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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA**

TONY CATELLI, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

INNOVATIVE CONSTRUCTION
SOLUTIONS, a California corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No.: MSC21-01257

(Assigned for all purposes to the Honorable
Edward G. Weil, Department 39)

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

Date: TBD
Time: 9:00 a.m.
Dept.: 39

Complaint Filed: June 1, 2021
Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on a date to be set by the Clerk, at 9:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Edward G. Weil, judge presiding, in Department 39 of the above referenced Court, located at 725 Court Street, Martinez, California 94553, Plaintiff Tony Catelli (“Plaintiff”) will seek an Order:

(1) preliminarily approving the Joint Stipulation of Class Action and PAGA Settlement (“Settlement,” “Agreement,” or “Settlement Agreement”);

(2) conditionally certifying the following Class for settlement purposes only: all current and former employees of Defendant who worked in California and received an Initial Physical Wage Statement during the Class Period;

(3) appointing Tony Catelli as Class Representative and Larry W. Lee and Kwanporn “Mai” Tulyathan of Diversity Law Group, P.C.; and William L. Marder of Polaris Law Group as Class Counsel;

(4) preliminarily approving the Settlement Agreement and the total Maximum Settlement Amount in the amount of Thirty Thousand Dollars and Zero Cents (\$30,000.00);

(5) finding on a preliminary basis that the Settlement Agreement appears to be within the range of reasonableness of a settlement, including the amount of the PAGA penalties, Class Representative Enhancement Payment, attorneys’ fees and costs, settlement administration costs, and the allocation of payments to Class Members, that could ultimately be given final approval by this Court;

(6) approving the Notice of Class Action and PAGA Settlement (“Notice of Settlement”) to be sent to Class Members, which is attached as Exhibit A to the Settlement Agreement;

(7) approving the distribution of the Notice of Settlement to Class Members substantially in the manner and form set forth in the Settlement Agreement;

(8) appointing Phoenix Settlement Administrators as the Settlement Administrator; and

(9) setting the matter for a Final Fairness and Final Approval hearing.

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

4 The basis for this Motion, filed without any opposition from Defendant Innovative
5 Construction Solutions (“Defendant”), is that the proposed settlement is fair, adequate, and
6 reasonable and the procedures proposed by the Parties are adequate to ensure the opportunity of
7 class members to participate in, opt-out of, or object to the settlement.

8 This Motion will be based on the attached Memorandum of Points and Authorities, the
9 Settlement Agreement and the proposed Notice of Settlement, the supporting Declarations of
10 Larry W. Lee, Kwanporn “Mai” Tulyathan, William L. Marder, and Plaintiff Tony Catelli, and
11 upon the oral arguments of counsel (should there be any), and on the complete records and file
12 herein.

13
14 DATED: December 14, 2022

DIVERSITY LAW GROUP, P.C.

15 By: 

16 Larry W. Lee

Kwanporn “Mai” Tulyathan

17 Attorneys for Plaintiff, the Class, and Aggrieved
18 Employees

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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative action seeking statutory and civil
3 penalties for alleged wage statement violations committed by Defendant Innovative Construction
4 Solutions (“Defendant”). Plaintiff Tony Catelli (“Plaintiff”) brought claims on a class and PAGA
5 wide basis for violations of Labor Code § 226. Defendant denies each, every, and all of the
6 allegations in the operative Complaint.

7 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating
8 to the claims alleged in the complaints and engaged in a thorough study of the legal principles
9 applicable to the claims asserted against Defendant. Defendant provided information related to
10 the number of wage statements issued to the class that Plaintiff alleged violated the Labor Code.
11 Thereafter, the Parties commenced informal settlement negotiations and were ultimately able to
12 reach the current settlement of \$30,000.00. Significantly, this entire amount is non-reversionary,
13 such that no monies will revert back to Defendant. Further, Class Members do not need to file a
14 claim to benefit from the settlement because all Class Members will automatically receive a
15 payment unless they affirmatively opt-out. There are approximately 129 Class Members, and the
16 average payment to participating Class Members is projected to be approximately \$48.45.

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

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

27 Therefore, Plaintiff respectfully requests that the Court grant this Motion for Preliminary
28 Approval of Class Action and PAGA Settlement.

