

Howard L. Magee (State Bar No. 185199)
Larry W. Lee (State Bar No. 228175)
Max W. Gavron (State Bar No. 291697)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile

William L. Marder, Esq. (State Bar No. 170131)
Polaris Law Group
501 San Benito Street, Suite 200
Hollister, CA 95023
Tel: (831) 531-4214
Fax: (831) 634-0333

Attorneys for Plaintiff and the Class

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

LOUIS WEYBREW, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

BEI CONSTRUCTION, INC.; and DOES 1
through 50, inclusive,

Defendants.

Case No.: FCS055658

[Assigned for all purposes to the Hon. E.
Bradley Nelson, Department 4]

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

Date: November 4, 2021

Time: 9:00 a.m.

Dept.: 4

Complaint Filed: November 10, 2020

FAC Filed: January 13, 2021

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on November 4, 2021, at 9:00 a.m., or as soon
3 thereafter as the matter may be heard, before the Honorable E. Bradley Nelson, judge
4 presiding, in Department 4 of the above referenced Court located at 600 Union Avenue,
5 Fairfield, California 94533, Plaintiff Louis Weybrew (“Plaintiff”) will seek an Order: (1)
6 approving the Joint Stipulation of Class Action Settlement (“Agreement” or “Settlement
7 Agreement”) in this matter; (2) conditionally certifying the following Class for settlement
8 purposes only: “all current and former employees of Defendant in the State of California who
9 earned wages at any time between May 16, 2019 through December 4, 2020 (the “Class”); (3)
10 appointing Plaintiff Louis Weybrew as the Class Representative and Howard L. Magee, Larry
11 W. Lee, and Max W. Gavron of Diversity Law Group, P.C. and William L. Marder of Polaris
12 Law Group as Class Counsel; (4) preliminarily approving the Settlement Agreement and the
13 total Gross Settlement Amount in the amount of Four Hundred Eighty-Five Thousand Dollars
14 (\$485,000.00); (5) finding on a preliminary basis that the Agreement appears to be within the
15 range of reasonableness of a settlement, including the amount of the PAGA penalties, Class
16 Representative Enhancement Payment, Class Counsel fees and costs, Settlement
17 Administration Costs, and the allocation of payments to Class Members, that could ultimately
18 be given final approval by this Court; (6) approving the Notice of Class Action Settlement to
19 be sent to Class Members; (7) appointing Phoenix Settlement Administrators as the Settlement
20 Administrator; and (8) setting the matter for a Final Fairness and Final Approval hearing.

21 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
22 provides for court approval of the settlement of a purported class action and allows the Court
23 to preliminarily certify a class for settlement purposes.

24 The basis for this Motion, filed without any opposition from Defendant BEI
25 Construction, Inc. (“Defendant”), is that the proposed settlement is fair, adequate, and
26 reasonable and the procedures proposed by the Parties are adequate to ensure the opportunity
27 of class members to participate in, opt-out of, or object to the settlement. This Motion will be
28 based on the attached Memorandum of Points and Authorities, the Settlement Agreement and

1 the proposed Notice of Class Action Settlement, and the supporting Declarations of Howard L.
2 Magee, Larry W. Lee, Max W. Gavron, William Marder, and Plaintiff Louis Weybrew, and
3 upon the oral arguments of counsel (should there be any) and on the complete records and file
4 herein.

5
6 DATED: September 15, 2021

DIVERSITY LAW GROUP, P.C.

7
8 By: 

Larry W. Lee

Max W. Gavron

Attorneys for Plaintiff and the Class

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	7
II. DISCUSSION	8
A. Proposed Class Definition	11
B. Settlement Terms and Evaluation	11
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	15
2. Whether, and Under What Circumstances, Amounts Available for Payment in Settlement Might Not Be Paid to Class Members or Might Revert to the Defendants.....	16
3. Scope of the Release of Class Members' Claims	16
4. Tax Treatment of Settlement Amounts.....	16
5. Affirmative Obligations to be Undertaken by Class Members or Class Counsel and the Reasons for Any Such Obligations	16
C. Notice to Class Members	16
D. Typicality and Adequacy of Representation	17
1. Class Representative's Claims are Typical of the Class.....	17
2. Class Counsel Has Adequately Represented the Class and Has Experience with Wage and Hour Class Actions.....	18
E. Costs and Fees	18
1. Attorneys' Fees and Costs	18
2. Proposed Payment to the Class Representative	20
3. Settlement Administration Fees.....	21
III. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR PRELIMINARY APPROVAL	21

