 authorities, who have been most vocal about the manner in which it exacerbates the problem of
24 ‘cheap settlements’ and burdens already overworked trial judge”).

25 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to
26 4 or even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also*,
27 *e.g.*, *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52
28 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal. App. 4th at p. 60

1 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203
2 Cal. App. 3d 78 (1988) (affirming a 2.34 multiplier without remand). The intermediate court in
3 *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a cross-check, affirmed
4 a 2.13 multiplier. *Laffitte*, 231 Cal. App. 4th at pp. 881-82. The intermediate court opinion was
5 affirmed in full by the California Supreme Court in its new decision guiding lower courts on
6 assessing fees.

7 With respect to Class Counsel’s lodestar, to date, approximately 371.9 hours have been
8 expended by Class Counsel in this matter, which includes significant deposition and motion
9 practice. Gavron Decl. ¶ 15, Ex. A; Lee Decl. ¶ 10, Ex. A. Moreover, Class Counsel expects to
10 incur approximately 10 additional hours in finalizing this settlement, including handling any
11 post-approval matters and settlement issues that may arise. Lee Decl. ¶ 11. Mr. Lee requests an
12 hourly rate of \$900.00 per hour. Lee Decl. ¶ 12. Mr. Gavron requests an hourly rate of \$700.00.
13 Gavron Decl. ¶ 17. The courts are quite liberal in the evidence required to prove an attorney’s
14 hours. Detailed time records are not required. An attorney’s testimony alone may suffice:
15 “Testimony of an attorney as to the number of hours worked on a particular case is sufficient
16 evidence to support an award of attorney fees, even in the absence of detailed time records.”
17 *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986).

18 Reasonable hours include, in addition to time spent during litigation, the time spent
19 before the action is filed, including time spent interviewing the clients, investigating the facts and
20 the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54,
21 62 (1980). Further, the fee award should include fees incurred to establish and defend the
22 attorneys’ fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982) [*Serrano IV*]. Thus, Class
23 Counsel requests that the court find that these hours were reasonable in this litigation.

24 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
25 experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095
26 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the
27 attorney’s skill and experience, the nature of the work performed, the relevant area of expertise
28 and the attorney’s customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App.

1 4th 629, 632-33 (1998).

2 Class Counsel's skill and experience justify the requested rate. As shown in the
3 supporting declarations, Class Counsel have significant experience in the area of employment
4 and wage and hour class actions. Specifically, Class Counsel's practice focuses on representing
5 employees in employment matters, particularly wage and hour cases. Lee Decl. ¶¶ 7-9; Gavron
6 Decl. ¶¶ 8-14. As such, based on the hours and applicable rate, the total lodestar to be expended
7 by Class Counsel through finalizing this settlement will be approximately \$280,550.00, based on
8 371.9 incurred + 10 anticipated total hours, at each attorney's respective billing rates. Lee Decl.
9 ¶¶ 10-11; Ex. A; Gavron Decl. ¶ 15, Ex. A.

10 Once the court establishes the lodestar amount, it may enhance the fee award by a
11 multiplier in order to make an appropriate fee award. *Serrano v. Priest*, 20 Cal. 3d at p. 48. The
12 pertinent factors include the difficulty of the questions involved and the skill in presenting them,
13 the contingent nature of the fee award, the extent to which the litigation precluded other
14 employment, and the percentage-of-the-fund the attorney would have received on the fair
15 market. *Id.*, *Lealao*, 82 Cal. App. 4th at p. 49. However, this list is not exhaustive, and the court
16 can consider other factors it deems important in setting the multiplier. *Ketchum v. Moses*, 24 Cal.
17 4th 1122, 1139 (2001).