1 **II. PROCEDURAL HISTORY**

2 On or about April 16, 2021, Plaintiff sent written notice to the California Labor &
3 Workforce Development Agency (“LWDA”) pursuant to Labor Code section 2698, *et seq.* of the
4 California Private Attorneys General Act (“PAGA”), setting forth Plaintiff’s allegation that
5 Defendants had violated Labor Code section 226(a). The LWDA did not respond to Plaintiff’s
6 notice. Declaration of Larry W. Lee (“Lee Decl.”) ¶ 2. On June 1, 2021, Plaintiff filed a class and
7 representative action complaint against Defendant in the Superior Court of the State of California
8 for the County of Contra Costa, alleging causes of action for: (1) violation of California Labor
9 Code § 226; and (2) violation of Labor Code § 2698, *et seq.*, the Private Attorneys General Act
10 (“PAGA”). Lee Decl. ¶ 3.

11 The complaint is premised on the allegation that the inclusive dates of the payroll period
12 were not identified on wage statements issued to Plaintiff and other employees. Lee Decl. ¶ 4.
13 The PAGA claim is predicated on an underlying violation of Labor Code § 226. *Id.*

14 The instant preliminary approval motion seeks approval of a settlement that resolves the
15 class action and PAGA claims of Plaintiff’s lawsuit. Lee Decl. ¶ 5.

16 After Plaintiff filed the complaint, Plaintiff and Defendant (together, the “Parties”)
17 agreed to engage in informal settlement discussions. Lee Decl. ¶ 6. In connection therewith,
18 Defendant produced data relating to the number of allegedly deficient wage statements issued to
19 the putative class members. *Id.* Specifically, it was discovered that the alleged violation only
20 appeared on the very first (initial) physical wage statements the employer issued to its
21 employees, and that all subsequent wage statements did not contain any of the alleged violations.
22 *Id.* After thorough investigation and evaluation of the facts and claims and negotiations
23 conducted over the course of months, the Parties reached the current settlement. *Id.*

24 In resolution of Plaintiff’s class and PAGA claims, the Parties entered into the Joint
25 Stipulation of Class Action and PAGA Settlement, a true and correct copy of which is attached
26 as **Exhibit A** to the Declaration of Larry W. Lee. Lee Decl. ¶ 7.

27 ///

28 ///

1 **III. DISCUSSION**

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

6 Approval of class action settlements involves a two-step process.
7 First, counsel submits the proposed terms of settlement and the court
8 makes a preliminary fairness evaluation. If the preliminary
9 evaluation of the proposed settlement does not disclose grounds to
10 doubt its fairness or other obvious deficiencies, such as unduly
11 preferential treatment of class representatives or of segments of the
12 class, 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.

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

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

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

24 When the parties to an action reach a monetary settlement, they will
25 usually prepare and execute a joint stipulation of settlement, which
26 is submitted to the court for preliminary approval. The stipulation
27 should set forth the central terms of the agreement, including but not
28 limited to, the amount of settlement, form of payment, manner of
determining the effective date of settlement and any recapture
clause.

1 *Id.* § 11.24.

2 Here, the Parties have reached such an agreement and have submitted to this Court in
3 connection with this Motion a copy of the Settlement Agreement fully setting forth the
4 agreement reached among the Parties. The Settlement Agreement sets forth all terms of the
5 agreement reached by the Parties, which include, among other things, the method for calculating
6 the Class Members' individual settlement payments.

7 The parties also may, at the preliminary approval stage, request that the court
8 provisionally approve certification of the class for purposes of settlement—conditional upon
9 final approval of the settlement. “[P]re-certification settlements are routinely approved if found
10 to be fair and reasonable.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001);
11 *accord Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1803 (1996) (although the settlement
12 was reached before any “adversary certification,” the court was satisfied that it was “fair,
13 adequate and reasonable”); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984)
14 (“many courts have employed this practice in the name of judicial efficiency in order to facilitate
15 apparently beneficial settlement proposals”). As further explained by Professor Newberg:

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

21 4 *Newberg on Class Actions* § 11.26.