TABLE OF AUTHORITIES

Page(s)

State Cases

<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018).....	13, 15
<i>City and County of San Francisco v. Sweet</i> , 12 Cal.4th 105, 110 (1995).....	19
<i>City of San Jose v. Superior Court</i> , 12 Cal. 3d 447, 460 (1974)	17
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794, 1803 (1996)	10
<i>Duran v. U.S. Bank Nat'l Ass'n</i> , 59 Cal. 4th 1 (2014).....	14
<i>Laffitte v. Robert Half Int'l</i> , 1 Cal. 5th 480, 503 (2016)	19
<i>Richmond v. Dart Industries, Inc.</i> , 29 Cal. 3d 462, 473 (1981).....	17
<i>Serrano v. Priest</i> , 20 Cal. 3d 25, 34 (1977)	18, 19
<i>Stephens v. Montgomery Ward & Co.</i> , 193 Cal. App. 3d 411, 421 (1987)	17
<i>Vasquez v. Superior Court</i> , 4 Cal. 3d 800, 812-13 (1971).....	17
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 240 (2001)	10, 18

Federal Cases

<i>Bellinghausen v. Tractor Supply Co.</i> , No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015).....	14
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980).....	18
<i>Hammon v. Barry</i> , 752 F. Supp. 1087 (D.D.C. 1990); <i>Steinberg v. Carey</i> , 470 F. Supp. 471 (S.D.N.Y. 1979).....	11
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011, 1019 (1998).....	17
<i>In re Armored Car Antitrust Litig.</i> , 472 F. Supp. 1357 (N.D. Ga. 1979)	11
<i>In re Baldwin-United Corp.</i> , 105 F.R.D. 475, 478 (S.D.N.Y. 1984).....	10
<i>In re Chicken Antitrust Litig.</i> , 560 F. Supp. 957, 962 (N.D. Ga. 1980).....	11
<i>In re Mego Fin. Corp. Secs. Litig.</i> , 213 F.3d 454, 459 (9th Cir.2000)	14
<i>Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.</i> , 834 F.2d 677, 682 (7th Cir. 1987)	11
<i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523, 528 (C.D. Cal. 2004). 11, 12	
<i>Priddy v. Edelman</i> , 883 F.2d 438, 447 (6th Cir. 1989).....	11
<i>Sommers v. Abraham Lincoln Federal Sav. & Loan Ass'n</i> , 79 F.R.D. 571 (E.D. Pa. 1978).....	11

<i>Van Ba Ma v. Covidien Holding Inc.</i> , U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014)	14
<i>Villegas v. J.P. Morgan Chase & Co.</i> , No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012)	14
<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997)	18, 19

Statutes

Fair Employment and Housing Act (“FEHA”)	7, 8
Labor Code § 226	12, 16
Labor Code § 226(a)	7, 8, 13
Labor Code § 226(a)(6)	8
Labor Code § 226(e)	12, 13
Labor Code § 2699(e)(2)	13
Labor Code § 2698, <i>et seq.</i>	7, 8, 12
Labor Code § 2699	8

Other Authorities

4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.26 (4th ed. 2002)	10, 11
4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.24	10
4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> , § 11.47	12
Manual for Complex Litigation (Third) § 30.41	9

1 **I. INTRODUCTION**

2 Plaintiff Louis Weybrew (“Plaintiff”) brings class, representative, and individual action
3 claims against Defendant BEI Construction, Inc. (“Defendant”) under the California Labor
4 Code (Plaintiff and Defendant shall be jointly referred to as the “Parties”). Plaintiff alleges in
5 this lawsuit that Defendant had a policy and practice of issuing defective wage statements in
6 violation of Labor Code §§ 226(a) and 2698, *et seq.*, the Private Attorneys General Act
7 (“PAGA”).¹ Plaintiff now moves for preliminary approval of the proposed class and
8 representative settlement after mediation and thorough investigation of the claims alleged.

