

Justin F. Marquez (SBN 262417)
justin@wilshirelawfirm.com
Christina M. Le (SBN 237697)
cle@wilshirelawfirm.com
Zachary D. Greenberg (SBN 331501)
zgreenberg@wilshirelawfirm.com
WILSHIRE LAW FIRM
3055 Wilshire Blvd., 12th Floor
Los Angeles, California 90010
Telephone: (213) 381-9988
Facsimile: (213) 381-9989

Attorneys for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN JOAQUIN**

KENNETH WILBURN, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

CONCRETE, INC., d/b/a KNIFE RIVER
CONSTRUCTION, a California corporation,
MDU RESOURCES GROUP, INC., d/b/a
KNIFE RIVER CONSTRUCTION, a Delaware
corporation, KNIFE RIVER CONSTRUCTION,
a Delaware corporation, and DOES 1 through 10,
inclusive,

Defendants.

Case No.: STK-CV-UOE-2021-10183
[Consolidated with STK-CV-UOE-2022-
0002317]

CLASS ACTION

[Assigned for all purposes to Judge Robert T.
Waters, Dept. 11B]

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

[Filed concurrently with: Plaintiff's Notice of
Motion and Motion for Preliminary Approval
of Class Action Settlement; Memorandum of
Points and Authorities; Declarations of Justin
F. Marquez, Kenneth Wilburn, Ryan L.
Eddings, and Julie Green; and [Proposed]
Order]

PRELIMINARY APPROVAL HEARING

Date: ~~August 11, 2023~~ **SEP - 8 2023**
Time: ~~1:30 p.m.~~ **9am**
Dept: 11B

Complaint filed: October 29, 2021

1 **TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that on August 11, 2023, at 1:30 p.m. in Department 11B of San
3 Joaquin Superior Court, located at 180 E Weber Avenue, Stockton, CA 95202, pursuant to Code
4 of Civil Procedure § 382 and California Rules of Court 3.769, *et seq.*, Plaintiff Kenneth Wilburn
5 (“Plaintiff”) will move the Court for an Order granting preliminary approval of the proposed class
6 action settlement between Plaintiff and Defendants Concrete, Inc., doing business as Knife River,
7 MDU Resources Group, Inc., and Knife River Corporation.

8 Plaintiff further moves the Court for an Order:

- 9 1. Granting preliminary approval of the Class Action and PAGA Settlement Agreement
10 and Class Notice;
11 2. Certifying a Class for settlement purposes only;
12 3. Approving the Class Notice and the plan for distribution to Settlement Class Members;
13 4. Appointing Plaintiff Kenneth Wilburn as Class Representative for settlement purposes
14 only;
15 5. Appointing Plaintiff’s Counsel, Wilshire Law Firm, PLC, as Class Counsel for
16 settlement purposes only;
17 6. Appointing CPT Group, Inc. as the Settlement Administrator; and
18 7. Scheduling a Final Approval Hearing.

19 The Motion will be based upon this Notice, the attached Memorandum of Points and
20 Authorities, the Declarations of Justin F. Marquez, Kenneth Wilburn, Ryan L. Eddings, and Julie
21 Green filed concurrently herewith, the records and files in this action, and any other further
22 evidence or argument that the Court may properly receive at or before the hearing.

23 Respectfully submitted,

24 Dated: July 20, 2023

WILSHIRE LAW FIRM

25 By: 

26 Justin F. Marquez
27 Christina M. Le
28 Zachary D. Greenberg
Attorneys for Plaintiff

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	SUMMARY OF THE LITIGATION AND SETTLEMENT.....	1
A.	Plaintiff's Claims	1
B.	Discovery and Investigation.....	2
C.	Settlement Negotiations	3
D.	Key Terms of the Proposed Settlement.....	4
III.	DISCUSSION	7
A.	The Settlement Is Fair, Reasonable, Adequate, and the Product of Investigation, Litigation, and Negotiation	8
1.	The Settlement Is the Product of Discovery, Investigation, and Informed and Non-Collusive Arm's-Length Negotiations.....	8
2.	The Settlement Is Fair and Reasonable in Light of the Parties' Respective Legal Positions.....	9
3.	Class Counsel Has Extensive Experience in Class Action Litigation.....	10
B.	The Proposed Class Notice of Settlement Should Be Approved	10
C.	The Proposed Attorneys' Fees and Costs Are Reasonable	10
1.	Class Counsel Request an Award of Fees Based on the "Common Fund" Method	10
2.	The Requested Fee Award Is in Line with Typical Cases	11
3.	This Matter Involves A "Fee-Shifting" Provision of the Labor Code	12
4.	The Experience, Reputation and Ability of Class Counsel Support the Requested Fee Award	12
D.	The Service Award to Named Plaintiff Is Reasonable.....	13
E.	There is Good Cause for Selecting JVS SoCal As the <i>Cy Pres</i> Recipient.....	14
IV.	CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS WARRANTED.....	15
A.	Legal Standard	15

1	B.	Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for	
2		Settlement Purposes	16
3	1.	The Class is Ascertainable and Numerous.....	16
4	2.	There are Many Common Issues of Law and Fact Which Predominate.....	17
5	3.	Plaintiff’s Claims Are Typical of the Claims of the Class.....	17
6	4.	Plaintiff and His Counsel Meet the Adequacy Requirement	18
7	5.	A Class Action is Superior to a Multiplicity of Litigation.....	18
8	V.	THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND.....	19
9	A.	The Proposed Notice Plan Satisfies Due Process	19
10	B.	The Notice is Accurate and Informative	19
11	VI.	CONCLUSION	20