22 In addition to such terms as class identification, settlement amount, and payment
23 procedures, the Settlement Agreement reached among the Parties contains a provision pursuant
24 to which the Parties stipulate to the Court's provisional certification of the Class, but do so for
25 the purposes of this settlement only.

26 **A. Proposed Class Definition**

27 The current settlement is being settled on behalf of “all current and former employees of
28 Defendant who worked in California and received an Initial Physical Wage Statement during the

Class Period.” Settlement Agreement ¶ 7.

B. Numerosity

Courts generally find that numerosity is satisfied if the class includes forty or more members. *See Villalpando v. Excel Direct Inc.*, 303 F.R.D. 588, 605-606 (N.D. Cal. 2014); *see also Jordan v. L.A. County*, 669 F.2d 1311, 1320 (9th Cir. 1982) (noting, in dicta, that the court “would be inclined to find the numerosity requirement...satisfied solely on the basis of [39] ascertained class members”), *vacated on other grounds*, 459 U.S. 810 (1982).

In this case, Defendant provided payroll data for approximately 129 Class Members, therefore, numerosity is satisfied. Lee Decl. ¶ 6.

C. Ascertainability

Class members are ascertainable where they may be “readily identified without unreasonable expense or time by reference to official records.” *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325, 1334 (2008); *see also Faulkinbury v. Boyd & Assocs., Inc.*, 216 Cal. App. 4th 220, 240 (2013).

Here, the identity of Class Members is clearly ascertainable from Defendant’s payroll records and have already been identified.

D. Typicality and Adequacy of Representation

1. Class Representative’s Claims are Typical of the Class

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

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

2 Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or procedure
3 violated the Labor Code by issuing inaccurate itemized wage statements. Declaration of Tony
4 Catelli (“Catelli Decl.”) ¶ 4.

5 In other words, Plaintiff was subjected to the same policy and practice as other Class
6 Members. Thus, Plaintiff’s claims are typical to those of Class Members.

7 Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such
8 issues been raised or presented. Catelli Decl. ¶ 5. Plaintiff has taken all necessary steps to
9 represent the interests of the Class, and by providing information and documents to Plaintiff’s
10 counsel. *Id.* ¶¶ 6-7. For such reasons, Plaintiff has adequately represented the Class Members
11 and will continue to do so.

12 **2. Class Counsel Have Adequately Represented the Class and Have**
13 **Experience with Wage and Hour Class Actions**

14 From the inception of the case, Class Counsel have zealously represented the interests of
15 the Class. For example, the informal discovery exchanged by the Parties was directed towards
16 class issues. Lee Decl. ¶ 17. Class Counsel also obtained sufficient class data in order to evaluate
17 the class claims at issue. *Id.* The settlement was obtained for the benefit of the Class, not for the
18 individual Plaintiff. *Id.* Finally, Class Counsel have been approved as class counsel on a number
19 of prior cases and are competent to represent the Class. Lee Decl. ¶¶ 18-23; Declaration of
20 Kwanporn “Mai” Tulyathan (“Tulyathan Decl.”) ¶¶ 5-10; Declaration of William L. Marder
21 (“Marder Decl.”) ¶¶ 6-11.

22 **E. Superiority**

23 Class treatment is clearly superior to any other method of resolving Plaintiff’s claims.
24 *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 326 (2004). In employment actions,
25 class actions are in fact encouraged. *Jaimez v. DAIOHS USA, Inc.*, 181 Cal. App. 4th 1286, 1308
26 (2010) (“In light of the numerous common issues of fact and law that predominate in this
27 lawsuit, we conclude that proceeding by way of class action is the superior method of
28 adjudication. Doing so would further judicial economy by avoiding repetitious suits, would unify

1 what would otherwise be a series of small claims so as to enhance the class members' access to
2 redress...").

3 Here, Plaintiff's claims are based on system-wide policies, procedures, and practices that
4 apply to all class members and can be most efficiently litigated on a class-wide basis; *i.e.*,
5 Defendant's issuance of wage statements. The alternative would be the unrealistic filing of
6 numerous individual claims. Since the putative class members are employees with relatively
7 modest individual claims and limited resources, there is a strong likelihood that individual claims
8 would never be brought. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund*, 244 F.3d
9 1152, 1163 (9th Cir. 2001) (superiority requirement met where class members would recover, at
10 most, about \$1,330); *see also Gentry v. Sup. Ct.*, 42 Cal. 4th 443, 462 (2007).