9 Prior to the settlement of this action, the Parties thoroughly investigated the facts
10 relating to the claims alleged in the complaint and engaged in a thorough study of the legal
11 principles applicable to the claims asserted against Defendant. Defendant provided information
12 related to the number of putative class members and wage statements issued to the Class.
13 Thereafter, the Parties commenced settlement negotiations through a private mediator and
14 were ultimately able to reach the current settlement by way of a mediator’s proposal and after
15 continued negotiations after the matter did not initially settle at mediation. **Significantly, this**
16 **entire amount is non-reversionary, such that no monies will revert to Defendant.**

17 The Parties believe that this amount is fair, adequate, and reasonable, especially given
18 the risks and uncertainty of class certification and the merits of this case.

19 Although Plaintiff and his counsel believe that they can prevail on class certification, as
20 well as on the merits, Plaintiff and his counsel recognize the inherent risks in drawn-out
21 litigation and the specific risks that a class might not be certified and/or that Plaintiff could fail
22 to establish liability. Defendant denies the allegations in the operative Complaint and believes
23 that it can prevail at trial. Based on their own independent investigation and evaluation, the
24 Parties and their respective counsel are of the opinion that the settlement for the consideration
25 and on the terms set forth in the Settlement Agreement is fair, reasonable, and adequate and is
26 in the best interests of the Class and Defendant in light of all known circumstances and the

27

¹ Plaintiff also brought a claim against Defendant for violations of the Fair Employment and
28 Housing Act (“FEHA”), which the Parties resolved separately through a confidential
individual settlement agreement.

1 expenses and risks inherent in litigation.

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

4 **II. DISCUSSION**

5 On November 5, 2020, Plaintiff filed a notice with the Labor and Workforce
6 Development Agency (“LWDA”) alleging that Defendant violated Labor Code § 226(a),
7 pursuant to Labor Code § 2699 (“PAGA notice”). The PAGA notice alleged that Defendant
8 failed to identify the pay period start date on wage statements issued to employees. Declaration
9 of Max W. Gavron (“Gavron Decl.”) ¶ 2.

10 On November 10, 2020, Plaintiff filed the initial complaint. The initial complaint
11 alleged causes of action for (1) violation of Labor Code § 226(a) and (2) violation of Labor
12 Code § 2698, *et seq. Id.* ¶ 3.

13 On or about December 4, 2020, Defendant filed a notice with the LWDA asserting that
14 it cured the defects identified in Plaintiff’s PAGA notice. *Id.* ¶ 4. Specifically, Defendant stated
15 that it revised its wage statements to include a “Period Start Date” to all employee wage
16 statements and a “Department – Salary” under the “Earnings” column on wage statements
17 issued to exempt employees. Defendant also stated that revised wage statements were sent to
18 current and former non-union employees on December 3, 2020, via email and/or priority mail.
19 *Id.*

20 On January 4, 2021, the LWDA issued a decision on the cure dispute after briefing
21 from both Parties. The LWDA determined that Defendant had not cured the violation of Labor
22 Code 226(a)(6) for failure to include the inclusive pay period dates. *Id.* ¶ 5.

23 On January 13, 2021, Plaintiff filed a first amended complaint, adding individual
24 causes of action for disability discrimination in violation of the Fair Employment and Housing
25 Act (“FEHA”), failure to engage in the interactive process in violation of the FEHA, failure to
26 accommodate in violation of the FEHA, retaliation in violation of the FEHA, and wrongful
27 termination in violation of public policy (the “FEHA Claims”). *Id.* ¶ 7. Plaintiff’s FEHA
28 Claims have been separately settled through an Individual Settlement Agreement and Release,

1 which contains a confidentiality provision. *Id.* ¶ 7.