TABLE OF AUTHORITIES

STATE CASES

<i>Bowles v. Super. Ct.</i> (1955) 44 Cal.2d 574	17
<i>Cartt v. Super Ct.</i> (1975) 50 Cal.App.3d 960.....	19
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43.....	12
<i>City and County of San Francisco v. Sweet</i> (1995) 12 Cal.4th 105.....	11
<i>Classen v. Weller</i> (1983) 145 Cal.App.3d 27	18
<i>Clothesrigger, Inc. v. GTE Corp.</i> (1987) 191 Cal.App.3d 605.....	17
<i>Collins v. Rocha</i> (1972) 7 Cal.3d 232	17
<i>D’Amico v. Bd. of Medical Examiners</i> (1974) 11 Cal.3d 1	10
<i>Daar v. Yellow Cab Co.</i> (1967) 67 Cal. 2d 695.....	16
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794	7
<i>Gentry v. Super. Ct.</i> (2007) 42 Cal.4th 443.....	13
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116.....	7
<i>Laffitte v. Robert Half Int’l Inc.</i> (2016) 1 Cal.5th 480.....	11
<i>Linder v. Thrifty Oil Co.</i> (2000) 23 Cal.4th 429.....	16
<i>Mallick v. Super. Ct.</i> (1979) 89 Cal.App.3d 434	7
<i>McGhee v. Bank of America</i> (1976) 60 Cal.App.3d 442	18
<i>Miller v. Woods</i> (1983) 148 Cal. App. 3d 862	18
<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i> (2010) 186 Cal.App.4th 399	7, 13
<i>Quinn v. State of California</i> (1995) 15 Cal.3d 162.....	11
<i>Richmond v. Dart Indus., Inc.</i> (1981) 29 Cal. 3d 462.....	16
<i>Rose v. City of Hayward</i> (1981) 126 Cal.App.3d 926	17
<i>Serrano v. Priest</i> (1977) 20 Cal.3d 25.....	10
<i>Stamburgh v. Super. Ct.</i> (1976) 62 Cal.App.3d 231	8
<i>Wershba v. Apple Computers, Inc.</i> (2001) 91 Cal.App.4th 224.....	9
<i>Wilner v. Sunset Life Ins. Co.</i> (2000) 78 Cal.App.4th 952	17

FEDERAL CASES

<i>Dennis v. Kellogg Co.</i> (9th Cir. 2012) 697 F.3d 858.....	15
<i>Frank v. Eastman Kodak Co.</i> (W.D.N.Y. 2005) 228 F.R.D. 174	13
<i>Leyva v. Medline Ind.</i> (9th Cir. 2013) 716 F.3d 510	19
<i>Priddy v. Edelman</i> (6th Cir. 1989) 883 F.2d 438	8
<i>Rodriguez v. W. Publ'g Corp.</i> (9th Cir. 2009) 563 F.3d 948	13
<i>Six Mexican Workers v. Arizona Citrus Growers</i> (9th Cir. 1990) 904 F.2d 1301.....	15
<i>Van Vranken v. Atlantic Richfield Company</i> (N.D. Cal. 1995) 901 F.Supp. 294.....	12

STATE STATUTES

Cal. Civ. Proc. Code § 382.....	4, 16, 17
Cal. Civ. Proc. Code § 384.....	4, 15
Labor Code § 90.5	14
Labor Code § 1194	13

RULES

California Rules of Court, Rule 3.766.....	19
California Rules of Court, Rule 3.769(f).....	11

TREATISES

Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 8.39	20
Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 11.51	8
Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 14.03	12

OTHER AUTHORITIES

Theodore Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”, 53 UCLA L. Rev. 1303 (2006)	15
--	----

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Kenneth Wilburn (“Plaintiff”) seeks preliminary approval of a proposed \$535,000.00 non-reversionary, wage and hour class action settlement with Defendants Concrete, Inc., doing business as Knife River, MDU Resources Group, Inc., and Knife River Corporation (“Defendants,” and together with Plaintiff, the “Parties”). The Settlement will provide substantial monetary payments to approximately 195 class members. And, as set forth more fully below, the proposed Settlement satisfies all the criteria for settlement approval under California law. The Settlement was reached after extensive investigation, discovery, and negotiations. The negotiations were at arms-length and were facilitated by an experienced class action mediator, Lisa Klerman, over the course of a full day of mediation that was conducted via Zoom. Accordingly, Plaintiff requests that the Court preliminarily approve the proposed Settlement, certify the proposed settlement class for settlement purposes only, approve the proposed notice, and set a Final Approval Hearing.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff’s Claims

This is a wage and hour class and Private Attorneys General Act (“PAGA”) (Cal. Lab. Code §§ 2699, et seq.) representative action. Plaintiff and putative class members worked in California as hourly-paid, non-exempt employees for Defendants during the class period. Defendants are one of the nation’s largest construction materials and contracting businesses, building roads, bridges, and airport runways, among many other things. Defendants operate multiple job sites throughout the state of California. (Declaration of Justin F. Marquez in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement [“Marquez Decl.”], ¶ 2.)

Plaintiff alleges that Defendants’ payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiff alleges that Defendants had non-compliant wage and hour policies throughout most of the relevant class period and failed to provide employees with legally compliant meal and rest periods which it failed to pay all premiums for. Based on these allegations, Plaintiff asserts claims against Defendants for failure to pay minimum and

1 straight time wages, failure to pay overtime wages, failure to provide meal periods, failure to
2 authorize and permit rest periods, failure to timely pay all final wages at termination, failure to
3 provide accurate itemized wage statements, unfair business practices, and civil penalties under
4 PAGA. (*Id.* at ¶ 3.) Defendants deny all allegations and contend that their employment
5 practices were at all relevant times compliant with applicable California law.

6 On October 29, 2021, Plaintiff filed a putative wage-and-hour class action complaint
7 (“Class Action”) against Defendants for: (1) failure to pay minimum and straight time wages;
8 (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize
9 and permit rest periods; (5) failure to timely pay final wages at termination; (6) failure to provide
10 accurate itemized wage statements; and (7) violation of California’s Unfair Competition Law,
11 California Business and Professions Code §§ 17200, et seq. On November 2, 2021, Plaintiff
12 sent a notice to Defendants and the California Labor & Workforce Development Agency
13 (“LWDA”) alleging wage-and-hour violations pursuant to PAGA, Cal. Lab. Code §§ 2699, et
14 seq. On April 19, 2022, Plaintiff sent an amended PAGA notice to Defendants and the LWDA
15 further detailing the wage-and-hour violations that he and other aggrieved employees
16 experienced while employed by Defendants. (*Id.* at ¶4.)