11 **F. Summary of the Case, Investigation, and Discovery and Reasonable Estimate**
12 **of the Nature and Amount of Recovery**

13 As discussed above, the Action alleges the following causes of action: (1) violation of
14 Labor Code § 226; and (2) violation of Labor Code § 2698, *et seq.* Lee Decl. ¶ 3. Specifically,
15 Plaintiff alleges that Defendant failed to identify the inclusive dates of the payroll period on
16 wage statements provided to Class Members. *Id.* ¶ 4. Defendant denies the allegations in the
17 Action and is prepared to continue to defend the action vigorously. *Id.*

18 After the filing of the lawsuit, the Parties conducted informal discovery. In connection
19 therewith, Defendant provided the putative class members' payroll data, which allowed Plaintiff
20 to complete a damage analysis for the class and PAGA claims. Lee Decl. ¶ 6. Specifically, it was
21 discovered that the alleged violation only appeared on the very first (initial) physical wage
22 statements the employer issued to its employees, and that all subsequent wage statements did not
23 contain any of the alleged violations. *Id.* Thereafter, the Parties engaged in settlement
24 discussions over the course of months and ultimately reached this arm's-length settlement. *Id.*

25 Based on their own independent investigations and evaluations, the Parties and their
26 respective counsel are of the opinion that settlement for the consideration and on the terms set
27 forth in the Settlement Agreement is fair, reasonable, and adequate and is in the best interests of
28 the Class and Defendant in light of all known facts and circumstances and the expenses and risks
inherent in litigation. Lee Decl. ¶ 16.

As explained by the Court of Appeal in *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 130, 133 (2008), a class action settlement should be approved when the plaintiff has conducted sufficient discovery and the settlement is reasonable in light of the strengths of the plaintiff's claims. As discussed herein, Plaintiff's counsel have conducted extensive discovery and investigation and, in light of the strength and weaknesses of Plaintiff's claims, Plaintiff's attorneys submit that this settlement is fair pursuant to *Kullar*.

In the present case, the gross settlement of \$30,000.00 is for approximately 129 defective wage statements issued to the Class Members during the Class Period. Settlement Agreement ¶ 7.

With respect to Plaintiff's Labor Code § 226 claim, it arises from Plaintiff's allegations that Defendant's wage statements failed to identify the inclusive dates of the payroll period. Lee Decl. ¶ 13. As stated above, it was discovered that the alleged violation only appeared on the very first (initial) physical wage statements the employer issued to its employees, and that all subsequent wage statements did not contain any of the alleged violations. *Id.*

Plaintiff calculated maximum exposure for Labor Code § 226 penalties to be \$6,450.00 and derivative PAGA penalties of \$32,250.00 for a total of \$38,700.00.

Based on the above, the \$30,000.00 settlement comprises approximately 77.5% of the realistic exposure, which is consistent with settlements approved by numerous courts. *See, e.g., In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir.2000); *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal. 2014).

G. The Settlement Was Negotiated at Arm's Length and is Not Collusive

Courts presume the absence of fraud or collusion in the negotiation of settlement unless evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms.*

1 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp.
2 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car*
3 *Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav.*
4 *& Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

5 While the recommendations of counsel proposing the settlement are not conclusive, the
6 Court can properly take them into account, particularly where, as here, they have been involved
7 in informal discovery and negotiations for some period of time, appear to be competent, have
8 experience with this type of litigation, and have exchanged substantial evidence from the
9 opposing party. *See Newberg on Class Actions, supra*, § 11.47; *Nat'l Rural Telecomms. Coop.*,
10 221 F.R.D. at 528 (quoting *In re Paine Webber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125
11 (S.D.N.Y. 1997) (“[s]o long as the integrity of the arm’s length negotiation process is preserved,
12 however, a strong initial presumption of fairness attaches to the proposed settlement...[citations]
13 and ‘great weight’ is accorded to the recommendations of counsel, who are most closely
14 acquainted with the facts of the underlying litigation”)).