2 The first amended complaint is the operative Complaint (“Complaint”). As alleged in
3 the Complaint, Plaintiff seeks to represent the Class and other aggrieved employees. Plaintiff
4 further seeks damages, penalties, interest, attorneys’ fees, and costs. *Id.*

5 Following the filing of the complaint, the Parties engaged in formal and informal
6 discovery. Defendant propounded requests for production of documents, interrogatories, and
7 requests for admission, and Plaintiff responded. *Id.* ¶ 9. Defendant also produced documents
8 including Plaintiff’s personnel file, wage statements, and copies of Defendant’s employment
9 policies in addition to quantitative information regarding the number of putative class members
10 and allegedly defective wage statements issued. *Id.* This information allowed Plaintiff to
11 conduct a full damage analysis. *Id.*

12 After Plaintiff filed the operative Complaint, the Parties agreed to attempt mediation of
13 Plaintiff’s claims. *Id.* ¶ 10.

14 On May 24, 2021, the Parties engaged in an all-day mediation session with neutral
15 Steven J. Serratore, Esq. *Id.* ¶ 10. After the exchange of data and materials and extended
16 negotiations, on June 28, 2021, the Parties reached an agreement in principle with the
17 assistance of the mediator. *Id.* The Parties agreement is detailed in the attached Joint
18 Stipulation of Class Action Settlement. *Id.*, Ex. A.

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

23 Approval of class action settlements involves a two-step process. First, counsel
24 submits the proposed terms of settlement and the court makes a preliminary
25 fairness evaluation. If the preliminary evaluation of the proposed settlement does
26 not disclose grounds to doubt its fairness or other obvious deficiencies, such as
27 unduly preferential treatment of class representatives or of segments of the class,
28 or 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.

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

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

11 When the parties to an action reach a monetary settlement, they will usually
12 prepare and execute a joint stipulation of settlement, which is submitted to the
13 court for preliminary approval. The stipulation should set forth the central terms
14 of the agreement, including but not limited to, the amount of settlement, form of
recapture clause.

15 *Id.* § 11.24.

16 Here, the Parties have reached such an agreement and have submitted to this Court in
17 connection with this Motion a copy of the Settlement Agreement fully setting forth the
18 agreement reached among the Parties. The Settlement Agreement sets forth all terms of the
19 agreement reached by the Parties, which include, among other things, the method for
20 calculating the Class Members’ individual settlements.

21 The parties also may, at the preliminary approval stage, request that the court
22 provisionally approve certification of the class—conditional upon final approval of the
23 settlement. “[P]re-certification settlements are routinely approved if found to be fair and
24 reasonable.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001); *accord Dunk*
25 *v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1803 (1996) (although the settlement was reached
26 before any “adversary certification,” the court was satisfied that it was “fair, adequate and
27 reasonable”); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (“many
28 courts have employed this practice in the name of judicial efficiency in order to facilitate

1 apparently beneficial settlement proposals”). As further explained by Professor Newberg:

2 The strength of the findings made by a judge at a preliminary hearing or
3 conference concerning a tentative settlement proposal...may be set out in
4 conditional orders granting tentative approval to the various items submitted to
5 the court. Three basic rulings are often conditionally entered at this preliminary
6 hearing. These conditional rulings may approve a temporary settlement class, the
7 proposed settlement, and the class counsel’s application for fees and expenses.

8 *4 Newberg on Class Actions* § 11.26.

9 In addition to such terms as class identification, settlement amount and payment
10 procedures, the Settlement Agreement reached among the Parties contains a provision pursuant
11 to which the Parties stipulate to the Court’s provisional certification of the Class for the
12 purposes of this settlement only.

13 **A. Proposed Class Definition**

14 The current settlement is being settled on behalf of a Class of “all current and former
15 employees of Defendant in the State of California who earned wages at any time between May
16 16, 2019 through December 4, 2020.” *See* Settlement Agreement ¶ 3.

17 **B. Settlement Terms and Evaluation**

18 Courts presume the absence of fraud or collusion in the negotiation of settlement unless
19 evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989);
20 *Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir.
21 1987); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not
22 substitute their judgment for that of the proponents, particularly where, as here, settlement has
23 been reached with the participation of experienced counsel familiar with the litigation. *Nat’l*
24 *Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v.*
25 *Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y.
26 1979); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v.*
27 *Abraham Lincoln Federal Sav. & Loan Ass’n*, 79 F.R.D. 571 (E.D. Pa. 1978).