17 On March 30, 2022, Plaintiff filed a separate complaint to assert his PAGA claims. (*Id.*
18 at ¶5.)

19 Pursuant to a stipulation filed by the Parties to consolidate the Class and PAGA Actions,
20 on December 16, 2022, the Court ordered the two matters consolidated, with the Class Action
21 designed as the lead case. (*Id.* at ¶6.)

22 **B. Discovery and Investigation**

23 Following the filing of the Complaint, the Parties exchanged documents and information
24 before mediating this action. Defendants produced timekeeping and pay records for the class
25 members. Defendants also provided documents of their wage and hour policies and practices
26 during the class period, and information regarding the total number of current and former
27 employees in its informal discovery responses. (*Id.* at ¶7.)

28 After reviewing documents regarding Defendants’ wage and hour policies and practices,

1 analyzing Defendants' timekeeping and payroll records, Class Counsel was able to evaluate the
2 probability of class certification, success on the merits, and Defendants' maximum monetary
3 exposure for all claims. Class Counsel also investigated the applicable law regarding the claims
4 and defenses asserted in the Litigation. Class Counsel reviewed these records and utilized an
5 expert to prepare a damages analysis prior to mediation. (*Id.* at ¶8.)

6 C. Settlement Negotiations

7 On October 31, 2022, the Parties participated in private mediation with experienced class
8 action mediator, Lisa Klerman, Esq. (*Id.* at ¶ 9.) The mediation was conducted via Zoom. The
9 settlement negotiations were at arm's length and, although conducted in a professional manner,
10 were adversarial. The Parties went into the mediation willing to explore the potential for a
11 settlement of the dispute, but each side was also prepared to litigate their position through trial
12 and appeal if a settlement had not been reached. (*Id.*)

13 After extensive negotiations and discussions regarding the strengths and weaknesses of
14 Plaintiff's claims and Defendants' defenses, the Parties were able to reach a resolution, the
15 material terms of which are encompassed within the Settlement Agreement. (*Id.* at ¶ 10; Ex. 1
16 [Class Action and PAGA Settlement Agreement and Class Notice ("Settlement" or "Settlement
17 Agreement")].

18 Class Counsel has conducted a thorough investigation into the facts of this case. Based
19 on the foregoing discovery and their own independent investigation and evaluation, Class
20 Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best
21 interests of the Settlement Class Members in light of all known facts and circumstances, the risk
22 of significant delay, the defenses that could be asserted by Defendant both to certification and
23 on the merits, trial risk, and appellate risk. (Marquez Decl., ¶ 17.)

24 Indeed, the \$535,000.00 Settlement represents **61.2% of the realistic maximum**
25 **recovery of \$873,624.72.** (*Id.* at ¶ 25.) Although Class Counsel estimated that Defendant's
26 maximum potential liability for all claims was approximately \$7.8 million, when the risk of
27 prevailing at certification and trial are factored into the equation, Class Counsel believes that
28 Defendants' realistic exposure was \$873,624,72, meaning the Settlement achieves a significant

1 recovery. (*Id.* at ¶¶ 17-29.) Considering the risk and uncertainty of prevailing at class
2 certification and at trial, this is an excellent result for the Class. Indeed, because of the proposed
3 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an
4 unfavorable judgment.

5 **D. Key Terms of the Proposed Settlement**

6 The Parties used the Los Angeles Superior Court’s Form Class Action and PAGA
7 Settlement Agreement and Class Notice. A document showing edits the parties made to the
8 template in redline is attached to the Declaration of Justin F. Marquez as Exhibit 2. The
9 Settlement’s key terms include:

10 1. Settlement Class: For settlement purposes only, the Parties agree to the certification
11 of a class pursuant to California Code of Civil Procedure § 382 defined as: “all persons employed
12 by Defendants in California and classified as an hourly-paid, non-exempt employee during the
13 Class Period.” (Settlement, § 1.4.)

14 2. Class Period: “means the period that starts on May 4, 2017 and shall end on January
15 31, 2023” (Settlement, § 1.11.)

16 3. PAGA Period: “means the period that starts on May 4, 2020 and shall end on
17 January 31, 2023” (Settlement, § 1.30.)

18 4. Participating Class Members: “means a Class Member who does not submit a valid
19 and timely Request for Exclusion from the Settlement.” (Settlement, § 1.34.)

20 5. Aggrieved Employee: “means a person employed by Defendants in California and
21 classified as an hourly-paid, non-exempt employee who worked for Defendants during the PAGA
22 Period.” (Settlement, § 1.3.)

23 6. Gross Settlement Amount: This amount is \$535,000.00, for all claims, including
24 wages, interest, the Class Counsel Award, Litigation costs, Settlement Administration Costs,
25 payment to the Labor and Workforce Development Agency (“LWDA”) for the alleged PAGA
26 penalties, all other penalties, and the Class Representative Service Award. (Settlement, § 1.21.)

27 7. Uncashed Checks & Cy Pres: If a settlement check is returned to the Settlement
28 Administrator as undeliverable, the Settlement Administrator shall promptly attempt to obtain a

valid mailing address by performing a skip trace search and, if another address is identified, shall mail the check to the newly identified address. (Settlement, §§ 4.4.1, 4.4.2.) Any settlement checks remaining uncashed after one hundred and eighty (180) days shall be deemed unpaid residue pursuant Code of Civil Procedure Section 384(a), and unpaid residue (uncashed or returned checks) will be paid to Legal Aid at Work. (Settlement, § 4.4.3.)

8. Release by Participating Class Members Who Are Not Aggrieved Employees: All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from (i) all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint and ascertained in the course of the Action, including any and all claims for: (1) failure to pay minimum and straight time wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate itemized wage statements; (7) violation of California’s Unfair Competition Law, California Business and Professions Code §§ 17200, et seq. Except as set forth in Section 6.3 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers’ compensation, or claims based on facts occurring outside the Class Period. (Settlement, § 6.2.)