15 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage
16 and hour class action litigation. Plaintiff’s counsel have been approved as class counsel in a
17 number of wage and hour class actions and have extensive litigation experience. Lee Decl. ¶¶ 18-
18 23; Tulyathan Decl. ¶¶ 5-10; Marder Decl. ¶¶ 6-11.

19 As discussed above, Plaintiff’s counsel conducted a thorough investigation of the
20 allegations involved in this case since the inception. Each side has apprised the other of their
21 respective factual contentions, legal theories, and defenses, resulting in extensive arm’s length
22 negotiations taking place among the Parties.

23 The settlement for each participating Class Member is fair, reasonable, and adequate,
24 given the inherent risks of litigation, including the substantial risks relative to class certification,
25 and the costs of pursuing such litigation. The settlement is the result of extensive arm’s length
26 negotiations between the Parties and their counsel.

27 Although Plaintiff believes that a class can be certified, Plaintiff also believes in the
28 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 operative Complaint, the possibility of non-certification, and potential for appeals. Lee Decl. ¶¶ 15.

Despite the asserted fairness of the settlement terms, as set forth in the Notice of Settlement, should any Class Member wish to pursue his or her own case for the claims being released herein, each Class Member has the right to submit a request for exclusion (*i.e.*, opt-out) from the settlement. Moreover, as set forth in the Notice of Settlement, Class Members are advised of their right to attend the final approval hearing and object to any of the terms contained in the proposed Settlement Agreement, provided that they give proper notice to the Parties and the Court.

H. Settlement Terms and Evaluation

1. Proposed Terms of the Settlement

This is a non-reversionary settlement wherein Class Members will be automatically paid out of the settlement if he/she does not opt-out of the settlement. The key terms of the settlement are as follows.

The Settlement Agreement provides for a Maximum Settlement Amount of Thirty Thousand Dollars and Zero Cents (\$30,000.00). Settlement Agreement ¶ 17. Attorneys' fees of up to one-third (1/3) of the Maximum Settlement Amount (\$10,000.00) will be paid to Class Counsel along with costs of up to \$5,000.00. *Id.* ¶ 45. A Class Representative Enhancement Award of up to \$2,500.00 will be paid to Plaintiff. *Id.* ¶ 46. The Settlement Administrator will be paid up to \$4,250.00 for the costs of administering this settlement. *Id.* ¶ 47. The PAGA Allocation is Two Thousand Dollars (\$2,000.00), of which 75% (\$1,500.00) shall be paid to the LWDA and 25% (\$500.00) shall be paid to the PAGA Employees. *Id.* ¶ 48.

2. Nature of Any Injunctive Relief

The Settlement Agreement does not provide for any injunctive relief.

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

Each Class Member who does not request exclusion from the settlement shall receive an Individual Settlement Payment and, if applicable, an Individual PAGA Payment.

1 The Individual Settlement Payment shall be calculated based on a pro-rata share of the
2 Net Settlement Amount, as determined by the number of Class Members who received an initial
3 wage payment during the Class Period. Settlement Agreement ¶ 49.a.

4 Each PAGA Employee will receive an Individual PAGA Payment, which shall be paid
5 from the PAGA Employee Allocation. Settlement Agreement ¶ 50. The Individual PAGA
6 Payment will be calculated by dividing the PAGA Allocation allocated to PAGA Employees by
7 the total number of PAGA Employees who received an initial wage payment during the PAGA
8 Period. *Id.* PAGA Employees shall receive the Individual PAGA Payment regardless of their
9 decision to request exclusion from the Settlement Class. *Id.* ¶ 14.

10 Based on the Net Settlement Amount, on a pure raw average, each Class Member will
11 receive approximately \$48.45. Lee Decl. ¶ 9. Such amounts for each person could increase or
12 decrease depending on a number of factors, including the number of opt outs received. The
13 approximate amount each person will be entitled to will not be known until the class data is
14 transferred to the Settlement Administrator for processing.

15 **4. Whether, and Under What Circumstances, Amounts May Revert to**
16 **Defendant**

17 This is a non-reversionary settlement as the entirety of the settlement amount will be fully
18 paid out. Funds represented by Individual Settlement Payment and Individual PAGA Payment
19 checks remaining un-cashed for more than 120 days after issuance will be tendered to the
20 Controller of the State of California to be held pursuant to the Unclaimed Property Law,
21 California Civil Code § 1500, *et seq.*, for the benefit of those Class Members and PAGA
22 Employees who did not cash their checks until such time that they claim their property.
23 Settlement Agreement ¶ 72.