28 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 formal and informal discovery and negotiations for some period of time, appear to

1 be competent, have experience with this type of litigation, and have exchanged substantial
2 evidence from the opposing party. *See Newberg on Class Actions, supra*, § 11.47; *Nat'l Rural*
3 *Telecomms. Coop.*, 221 F.R.D. at 528 (“[s]o long as the integrity of the arm’s length
4 negotiation process is preserved, however, a strong initial presumption of fairness attaches to
5 the proposed settlement...[citations] and ‘great weight’ is accorded to the recommendations of
6 counsel, who are most closely acquainted with the facts of the underlying litigation”).

7 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage
8 and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a
9 number of wage and hour class actions and have extensive litigation experience. Gavron Decl.
10 ¶¶ 30-39; Declaration of Howard L. Magee (“Magee Decl.”) ¶¶ 6-7; Declaration of Larry W.
11 Lee (“Lee Decl.”) ¶¶ 7-9. Each side has apprised the other of their respective factual
12 contentions, legal theories and defenses, resulting in negotiations taking place between the
13 Parties. Gavron Decl. ¶¶ 9-23.

14 Based on the class data provided by Defendant, Plaintiff estimated that Defendant
15 would face potential maximum liability of up to approximately \$1.6 million for Plaintiff’s
16 class claims, pursuant to Labor Code § 226(e), which provides a \$50 penalty for the initial
17 violation, followed by \$100 penalties for subsequent violations, with each employee’s
18 cumulative penalties totaling no more than \$4,000. Gavron Decl. ¶¶ 17-18. Plaintiff was able
19 to estimate the potential damages and penalties based on data provided by Defendant,
20 including the number of employees in the putative class and the number of wage statements at
21 issue. *Id.* Specifically, the amount of Labor Code § 226(e) penalties are based on
22 approximately 16,717 pay periods during which allegedly deficient wage statements were
23 distributed to class members. *Id.*

24 With respect to potential liability of Plaintiff’s PAGA claims, Plaintiff estimated that
25 Defendant could face civil penalties under the PAGA for violation of Labor Code § 226 of up
26 to a maximum \$4.17 million if Plaintiff were successful at trial, which is premised on a \$250
27 penalty per wage statement. *Id.* ¶ 18.

28 Thus, based on the data provided by Defendant, Plaintiff’s counsel estimated the

1 maximum total class and PAGA penalties to be approximately \$5.77 million. *Id.* ¶ 17.

2 Even assuming Plaintiff prevailed on his PAGA claim, the Court still has discretion to
3 reduce any PAGA penalties. Pursuant to Labor Code § 2699(e)(2), the Court can decline to
4 award PAGA penalties where “if, based on the facts and circumstances of the particular case,
5 to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or
6 confiscatory.” Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks*
7 *Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his PAGA claim upon
8 trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the
9 employer’s good faith attempt at complying with the law. *Id.* at p. 517. Upon review, the Court
10 of Appeal found such reduction to be proper. *Id.* at p. 539.

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

20 Further, Defendant raised several defenses that presented risk, including that its wage
21 statements complied with Labor Code § 226(a), that employees did not suffer any injury as
22 defined by Labor Code § 226(e), and, even if its wage statements did not comply, it did not
23 issue them “knowingly and intentionally.” *Id.* ¶ 20.

24 Thus, the settlement for each Class Member is fair, reasonable, and adequate, given the
25 inherent risks of litigation, including the substantial risks relative to class certification and the
26 merits of the claims, the costs of pursuing such litigation, and the risks associated with the
27 Court’s discretion to reduce PAGA penalties. The settlement is the result of extensive arm’s-
28 length negotiations between the Parties and their counsel and was facilitated by an experienced

1 and neutral mediator.

2 Although Plaintiff believes that a class can be certified, Plaintiff also believes in the
3 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
4 involved in not prevailing on one or more of the causes of action or theories alleged in the
5 operative Complaint, the possibility of non-certification, and the potential for appeals. Gavron
6 Decl. ¶ 23. These risks on class certification are compounded by the California Supreme
7 Court's holding in *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1 (2014). There, the plaintiffs
8 obtained class certification and subsequently prevailed at trial after eight years of litigation, but
9 the judgment and the certification ruling were reversed by the California Supreme Court after
10 an additional five years of litigation. The case was remanded to superior court where class
11 certification was denied and plaintiffs' subsequent appeal also was denied.