9. No Reversion: “None of the Gross Settlement Amount will revert to Defendants.” (Settlement, § 3.1.)

10. PAGA Penalties and Allocation: The settlement includes \$25,000.00 allocated to Plaintiff’s claims under PAGA, with 75% of which (\$18,750.00) being paid to the LWDA and 25% (\$6,250.00) being paid to the Participating PAGA Members. (Settlement, § 3.2.5.) Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶ 11.)

11. Net Settlement Fund: The “Net Settlement Fund” or “Net Settlement Amount” is the amount that remains and that shall be paid to Settlement Class Members after the following

amounts are subtracted: (1) attorneys' fees and Litigation costs, (2) Administrative Costs, (3) enhancement to the Named Plaintiff, and (4) the penalties recoverable pursuant to the PAGA. (Settlement, § 1.27.)

12. Distribution Formula: "An Individual Class Payment calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks." (Settlement, § 3.2.4.) As to PAGA: "The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties (\$2,500) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods." (Settlement, § 3.2.5.1.)

13. Tax Allocation: Any settlement money paid to Settlement Class Members will be allocated as 34% wages and 33% in penalties and 33% interest. (Settlement, § 3.2.4.1.)

14. Class Representative Service Award: Subject to Court approval, Plaintiff shall be paid an enhancement award not to exceed \$10,000.00. (Settlement, § 3.2.1.) This amount is for Plaintiff's time and effort in bringing and presenting the action, and in exchange for a general release of all claims, known or unknown, pursuant to Civil Code Section 1542. (Settlement, § 3.2.1.) If the Court approves a lesser enhancement, then the unapproved portion or portions shall revert into the Net Settlement Amount to be distributed between the participating Settlement Class Members on a pro-rata basis. (Settlement, § 3.2.1.)

15. Attorneys' Fees and Costs: The Settlement provides that Defendants will not oppose a fee application of up to 33 1/3% (\$178,333.33) of the Gross Settlement Amount, plus out-of-pocket costs not to exceed \$20,000.00. (Settlement, § 3.2.2 and Amendment to Settlement, § 3.2.2.) At this time, Class Counsel's costs are approximately \$16,644.92. (Marquez Decl., ¶ 39.)

16. Notice of Proposed Class Action Settlement: The Notice sets forth in plain terms, a statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees, costs, and service award being sought, and an explanation of how the settlement allocations are calculated. (Settlement, Ex. 1.) The Notice also includes an opt-out form that class members

1 can complete in the event they decide to not participate in the settlement. (*Id.*) Class Members
2 will be notified by first-class mail of the settlement. (Settlement, § 8.4.) CPT Group, Inc., the
3 proposed Settlement Administrator, will undertake its best efforts to ensure that the notice is
4 provided to the current addresses of class members, including conducting a national change of
5 address search and re-mailing the notice to updated addresses. (*Id.*) (Marquez Decl., ¶ 13; Ex. 3
6 [Settlement Administrator Bid].)

7 **III. DISCUSSION**

8 To prevent fraud, collusion, or unfairness to the class, the settlement of a class action
9 requires court approval. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-01.) This
10 Court has wide discretion to determine whether the proposed settlement is fair. (*Mallick v. Super.*
11 *Ct.* (1979) 89 Cal.App.3d 434, 438.) Fairness is presumed when: (1) the settlement is reached
12 through arm's-length bargaining; (2) investigation is sufficient to allow counsel and the court to
13 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors
14 is small. (*Dunk*, 48 Cal.App.4th at p. 1800.)

15 In considering whether a settlement is reasonable, the trial court should consider relevant
16 factors, which may include the strength of Plaintiff's case, the risk, expense, complexity and likely
17 duration of further litigation, the risk of maintaining class action status through trial, the amount
18 offered in settlement, the extent of discovery completed and the stage of the proceedings, the
19 experience and views of counsel, the presence of a governmental participant, and the reaction of
20 the class members to the proposed settlement. (*Kullar, supra*, 168 Cal.App.4th at p. 128.) In order
21 to approve a class action settlement, the court must satisfy itself that the class settlement is within
22 the "ballpark" of reasonableness. (*Id.* at p. 133.) The record need not contain an explicit statement
23 of the maximum theoretical recovery. (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*
24 (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar* does not require "an explicit statement of
25 the maximum amount the Plaintiff class could recover if it prevailed on all its claims", but instead,
26 only an "understanding of the amount that is in controversy and the realistic range of outcomes of
27 the litigation."].)

28 As discussed below, Class Counsel has provided information exceeding the threshold

required to provide this Court with materials and information necessary to determine that the proposed settlement is fair, adequate, and reasonable.

A. The Settlement Is Fair, Reasonable, Adequate, and the Product of Investigation, Litigation, and Negotiation

1. The Settlement Is the Product of Discovery, Investigation, and Informed and Non-Collusive Arm's-Length Negotiations

Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is offered; thus, there is a presumption here that the negotiations were conducted in good faith. (Conte & Newberg, *Newberg on Class Actions* (3rd Ed.) § 11.51.) Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 [“The fact that a Plaintiff might have received more if the case had been fully litigated is no reason not to approve the settlement.”].)

The Settlement was reached following extensive negotiations following a full day of mediation with experienced employment mediator, Lisa Klerman, Esq. (Marquez Decl., ¶¶ 9-10.) The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. (*Id.*) The Parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their or its position through trial and appeal if a settlement had not been reached. (*Id.*)

Prior to reaching this settlement, Class Counsel conducted informal discovery concerning the claims set forth in the Litigation, such as class member timekeeping and payroll records, Defendants' policies and procedures concerning the payment of wages, the provision of meal and rest breaks, issuance of wage statements, and providing all wages at separation, as well as information regarding the number of putative class members and the mix of current versus former employees, the wage rates in effect, and the amount of meal and rest period premium wages paid to class members. (*Id.* at ¶¶ 7-8.) In conjunction with their extensive factual investigation, Class Counsel investigated the applicable law regarding the claims and defenses asserted in the Litigation. (*Id.*) Thus, Plaintiff and his counsel were able to act intelligently and effectively in

1 negotiating the proposed Settlement. (*Id.*)

2 Class Counsel also has considerable experience and has demonstrated competence with
3 litigating wage and hour class actions. (*Id.* at ¶¶ 41-51.) Again, this supports the position that the
4 terms of the Settlement are premised on objective evidence that has been considered and weighed
5 in light of the risks, expenses, and time consumption to both sides of continued litigation of this
6 action.