24 **5. Scope of the Release of Class Members' Claims**

25 Class Members shall release the following claims that arose during the Class Period
26 ("Released Class Claims"):

- 27 (a) All causes of action and factual or legal theories that were alleged
28 in the Class Action Complaint based upon Defendant's alleged
failure to provide the beginning and/or ending dates on the Class

Members' Initial Physical Wage Statements. This release includes all claims for damages, penalties, liquidated damages, interest, attorneys' fees and costs, and other amounts recoverable under said claims, causes of action or legal theories of relief.

Settlement Agreement ¶ 83.

PAGA Employees shall release the following claims that arose during the PAGA Period ("Released PAGA Claims"):

(a) All claims for statutory penalties that could have been sought by the Labor Commissioner based upon Defendant's alleged failure to provide the beginning and/or ending dates on the PAGA Employees' Initial Physical Wage Statements. Plaintiff and the State of California do not release any PAGA Employees' individual claims for wages or damages.

Settlement Agreement ¶ 82.

As shown above, the release being provided by the Class Members is significantly limited as it only applies to the very first, i.e., initial, wage statement each class member received, and nothing else.

6. Tax Treatment of Settlement Amounts

Individual Settlement Payments shall be allocated as one hundred percent (100%) penalties and interest, for which an appropriate IRS Form 1099 shall issue. Settlement Agreement ¶ 74.

Individual PAGA Payments shall be allocated as one hundred percent (100%) penalties, for which an appropriate IRS Form 1099 shall issue. Settlement Agreement ¶ 75.

7. 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, he/she must submit an exclusion request. Such obligations are thoroughly identified in the Notice of Settlement. Settlement Agreement, Ex. A.

///

1 **I. Submission of Claims, Exclusions, Objections**

2 Class Members will not be required to submit a claim form to receive compensation.
3 Instead, this is a non-reversionary Settlement Agreement. Settlement Agreement, Ex. A. Class
4 Members will be provided 45 calendar days to opt out or object to the settlement. Settlement
5 Agreement ¶ 29. Any Class Member who does not opt-out of the settlement will be
6 automatically issued his/her share of the settlement proceeds. Given that this is a non-
7 reversionary settlement, the Parties believe that 45 calendar days is sufficient time for Class
8 Members to object or opt-out of the settlement. Further, Class Members will be notified of the
9 Fairness/Final Approval hearing and will have an opportunity to appear at the Fairness hearing.

10 **J. Notice to Class Members**

11 The Notice of Settlement will be sent in English and Spanish. Settlement Agreement ¶
12 56. Within twenty-one (21) calendar days after entry of the Preliminary Approval Order,
13 Defendant shall provide the Settlement Administrator with the Class List for purposes of sending
14 the Notice of Settlement to Class Members. *Id.* ¶ 54. Within ten (10) days after receipt of the
15 Class List from Defendant, the Settlement Administrator will mail the Notice of Settlement to
16 Class Members. *Id.* ¶ 56. Before the initial mailing of the Notice of Settlement, the Settlement
17 Administrator shall make a good-faith attempt to obtain the most-current names and postal mail
18 addresses for all Class Members to receive such postal mail, including reviewing the addresses
19 with the National Change of Address Database. *Id.* ¶55. If any Notice of Settlement sent via U.S.
20 mail to any Class Member is returned to the Settlement Administrator with a forwarding address,
21 the Settlement Administrator shall forward the postal mailing to that address. *Id.* If the returned
22 Notice of Settlement does not include a forwarding address, the Settlement Administrator shall
23 attempt to locate a current mailing address for the Class Member by skip tracing and will
24 perform a single remailing of the Notice of Settlement to the updated address identified. *Id.*

25 The Notice of Settlement will include the material terms of the proposed settlement and
26 an estimate of the expected Individual Settlement Payment and Individual PAGA Payment
27 amounts. *Id.* ¶ 57. Based on the foregoing, the notice procedures fully comply with California
28 Rules of Court Rule 3.766 (d) & (e).