18 It is also critical to note that prompt settlement cannot be used to diminish the fee or the
19 enhancement based on a percentage-of-the-fund. *Lealao*, 82 Cal. App. 4th at p. 52 (the
20 promptness of settlement "cannot be used to justify the refusal to apply a multiplier"). According
21 to *Lealao*, courts placed "an extraordinarily high value" on settlement, and counsel should be
22 rewarded, not punished, for achieving this goal in a timely fashion. *Id.*

23 Here based upon Class Counsel's lodestar of \$280,550.00, Plaintiff's request for a
24 **negative multiplier** of approximately **0.77** is reasonable and fair, particularly based on the
25 factors described above and that it is *well below* the typical range of multipliers awarded by the
26 court. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224 (2001) (noting that courts using
27 the lodestar method to calculate attorney fees awards in class actions typically apply multipliers
28 in the range of 2 to 4); *Boyd v. Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS 162880 (C.D. Cal.

2014) (awarding 33% of the common fund, based on a multiplier of 2.58, in a wage and hour class action settlement); *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding 33% of the common fund, based on a multiplier of 2.52).

As such, the requested fee award is fair and reasonable, and should be awarded in its entirety. Class Counsel risked not only a great deal of time, but also a great deal of expense to ensure the successful litigation of this action on behalf of all Class Members. For such reasons, Class Counsel's request for attorneys' fees in the amount of \$214,166.67 is fair, reasonable, and adequate.

VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF COSTS

The request for reimbursement of costs, in the amount of \$30,820.64 is fair and reasonable, especially in light of the fact that the Parties agreed that Class Counsel may seek up to \$35,000.00 as reimbursement for litigation costs under the Settlement Agreement. As set forth in Class Counsel's declaration, the costs were all directly incurred in the prosecution of this action, including but not limited to, filing and service fees, postage fees, and costs associated with mediation. Gavron Decl. ¶ 19, Ex. B. As such, this requested costs should be approved as fair and reasonable.

VIII. THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS SHOULD BE APPROVED

Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement Administrator, Phoenix Settlement Administrators, are to be paid out of the class settlement funds. As shown on the Declaration of Kevin Lee the settlement administration fees expended in this matter amount to a total of \$8,250.00, which is the amount that was agreed upon by the Parties. Admin. Decl. ¶ 18, Ex. B. For such reasons, it is requested that the Settlement Administrator's fees be approved.

IX. NOTICE TO THE LWDAS

Concurrently with this Motion, Plaintiff provides notice to the LWDA. Gavron Decl. ¶ 20.

X. CONCLUSION

For all the foregoing reasons, and on the basis of the authorities cited herein, Plaintiff

1 respectfully submits that the standards for final approval have been met and the terms of the
2 Settlement Agreement are fair, adequate, and reasonable.

3 Accordingly, Plaintiff respectfully requests that the Court enter an Order in the form
4 proposed and submitted:

- 5 1. Granting final approval to the proposed Settlement Agreement in this action;
- 6 2. Approving distribution of the settlement funds to the Class Members pursuant to
7 the terms of the Settlement Agreement;
- 8 3. Approving Plaintiff's request for an award of the Class Representative Incentive
9 Payment of \$10,000.00, with payment pursuant to the terms of the Agreement;
- 10 4. Approving Class Counsel's request for an award to Class Counsel for
11 \$214,166.67 in attorneys' fees and \$30,820.64 in costs, with payment pursuant to the terms of
12 the Settlement Agreement;
- 13 5. Approving Plaintiff's request for payment of the settlement administration costs
14 to Phoenix Settlement Administrators in the amount of \$8,250.00, with payment pursuant to the
15 terms of the Settlement Agreement;
- 16 6. Approving Plaintiff's request for payment of PAGA penalties to the LWDA for
17 \$45,000.00 and \$15,000.00 to the aggrieved employees, with payment pursuant to the terms of
18 the Agreement; and
- 19 7. Entering final judgment as to all Class Members in this action.

20
21 DATED: January 14, 2025

DIVERSITY LAW GROUP, P.C.

22
23 By: 

Larry W. Lee

24 Max W. Gavron

25 Attorneys for Plaintiff and Class Members
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27
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