7 **2. The Settlement Is Fair and Reasonable in Light of the Parties’**
8 **Respective Legal Positions**

9 A settlement is not judged against what Plaintiff might recover had he prevailed at trial, nor
10 does the settlement have to provide 100% of the damages sought to be fair and reasonable.
11 (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250 [“Compromise is inherent
12 and necessary in the settlement process...even if the relief afforded by the proposed settlement is
13 substantially narrower than it would be if the suits were to be successfully litigated, this is no bar
14 to a class settlement because the public interest may indeed be served by a voluntary settlement in
15 which each side gives ground in the interest of avoiding litigation.”].)

16 This settlement avoids the risks and the accompanying expense of further litigation.
17 (Marquez Decl., ¶ 27.) While Plaintiff is confident in the merits of his claims, a legitimate
18 controversy exists as to each cause of action. (*Id.* at ¶ 26.) Plaintiff also recognizes that proving
19 the amount of wages due to each class member would be an expensive, time-consuming, and
20 uncertain proposition. (*Id.*)

21 The proposed settlement of \$535,000.00 therefore represents a substantial recovery when
22 compared to Plaintiff’s reasonably forecasted recovery. (*Id.* at ¶¶ 17-29.) Because of the proposed
23 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an
24 unfavorable judgment. When considering the risks of litigation, the uncertainties involved in
25 achieving class certification, the burdens of proof necessary to establish liability, the probability
26 of appeal of a favorable judgment, it is clear that the settlement amount of \$535,000.00 is within
27 the “ballpark” of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed,***
28 ***each Settlement Class Member is eligible to receive an average net benefit of approximately***

1 **\$1,495.73.** (*Id.* at ¶ 28.)

2 **3. Class Counsel Has Extensive Experience in Class Action Litigation**

3 The settlement negotiations were conducted by highly capable and experienced counsel.
4 Class Counsel have a strong record of vigorous and effective advocacy for their clients and are
5 experienced in handling complex wage and hour class action litigation. (Marquez Decl., ¶¶ 41-
6 51.) Although Plaintiff and his counsel were prepared to litigate the claims alleged in the litigation,
7 they support the proposed Settlement as being in the best interests of the class.

8 **B. The Proposed Class Notice of Settlement Should Be Approved**

9 The Class Notice, in the form attached to the Settlement Agreement, should be approved
10 for dissemination to the class. The Notice informs the class of the terms of the settlement and of
11 their rights to be excluded from the settlement. And if there are class members who wish to object
12 to this proposed class action settlement, they will have the opportunity to file their objections and
13 be heard at the Final Approval Hearing. Accordingly, the proposed Notice meets all the
14 requirements of Rule 3.769(f) of the California Rules of Court.

15 **C. The Proposed Attorneys' Fees and Costs Are Reasonable**

16 Under the Settlement, subject to the Court's approval, Defendant agrees to pay Class
17 Counsel reasonable attorneys' fees in amount of \$178,333.33, which is 33 1/3% of the gross
18 Settlement Amount, and up to \$20,000.00 in costs. These amounts are disclosed to all class
19 members in the Notice of Proposed Class Action Settlement and are reasonable.

20 **1. Class Counsel Request an Award of Fees Based on the "Common**
21 **Fund" Method**

22 California courts have long awarded attorneys' fees as a percentage of the benefit created
23 by counsel in creating a common fund. The California Supreme Court held that "when a number
24 of persons is entitled in common to a specific fund, and an action brought by a Plaintiff or Plaintiff
25 for the benefit of all results in the creation or preservation of that fund, such Plaintiff or Plaintiff
26 may be awarded attorneys' fees out of the fund." (*Serrano v. Priest* (1977) 20 Cal.3d 25, 34,
27 quoting *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

28 Class Counsel seek an award of attorneys' fees on the "percentage of recovery/common

1 fund” theory. The purpose of this approach is to “spread litigation costs proportionally among all
2 the beneficiaries so that the active beneficiary does not bear the entire burden alone.” (*Vincent*,
3 *supra*, 557 F.2d at p. 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, the California
4 Supreme Court stated: “[O]ne who expends attorneys’ fees in winning a suit which creates a fund
5 from which others derive benefits may require those passive beneficiaries to bear a fair share of
6 the litigation costs.” (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet*
7 (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine
8 has been applied “consistently in California when an action brought by one party creates a fund in
9 which other persons are entitled to share.” (*Id.* at p. 110.)

10 The California Supreme Court affirmed in *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th
11 480 that, “when class action litigation establishes a monetary fund for the benefit of the class
12 members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the
13 court may determine the amount of a reasonable fee by choosing an appropriate percentage of the
14 fund created.” (*Id.* at p. 503.) The court explained: “The recognized advantages of the percentage
15 method—including relative ease of calculation, alignment of incentives between counsel and the
16 class, a better approximation of market conditions in a contingency case, and the encouragement
17 it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation—
18 convince us the percentage method is a valuable tool that should not be denied our trial courts.”
19 (*Id.* [internal citations omitted].)

20 2. The Requested Fee Award Is in Line With Typical Cases

21 According to a leading treatise on class actions, “No general rule can be articulated on what
22 is a reasonable percentage of a common fund. Usually, 50% of the fund is the upper limit on a
23 reasonable fee award from a common fund in order to assure that the fees do not consume a
24 disproportionate part of the recovery obtained for the class, although somewhat larger percentages
25 are not unprecedented.” (*See Conte & Newberg, Newberg on Class Actions* (3rd Ed.) § 14.03.)
26 Attorneys’ fees that are fifty percent of the fund are typically considered the upper limit, with thirty
27 to forty percent commonly awarded in cases where the settlement is relatively small. (*Id.*; see also
28 *Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F.Supp. 294 [stating that most

1 cases where 30-50 percent was awarded involved “smaller” settlement funds of under \$10
2 million].)