12 Indeed, numerous courts have held that **gross** settlements approximating between only
13 8 and 25% of the defendant's potential exposure are fair and reasonable. *See, e.g., In re Mego*
14 *Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action settlement
15 recovering 16% of potential exposure was fair and reasonable; "[i]t is well-settled law that a
16 cash settlement amounting to only a fraction of the potential recovery does not per se render
17 the settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement
18 should be assessed relative to risks of pursuing the litigation to judgment"; noting that whether
19 the settlement is fair and adequate depends on the "the difficulties in proving the case");
20 *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D.
21 Cal. Mar. 20, 2015) (holding that class action settlement recovering between 8.5% and 25% of
22 the defendant's potential exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist.
23 Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014) (court granted preliminary approval of wage and
24 hour class settlement which obtained **only 9.1%** of projected damages, given the risks of
25 continued litigation); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC,
26 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (holding that gross class action settlement
27 of approximately 15% of the potential recovery was fair and reasonable). Here, the Gross
28 Settlement Amount is fair and reasonable as it is approximately 8.4% of the potential recovery

1 of Plaintiff's class and PAGA claims if Plaintiff was to fully succeed at trial. Gavron Decl. ¶
2 22. If the Court only awarded 10% of the PAGA penalties, as was done in *Carrington*, the
3 potential exposure on Plaintiff's PAGA claim is greatly reduced. *Id.* ¶ 21.

4 Despite the asserted fairness of the settlement terms, as set forth in the Notice of Class
5 Action Settlement, should any Class Member wish to pursue his or her own case for the claims
6 being released herein, each Class Member has the right to submit a request for exclusion (*i.e.*,
7 opt-out) from the settlement. Settlement Agreement ¶ 63. Moreover, as set forth in the Notice
8 Packet, Class Members are advised of their right to attend the final approval hearing and object
9 to any of the terms contained in the Settlement Agreement. Settlement Agreement ¶ 65.

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

12 The Settlement Agreement provides for Four Hundred Eighty-Five Thousand Dollars
13 (\$485,000.00) as the Gross Settlement Amount. Settlement Agreement ¶ 16. The Net
14 Settlement Amount, calculated after deduction of attorneys' fees (up to \$161,666.67), costs (up
15 to \$25,000.00), Class Representative Enhancement Payment (up to \$10,000.00), payment to
16 the LWDA (\$22,500.00), and Settlement Administration Costs (up to \$9,500.00), is estimated
17 to be approximately \$256,333.33. *Id.* ¶¶ 5, 9, 16, 18, 21, 31. Each Participating Class Member
18 who does not opt-out of the Settlement will be awarded a portion of the Net Settlement
19 Amount on a pro-rata basis, based upon the number of pay periods each respective
20 Participating Class Member worked during the Class Period. *Id.* ¶ 51.

21 Based thereon, on a raw average, each Participating Class Member may potentially
22 recover approximately \$459.38 based on a raw average. Gavron Decl. ¶ 25. The amount
23 actually paid to each Participating Class Member may increase or decrease depending on the
24 actual number of pay periods he or she worked during the Class Period and/or the number of
25 timely Requests for Exclusion received. *Id.*

26 Finally, the terms of the settlement provide that uncashed checks (upon the expiration
27 date) shall be distributed to the Legal Aid at Work, a non-profit legal services organization that
28 provides legal services and policy advocacy for and on behalf of low-income workers.

Settlement Agreement ¶ 69.

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

None of the settlement funds will revert to Defendant.

3. Scope of the Release of Class Members' Claims

As a condition of participating in this settlement, Class Members shall waive and release “a. All claims, including penalties, costs, and attorneys’ fees related thereto, that could have been brought under the facts and allegations made in the operative Complaint, for violation of Labor Code section 226 that accrued from May 16, 2019 through December 4, 2020; b. All claims for penalties under the California Labor Code Private Attorneys General Act of 2004, including costs and attorneys’ fees related thereto, predicated on the violation of Labor Code section 226 based on the facts as alleged in the operative Complaint that accrued from May 16, 2019 through December 4, 2020.” Settlement Agreement ¶¶ 25, 73. This release is appropriately limited, as it only applies during the time period of May 19, 2019 through December 4, 2020, and only applies to the claims alleged.