1 **K. Costs and Fees**

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

3 California state and federal courts have recognized that an appropriate method for
4 determining award of attorneys' fees is based on a percentage of the total value of benefits to
5 Class Members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254
6 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472,
7 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of
8 this equitable doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs
9 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
10 burden alone." *Vincent*, 557 F.2d at 769.

11 Under California law, the award of attorneys' fees in common fund wage and hour class
12 action settlements should start with the percentage method. *See Laffitte v. Robert Half Int'l*, 1
13 Cal. 5th 480, 503 (Aug. 11, 2016) ("We join the overwhelming majority of federal and state
14 courts in holding that when class action litigation establishes a monetary fund for the benefit of
15 the class members, and the trial court in its equitable powers awards class counsel a fee out of
16 that fund, the court may determine the amount of a reasonable fee by choosing an appropriate
17 percentage of the fund created."). Under the percentage of the fund method, the Court's objective
18 remains to "mimic the market" in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361,
19 363 (7th Cir. 1998) (J. Posner) ("When a fee is set by a court rather than by contract, the object is
20 to set it at a level that will approximate what the market will set.... The judge, in other words, is
21 trying to mimic the market in legal services.").

22 An award of one-third of the fund in attorneys' fees mimics the marketplace as it "is
23 supported by the fact that typical contingency fee agreements provide that class counsel will
24 recover 33% if the case is resolved before trial and 40% if the case is tried." *Fernandez v.*
25 *Victoria Secret Stores LLC*, 2008 WL 8150856, *16 n. 59 (C.D. Cal. July 21, 2008) (citing
26 Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-*
27 *Competitive Fees* (Fall 2003) 81 Wash U. L. Q. 653, 659 n. 11). Indeed, "empirical studies [that]
28 show that...fee awards in class actions average around one-third of the recovery." *Chavez v.*

1 *Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008).

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

7 Moreover, in the *Laffitte* intermediate court decision, the court observed that “33 1/3
8 percent of the common fund is consistent with, and in the range of, awards in other class action
9 lawsuits.” *Laffitte v. Robert Half Int’l*, 231 Cal. App. 4th 860, 871 (2014). Here, the fee award
10 representing one-third of the fund clearly falls within that range and is consistent with other
11 comprehensive surveys of class action settlements and fee awards. *See Fitzpatrick, An Empirical*
12 *Study of Class Action Settlements and Their Fee Award*, 7 J. Empirical Leg. Stud. 811, 833
13 (2010) (analyzing 444 cases between 2006-2007 and concluding that “[m]ost fee awards were
14 between 25 percent and 35 percent, with almost no awards more than 35 percent.”); Eisenberg &
15 Miller, *Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008*, 7 J. of
16 Empirical Leg. Stud. 248, 262, fn.16 (2010) (independent studies of class action litigation
17 nationwide conclude that fees representing one-third of the total recovery is consistent with
18 market rates).

19 The results delivered by Plaintiff’s counsel also support the requested percentage of the
20 fund. Here, the Parties have agreed to a payment of a maximum of one-third of the settlement
21 (\$10,000.00) for payment to Class Counsel as attorneys’ fees. Settlement Agreement ¶ 45. The
22 Parties have agreed to a payment of the foregoing attorneys’ fees and, thus, this payment should
23 be presumed to be fair.

24 Further, the Parties have agreed to reimbursement of class counsel’s litigation costs of up
25 to \$5,000.00. Settlement Agreement ¶ 45. Class counsel have, at their own risk, expended costs,
26 for example, to file this instant action, effect service of process, and pay other litigation-related
27 costs, and will be submitting detailed cost sheets for the respective costs incurred prior to the
28 Motion for Final Approval. 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

Plaintiff requests a modest enhancement of \$2,500.00. Settlement Agreement ¶ 46. Plaintiff provided documents and information to Class Counsel and reviewed the Settlement Agreement and declaration. Catelli Decl. ¶ 6. Moreover, as part of his duties as the representative, Plaintiff provided invaluable information, evidence, and documents that resulted in this settlement. *Id.* ¶ 7.

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 also faced the risk of being subjected to Defendant's costs had Plaintiff lost this case. Plaintiff assumed these risks 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 fees and 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.