3 Here, Plaintiff requests attorneys’ fees equal to 33 1/3% of the Settlement Amount, which
4 is in line with the prevailing guidelines established in California case law and academic literature
5 and is consistent with awards in California. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th
6 43, 66, n.11 [“Empirical studies show that, regardless whether the percentage method or the
7 lodestar method is used, fee awards in class actions average around one-third of the recovery.”].)
8 Accordingly, Plaintiff respectfully requests that the Court approve the attorneys’ fees as negotiated
9 by the Parties and requested herein.

10 **3. This Matter Involves A “Fee-Shifting” Provision of the Labor Code**

11 Labor Code § 1194(a) provides for the recovery of “minimum wage or overtime
12 compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” Under this
13 section, Plaintiff would be permitted to recover their actual attorneys’ fees, even if those fees were
14 larger than the total class recovery at the conclusion of this case. This settlement is beneficial in
15 that it limits the risk of continued expenses and consumption of time, energy, and resources facing
16 Defendant while at the same time rewarding Class Counsel for their decision to assume risk by
17 taking on this matter. In fact, prosecution of this action involved significant financial risk for Class
18 Counsel. (Marquez Decl., ¶¶ 35-40.) Class Counsel undertook this matter solely on a contingent
19 basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on behalf of the
20 Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary duty to the Class
21 ahead of all other concerns.

22 **4. The Experience, Reputation and Ability of Class Counsel Support the** 23 **Requested Fee Award**

24 As demonstrated by their past experience in pursuing class actions on behalf of consumers
25 and employees, Class Counsel possesses considerable expertise in litigating class actions.
26 (Marquez Decl., ¶¶ 41-51.) Class Counsel has been involved as lead counsel or co-counsel in
27 several class actions that resulted in millions in recovery. (*Id.*) Because it is reasonable to
28 compensate class counsel commensurate with their skill, reputation and experience, Class

1 Counsel's requested fee award is supported here.

2 Class Counsel's experience in wage and hour class actions was integral in evaluating the
3 strengths and weaknesses of the case against Defendants and the reasonableness of the settlement.
4 Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning
5 the rapidly evolving substantive law (state and federal), as well as the procedural law of class
6 action litigation. Based on these and other factors, Class Counsel has frequently received fee
7 awards of this percentage from the gross recovery for the class. Therefore, the requested fee award
8 is reasonable and fair.

9 **D. The Service Award to Named Plaintiff Is Reasonable**

10 Named Plaintiff in class action lawsuits "are eligible for reasonable incentive payments to
11 compensate them for the expense or risk they have incurred in conferring a benefit on other
12 members of the class." (*Munoz, supra*, 86 Cal.App.4th at p. 412.) Courts routinely grant approval
13 of class action settlement agreements containing enhancements for the class representatives, which
14 are necessary to provide incentive to represent the class, and are appropriate given the benefit the
15 class representatives help to bring about for the class. (*See Rodriguez v. W. Publ'g Corp.* (9th Cir.
16 2009) 563 F.3d 948, 958-59.)

17 Service awards are particularly important to Plaintiff in wage and hour cases because they
18 promote the important public policies underlying the wage and hour laws. This strong policy is
19 codified in California Labor Code section 90.5, which provides, "it is the policy of this state to
20 vigorously enforce minimum labor standards in order to ensure employees are not required or
21 permitted to work under substandard unlawful conditions...."). Nonetheless, the California
22 Supreme Court has noted that "retaliation against employees for asserting statutory rights under
23 the Labor Code is widespread," despite anti-retaliation statutes designed to protect employees.
24 (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should
25 be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v.*
26 *Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

27 Under the Settlement Agreement, subject to the Court's approval, Defendants agreed to pay
28 a Service Award in the amount of \$10,000.00 to Plaintiff. This amount is also in exchange for

1 Plaintiff's general release of all claims against Defendants. Class Counsel represent that Plaintiff
2 devoted a great deal of time and work assisting counsel in the case, communicated with counsel
3 very frequently for litigation and to prepare for mediation, and were frequently in contact with
4 Class Counsel during the mediation. (Marquez Decl., ¶¶ 30-34; Declaration of Kenneth Wilburn
5 ["Wilburn Decl.,"] ¶¶ 4-20.) This amount is reasonable particularly in light of the substantial
6 benefits Plaintiff generated for all class members. (*Id.*) Indeed, in *Karl Adams, III, et al. v.*
7 *MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB, Class Counsel Justin F. Marquez
8 helped negotiate a \$2.5 million class action settlement for 339 class members, and the court
9 approved a \$10,000.00 class representative incentive award for each named Plaintiff. (Marquez
10 Decl., ¶ 34.)

11 When compared with the amounts awarded in typical class action cases, the amount
12 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive
13 award given to class action Plaintiff from **1993 to 2002** found that the "average award per class
14 representative was \$15,992 and the median award per class representative was \$4,357." (Theodore
15 Eisenberg & Jeffrey P. Miller, "Incentive Awards to Class Action Plaintiff: An Empirical Study",
16 53 UCLA L. Rev. 1303, 1308 (2006).) That same study found that named Plaintiff in employment
17 discrimination class actions received an average award of \$69,850 and a median award of \$31,081,
18 while named Plaintiff in other employment class actions received an average award of \$12,121 and
19 a median award of \$13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards in
20 employment cases reflected the "courts' wish to make representative Plaintiff whole by
21 compensating them for the high costs of their service to the class, including risks of stigmatization
22 or retaliation on the job." (*Id.* at p. 1308.)

23 E. **There is Good Cause for Selecting Legal Aid at Work As the *Cy Pres***
24 **Recipient**

25 A *cy pres* award allows for "aggregate calculation of damages, the use of summary claim
26 procedures, and distribution of unclaimed funds to indirectly benefit the entire class." (*Six Mexican*
27 *Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1305.) "To ensure that the
28 settlement retains some connection to the Plaintiff class and the underlying claims, however, a *cy*

1 *pres* award must qualify as ‘the next best distribution’ to giving the funds directly to class
2 members.” (*Dennis v. Kellogg Co.* (9th Cir. 2012) 697 F.3d 858, 865, quoting *Six Mexican*
3 *Workers*, 904 F.2d at 1308.)