4. Tax Treatment of Settlement Amounts

As Plaintiff’s lawsuit sought statutory and civil penalties, the Parties have agreed that 100% of all settlement payments to Class Members shall be deemed as IRS Form 1099 income and not subject to withholdings and deductions. Settlement Agreement ¶ 52.

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

As stated above, Class Members do not need to do anything should they wish to receive their share of the settlement funds. Thus, this substantially decreases the amount of burden each Class Member must bear in order to receive their settlement share. If a Class Member does not wish to take part in this settlement and be bound by the release, the Class Member must submit an exclusion request. Settlement Agreement ¶¶ 27, 63.

C. Notice to Class Members

Within fifteen (15) days of the preliminary approval of this settlement, Defendant will

1 confidentially transmit to the Settlement Administrator a spreadsheet containing each Class
2 Member's full name, employee number, most recent mailing address, Social Security Number,
3 and number of pay periods worked during the period of May 16, 2019 through December 4,
4 2020 ("Class List and Data"). Settlement Agreement ¶¶ 6, 58. Upon receipt of the information
5 and prior to mailing the Notice of Class Action Settlement ("Notice Packet"), the Settlement
6 Administrator shall perform a search based on the National Change of Address Database for
7 information to update and correct for any known or identifiable address changes. *Id.* ¶ 60.
8 Within ten (10) business days of receipt of the Class List and Data, the Settlement
9 Administrator shall mail the Notice Packet to all Class Members. *Id.* ¶ 59. The Settlement
10 Administrator will re-mail the Notice Packet to Class Members for whom the notice is returned
11 with a forwarding address and perform a skip-trace or other search on Class Members and re-
12 mailing for whom a Notice Packet is returned as undeliverable. *Id.* ¶ 62.

13 As set forth in the Notice Packet, Class Members will be allowed to opt out of the
14 settlement by a certain deadline, or object to the settlement in writing or by appearing at the
15 final approval hearing. Settlement Agreement ¶¶ 63, 65.

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

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

18 The commonality requirement is met when there are questions of law and fact common
19 to the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) ("The existence of
20 shared legal issues with divergent legal factual predicates is sufficient, as is a common core of
21 salient facts couple with disparate legal remedies within the class"). Commonality requires
22 only that some common legal or factual questions exist; the plaintiffs need not show that all
23 issues in the litigation are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 473
24 (1981). Defendant's conduct is central to the commonality inquiry. *See City of San Jose v.*
25 *Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13
26 (1971). Where the employer's conduct is uniformly directed at a class of employees, as it is
27 here, the class wide impact of the Defendant's policies satisfies the commonality requirement.
28 *See Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

1 Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or
2 procedure violated the Labor Code by issuing inaccurate itemized wage statements.
3 Declaration of Louis Weybrew (“Weybrew Decl.”) ¶ 2. In other words, Plaintiff was subjected
4 to the same policy and practice as other Class Members. Thus, Plaintiff’s claims are typical to
5 those of Class Members.

6 Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such
7 issues been raised or presented. Weybrew Decl. ¶ 3. Plaintiff has taken all necessary steps to
8 represent the interests of the Class, and by providing information and documents to Plaintiff’s
9 counsel. *Id.* ¶ 4. For such reasons, Plaintiff has adequately represented the Class Members and
10 will continue to do so.

11 **2. Class Counsel Has Adequately Represented the Class and Has
Experience with Wage and Hour Class Actions**

12 From the inception of the case, Class Counsel has zealously represented the interests of
13 the class. The settlement was obtained for the benefit of the class, as opposed to the individual
14 Class Representative. Further, Class Counsel has been approved as class counsel on a number
15 of prior cases, have litigated numerous other class action cases, and are competent to represent
16 the class. Gavron Decl. ¶¶ 30-39; Magee Decl. ¶¶ 6-7; Lee Decl. ¶¶ 7-9; Marder Decl. ¶¶ 6-13.

17 **E. Costs and Fees**

18 **1. Attorneys’ Fees and Costs**

19 California state and federal courts have recognized that an appropriate method for
20 determining award of attorneys’ fees is based on a percentage of the total value of benefits to
21 Class Members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254
22 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472,
23 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose
24 of this equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation
25 costs proportionally among all the beneficiaries so that the active beneficiary does not bear the
26 entire burden alone.” *Vincent*, 557 F.2d at 769.