Finally, as part of this settlement, Plaintiff has agreed to provide a full, complete, and general release of his individual claims, including any rights under Civil Code § 1542, which was not required of Class Members.

Notably, courts have routinely granted approval of representative enhancements for far greater amounts than the \$2,500.00 sought by Plaintiff in this case. *See, e.g., Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three incentive awards of \$35,000); *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). Here, Plaintiff requests a modest enhancement of \$2,500.00, which is reasonable and consistent with case law.

3. Settlement Administration Costs

The Parties have agreed to payment of a maximum of \$4,250.00 to the Settlement Administrator, Phoenix Settlement Administrators, for administering this settlement, including, but not limited to, printing, distributing, and tracking documents for this settlement, tax reporting, distributing the Maximum Settlement Amount, and providing necessary reports and declarations, as requested by the Parties. Settlement Agreement ¶¶ 31, 47, 53-58. Phoenix Settlement Administrators is a well-recognized class action settlement administrator. The Parties believe that the administration fee is reasonable and should be approved.

IV. THE LWDA HAS BEEN PROVIDED WITH NOTICE OF THIS MOTION

Concurrent with the filing of this Motion, Plaintiff uploaded this motion and proposed order to the LWDA's website. Lee Decl. ¶ 24; Ex. B.

V. PROPOSED SCHEDULE FOR CLASS NOTICE, OBJECTION, OPT OUT AND MOTION FOR APPROVAL, ATTORNEYS' FEES, AND FINAL ACCOUNTING

Plaintiff requests that a final fairness/approval hearing be set for approximately 5 months after the hearing on Plaintiff's Motion for Preliminary Approval.

VI. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR PRELIMINARY APPROVAL

Here, the proposed settlement is fair, adequate, and reasonable. It will result in both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the result of informed, extensive, and arm's length negotiations conducted by counsel for respective Parties who are experienced in wage and hour class action litigation. For the foregoing reasons, Plaintiff respectfully request that the Court grant preliminary approval of the proposed settlement, sign the proposed Order, approve and authorize mailing of the proposed Notice of Settlement, and set a date for a final approval hearing 5 months after the hearing on Plaintiff's Motion for Preliminary Approval.

1 DATED: December 14, 2022

DIVERSITY LAW GROUP, P.C.

2 By: 

3 Larry W. Lee

4 Kwanporn "Mai" Tulyathan

5 Attorneys for Plaintiff, the Class, and Aggrieved
6 Employees

1 **PROOF OF SERVICE**

2 **(Code of Civil Procedure Sections 1013a, 2015.5)**

3
4 STATE OF CALIFORNIA]
5 COUNTY OF LOS ANGELES]ss.
6]

7 I am employed in the County of Los Angeles, State of California. I am over the age of
8 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite
9 1250, Los Angeles, California 90071.

10 On December 15, 2022, I served the following document(s) described as:

- 11 **1. PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY**
APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT; AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
- 12 **2. DECLARATION OF WILLIAM L. MARDER IN SUPPORT OF PLAINTIFF'S**
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA
SETTLEMENT
- 13 **3. DECLARATION OF KWANPORN "MAI" TULYATHAN IN SUPPORT OF**
PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT
- 14 **4. DECLARATION OF LARRY W. LEE IN SUPPORT OF PLAINTIFF'S MOTION**
FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT
- 15 **5. DECLARATION OF TONY CATELLI IN SUPPORT OF PLAINTIFF'S**
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA
SETTLEMENT
- 16 **6. [PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR**
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

17 on the interested parties in this action as follows:

18
19 Michael J. Studenka
20 Michael.Studenka@ndlf.com
21 Newmeyer & Dillion LLP
22 895 Dove Street, 5th Floor
23 Newport Beach, California 92660
24 *Attorneys for Defendant Innovative Construction Solutions*
25
26
27
28

X BY ELECTRONIC SERVICE: Based on a court order I caused the above-entitled document(s) to be served through the Odyssey eFileCA E-Filing System at the website www.california.tylerhost.net, addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the filing receipt/confirmation will be filed, deposited, or maintained with the original document(s) in this office.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 15, 2022, at Los Angeles, California.


Erika Mejia