4 Moreover, in the class action context, California Code of Civil Procedure permits unpaid
5 cash residues in a class action settlement to be distributed to a *cy pres* recipient “in a manner
6 designed either to further the purposes of the underlying class action or causes of action, or to
7 promote justice for all Californians.” (Cal. Civ. Proc. Code § 384.)

8 Here, under the terms of the Settlement Agreement, in the event settlement checks remained
9 uncashed for 180 days, those funds shall be donated to Legal Aid at Work (located at 180
10 Montgomery Street, Suite 600, San Francisco, CA 94104) as a *cy pres* beneficiary. (Settlement, §
11 4.4.3.) Legal Aid at Work is a 501(c)(3) non-profit organization located in San Francisco,
12 California. Legal Aid at Work provides essential public services which directly relate to the
13 objective and purposes of this matter. “Legal Aid at Work is a non-profit legal services
14 organization that has been assisting low-income, working families for more than 100 year.”¹ Legal
15 Aid at work provides free clinics and helplines, free legal information, assists in litigation which
16 “enforces and strengthens the civil and employment rights of low wage workers in California,” and
17 works on policy advocacy to “strengthen civil and workplace rights at the local, state and federal
18 level.”² (*See Eddings v. Health Net, Inc.* (C.D. Cal. 2013), 2013 WL3013867, *4
19 [approving Legal Aid at Work as a *cy pres* beneficiary in a wage and hour class action].)

20 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES ONLY IS WARRANTED**

21 **A. Legal Standard**

22 The proposed Settlement Class is well suited for class certification. All of the claims derive
23 from a core set of alleged violations of California’s wage and hour laws and regulations. For the
24 reasons set forth more fully below, for purposes of settlement only, the Class satisfies the
25 prerequisites for certification under Code of Civil Procedure § 382. Section 382 provides: “when
26 _____

27 ¹ See “Our Mission and How We Work,” accessed June 24, 2022, located at
<https://legalaidatwork.org/our-mission-and-how-we-work/>

28 ² *Id.*

1 the question is one of a common or general interest, of many persons, or when the parties are
2 numerous, and it is impracticable to bring them all before the court, one or more may sue or defend
3 for the benefit of all.” (Code Civ. Proc., § 382.) There are two requirements to section 382: “(1)
4 There must be an ascertainable class; and (2) there must be a well-defined community of interest
5 in the questions of law and fact involved affecting the parties to be represented.” (*Daar v. Yellow*
6 *Cab Co.* (1967) 67 Cal. 2d 695, 704 [citations omitted].) To clarify these requirements, the
7 California Supreme Court has looked to Federal Rule of Civil Procedure 23 to explain that the
8 community-of-interest requirement itself embodies three factors: “(1) predominant questions of
9 law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class
10 representatives who can adequately represent the class.” (*Richmond v. Dart Indus., Inc.* (1981) 29
11 Cal. 3d 462, 470.)

12 California law and policy favor the fullest and most flexible use of the class action device.
13 (*Id.* at pp. 469-73.) Indeed, “Courts long have acknowledged the importance of class actions as a
14 means to prevent a failure of justice in our judicial system” particularly where the rights of
15 consumers are at issue. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 434.) Any doubt as to
16 the appropriateness of class treatment should be resolved in favor of certification. (*Richmond,*
17 *supra*, 29 Cal.3d at pp. 473-75.)

18 **B. Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for**
19 **Settlement Purposes**

20 **1. The Class is Ascertainable and Numerous**

21 Plaintiff contends that the proposed class that Plaintiff seeks to represent is easily
22 ascertainable, and includes approximately 195 employees of Defendants.

23 Plaintiff maintains that there is an easily ascertainable class, defined by objective and
24 precise criteria. Because class members are identified using specific criteria in the regular business
25 records of Defendants (i.e., job position), the class is ascertainable. (*Wilner v. Sunset Life Ins. Co.*
26 (2000) 78 Cal.App.4th 952, 959-60 [class membership defined by ownership of product that is the
27 subject of the lawsuit is sufficient to make the class ascertainable].)

28 “The requirement of Code of Civil Procedure section 382 that there be ‘many’ parties to a

1 class action suit is indefinite and has been construed liberally.” (*Rose v. City of Hayward* (1981)
2 126 Cal.App.3d 926, 934.) “Where a question is of common interest to ‘many’ persons, an action
3 may be maintained as a class action even where the parties are numerous and it is in fact practicable
4 to join them all.” (*Id.*) “No set number is required as a matter of law for the maintenance of a
5 class action.” (*Id.*) “Thus, our Supreme Court has upheld a class representing the 10 beneficiaries
6 of a trust in an action for removal of the trustees.” (*Id.*, citing *Bowles v. Super. Ct.* (1955) 44 Cal.2d
7 574; see also, *Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35 member class.]) Therefore,
8 Plaintiff contends that numerosity is plainly satisfied.

9 **2. There are Many Common Issues of Law and Fact Which Predominate**

10 The Court should grant conditional class certification for settlement purposes here on the
11 grounds that questions of law and fact common to all class predominate over any individual
12 questions. This inquiry tests whether proposed classes are sufficiently cohesive to warrant
13 adjudication by representation. (*See, e.g., Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d
14 605.)

15 Here, the alleged employment practices at issue are: whether Defendants had legally
16 compliant policies and practices to provide employees with meal periods; whether Defendants had
17 legally compliant policies and practices authorizing and permitting its employees to take rest
18 periods; whether final payment of wages was untimely and excluded unpaid wages, including meal
19 period premium and rest period premium wages; and whether the wage statements were
20 consequently non-compliant. Plaintiff contends that the factual and legal issues are the same for
21 all of the identified class members, including Plaintiff. Further, all class members are alleged to
22 have suffered from, and seek redress for, the same alleged injuries. Defendants deny all
23 allegations.