27 The common fund doctrine is predicated on the principle of preventing unjust
28 enrichment. When a litigant’s efforts create or preserve a fund from which others derive

benefits, he may require the passive beneficiaries to compensate those who created the fund. Both California state and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35; *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has been applied “consistently in California when an action brought by one party creates a fund in which other persons are entitled to share.” The reasons for applying the common fund doctrine include: “fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the 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.” *Id.*

Indeed, most recently, the California Supreme Court has also now held that the award of attorneys’ fees in common fund wage and hour class action settlements should start with 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”).

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

The Parties have agreed to a payment of a maximum of one-third of the Gross Settlement Amount (or \$161,666.67) for payment to Class Counsel as attorneys’ fees. The

Parties have agreed to a payment of the foregoing attorney's fees and, thus, this payment should be presumed to be fair.

Further, the Parties have agreed to reimbursement of Class Counsel's litigation costs in an amount up to \$25,000.00. Class Counsel has expended costs at their own risk, for example, to file this instant action, effect service of process, pay the mediation fee, and pay of other litigation-related costs.

Based on the foregoing, the Court should preliminarily approve the attorneys' fees and costs being requested by the Parties.

2. Proposed Payment to the Class Representative

Class Representative Louis Weybrew requests an enhancement of \$10,000.00. Settlement Agreement ¶¶ 9, 48. The Class Representative met and conferred with Class Counsel on a number of occasions to discuss the case, provided documents and information to Class Counsel, and reviewed the Settlement Agreement. As part of his duties as the Class Representative, Plaintiff provided invaluable information and documents that resulted in this settlement. Weybrew Decl. ¶ 4. In addition to the invaluable services that Plaintiff provided, he also took a significant risk, both professionally and monetarily, in acting as the Class Representative and seeking benefits on behalf of the Class. Because the claims alleged by the Class Representative involved the payment of costs to the prevailing party, Plaintiff could have possibly faced paying the costs of Defendant had he not prevailed in this action.

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

//

//

1 **3. Settlement Administration Fees**

2 The Parties have agreed to an estimated payment of \$9,500.00 to the Settlement
3 Administrator, Phoenix Settlement Administrators, to send notices and to administer this
4 settlement. Settlement Agreement ¶¶ 30-31, 49. Phoenix Settlement Administrators is a well-
5 recognized class action settlement administrator. The Parties believe that the administration fee
6 is reasonable and should be approved.

7 **III. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
8 **PRELIMINARY APPROVAL**

9 Here, the proposed settlement is fair, adequate, and reasonable. It will result in both
10 substantial monetary benefits to class members; it is non-collusive; and it was achieved as the
11 result of informed, extensive, and arm's-length negotiations conducted by counsel for
12 respective parties who are experienced in wage and hour class action litigation. For the
13 foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary approval of
14 the proposed settlement, sign the proposed Order, approve and authorize mailing of the
15 proposed Notice of Class Action Settlement, and set a date for a final approval hearing.

16
17 DATED: September 15, 2021

DIVERSITY LAW GROUP, P.C.

18
19 By: 

Larry W. Lee

Max W. Gavron

Attorneys for Plaintiff and the Class

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

On September 16, 2021, I served the following document(s) described as:

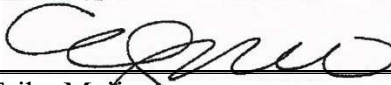
- on the interested parties in this action as follows:

PROOF OF SERVICE

KAUFMAN DOLOWICH & VOLUCK, LLP
425 California Street, Suite 2100
San Francisco, California 94104
Attorneys for Defendant BEI Construction, Inc.

 X BY ELECTRONIC MAIL: by personally sending a true and correct copy of the above-described document(s) to the party(ies) listed above or on the attached mailing list from the e-mail server diversitylaw.com, to the electronic transmission address of the recipient(s) indicated above or on the attached mailing list. I certify that said electronic transmission was completed and that all pages were received by the party(ies) identified herein or on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 16, 2021, at Los Angeles, California.



Erika Mejia