24 **3. Plaintiff’s Claims Are Typical of the Claims of the Class**

25 The typicality requirement does not focus on the individual characteristics or circumstances
26 of the representative Plaintiff compared to those of the remainder of the class, but rather upon the
27 typicality of the proposed representative’s claims as they relate to the defendant’s conduct and
28 activities. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 47 “[t]he only requirements are that

1 common questions of law and fact predominate and that the class representative be similarly
2 situated” vis-à-vis the class.].) A representative Plaintiff’s claims are typical of the class if they
3 arise from the same event, practice or course of conduct, and if the claims rest on the same legal
4 theories. (*Id.*) That is precisely the case here. Plaintiff is a former employee of Defendant; as
5 such, he alleges that he was subject to the same policies and practices as other similarly situated
6 employees.

7 **4. Plaintiff and His Counsel Meet the Adequacy Requirement**

8 The adequacy of representation requirements is met by fulfilling two conditions: first, a
9 named Plaintiff must be represented by counsel qualified to conduct the pending litigation; second,
10 a named Plaintiff’s interests cannot be antagonistic to those of the class. (*McGhee v. Bank of*
11 *America* (1976) 60 Cal.App.3d 442, 451.)

12 All of these requirements are met here for settlement purposes. Plaintiff retained counsel
13 with extensive experience in prosecuting complex class actions, including similar class actions that
14 previously settled. (Marquez Decl., ¶¶ 41-51.) Class Counsel unquestionably is “qualified,
15 experienced and generally able to conduct the proposed litigation.” (*Miller v. Woods* (1983) 148
16 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel,
17 litigated this case and diligently reviewed the settlement terms, showing their dedication.
18 Plaintiff’s willingness to serve as a representative demonstrates his serious commitment to bringing
19 about the best results possible for the class. (*McGhee, supra*, 60 Cal.App.3d at p. 451.)

20 **5. A Class Action is Superior to a Multiplicity of Litigation**

21 Finally, in making its class certification decision, the Court must determine that a class
22 action would be superior to alternative means for the fair and efficient adjudication of the litigation.
23 By consolidating many potential individual actions into a single proceeding, this Court’s use of the
24 class action device enables it to manage this Litigation in a manner that serves the economics of
25 time, effort and expense for the litigants and the judicial system. Absent class treatment, similarly-
26 situated employees with small but nevertheless meritorious claims for damages would, as a
27 practical matter, have no means of redress because of the time, effort and expense required to
28 prosecute individual actions. (*Gentry v. Super. Ct.* (2007) 42 Cal. 4th 443, 457-62; *Leyva v.*

1 *Medline Ind.* (9th Cir. 2013) 716 F.3d 510, 515.) Moreover, in the context of settlement, the
2 superiority concerns are essentially non-existent.

3 **V. THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND**

4 **A. The Proposed Notice Plan Satisfies Due Process**

5 Notice requirements are set forth in the California Rules of Court. (Cal. Rules of Court,
6 Rule 3.766 (e) and (f).) California law vests the Court with broad discretion in fashioning an
7 appropriate notice program. (*Cartt v. Super Ct.* (1975) 50 Cal.App.3d 960, 973-74.) There is no
8 statutory or due process requirement that all class members receive actual notice, but in this matter,
9 the class members will receive direct mailed notice. As the Court of Appeals has explained, “[t]he
10 notice given should have a reasonable chance of reaching a substantial percentage of the Class
11 Members” (*Id.* at p. 974.) In this case, notice of the proposed settlement will be provided by
12 direct mailing, the best possible form of notice.

13 **B. The Notice is Accurate and Informative**

14 The Notice of Proposed Class Action Settlement should be approved. It will be
15 disseminated through direct U.S. first-class mail to the last known address for each Class Member.
16 It informs the Class Members of the terms of the Settlement and their right to be excluded from
17 the Settlement. And if there are Class Members who wish to object to this proposed class action
18 settlement, they will have the opportunity to file their objections and be heard at the Final Approval
19 Hearing.

20 The Notice also fulfills the requirement of neutrality in class notices. (Conte & Newberg,
21 Newberg on Class Actions (3rd Ed.) § 8.39.) It summarizes the proceedings to date and the
22 terms and conditions of the Settlement Agreement, in an informative and coherent manner. It
23 makes clear that the Settlement Agreement does not constitute an admission of liability by the
24 Defendant, who denies all liability, and it recognizes that this Court has not ruled on the merits
25 of the action. It also states that the final settlement approval decision has yet to be made.
26 Accordingly, the Notice complies with the standards of fairness, completeness, and neutrality
27 required of a combined settlement-certification class notice.


1 **VI. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
3 approval of the proposed Settlement and set a Final Approval Hearing on December 11, 2023
4 (about 120 days from MPA hearing), or the first available date thereafter.

5
6 Respectfully submitted,

7 Dated: July 20, 2023

WILSHIRE LAW FIRM

8
9 By: 

10 Justin F. Marquez
Christina M. Le
Zachary D. Greenberg

11 Attorneys for Plaintiff
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Wilburn v. Concrete, Inc., et al.
STK-CV-UOE-2021-0010183

I, Sandy S. Sespene, state that I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 3055 Wilshire Blvd., 12th Floor, Los Angeles, California 90010. My electronic service address is ssespene@wilshirelawfirm.com.

Ryan L. Eddings (SBN 256519)
reddings@littler.com
LITTLER MENDELSON, P.C.
 5200 North Palm Avenue Ste. 302
 Fresno, California 93704
 Tel: (559) 244-7500
 Fax: (559) 244-7525

Victoria A. Kovanis (SBN 289275)
vkovanis@littler.com
LITTLER MENDELSON, P.C.
 500 Capitol Mall Ste. 2000
 Sacramento, California 95814
 Tel: (916) 830-7200
 Fax: (916) 561-0828

(X) **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known email address or e-mail of record in this action.

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

Executed on July 20, 2023, at Los Angeles, California.


Sandy S. Sespene